



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 19960/2008

Before: The Hon. Mr Justice Binns-Ward  
Hearing: 10 November 2016  
Judgment: 15 November 2016

In the matter between:

**CESAR ALEXANDRE**

Applicant

and

**MILNERTON INFORMAL TRADERS' ASSOCIATION**

First Respondent

**ADV EBEN GROBBELAAR N.O.**

Second Respondent

**THE SHERIFF, CAPE TOWN EAST**

Third Respondent

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**JUDGMENT**

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**BINNS-WARD J:**

[1] The applicant has applied for an order staying execution of an award in respect of costs made against him in arbitration proceedings. The stay is sought pending the determination of an intended appeal. The award was made on 11 May 2015 and the appeal against it was noted only on 11 March 2016, notwithstanding a provision in the arbitration agreement that any party desiring to appeal was required to do so by delivering notice thereof to the other party 'not later than 10 days after the delivery of the Arbitrator's award'. The agreement also provided that a party wishing to proceed on appeal from the award at first instance had to put up security in the sum of R250 000 within 10 days of noting the appeal. The applicant furnished the required

security only on 30 September 2016, more than six months after having purported to note the appeal.

[2] It is evident that the applicant is intending to prosecute an arbitration appeal that has been noted well outside the period afforded in terms of the governing agreement and that having noted it he failed to timeously fulfil the condition to which its prosecution was made subject. The applicant's counsel has argued, however, that the agreement allows for any appellate tribunal that might be constituted to condone the late noting of the appeal and the tardy provision of security. He was at pains to emphasise that the jurisdiction to determine whether condonation should be granted or not vested in the appellate tribunal, not in the court. He also submitted that the general principle that the noting of an appeal suspends the exigibility of the judgment was applicable in respect of an arbitration award.

[3] I am willing for present purposes to assume (without so deciding) that all of those submissions were well-founded. The factor that they failed to take into account, however, was that the award was made an order of court on 11 August 2015 in terms of s 31 of the Arbitration Act 42 of 1965. The order was obtained pursuant to an application that was served on the applicant's attorney of record in the arbitration on 11 June 2015, after the expiry of the period provided in terms of the arbitration agreement for the noting of an appeal. I refrain from commenting on whether service on the applicant's attorneys of record in the arbitration was competent for the purpose of the subsequent curial proceedings. The court that made the order had the requisite jurisdiction and the judge was evidently satisfied with the effectiveness of the notice that had been given. The effect of the order made on 11 August 2015 was that the award thereupon became enforceable 'in the same manner as any judgment or order to the same effect'; see s 31(3) of the Act.

[4] Once the award was made an order of court it was no longer amenable to any appellant jurisdiction created in terms of the arbitration agreement; at least for so long as the order remains in place. The effect of having an award made an order of court translates the outcome of the arbitration proceedings from the private environment of contract to the public sphere, whereupon it qualifies for enforcement using the resources of the state pursuant to s 165(5) of the Constitution.<sup>1</sup> The applicant's notice

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<sup>1</sup> Section 165(5) of the Constitution provides: '*An order or decision issued by a court binds all persons to whom and organs of state to which it applies*'.

of appeal in terms of the arbitration agreement did not have the effect of suspending the court order; only a notice of appeal against the court order could have had that consequence.

[5] The applicant has therefore misconceived his remedy. He should have applied for the setting aside of the order of court. If he were to obtain such relief the question of execution would fall away; if on the other hand it were to be refused, no basis would exist for suspending execution. It would be appropriate to consider exercising this court's discretion in terms of rule 45A<sup>2</sup> only in the context of evidence that the first respondent was proceeding to enforce the court order in the face of a pending application by the applicant to set it aside. There is no such application, and, having regard to the applicant's history of inordinate procedural dilatoriness, no assurance that one might be brought with expedition. While the court order stands unimpugned, there is no basis to stay its execution.<sup>3</sup>

[6] For those reasons the application is dismissed with costs.

**A.G. BINNS-WARD**  
**Judge of the High Court**

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<sup>2</sup> Rule 45A provides: '*The court may suspend the execution of any order for such period as it may deem fit*'.

<sup>3</sup> Cf. *Firm Mortgage Solutions (Pty) Ltd v Absa Bank Ltd* 2014 (1) SA 168 (WCC).