

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No:

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/ NO
(3)	REVISED.
.....
SIGNATURE	DATE

In the matter between:

THEODORE WILHELM VAN DEN HEEVER N.O.

First

Applicant

TSHEPO MEDUPE N.O.

Second

Applicant

POGISO TUMISANG N.O.

Third Applicant

And

N'KOMATI

ANTHRACITE

(PTY)

LTD

Respondent



JUDGMENT

WINDELL, J:

INTRODUCTION

[1] On 14 August 2021, an arbitration award was made in favour of the applicants, the joint liquidators of Liviero Mining (Pty) Ltd in liquidation (“Liviero”).

[2] The arbitration agreement contained an appeal provision that provided that a notice of appeal shall be delivered by the appellant within ten calendar days of publication of the award, failing which the right to appeal shall lapse and the award shall not be appealable. The respondent, N’Komati Anthracite (Pty) Ltd, delivered a notice of appeal out of time.

[3] The applicants seek an order making the arbitration award an order of court. The respondent opposes the application. It also brought a counter-application in terms of section 8 of the Arbitration Act, 42 of 1965 for an extension of the time period for the delivery of its notice of appeal in the arbitration, and directing the applicants to nominate arbitrators for purposes of constituting an arbitration appeal tribunal.

[4] The central issue that arises for consideration is whether the respondent is entitled to the relief sought in terms of section 8 of the Arbitration Act. The applicants argue that the parties contractually agreed the time periods for filing a notice to appeal and that section 8 is not applicable. Alternatively, and only if it be found that section 8 is applicable, the respondent has not made out a case for relief in terms of that section.

THE BACKGROUND FACTS

[5] Liviero was placed under provisional liquidation on 22 November 2017 and finally liquidated on 6 May 2020. Prior to its liquidation, Liviero performed opencast mining services on behalf of the respondent in terms of an agreement concluded in August 2017 which contained an arbitration clause.

[6] The respondent went into business rescue on 13 October 2020. During the respondent's business rescue proceedings, the applicants appointed a forensic auditor to ascertain the extent of its claim against the respondent. The report detailed an amount of R17 863 604.00 outstanding.

[7] The report was disputed by the respondent. The respondent's business rescue practitioner therefore only paid the applicants a sum of R4 117 843.00. The applicants contended that the balance of R13 745 761.00 remained due and payable by the respondent, which was disputed by the respondent. The respondent alleged, *inter alia*, that it has paid certain amounts to Liviero's creditors which should be set-off from the amount of R13 745 761.00 and otherwise, that the amount was in any event not owing, due and payable.

[8] On or about 15 April 2021, the parties agreed to refer the dispute for resolution in accordance with the provisions of the respondent's business rescue plan and the dispute resolution mechanism contained therein. Retired Judge Harms was appointed as "the expert." On or about 4 May 2021, the business rescue practitioner of the respondent filed a notice of substantial implementation and the parties agreed to convert the dispute resolution process into arbitration proceedings. As a result, an arbitration agreement was concluded between the parties on 17 May 2021. Judge Harms was appointed as the arbitrator.

The award

[9] Before Judge Harms, the respondent raised two defences in the pleadings: Firstly, it contended that it was entitled to make an adjustment to compensation paid for drilling and blasting, which would reduce the amount of its indebtedness to the applicants ("the adjustment defence"). Secondly, the respondent relied on a defence of set-off, pleading that it had paid certain sub-contractors or creditors of the applicants which must be set-off against the respondent's indebtedness towards the applicants ("the set-off defence").

[10] The parties agreed to separate the set-off defence from other issues and to deal with it first. The issues that fell to be decided were: (a) whether payments made after the concursus (alternatively after the winding-up order) can validly be set-off from the respondent's indebtedness; and (b) when the concursus commenced: date when liquidation application was issued, or date of provisional liquidation.

[11] The award was rendered on 14 August 2021 and delivered to the parties by email. The award was in favour of the applicants and reads as follows:

1. *The defendant (the respondent in this matter) is ordered to pay the claimants (the applicants) the amount of R11 703 434.00 together with statutory interest a tempore morae;*
2. *The other issues are postponed to a date to be arranged.*
3. *The defendant is to pay the costs of the separated hearing in terms and according to clause 13 of the arbitration agreement. "*

The notice of appeal

[12] In terms of clause 9.2 of the arbitration agreement the *dies* to deliver a notice of appeal expired on 24 August 2021. The respondent did not deliver a notice of appeal on or before 24 August 2021.

[13] On 26 August 2021, the applicants' attorney addressed a letter to the respondent's attorney to enquire about the payment of the award. On 31 August 2021, when no response was forthcoming, the applicants' attorney telephoned the respondent's attorney and was advised that the respondent intended to appeal. In confirmation thereof the applicants' attorney wrote to the respondent's attorney to confirm the conversation. The respondent's attorney replied after close of business on 31 August 2021 and stated that it was in the process of finalising the notice of appeal. The attorney also acknowledged that the notice of appeal was late and apologized for the delay. He also enquired whether the applicants would condone the late filing of the notice to appeal.

[14] The notice of appeal was served on 1 September 2021. The applicants' attorney responded and recorded that no condonation would be granted as it would amount to a variation of the agreement.

[15] On 3 September 2021, the applicants launched the current application. The respondent opposed the application and brought a counter-application in terms of section 8 of the Arbitration Act for the extension of the time period for the delivery of the notice of appeal.

The arbitration agreement

[16] The relevant terms of the arbitration agreement are clauses 3 and 9:

" 3. Arbitration

3.1 The Claimant and the Defendant agree to submit the disputes between them for determination by arbitration.

3.2 The arbitration shall be conducted in accordance with the provisions of the Arbitration Act 42 of 1965 ("the Act") read with the referenced Rules as published by the Association of Arbitrators."

"9. Appeal

9.1 The parties agree that there shall be a right of appeal.

9.2 Should either of the parties be dissatisfied with an appealable interim award or the final award of the arbitrator, a notice of appeal shall be delivered by the appellant, within 10 calendar days of publication of the award, failing which the right to appeal shall lapse and the interim award or final award shall not be appealable."

[17] The applicants contend that it is clear from clause 9.2 that any right of appeal would lapse after the expiration of the period referred to in clause 9.2. No right to "condonation" of the late filing has been created by the arbitration agreement, and consequently, cannot come into being without a variation of the arbitration agreement, which falls foul of the non- variation clause (clause 14.4). The applicants are not prepared to vary the agreement.

SECTION 8 OF THE ARBITRATION ACT

[18] The respondent relies on section 8 of the Arbitration Act. Section 8 reads:

"Power of court to extend time fixed in arbitration agreement for commencing arbitration proceedings.

Where an arbitration agreement to refer future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the court, if it is of the opinion that in the circumstances of the case undue hardship would otherwise be caused, may extend the time for such period as it considers proper, whether the time so fixed has expired or not, on such terms and conditions as it may consider just but subject to the provisions of any law limiting the time for commencing arbitration proceedings.”

[19] Section 8, in principle, gives the court a discretion to extend the time stipulated in a time-bar clause in an arbitration agreement, if the court is of the opinion that in the circumstances of the case undue hardship would otherwise be caused.

[20] Clause 9.2 of the arbitration agreement is a time-bar clause. The time-bar clause affords the appellant 10 calendar days after the publication of the award to file its notice of appeal, failing which the right to appeal shall lapse and the interim award or final award shall not be appealable.

[21] But, are all time-bar clauses, where arbitration is concerned, subject to section 8? The applicants' opposition to the counter-application is based on two arguments. Firstly, it contends that it is clear from the definition of arbitration agreement in the Arbitration Act that it refers to two types of agreements, namely, agreements dealing with existing disputes, and agreements referring to future disputes.¹ The agreement in the present matter was concluded after the dispute arose, in other words it is an agreement dealing with an existing dispute. As section 8 only refers to **future**

¹ Section 1: 'arbitration agreement' means a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not.

disputes, it is plain that the legislature intended to exclude agreements relating to existing disputes from the ambit of section 8.

[22] Secondly, section 8 specifically makes mention of "some step to **commence arbitration proceedings**". Section 1 of the Arbitration Act defines arbitration proceedings to mean "*proceedings conducted by an arbitration tribunal for the settlement by arbitration of a dispute which has been referred to arbitration in terms of an arbitration agreement*". It is submitted that in the present matter arbitration proceedings have already "commenced", either when the arbitrator was appointed, or when the pre-arbitration meeting was held, or when the applicants (claimants in the arbitration) delivered their statement of claim. Section 8 therefore finds no application in this matter.

[23] In support of its argument the applicants referred the court to *Wilmington (Pty) Ltd v Short & McDonald (Pty) Ltd*.² In that matter, the applicant and the respondent entered into an agreement (a building contract) which provided for the reference of future disputes to arbitration. Clause 22 (h) of the conditions of contract fixed the time within which the employer must advise the contractor of any complaints or objections he may have to the final statement of account delivered by the contractor. The applicant brought an application in terms of section 8 of the Arbitration Act and sought an order that the time be extended to a date seven days after the date of the order. Friedman J held that the "steps" referred to in section 8 of the Arbitration Act refer to a step which must be taken in terms of an agreement to commence arbitration proceedings after a dispute has arisen between the parties to the agreement, and not a step which must be taken before it can be said that a dispute has arisen which, in terms of the agreement, may form the subject-matter

² 1966 (4) SA 33 (D) at 34C-D.

of arbitration proceedings. He therefore concluded that section 8 does not entitle the court to grant an extension of the time fixed by a clause in a contract within which the employer must notify the contractor of any complaints or objections he may have to the final account delivered by the contractor. In that context Friedman J remarked that:

“The creation of a dispute is a condition precedent to the commencement of arbitration proceedings. It is not a step which is taken to commence arbitration proceedings. It is only when a dispute actually arises between the parties that arbitration proceedings can be commenced and, accordingly, that some step can be taken to commence such proceedings. It is clear from the wording of sec. 8 of Act 42 that, before an order in terms of that section can be made - (a) there must be an arbitration agreement to refer future disputes to arbitration; (b) that agreement must provide that any claim to which the agreement applies shall be barred unless some step to commence arbitration proceedings is taken within a time fixed by the agreement; and (c) a dispute to which the agreement applies must have arisen. What sec. 8 deals with is a step which must be taken in terms of the agreement to commence arbitration proceedings after a dispute has arisen between the parties to the agreement and not a step which must be taken before it can be said that a dispute has arisen which in terms of the agreement may form the subject-matter of arbitration proceedings.”

[24] I have no difficulty with the finding of the court in *Wilmington*. But, the remarks by that court must be seen in context to the facts of that particular matter. That matter is only authority for the proposition that section 8 is intended to allow a referral to arbitration even where the right to do so had lapsed, as opposed to cases

where the contractual preconditions for a referral to arbitration, had not been complied with. This is intended to cater for cases where, for instance, certain contractual formalities have to be complied with before a dispute can be said to become arbitrable. This is often encountered in building and construction contracts where parties, would for instance, agree to a multi-tier dispute resolution process that would typically commence with the determination of an engineer or an architect, then an adjudicator's determination and, in the final instance, arbitration. It is similarly often encountered that these procedural steps (or contractual preconditions) each include its own time-bar.

[25] The issue that the court was faced with in *Wilmington* is therefore different from the issue in the present matter. The court in *Wilmington* was not asked to interpret what is meant by "future disputes" and "commencement of arbitration proceedings", and is not supportive of the applicants' argument in the present matter. *Wilmington* is therefore of no assistance to the present debate.

[26] I now turn to the issues at hand. It is common cause that the respondent seeks to enforce an appeal provision in an arbitration agreement. Two questions arise: Is an appeal to the tribunal a "future dispute"? And, can the lodging of a notice to appeal constitute "a step in commencing arbitration proceedings"?

A step in commencing arbitration proceedings

[27] The fact that an appeal process is provided for in the arbitration agreement, does not change the nature of the proceedings. It remains an arbitration. This much is clear from the judgment of the Supreme Court of Appeal ("SCA") in *Hos+ Med Medical Aid Scheme v Thebe Ya Bophelo Marketing & Consulting (Pty) Ltd.*³ In this

³ 2008 (2) SA 608 (SCA).

matter the arbitration agreement also provided for an appeal. The arbitration appeal tribunal made an award. The respondent successfully brought an application to have the appeal award set aside. Section 33(4) of the Arbitration Act was at play. This section provides that if the award is set aside the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court.

[28] Lewis JA held that although the Arbitration Act does not specifically refer to an award of an **appeal** tribunal, its terms clearly enable an agreement to refer an arbitrator's award to an appeal body, and the provisions of the Arbitration Act must apply to an appeal tribunal, and its award, in the same way as they do to an arbitration and an arbitral award. (Emphasis added)

[29] In the present matter the appeal tribunal will be constituted of three arbitrators who will make their decision subject to the Arbitration Act. When they have done so, they will issue an arbitration award. The appeal tribunal will consider the interim award and correct it if they believe it is wrong. That is an altogether different mandate to that which was given to the arbitrator in the arbitration and an appeal tribunal can be reviewed, independently of the arbitration tribunal.⁴

[30] Therefore, in section 1 of the Arbitration Act where arbitration proceedings are defined as "*proceedings conducted by an arbitration tribunal for the settlement by arbitration of a dispute which has been referred to arbitration in terms of an arbitration agreement*", it includes the arbitration proceedings at the appeal tribunal. The issuing of a notice of appeal will therefore constitute a step in the commencement of arbitration proceedings as provided for in section 8.

⁴ *Hos+Med supra.*

Future dispute

[31] When the arbitration agreement was concluded, the parties could not have known whether a dispute would or would not arise as to the correctness of any award that may be issued by the arbitrator. Instead, they contemplated the possibility that a dispute might arise and for that purpose, agreed that an arbitration appeal tribunal will resolve a dispute as to the correctness of an award, if such a dispute arose.

[32] The arbitration agreement provides that an appeal may (not *must*) be noted against an award, which appeal, if it is noted, will be determined by a tribunal of three arbitrators. In these circumstances the type of dispute under consideration is indeed a “future dispute” as contemplated in section 8 of the Arbitration Act.

[33] I therefore conclude that clause 9.2 is plainly a time-bar clause falling squarely within the ambit of section 8. In view of the finding, it is not necessary to consider the additional argument raised by the respondent, namely whether the court has the power to vary the arbitration agreement.⁵

THE COUNTER-APPLICATION

[34] In terms of section 8 the court has a discretion to extend the time period (the period to file the notice of appeal) if the court is of the opinion that, in the circumstances of the case, undue hardship to the claimant (the respondent) would otherwise be caused.

⁵ See *Samancor Holdings (Pty) Ltd and Others v Samancor Chrome Holdings (Pty) Ltd and Another* 2021 (6) SA 380 (SCA0 at paragraph 68 where Rogers AJA held that all time-bar clauses, where arbitration is concerned, are subject to section 8.

[35] Recently, in *Samancor*,⁶ the SCA considered the requirement of “undue hardship” that will be caused if an extension is not granted in terms of section 8. Rogers AJA⁷ remarked as follows:

*“[32] The language of s 8 is straightforward. The power to extend arises if the court is of the opinion that ‘in the circumstances of the case **undue** hardship would otherwise be caused’ (my emphasis). The hardship which the section contemplates is hardship to the claimant because its claim is time-barred. Every claimant whose claim is time-barred can be said to suffer hardship through the loss of its claim, but the section requires something more. The court must be of the opinion that the claimant’s hardship will be ‘undue’. The ordinary meaning of that word conveys a hardship which is unwarranted or inappropriate because it is excessive or disproportionate. Whether the hardship is ‘undue’ in this sense must, as the section tells us, be determined with reference to the circumstances of the particular case.*

[33] There is nothing in s 8 to indicate that the power of extension should only be exercised rarely or in exceptional circumstances. There is no reason to add a gloss to the plain language of the section. A restrictive interpretation would be antithetical to s 34 of the Constitution which guarantees access to courts or other independent and impartial tribunals in order to have justiciable disputes adjudicated.

*[34] This is the view which the English courts took of s 27 of the 1950 Act following the landmark judgment of the English Court of Appeal in *Liberian Shipping Corporation v A King & Sons Ltd* [1967] 1 All ER 934 (CA).*

⁶ Footnote 5.

⁷ Judge O.L. Rogers has been appointed as a Judge of the Constitutional Court of South Africa with effect from 1 August 2022.

In Comdel Commodities Ltd v Siporex Trade SA [1990] 2 All ER 552 (HL) the House of Lords declined to read restrictions into the ordinary meaning of s 27. Lord Bridge of Harwich said the following (at 557f – h):

'The mischief which the section sets out to remedy, in my opinion, is simply the undue or unreasonable hardship suffered by a party to an arbitration agreement who is deprived of the opportunity to pursue a contractual claim by the operation of a restrictive contractual time limit in circumstances in which he ought reasonably to be excused for his failure to comply with it.'

[36] The applicants contend that, (1) the delay in delivering the notice of appeal has not been properly or adequately explained; (2) the intended appeal has no prospects of success; and (3) the applicants stand to suffer prejudice, should the intended appeal be allowed.

[37] The relief under section 8 of the Arbitration Act should not be conflated with an application for condonation. Although some of the elements overlap, the question of undue hardship is paramount in the remedy provided for in section 8. As such, on the strength of *Samancor*, the circumstances of the case are relevant to the extent that they inform the primary question of undue hardship. In this context, the discretion of the court to take relevant factors into account is largely unfettered.⁸ Importantly, fault that results in the failure and which, in turn, results in the operation of the time-bar, does not *per se* disentitle a party to relief under section 8.⁹ The proper application of section 8 means that, "*where the hardship is due to the fault of*

⁸ The court in *Samancor* in paragraph [35] listed some of the factors that might be considered by a court in such instance, but stated that any circumstance rationally bearing on the 'undue' question may be taken into account.

⁹ See *Moscow V/O Exportkhleb v Helmville Ltd [1977] 2 Lloyd's Rep 121 (CA)*, quoted with approval in *Samancor* at paragraph [35].

the claimant, it means hardship the consequences of which are out of proportion to such fault."¹⁰

[38] The respondent explained, in detail, how and why it happened that the notice of appeal was delivered late. It was as a result of a misunderstanding between the respondent's attorney and the advocates, exacerbated by a confluence of most unfortunate circumstances, which includes: one member of the (attorneys') professional team having resigned; one member of the professional team being on maternity leave; one member of the professional team being in isolation on account of Covid-19 exposure; one advocate recovering from Covid-19; and having to attend to six other matters (hearings) during the time after which an instruction had been taken to appeal against the interim award. Whilst the delay in delivering the notice of appeal could obviously have been avoided, the non-compliance or default was certainly not deliberate.

[39] In assessing the delay/non-compliance and the explanation therefor, a history or pattern of delay is also relevant. The respondent initiated the arbitration and there has been no delay on the part of the respondent. It was with the co-operation of the respondent that it was possible to exchange pleadings, have a hearing and receive an award, in a matter of approximately 2 months. On this score, there can therefore be no suggestion that the respondent's failure to deliver the notice of appeal on time was part of an ongoing strategy of delay.

[40] Delay is, however, not a threshold requirement for the relief claimed under section 8. The issue remains whether the hardship occasioned by the respondent's failure to file the notice of appeal timeously, is "undue" or disproportionate" to such fault. The facts illustrate that the failure to deliver the notice of appeal was slight (7

¹⁰ *Supra Moscow V/O Exportkhleb.*

days) and as a result of an administrative oversight. Hence, whilst the mistake in this case was neither deliberate nor reckless, nor indicative of an election not to appeal, the hardship and prejudice that would result if the respondent is not allowed to pursue the appeal is wholly disproportionate.

[41] As for the prospects of the intended appeal: The issues raised before the arbitrator was not simple. The central issue (as part of the hearing on the separated issues) concerned the date on which the *concursum creditorum* of Liviero commenced. Payments made by the respondent directly to the sub-contractors of Liviero, after the *concursum* – according to the applicants – had to be refunded to Liviero. The applicants relied on the provisions of section 348 of the Companies Act no. 61 of 1973 (“the 1973 Act”) where it is provided that a winding-up of a company by the court shall be deemed to commence at the time of the presentation to the court of the application for the winding-up. The applicants contended that, because the application for the winding-up of Liviero was issued on 7 November 2019, all payments made directly to the sub-contractors, on and after that date were made after the commencement of the winding-up of Liviero, and cannot be set off from what is otherwise owed to the applicants (the liquidators of Liviero). The respondent disputed that the applicants were entitled to rely on the deemed date for the commencement of the winding-up, as contemplated in section 348 of the 1973 Act. It was argued that the payments were made whilst Liviero remained in business rescue, and section 132(2)(a)(ii) of the Companies Act no. 71 of 2008 (“the 2008 Act”) provides that business rescue ends, *inter alia*, when the court has converted the proceedings to liquidation proceedings. It was (and is) the respondent’s position that 22 November 2019 ought to be the date of liquidation and further, that the

concursum creditorum was constituted at the date of winding-up, not the date of deemed winding-up.

[42] At its most basic, it is undeniable that there is a tension between section 348 (and section 341(2) of the 1973 Act) and the applicable provisions of Chapter 6 of the 2008 Act. It was submitted on arbitration that the inconsistency ought to be resolved as provided for in section 5(4)(a) by applying the two sets of provisions concurrently. This could be done by recognising the existence of the countervailing provisions in the 2008 Act and rejecting the notion that section 348 and 341(2), which are remnants of the 1973 Act,¹¹ operate to the exclusion of the subsequent provisions of the 2008 Act. A concurrent application of the two sets of provisions entails recognising that the payments made to the sub-contractors *during business rescue proceedings*, although made during the relevant period, do not constitute dispositions as contemplated in section 341(2). However, so it was argued, to the extent that it may be found that the two sections cannot be applied concurrently, section 5(4)(b)(ii) of the 2008 Act provides the solution: the provisions of the 2008 Act must prevail over those of the 1973 Act.

[43] The respondent further contends that there are at least two further reasons why the interim award is incorrect and ought to be reconsidered on appeal. Firstly, it is common cause that the decision of the SCA in *Diener NO v Minister Of Justice and Others*¹² featured prominently in the interim award. It is the respondent's position that *Diener* was wrongly relied upon and further, that *Diener* is distinguishable from the dispute at hand. In *Diener*, a business rescue practitioner asked for the date of the

¹¹ Chapter XIV of the Companies Act, 1973, which includes section 341(2), continues to apply in terms of the transitional arrangements provided for in Item 9 of Schedule 5 to the Companies Act, 2008. It is apparent from Item 9(5) that this is a temporary or transitional arrangement until "*alternative legislation has been brought into force adequately providing for the winding-up and liquidation of insolvent companies*".

¹² 2018 (2) SA 399 (SCA).

concursum to be extended to the date on which business rescue commenced, in circumstances where liquidation had followed on business rescue. In these circumstances, so it is argued, the dispute in *Diener* bore no resemblance to the one that was considered in the arbitration.

[44] Secondly, the respondent alleges that a number of the remaining issues as they present on the pleadings have effectively been determined, despite these issues not forming part of the separated issues. The remaining issues on the pleadings include: [a] the respondent's reliance on a cession between it and a sub-contractor which would have an impact of approximately R4, 7 million on the quantum of any award; [b] adjustments of claims on the basis of "rise and fall" calculations; [c] the question of compliance with the pre-conditions for the applicants' claims for payment; and [d] the question of the applicants' proper remedy (and whether the sub-contractors to whom payments were made by the respondent, ought not to be pursued). It is submitted that this error in the award results in prejudice to the respondent (absent an appeal) on two counts: first, the respondent is saddled with an award in an incorrect amount; and second, the respondent's right to pursue other, remaining defences on arbitration, has been expunged.

[45] Whilst prospects of success remain relevant to the question of undue (or disproportionate) harm, section 8 does not include a requirement of good or reasonable prospects before relief can be granted under it. What is undeniable, however, is that if the respondent is correct in its contentions, the prejudice it will suffer if the court does not condone its failure to file timeously, is wholly undue and disproportionate compared to the mistake of filing a notice of appeal out of time.¹³

¹³ *Supra Moscow V/O Exportkhleb*.

[46] That said, I do not find it necessary to substantially deal with the merits. The issues raised in the arbitration were novel and complicated and the amounts involved in the dispute is not insignificant. In my view, it cannot be said that the respondent's prospects of success is so unreasonable that it should not be granted an indulgence.¹⁴

[47] The applicants complain that the appeal will negatively impact on their interest in bringing matters to finality. Whilst some delay is inevitable, this delay does not outweigh the prejudice that the respondent is (and will be) exposed to, should the right to appeal be forfeited. The respondent will lose the right to an appeal despite this right being agreed to in the parties' arbitration agreement. With it, the respondent loses the right to challenge the findings of the arbitrator in circumstances where it is submitted that disputes and issues beyond the scope of the separated issues were determined and the interim award was made in circumstances where the separated issues concerned a narrower question. Moreover, the respondent contends that the principal separated issue is an important, serious legal issue that ought to be reconsidered, and which, if the respondent is correct, will be corrected on appeal. An award will be made in a lesser amount and the respondent's right to proceed to arbitration on all the remaining issues, will be restored. As such, the intended appeal has a bearing and an impact not only on the interim award, but also on the future conduct of the arbitration.

CONCLUSION

[48] I am satisfied that an appropriate case for relief in terms of section 8 of the Arbitration Act was made out and that the respondent is entitled to an order in the

¹⁴ In *United Plant Hire v Hills*, 1976(1) SA 717 (A) at 720 E-G, the court held that a reasonable prospect of success on the appeal is not a *sine qua non* for condonation. It is sufficient if the appeal is *prima facie* arguable.

terms set out in the notice of counter-application. As far as costs is concerned, the respondent referred the court to a letter dated 8 September 2021, in which the respondent proposed that the intended appeal should be allowed, to avoid the costs and delay that would be occasioned by this application. This proposal was rejected and the reality is, that had it been accepted, the appeal would, by now, have been heard and determined.

[49] In the result the following order is made:

1. The applicants' application is dismissed with costs.
2. The relief sought in the counter-application is granted with costs, including the costs of two counsel [one of whom is senior counsel].
3. Draft Order marked "X" is made an order of court.

L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

(Electronically submitted therefore unsigned)

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 10 June 2022.

APPEARANCES

Counsel for the applicants:	Advocate P. van der Berg SC
Instructed by:	Van Veijeren Inc

Counsel for the respondent:	Advocate A.J. Daniels SC Advocate A. Vorster
Instructed by:	Cox Yeats Attorneys
Date of hearing:	15 March 2022
Date of judgment:	10 June 2022

