

IN THE HIGH COURT OF LESOTHO
(COMMERCIAL DIVISION)

HELD AT MASERU

CCA/0019/2022

In the matter between

LETŠENG DIAMONDS (PTY) LTD

APPLICANT

And

**THE PRESIDENT OF THE LAW SOCIETY OF
LESOTHO**

1ST RESPONDENT

ADVOCATE PATRIC VUSIMUSI

TŠENOLI N.O “THE ARBITRATOR”

2ND RESPONDENT

THOLO ENERGY SERVICES (PTY) LTD

3RD RESPONDENT

Neutral Citation: Letšeng Diamonds (Pty) Ltd v The President of the Law Society of Lesotho & 2 others [2023] LSHC 100 Comm. (11 May 2023)

CORAM: M. S. KOPO, J

HEARD: 22/02/23

DELIVERED: 11/ 05/ 23

SUMMARY

Interlocutory Application to file an annexure – Condonation to file further evidence not granted as would be prejudicial to the other party – Said document considered hearsay and application not in compliance with the Rules.

In the Main- Interpretation of the contract discussed – Intention of the parties in a contract discussed – section 4 and 14 of the Arbitration Act discussed.

Annotation

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Cases

Lesotho

Bataung Chabeli Construction (Pty) Ltd v Road Fund (C of A (CIV) 34/2020)
[2021] LSCA 17 (14 May 2021)

Hippo Transport (Pty) Ltd v Afrisam Lesotho (Pty) Ltd and Others (C of A (CIV) NO. 44/2016) [2017] LSCA 4 (12 May 2017)

Lesotho Public Motor Transport v Lesotho Bus and Taxi Owners Association
LAC (2015-2016)

Manyokole V The Prime Minister and Others (CIV/APN/463/2020) [2021]
LSHC 12

Motaba V Board of trustees: Public Officers' Defined Contribution Fund and
Others (CIV/APN/19/2021) [2021] LSHC 19 (17 June 2021)

Standard Lesotho Bank v Mahomed (CIV/T/ 182/ 2010) (NULL) [2010] LSHC
9 (07 June 2010)

Zainab Moosa & Others v Lesotho Revenue Authority (C of A (CIV) 2 of 2014)
[2015] LSCA 36 (06 November 2015)

South Africa

MAN Financial Services (SA) (Pty) Ltd, v Elsologix (Pty) Ltd and Others
(36672/2020 [2021] ZAGP JHC (24 August 2021)

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593
(SCA)

Zhongji Development Construction Engineering Company Limited v Kamoto
Copper Company Sarl [2014] 4 All SA 617 (SCA) (1 October 2014)

Statutes

Arbitration Act No. 12 of 1980

High Court Act No. 5 of 1978

High Court Rules No. 9 of 1980

JUDGMENT

[A] INTRODUCTION

[1] In May, 2018, Letšeng Diamond (Pty) Ltd (hereinafter interchangeably referred to as Letšeng or Applicant) entered into a written Fuel Supply Agreement (FSA) with Tholo Energy Services (Pty) Ltd (hereinafter referred to as Tholo or 3rd Respondent interchangeably). The hub of the said agreement between the parties was that Tholo supply Letšeng with diesel fuel for its mining operations at Letšeng Mine (Mine) operations as the name of the agreement duly suggests.

[2] Of relevance to this matter, is a term of the contract that provides for a dispute resolution process. Clause 21 of the said contract is the one that governs the issues in dispute between the parties and referral to arbitration.

[3] There are some disputes that arose between the parties during the implementation of the contract spanning from around July 2021 to sometime in January 2022 that I will not go deeply into for the purposes of this ruling. Suffice to say that of relevance to this matter, Letšeng terminated the contract in issue or communicated its intention to

terminate it. The said termination caused Tholo to invoke the arbitration clause (whether rightly or wrongly so, is not of importance at this stage) and commence with the referral of the dispute to arbitration in January 2022. Pursuant to the request by Tholo to the President of the Law Society of Lesotho (hereinafter referred to as the Law Society or 1st Respondent interchangeably), the Law Society appointed Advocate Tšenoli (hereinafter referred to as the Arbitrator or 2nd Respondent interchangeably) as the Arbitrator. It is as a result of this appointment that Letšeng instituted the Main Application (the Main). In the Main, Letšeng mainly seeks an order that the referral of the dispute by Tholo to The Law Society be set aside, alternatively the decision by The Law Society to Appoint Advocate Tšenoli be reviewed and set aside.

[4] Tholo opposes this Application, and all the pleadings were accordingly filed and closed when it was set down for hearing. As a result, on the 15th day of February 2023, a notice of set down was filed by the Applicant for the matter to be heard on the 22nd day of February 2023. On the 20th day of February, 2023, the Applicant instituted an interlocutory application and set it down to be heard on the same day. This Interlocutory Application was therefore argued on the said date, and I gave an *ex tempore* ruling. This judgment will therefore deal first with the said Interlocutory Application before delving into The Main.

[B] INTERLOCUTORY APPLICATION

[5] In this Interlocutory Application, Letseng applies for leave of court to include a document called AFSA Correspondence in the record. For this Application, Mr. Neil Fraser, an Attorney for Letseng, deposed that this document only became available on the 17th day of February, 2023 upon an answer by Arbitration Foundation of Southern Africa (AFSA) Secretariat. The request to AFSA, according to Mr. Fraser, had been made in May 2022.

[6] Mr. Fraser went on to show that the said document is relevant to the AFSA rules and administrative procedure that were agreed upon by the parties. Moreover, the said document only confirms the mandatory procedure for referral to arbitration and the process and substance necessary for appointment of an arbitrator.

[7] The reason for the delay in including this document is explained by the Applicant as the non-response by AFSA that was only rectified when Advocate Roux pressed at the 11th hour of preparing for this matter. The nature of the said document is an email response to that of Advocate Roux requesting explanations on arbitral referral procedure to AFSA. Of

relevance among the explanations provided is that per Article 4.1 of AFSA Commercial Rules;

“a party wishing to resort to arbitration under the aegis of and according to the Rules of the Foundation, shall submit a written Request for Arbitration to the Secretariat of the Foundation through the office of the Registrar”.

[8] The Respondent had not filed any opposing papers to the Interlocutory Application but opposed the matter from the bar. Taking into consideration that the Interlocutory Application was only served and filed on the 20th day of February and was moved on the 22nd day of February, I allowed Advocate Tšabeha to address from the bar.

[9] Advocate Roux argued that the application for the late filing of the document in question is occasioned by the delay in getting it from the secretariat of AFSA. Moreover, the allowance of the inclusion of this document does not prejudice the Applicant in any way. Furthermore, Advocate Roux argues that this document is relevant and does not attempt to prove the truthfulness of its contents but that it goes to proving only its existence.

[10] On the other hand, relying on **MAN Financial Services (SA) (Pty) Ltd, v Elsologix (Pty) Ltd and Others**¹, Advocate Tšabeha argues that

¹ (36672/2020 [2021] ZAGP JHC (24 August 2021)

once the pleadings were closed, Applicant cannot be allowed to file any further affidavit as this would prejudice the Respondent. He even argued that the application to court for the filing of this document legitimately was only an afterthought as the Applicant first attempted to file the documents by attaching it to the Practice Note and thereby sneaking it into the papers of the case.

[11] The second ground that Advocate Tšabeha relies on to have this interlocutory application dismissed is that it does not comply with **Rule 8 (7) of the High Court Rules**² as it is not in conformity with Form J. For this argument, he cited **Lesotho Public Motor Transport v Lesotho Bus and Taxi Owners Association**³ as the authority. The substantial irregularity that he challenged the form used by the Applicant is that it did not specify the procedural rights of the respondents necessary to defend the application.

[12] The third and final ground relied upon by Advocate Tšabeha is that the document that the Applicant attempts to have admitted is hearsay and should not be accepted. He argues that it is just a copy and as such should have been certified and supported by an Affidavit. For this argument he referred the court to the case of **Standard Lesotho Bank v Mahomed**⁴

² Legal Notice No. 9 of 1980

³ LAC (2015-2016)

⁴ (CIV/T/ 182/ 2010) (NULL) [2010] LSHCCD 9 (07 June 2010)

and **Hippo Transport (Pty) Ltd v Afrisam Lesotho (Pty) Ltd and Others**⁵.

[13] The Interlocutory Application has indeed been made in haste and as a result has denied Tholo enough time to prepare for its defence. It may be that AFSA did not accede to the request by the legal representatives of Letšeng at first. Be that as it may, there was not enough follow up. It was only at an advanced stage of preparations for arguments that a follow up was made. This inertia caused the Applicant to move in a haste and thus failing to use Form J as provided for by the rules. The next question should however be whether the non-compliance with the rules by the Applicant should be condoned. It is trite that to answer this question, the court should consider whether condoning such non-compliance with the rules will not prejudice the other party. In *casu* allowing the Applicant to include the document in question would deny the respondent a chance to ably raise a defence on it without causing more delay as the pleadings were closed long before the day of the hearing of this application. Pleadings were closed in May 2022. Nine (9) months later, almost a year, the Applicant is attempting to have a piece of evidence included in its papers. Allowing a further delay in a commercial litigation for an interlocutory application would amount to injustice. And by interlocutory application I am referring to the Review Application

⁵ (C of A (CIV) NO. 44/2016) [2017] LSCA 4 (12 May 2017)

(Application in the main in this matter) since this is a review with a view to enabling the arbitration process to kick off. While the court has a wide discretion to allow non-compliance with its rules per **Rule 59** of the **High Court Rules**⁶, such discretion must be exercised judiciously with consideration of fairness as espoused by Musonda AJA (Chinhengo AJA and Mahase J Concurring) in **Zainab Moosa & Others v Lesotho Revenue Authority**⁷. In Moosa, the court was faced with a delay in filing an appeal filed out of time. However, as to what fairness entails, it is my considered view that it will apply similarly in considerations of condonation for non-compliance with the rules of court in exercising the wide discretion in **Rule 59**. Fairness was ruled to include;

*“...the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success”*⁸

[14] In *casu*, it was almost a year since the pleadings were closed when the Applicant moved to include the document in question. This could cause a further delay in the matter as Tholo would also, most probably,

⁶ Supra

⁷ (C of A (CIV) 2 of 2014) [2015] LSCA 36 (06 November 2015)

⁸ Ibid

seek to be given time to answer the said evidence. Secondly, this evidence/document has not been supported by any affidavit of the author but is sought to be attested to by the one who is not the author. At best it could only prove its existence or that it says what it says and not the truthfulness of its contents. That would mean that as far as the truthfulness of its contents is concerned, it is hearsay. This goes to minimising the prospects of its admissibility in the main and therefore goes to prospects of success. Finally, the inertia in following up on the request from AFSA is a fault on the part of Applicant or its attorneys. A good follow up would have yielded better results. For the sake of justice, it is better that the interlocutory application is dismissed.

[C] REVIEW APPLICATION

[I] LETŠENG'S CASE

[15] Letšeng's case is premised on **Section 4 & 14** of the **Arbitration Act, 1980**⁹ and **Rule 50** of the **High Court Rules**¹⁰. In the main Letšeng seeks to set aside, in accordance with **Section 4 (2)** of the Act, the referral of the dispute to the Law Society by Tholo on the ground that it is procedurally and substantively contrary to requirements of the **AFSA Commercial Rules for Arbitration in Southern Africa** (Rules). In the

⁹ Act 12 of 1980

¹⁰ supra

alternative, Letšeng seeks to review the decision of the Law Society to appoint Advocate Tšenoli as the Arbitrator and the declaration that it has no force and effect basing itself on **Rule 50** read with **section 14 of the Act**.

[16] Advocate Roux for Letšeng argued that the Law Society did not comply with the mandatory, requirements of;

- a. Seeking a request for arbitration from the secretariat of AFSA
- b. Requesting, payment of a fee, and other procedural steps per articles 3, 4 and 6 of AFSA Rules, and
- c. Appointment of the arbitrator as envisaged under article 9 of AFSA Rules.

Advocate Roux gleaned the non-compliance with the above-mentioned steps from the speed within which the appointment of Advocate Tšenoli was made from the time of the request to the time of his (Advocate Tšenoli) communication with the parties to set up a meeting. Moreover, he argued that the fact that Advocate Tšenoli also requested the agreement, it becomes clear that the steps, as required by the AFSA Rules, were not complied with.

[II] THOLO'S CASE

[17] It is apposite to mention at this stage that Tholo pleaded that the Commercial Court does not have jurisdiction in this matter but rather the High Court in its ordinary jurisdiction. However, Advocate Tšabeha abandoned this ground of his case (and rightly so in my considered view) at the commencement of the arguments.

[18] Advocate Tšabeha argued that per the terms of clause 21.3.1 of the FSA, the parties have agreed to arbitration. The said agreement to arbitration provides that dispute shall be resolved per the AFSA Rules by an arbitrator appointed by the Law Society of Lesotho. He therefore argues that the arbitrator was correctly appointed.

[19] Secondly, Advocate Tšabeha argues that it is now settled in our jurisdiction that once the parties have agreed to the alternative dispute resolution, the courts will not interfere with their agreement. On this argument, he relied on **Bataung Chabeli Construction (Pty) Ltd v Road Fund**¹¹.

[20] The second leg of Advocate Tšabeha's argument is that the application for the alternative relieve has been wrongly based on Rule 50 of the High Court Rules. He argues that Rule 50 is concerned with the

¹¹ (C of A (CIV) 34/2020) [2021] LSCA 17 (14 May 2021)

review of subordinate court or tribunal, administrative body, or quasi-judicial function and not a commercial decision such as the one performed by the Law Society in *casu*. The president of the Law Society was not exercising any public power.

[21] Finally, it is Tholo's case that even section 4 and 14 of the Act cannot be relied upon by Letšeng. The argument by Advocate Tšabeha is that the closest that Letšeng's case gets is if premised on section 4 (2) (b). However, section 4 (2) (b) deals with the dispute and whether it can be taken for arbitration. On section 14, he argues that the alleged irregularity complained of by Letšeng is not envisaged under the said section.

[D] ANALYSIS OF THE MATTER

[22] It is not in issue that the parties were in a commercial relationship. It is also not in dispute that they had agreed to subject their disagreements emanating from the implementation of the contract to an alternative dispute resolution. Moreover, it is common cause that the parties encountered a dispute which Tholo referred to arbitration invoking the relevant part of their agreement. It is apposite at this juncture to quote verbatim the said **clause 21.3.1** of the FSA. It is couched as follows;

“Any dispute that has not been resolved pursuant to clause 21.1 or 21.2 hereof shall be finally settled in terms of the Commercial Arbitration Rules of the Arbitration Foundation of Southern Africa (AFSA) by one arbitrator who shall be appointed by the Chairperson of the Law Society of Lesotho. The place of arbitration shall be Maseru, Lesotho and the arbitration proceedings shall be subject to the Lesotho Arbitration Act of 1980.”

[23] The first port of call is the interpretation of this clause in order to get the intention of the parties in as far as how disputes that they have not been able to resolve on their own will be resolved through alternative dispute resolution. Advocate Roux cited the South African case of **Natal Joint Municipal Pension Fund v Endumeni Municipality**¹² in his Heads of Arguments in support of his interpretation of section 14 (2) (a) of the Act. I am in total agreement with the approach of **Endumeni** which my brother Mokhesi J has adopted and cited with approval in **Motaba V Board of trustees: Public Officers' Defined Contribution Fund and Others**¹³ as well as in **Manyokole V The Prime Minister and Others**¹⁴. It is apposite at this stage to reproduce the widely quoted passage of Wallis JA (Farlam, Van Heerden, Cachalia, and Leach JJA concurring)

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context

¹² 2012 (4) SA 593 (SCA)

¹³ (CIV/APN/19/2021) [2021] LSHC 19 (17 June 2021)

¹⁴ (CIV/APN/463/2020) [2021] LSHC 12

provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[24] In *casu* clause 21.3.1 of the FSA quoted in paragraph **[22]** above provides that the parties agreed to have their unresolved dispute referred to arbitration. This is common cause. That clause further provides that the said dispute referred to arbitration shall be resolved in terms of the AFSA commercial rules. As has been rightly pointed out by Advocate Roux for the Applicant, the choice of an arbitrator per the AFSA Rules, is by the

Secretariat of AFSA under **Article 9** of the said Rules. However, under the FSA, the parties have agreed that the appointment of the arbitrator shall be by the Law Society. Advocate Roux cannot therefore be correct that there should have been compliance with Article 5 of the AFSA Rules that requires acceptance of a request for arbitration by and payment of a fee to the secretariat. The parties have therefore consciously agreed that the appointment of the arbitrator shall be by the Law Society as opposed to the Secretariat of AFSA. This agreement has therefore cut the procedural steps of referring the dispute to the secretariat of AFSA and with it, the choice of the arbitrator.

[25] The AFSA Rules have indeed stipulated some steps that are to be undertaken by the Secretariat of AFSA before any matter could be said to be ripe to be referred to an arbitrator. It is only logical that such procedural steps, in the FSA in issue, were intended to be undertaken by the Law Society. Such steps for example, would be the acceptance of a request for arbitration as envisaged in **Article 4 of the AFSA Rules**, acceptance of refusal of a request under **Article 5** (which of course is done without the engagement of a defendant in arbitration but purely in the free discretion of the Secretariat), the invitation for response by a defendant and finally, the choice of an arbitrator¹⁵. The role of the Secretariat of

¹⁵ Article 6

AFSA and of the Law Society in *casu*, is administrative and also meant to accept “pleadings” (for lack of a better word). However, even if the AFSA Secretariat would find any dispute upon invitation for response from a defendant, it would go ahead and appoint an arbitrator to consider the said disputes per **Article 6.2.1 of the AFSA Rules**. Such arbitrator would then be the one who would preside over the preliminary dispute. This is insightful and informative that the work of AFSA secretariat is mostly just preparatory and meant to assist any arbitrator that would preside over any matter. Even the refusal to accept a referral by the secretariat is done in its “free discretion” without invitation for deliberation by the other party. Advocate Roux argues that the only semblance of compliance with AFSA Rules by the Law Society is a letter of the 10th day of April 2022 showing how highly the Arbitrator is regarded. However, he argues further, the Law Society does not show if the said Arbitrator is accredited or if AFSA was engaged. I do not believe that in as far as the appointment of the Arbitrator, the parties agreed that AFSA Secretariat should be engaged. In fact, they agreed against it by agreeing to the Law Society being given power to appoint the Arbitrator. The question is, is this referral process for arbitration, or as I have referred to it earlier, the preparatory groundwork, challengeable under **section 4 and/or 14 of the Act** as Advocate Roux argues?

[26] Section 4 (2) of the Act gives the court power to,

- a. set aside the arbitration agreement; or
- b. Order that any dispute in the agreement shall not be referred to arbitration; or
- c. Order that the agreement shall not have effect on a particular dispute.

Letšeng's argument is not based on this section. It is against the process that The Law Society took in referring the dispute to the Arbitrator and/or the appointment of the Arbitrator.

[27] The spirit and aim of arbitration are for the parties to opt for alternative dispute resolution. As long as the agreement of the parties is clear, courts should not be quick to intervene. The AFSA Rules exudes the same spirit. In **Bataung Chabeli Construction v Road Fund**¹⁶ the Court of Appeal cited, with approval, the South African case of **Zhongji Development Construction Engineering Company Limited v Kamoto Copper Company Sarl**¹⁷ wherein Gorven AJA (Mpati P, Mbha JA and Mathopo AJA concurring) had this to say;

“This court has said that parties who refer matters to arbitration ‘implicitly, if not explicitly, (and subject to the

¹⁶ Supra

¹⁷ [2014] 4 All SA 617 (SCA) (1 October 2014)

limited power of the Supreme Court under s 3(2) of the Arbitration Act), abandon the right to litigate in courts of law and accept that they will be finally bound by the decision of the arbitrator”.

In *casu*, what the Applicant challenges is the process of referring the matter to the arbitrator by the Law Society and the choice of the Arbitrator. Section 4 (2), as shown above, does not apply to such a situation. It is concerned with the power of the court to set aside the arbitration agreement; or order that any dispute in the agreement shall not be referred to arbitration, or Order that the agreement shall not have effect on a particular dispute.

[28] Section 14 (2) (a) and (b) of the Act on the other hand reads thus;

(2) (a) The court may at any time on the application of any party to the reference, on good cause shown, set aside the appointment of an arbitrator or umpire or remove him from office.

(3) For the purposes of this sub-section, the expression “good cause”, includes failure on the part of the arbitrator or umpire to use all reasonable dispatch in entering on and proceeding with the reference and making an award or, in a case where two arbitrators are unable to agree, giving a notice of that fact to the parties or to the umpire.

Advocate Roux argues that “commencement of the proceedings (the referral) is tainted with procedural and substantive unlawfulness and irregularity”¹⁸. The basis for this argument is that the Law Society has failed to show that the Arbitrator is accredited with AFSA or that it engaged AFSA in any manner in order to appoint the Arbitrator. As I have said in paragraph [25] above, the work of the secretariat is preparatory and the spirit of the AFSA Rules shows that those preparatory steps are not the arbitration but the means to an arbitration. Moreover, the parties have chosen the Law Society in place of the Secretariat, and it is my considered view that there was no need for the Law Society to refer to the Secretariat in choosing the Arbitrator. I agree that section 14 of the Act, gives power

to the court to terminate the appointment of an arbitrator. However, the good cause envisaged under the said section should emanate from the fault of the arbitrator. At this stage, it would be a bit premature for the court to intervene. Any party can make its presentation before the Arbitrator and if he does not adhere to the requirements of the Act, then the court would be empowered to intervene.

¹⁸ At para 5.21.1 of the Heads of Argument

[E] CONCLUSION AND ORDER

[29] The FSA is very clear that the choice of the Arbitrator will be by the Law Society. From reading of the agreement, it is my considered view that while the parties agreed that AFSA Rules will be followed, it does not follow that the Secretariat of AFSA needed to be consulted in choosing or appointing the Arbitrator. The procedural steps that the AFSA Rules prescribe in preparing for the referral of the matter to the Arbitrator do not cause for this court to vitiate or terminate the appointment of the Arbitrator. Having concluded thus, the following order is therefore made;

The Application is dismissed with costs.

Kopo M.S.
Judge of the High Court

For Applicant:

ADV. ROUX

For 3rd Respondent:

ADV. TŠABEHA ASSITED BY ADV.

MABOTE