
AFSA ADVANCED PROGRAMME IN ALTERNATIVE DISPUTE RESOLUTION

ISSUED IN COLLABORATION WITH THE UNIVERSITY OF PRETORIA

MODULE: ARBITRATION

FILE 3: CASES



The Arbitration Foundation of Southern Africa
NPC

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LUFUNO MPHAPHULI & ASSOCIATES (PTY) LTD v ANDREWS AND ANOTHER

2009 (4) SA 529 (CC)

Citation	2009 (4) SA 529 (CC)
Case No	CCT 97/2007
Court	Constitutional Court
Judge	Langa CJ, O'Regan ADCJ, Mokgoro J, Ngcobo J, Nkabinde J, Van Der Westhuizen J, Yacoob J, Jafta AJ and Kroon AJ
Heard	May 13, 2008
Judgment	May 20, 2009
Counsel	GJ Marcus SC (with him S Budlender) for the applicant. BC Stoop for the first respondent. F du Toit SC for the second respondent.
Annotations	Link to Case Annotations

Flynote

Arbitration - Award - Setting aside - Power of court - Constitutional values not necessarily best served by increasing power of courts to set aside arbitration awards - Courts to avoid undermining goals of private arbitration process - To construe statutory requirements for setting-aside of awards quite strictly when it comes to private arbitration - Arbitration Act 42 of 1965, s 33(1).

Arbitration - Procedure - Private arbitration - Fair hearing - Constitutional right of access to courts not applying directly to private arbitration - But arbitration still regulated by law and Constitution - Arbitration differing from proceedings before court or statutory tribunal in that process consensual, proceedings need not be in public and identity of arbitrator and manner of proceedings ordinarily determined by agreement between parties - Quaere: Whether right of access to courts having any indirect application to private arbitration - Constitution, s 34.

Arbitration - Procedure - Private arbitration - Fair hearing - Investigative procedure permissible as long as fairly implemented - Arbitration procedure to be determined by agreement between parties and, in default thereof, by arbitrator - Process to be followed to be discerned from terms of arbitration agreement - Courts to respect intention of parties as to procedure - Courts not to defeat goals of private arbitration by being too quick to set proceedings aside on ground of alleged 'gross irregularity' - Arbitration Act 42 of 1965, s 33(1).

Headnote

(Per O'Regan ADCJ, Langa CJ, Mokgoro J, Van der Westhuizen J and Yacoob J concurring; Nkabinde J, Jafta AJ and Kroon AJ dissenting; Ngcobo J delivering a further judgment): The only strong reason to read private arbitration as falling within the meaning of s 34 of the Constitution is the requirement imposed by that section that the hearing be 'fair'. However, it is not appropriate to understand the section to relate to private arbitration, which

otherwise does not fit the language of the section, simply because it might be seen to be desirable to require arbitration proceedings to be fair. Section 34 must be interpreted on its own language and with integrity, and it cannot be concluded, given the general lack of fit between private arbitration and the language of the section, that the section has direct application to private arbitration. Despite the choice not to proceed before a court or statutory tribunal, the arbitration proceedings will still be regulated by law and by the Constitution. Those proceedings, however, will differ from proceedings before a court, statutory tribunal or forum. The first difference is that the process must be consensual - no party may be compelled into private arbitration. The second is that the proceedings need not be in public at all. The third is that the identity of the arbitrator and the manner of the proceedings will ordinarily be determined by agreement between the parties. The party who opts for arbitration will have chosen these consequences. In the light of the foregoing, on a proper construction

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of s 34 it should be understood not to apply directly to private arbitrations. (Paragraphs [214] and [217] - [218] at 591D - E and 592B - D.)

Quaere: Whether s 34 of the Constitution has any indirect application to private arbitrations. Indirect application of rights in the Bill of Rights operates generally through s 39(2) of the Constitution which requires courts when interpreting statutes or developing the common law or customary law to promote the 'spirit, purport and objects' of the Constitution. Mindful of the role courts have in giving effect to arbitration agreements, it seems s 34 may have some relevance to the interpretation of legislation or the development of the common law. (Paragraph [215] at 591F - G.)

The values of the Constitution will not necessarily best be served by interpreting s 33(1) of the Arbitration Act 42 of 1965 in a manner that enhances the power of courts to set aside private arbitration awards. Indeed, the contrary seems to be the case. International and comparative law suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. Section 33(1) provides three grounds for setting aside an arbitration award: misconduct by an arbitrator; gross irregularity in the conduct of the proceedings; and the fact that an award has been improperly obtained. In my view, and in the light of the reasoning in the previous paragraphs, the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration. (Paragraph [235] at 598H - 599B.)

What should the approach of a court be to the question of fairness in the conduct of an arbitration? First, it must be recognised that fairness in arbitration proceedings should not be equated with the process established in the Uniform Rules of Court for the conduct of proceedings before our courts. Secondly, there is no reason why an investigative procedure should not be pursued as long as it is pursued fairly. The international conventions make it clear that the manner of proceeding in arbitration is to be determined by agreement between the parties and, in default of that, by the arbitrator. Thirdly, the process to be followed should be discerned in the first place from the terms of the arbitration agreement itself. Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If courts are too quick to find fault with the manner in which an arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of s 33(1) of the Arbitration Act, the goals of private arbitration may well be defeated. (Paragraph [236] at 599B - E.)

In the present case, the majority of the court found that the various complaints of irregularities by the arbitrator, the arbitration having been an informal and investigative one, were not sufficiently serious to warrant the award being set aside. It appeared that throughout the arbitration process, the arbitrator had given both sides the opportunity to comment upon and challenge his preliminary findings and that the parties had indeed taken the opportunity to do so.

Cases Considered

Annotations

Reported cases

Southern Africa

Administrator, Transvaal, and Others v Zenzile and Others 1991 (1) SA 21 (A): considered

J Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA): referred to
2009 (4) SA p531

Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A): dictum at 532G - H considered

AParty and Another v Minister of Home Affairs and Others; Moloko v Minister of Home Affairs and Others 2009 (3) SA 649 (CC): considered

Armbruster and Another v Minister of Finance and Others 2007 (6) SA 550 (CC) (2007 (12) BCLR 1283): considered

BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another 1992 (3) SA 673 (A): considered

Barkhuizen v Napier 2007 (5) SA 323 (CC) (2007 (7) BCLR 691): referred to

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) (2004 (7) BCLR 687): compared

Brisley v Drotosky 2002 (4) SA 1 (SCA) (2002 (12) BCLR 1229): dictum in para [91] applied

Burns & Co v Burne 1922 NPD 461: considered

Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another 2006 (6) SA 103 (CC) (2006 (6) BCLR 669): considered

Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC) (2001 (10) BCLR 995): considered

Chelsea West (Pty) Ltd and Another v Roodebloem Investments (Pty) Ltd and Another 1994 (1) SA 837 (C): considered

Chief Lesapo v North West Agricultural Bank and Another 2000 (1) SA 409 (CC) (1999 (12) BCLR 1420): dicta in paras [13] and [22] applied

Croll qq Kerr v Brehm 2 Searle 227: referred to

De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlathuzana Civic Association Intervening) 2002 (1) SA 429 (CC) (2001 (11) BCLR 1109): considered

Estate Milne v Donohoe Investments (Pty) Ltd and Others 1967 (2) SA 359 (A): considered

Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another 1993 (2) SA 451 (A): considered

Giddey NO v JC Barnard and Partners 2007 (5) SA 525 (CC) (2007 (2) BCLR 125): considered

Goldfields Investment Ltd and Another v City Council of Johannesburg and Another 1938 TPD 551: considered

Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others 2008 (2) SA 608 (SCA): considered

Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC) (2000 (10) BCLR 1079): considered

James v Magistrate, Wynberg, and Others 1995 (1) SA 1 (C): compared

Landmark Construction (Pvt) Ltd v Tselentis 1972 (1) SA 435 (R): considered

Laws v Rutherford 1924 AD 261: considered

Lazarus v Goldberg and Another 1920 CPD 154: considered and distinguished

Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another 2008 (2) SA 448 (SCA) (2008 (7) BCLR 725): confirmed on appeal

Magajane v Chairperson, North West Gambling Board and Others 2006 (5) SA 250 (CC) (2006 (10) BCLR 1133): considered

Masetlha v President of the Republic of South Africa and Another 2008 (1) SA 566 (CC) (2008 (1) BCLR 1): considered

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Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening) 2001 (3) SA 893 (CC) (2001 (7) BCLR 685): considered

Muller and Another v The Master and Others 1991 (2) SA 217 (N): compared

Naidoo v Estate Mahomed and Others 1951 (1) SA 915 (N): considered

National Education Health and Allied Workers Union v University of Cape Town and Others 2003 (3) SA 1 (CC) (2003 (2) BCLR 154): considered

Phillips and Others v National Director of Public Prosecutions 2006 (1) SA 505 (CC) (2006 (2) BCLR 274): considered

Pieters v Administrateur, Suidwes-Afrika, en 'n Ander 1972 (2) SA 220 (SWA): compared

Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal 1999 (2) SA 91 (CC) (1999 (2) BCLR 151): dictum in para [39] applied

President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae) 2005 (5) SA 3 (CC) (2005 (8) BCLR 786): dictum in para [39] applied

President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU) 1999 (4) SA 147 (CC) (1999 (2) BCLR 175; [1998] ZACC 21): considered

Pretorius v Greyling 1947 (1) SA 171 (W): considered

Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another 2005 (4) SA 319 (CC) (2005 (3) BCLR 231): considered

Road Accident Fund v Mothupi 2000 (4) SA 38 (SCA): considered

Rose v Johannesburg Local Road Transportation Board 1947 (4) SA 272 (W): considered

S v Basson 2007 (3) SA 582 (CC) (2005 (12) BCLR 1192): referred to

F S v Bierman 2002 (5) SA 243 (CC) (2002 (2) SACR 219; 2002 (10) BCLR 1078): considered

S v Boesak 2001 (1) SA 912 (CC) (2001 (1) SACR 1; 2001 (1) BCLR 36): considered

S v Jaipal 2005 (4) SA 581 (CC) (2005 (1) SACR 215; 2005 (5) BCLR 423): considered

S v Roberts 1999 (4) SA 915 (SCA) (1999 (2) SACR 243): referred to

G S v Shaik and Others 2008 (2) SA 208 (CC) (2008 (1) SACR 1; 2007 (12) BCLR 1360): considered

Sapiero and Another v Lipschitz and Others 1920 CPD 483: considered

Shippel v Morkel and Another 1977 (1) SA 429 (C): dictum at 434B - C overruled

Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC) (2008 (2) BCLR 158): considered and dictum in para [260] applied

South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (3) SA 705 (CC) (2000 (8) BCLR 886): referred to

Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA) (2007 (5) BCLR 503): dictum in paras [47] - [48] discussed and doubted

Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another 2002 (4) SA 661 (SCA): dictum in para[25] applied

Traube and Others v Administrator, Transvaal, and Others 1989 (1) SA 397 (W): J considered

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KROON AJ

Van Rooyen and Others v The State and Others (General Council of the Bar of A South Africa Intervening) 2002 (5) SA 246 (CC) (2002 (8) BCLR 810): considered

Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC) (2005 (4) BCLR 347): considered.

Unreported cases B

Bopanang Construction CC v Lufuno Mphaphuli & Associates (Pty) Ltd; Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another (GNP case Nos 27225/2004 and 33188/2004, 22 February 2006): referred to.

Foreign

England

Interbulk Ltd v Aidan Shipping Co Ltd, The 'Vimiera' [1984] 2 Lloyd's Rep 66: considered

London Export Corporation Ltd v Jubilee Coffee Roasting Co. Ltd [1958] 1 WLR 271: considered.

European Court of Human Rights

Bramelid and Malmström v Sweden ECHR case Nos 8588/79 and 8589/79 (12 December 1982): referred to

Suovaniemi v Finland (ECHR case No 31737/96, 23 February 1999): discussed.

[zSTz]Statutes Considered

Statutes

The Arbitration Act 42 of 1965, s 33(1): see Juta's Statutes of South Africa 2007/8 vol 1 at 1-10

The Constitution of the Republic of South Africa, 1996, ss 34, 39(2): see Juta's Statutes of South Africa 2007/8 vol 5 at 1-25 and 1-27.

Case Information

Application for leave to appeal from a decision in the Supreme Court of Appeal (Harms ADP, Mthiyane JA, Lewis JA, Ponnann JA and Malan AJA), reported at 2008 (2) SA 448). The facts appear from the judgments of Kroon AJ and O'Regan ADCJ. G

GJ Marcus SC (with him S Budlender) for the applicant.

BC Stoop for the first respondent.

F du Toit SC for the second respondent.

Cur adv vult.

Postea (March 20).

[zJDz]Judgment

Kroon AJ:

Introduction

[1] This is an application for leave to appeal to this court against a decision of the Supreme Court of Appeal 1 upholding a judgment of the

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KROON AJ

High Court in Pretoria. 2 In terms of the latter judgment an application by the second respondent to have an arbitrator's award made an order of court was granted, and an application by the applicant for the review and setting aside of the award was dismissed. Factual background

The applicant, Lufuno Mphaphuli & Associates (Pty) Ltd (Mphaphuli), conducts business at Polokwane, Limpopo, as an electrical infrastructure contractor. The first respondent, Mr Andrews (the arbitrator), is a quantity surveyor and project manager in Johannesburg. The second respondent, Bopanang Construction CC (Bopanang), carries on C business at Witbank, Mpumalanga.

[3] Mphaphuli was the main contractor on a project of Eskom (the national electricity supplier) for the electrification of certain rural villages in Limpopo. On 16 May 2002 Mphaphuli and Bopanang concluded a written contract in terms of which the latter was engaged as a subcontractor D to undertake certain of the work entailed in the project. On 16 January 2003, prior to completion of the work assigned to it, Bopanang vacated the site. Another entity, AA Electrical Ltd, was engaged to complete the work, and also to do certain remedial work. Disputes arose between the parties concerning the execution by Bopanang of the work undertaken by it, and whether either party was liable to make payment to the other.

[4] During April 2003 Bopanang issued summons out of the High Court claiming payment from Mphaphuli in the sum of R656 934,44 in respect of the work done by it (less payments on account). Bopanang also launched an urgent application for a temporary interdict preventing Eskom from paying out certain moneys to Mphaphuli.

These proceedings were settled on the basis that an interim interdict would issue and the dispute between the parties referred to arbitration.

[5] At a preliminary meeting on 21 July 2003 Mphaphuli and Bopanang G agreed to appoint the arbitrator to undertake the arbitration and to exchange pleadings. On 1 August 2003 Bopanang submitted its statement of claim in which it claimed payment of the said amount of R656 934,44 (together with interest on the component amounts thereof from various dates), made up as reflected in the invoices annexed to the statement of claim. Attached to and forming part of the statement of H claim were the papers filed by Bopanang in the High Court in the application referred to in para [4] above. In those papers Bopanang had confirmed on oath that the invoices constituted an accurate record of the work it had done. Kroon AJ

[6] Mphaphuli filed its statement of defence (alleging, inter alia, I repudiation of the agreement by Bopanang) together with a counterclaim for moneys allegedly overpaid to Bopanang. Bopanang filed a reply to

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KROON AJ

Mphaphuli's statement of defence and a plea to the counterclaim. A A meeting was held between the parties and the arbitrator on 7 October 2003. The arbitrator was furnished with copies of all the pleadings that had been filed.

[7] On 16 October 2003 the parties finalised the terms of the reference to arbitration in a written agreement. Its relevant terms were as follows: B

'ARBITRATION AGREEMENT

Whereas [Bopanang] instituted an arbitration action against [Mphaphuli] in terms whereof [Bopanang] claimed payment of an amount of R656 934,44; interest on the amount of R143 395,53 at 0.5% per week C from 6 October 2002; interest on the amount of R208 937,54 at 0.5% per week from 21 April 2003; interest on the amount of R304 601,37 at 0.5% per week from 21 April 2003 and costs of suit;

And whereas [Mphaphuli] opposed the action and inter alia claimed payment of whatever amount appears to have been overpaid by [Mphaphuli] to [Bopanang]; D

And whereas the parties have reached an agreement regarding the finalisation of the arbitration proceedings and the mandate to be given to the arbitrator, Mr Nigel Andrews;

Now therefore the parties agree as follows:

1. PURPOSE OF ARBITRATION E

The purpose of the arbitration is to determine whether payment is due in terms of the contract concluded between the parties, and if it is determined that payment is in fact due, the extent of such payment due, having regard to the scope of the agreement; any agreed amendments or instructions for amendments thereto by [Mphaphuli] or ESKOM; the F value of the work that has been done by [Bopanang]; the effect of any defects, if any, and the rectification thereof; any and all payments made to [Bopanang]. Therefore a final assessment of moneys reasonably due by any one of the parties to the other needs to be made by the arbitrator.

2. AWARD OF ARBITRATOR IS FINAL AND BINDING

The final award made by the arbitrator as described in clause 1 above G shall be final and binding on the parties.

3. PAYMENT TO BE MADE IN TERMS OF AWARD OF ARBITRATOR

Any payment to be made by any of the parties in terms of the award made by the arbitrator shall be due and payable to the other party within 21 calendar days of the date of the written award made by the H arbitrator.

4. PROVISION OF DOCUMENTATION

The parties record that the arbitrator has already been provided with a bundle of documentation forming part of [Bopanang's] particulars of claim. In addition hereto, each party shall be entitled to submit such I documentation as it may deem necessary to the arbitrator by not later than 10 October 2003 (sic).

5. REQUEST FOR ADDITIONAL DOCUMENTATION

The arbitrator shall be entitled to require from any of the parties to make such further documentation available as he may require. The J

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KROON AJ

A parties shall provide such requested documentation within 3 (three) days from such written request of the arbitrator.

6. LIAISON WITH ESKOM

The arbitrator shall be entitled to liaise with ESKOM's duly authorised representatives, and to request any documentation with regard to this B project from ESKOM, who is hereby authorised by both parties to make such documentation available.

7. INSPECTION AND MEASUREMENT

The arbitrator shall commence with the inspection and measurement of the work done on site on or about 27 October 2003. Each party shall C provide their reasonable co-operation with the aim of completing the process as speedily as possible, and shall appoint representatives to attend the physical inspection and measurement.

...

10. FULL AGREEMENT

D This agreement constitutes the full and complete agreement reached between the parties and no variation, amendment, alteration, addition or omission shall be valid and binding on the parties unless reduced to writing and signed by all the parties or their duly authorised representatives.'

E [8] The arbitrator published his award on 23 August 2004. In terms thereof Mphaphuli was liable to Bopanang in the sum of R339 998,83, with interest thereon as from 6 October 2002.

High Court proceedings

F [9] On receipt of the award Mphaphuli's then attorney addressed a letter to the arbitrator stating that certain aspects of the award would require clarification and proposing a round-table discussion thereanent. The response of the arbitrator was that the arbitration agreement did not provide for such a process. On 16 September 2004 Mphaphuli's attorney advised Bopanang's attorney that instructions had been received to take G the matter on review to the High Court. Attempts by Mphaphuli to secure Bopanang's agreement for the remittal of the matter to the arbitrator were unsuccessful.

[10] When no application for review was forthcoming, Bopanang, on 18 October 2004, applied to the High Court in terms of s 31(1) of the Arbitration Act 42 of 1965 (Arbitration Act) for the award to be made an order of court and for judgment in its favour in the sum of R339 998, 83, plus interest.

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KROON AJ

[11] The application was opposed by Mphaphuli, which filed its answering affidavit on 13 December 2004. At the same time it launched a separate application in terms of s 32(2) of the Arbitration Act, 4 seeking relief in the form of an order -

- (i) reviewing and setting aside the award; and
- (ii) remitting the matter to the arbitrator for a review of the award B having regard to the issues raised in the founding affidavit.

Both the arbitrator and Bopanang were cited as respondents in this application.

[12] On 7 March 2005 the arbitrator lodged his reasons and what purported to be the record in the arbitration proceedings with the C registrar, in accordance with High Court Rule 53(1)(b). 5 The document filed with the registrar reads as follows:

'FIRST RESPONDENT'S REASONS IN TERMS OF RULE 53(1)(b).

Take notice that first respondent hereby furnishes his reasons, as set out in the following documents:
D

1. First respondent's decision dated 23 August 2004, annexed to applicant's founding affidavit as annexure L4.
2. Letter by first respondent to Niland and Pretorius Inc dated 18 October 2004, annexed to applicant's founding affidavit as annexure L8; and E
3. Preliminary site measurements dated 23 August 2004 attached hereto as annexure NA1.

Take notice further that first respondent does not wish to supplement such reasons at this time.'

[13] Mphaphuli's Pretoria attorney sought instructions from its Polokwane F attorney regarding the site measurements included in the record and the possible supplementation or amendment of the founding affidavit and amendment of the notice of motion. The response was that the measurements were referred to Mphaphuli but that the latter did not consider that they took the matter any further; accordingly, the matter G should be enrolled as soon as possible. The Pretoria attorney thereupon advised Bopanang's attorney that Mphaphuli did not wish to amend, add to or vary the terms of its notice of motion in terms of rule 53(4), 6

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KROON AJ

A and the filing of the opposing affidavits was called for. This was done by both the arbitrator and Bopanang on 18 May 2005.

[14] On 5 August 2005 Mphaphuli, having engaged new attorneys, filed an amended notice of motion supported by an affidavit styled a supplementary founding affidavit. The substantive relief sought was:

- B (i) An order reviewing and setting aside the award;

(ii) a declarator that Bopanang was indebted to Mphaphuli in certain stated sums, together with an order that the award be substituted with an order that Bopanang pay the said sums; and

(iii) as an alternative to (ii), an order remitting the matter to the C arbitrator to review his award having regard to the issues raised in the original founding affidavit and the supplementary founding affidavit.

[15] There was also a prayer for condonation of the late bringing of the initial application and for the late filing of the amended notice of motion D and the supplementary founding affidavit. 7

[16] Both the arbitrator and Bopanang filed further answering affidavits in response to the supplementary founding affidavit of Mphaphuli. The latter in turn filed affidavits in reply thereto. It also filed affidavits in reply to the first answering affidavits of the arbitrator and Bopanang (filed in response to the original founding affidavit of Mphaphuli). Mphaphuli's E reply to the further answering affidavit of the arbitrator elicited a rejoinder affidavit from the latter.

[17] On 18 January 2006 Mphaphuli filed a further amended notice of motion in which the third (alternative) prayer, referred to in para [14] above, was substituted with a prayer for an order referring the dispute F between the parties for trial, alternatively, for the hearing of oral evidence. A further prayer was added, for an order that the six-week period stipulated in s 32(2) 8 be extended to provide for the admission of Mphaphuli's original founding affidavit, as supplemented by its supplementary founding affidavit.

G [18] The two applications were heard together by the High Court. In the result, the court granted Bopanang the relief it sought and dismissed

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KROON AJ

Mphaphuli's application on the merits. In the course of its judgment the A High Court recorded its dismissal of Mphaphuli's applications for condonation on the grounds both of an absence of a proper explanation for the delay and, more particularly, of a lack of merit in the cause of action invoked by Mphaphuli. (It may be noted that, as the High Court itself commented, the refusal of condonation had the result that there B was in fact no application by Mphaphuli before it. The correct order would have been that the application be struck from the roll, not its dismissal. Be that as it may.)

The Supreme Court of Appeal proceedings C

[19] The Supreme Court of Appeal upheld the High Court's decision not to grant condonation to Mphaphuli. While commenting that that should have been the end of the matter, the court went on to give consideration to aspects relating to the merits. On that score, too, it found against Mphaphuli. It accordingly dismissed the appeal against the High Court judgment. D

Condonation in this court

[20] Mphaphuli's application for leave to appeal was filed one day late (although it was served timeously on the respondents). The reason for E the late filing was unexpected, pressing business exigencies on the last day for filing, resulting in the unavailability of the deponent to the affidavit in support of the application until late during that day. A proper case for condonation has been made out.

[21] The arbitrator and Bopanang also seek condonation for the late F filing of their answering affidavits. In each case this was occasioned in the main by the intervention of the annual holiday season and the consequent unavailability of counsel. The grant of condonation is not opposed by Mphaphuli. A proper case for condonation has been made out.

The application for leave to appeal G

[22] This court only has jurisdiction to hear a matter if it is a constitutional matter or if it raises an issue connected with a decision on a constitutional matter. 9 That, however, is not decisive. 10 In addition, it must be shown that it is in the interests of justice that the application be H

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KROON AJ

A granted. 11 Whether it is in the interests of justice for leave to appeal to be granted is based on a careful weighing-up of all relevant factors, including the interests of the public and the prospects of success. 12

Constitutional matter

B [23] On behalf of Mphaphuli it was argued that, having regard to the judgments of both the High Court and the Supreme Court of Appeal, the application for leave to appeal raises a series of constitutional issues regarding the relationship between arbitrations, the courts and the Constitution. In particular, it was contended that three main issues arise:

C (a) To what extent are the courts entitled and required to exercise some control over arbitration awards before adopting them as their own and making them orders of court?

(b) By concluding an arbitration agreement, can parties be taken to have waived fundamental aspects of their right to a fair hearing in D terms of s 34 of the Constitution, 13 and if so, under what circumstances?

(c) What is the correct approach to the grounds of review set out in s 33(1) of the Arbitration Act, 14 when that section is properly interpreted in the light of the right to a fair hearing contained in E s 34 of the Constitution?

It was stressed that the three aspects bear on Mphaphuli's right to a fair and impartial hearing in terms of the Arbitration Act read with s 34 of F the Constitution.

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[24] Other than providing that a constitutional matter includes any issue A involving the interpretation, protection or enforcement of the Constitution, 15 the Constitution itself does not define what a constitutional matter is. The decision whether a constitutional matter is at issue or whether an issue is connected with a decision on a constitutional matter reposes in this court. 16 B

[25] In my view a number of constitutional matters are at issue. First, the case involves the interpretation of s 34 of the Constitution and its application to arbitrations held in terms of the Arbitration Act. Allied thereto is the question of the correct approach to the grounds of review C set out in s 33(1) of the Arbitration Act properly interpreted in the light of the right to a fair and impartial hearing guaranteed in s 34 of the Constitution. Relevant to these questions is an application of the provisions of s 39(2) of the Constitution. 17 Second, the question arises whether, and to what extent, the parties, by entering into an arbitration agreement, are to be taken to have waived the constitutional right D (entrenched in the Bill of Rights) to a fair and impartial hearing. Third, the role of the courts in confirming or setting aside arbitration awards involves the administration of justice, and that too is a constitutional issue. As was said in the early case of *Burns & Co v Burne* 18 (where an arbitrator's award was sought to be assailed on grounds similar to those E invoked by Mphaphuli in the present matter):'. . . the matter is not one affecting only the parties to this particular dispute, but it concerns the administration of justice generally'.

[26] That the administration of justice is concerned is borne out by the following considerations: F

(a) Arbitration awards made orders of court may be enforced in the same manner as any judgment or order to the same effect, including execution by State mechanisms.

(b) Arbitrators have no powers to enforce their awards and the effectiveness G of the private process therefore rests on the binding, even coercive, powers the State entrusts to its courts.

(c) State execution of court orders, an integral part of the resolution of disputes between parties, and which is antithetical to self-help, is an important facet of the rule of law, 19 a core constitutional precept. H

[27] Because the courts are requested to adopt, support and trigger the enforcement of arbitration awards, it is permissible for, and incumbent

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A on, them to ensure that arbitration awards meet certain standards to prevent injustice. 20

[28] In *Telcordia Technologies Inc v Telkom SA Ltd* 21 the Supreme Court of Appeal stressed the need, when courts have to consider the confirmation or setting-aside of arbitral awards, for adherence to the principle B of party autonomy, which requires a high degree of deference to arbitral decisions and minimises the scope for intervention by the courts. The decision of the Supreme Court of Appeal in the present matter was informed by this principle. 22 Resolving, for the purposes of the present case, the tension between this principle and the duty of the courts to C ensure, before ordering that an arbitration award be enforced by the State, that the award was obtained in a manner that was procedurally fair, as required by s 34 of the Constitution, 23 is the key constitutional issue that arises in this case.

[29] Two further issues require mention. First, the question whether the D arbitrator acted as an arbitrator or a valuer is an issue connected with the constitutional matters referred to above. Second, to the extent that the refusal by the High Court and the Supreme Court of Appeal to grant Mphaphuli condonation is to be ascribed to a failure properly to consider constitutional imperatives, a constitutional issue is involved. At the very least, the question is an issue connected with the constitutional matters E referred to above.

Interests of justice

[30] The matter is of obvious importance to the parties. However, it has implications that go substantially beyond the narrow interests of the F parties. As already recorded, the matter also concerns the administration of justice generally; and it does so in an area that is extremely important in the commercial world: recourse to arbitration proceedings to resolve disputes is extensive and is increasing. Moreover, important constitutional issues arise, including the extent to which an agreement such as that with which this matter is concerned can be read as amounting to a G waiver of a constitutional right (the right to a fair and impartial hearing) in respect of which this court has the benefit of the recent judgment of the Supreme Court of Appeal in *Telcordia* 24 together with the judgment of the same court in the present matter. It may be noted that while

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Mphaphuli did not in explicit language advert to a constitutional issue in A the High Court or the Supreme Court of Appeal, the aspects invoked by it, by their nature, raised the constitutional issues referred to. 25

[31] As will appear below, Mphaphuli has reasonable prospects of success in the appeal.

[32] I conclude accordingly that it is in the interests of justice to grant B leave to appeal.

Condonation in the High Court

[33] The judgment of the High Court recorded that three applications by Mphaphuli for condonation required to be considered: C

(a) condonation of the late filing of Mphaphuli's replies to the answering affidavits of the arbitrator and Bopanang filed in response to Mphaphuli's initial founding affidavit;

(b) condonation of the late filing of Mphaphuli's supplementary founding affidavit; D

(c) condonation of the late filing of the initial founding affidavit in view of the provisions of the Arbitration Act.

[34] As already recorded, condonation was refused on the grounds both of an absence of a proper explanation for the late filing and of the lack of merits in Mphaphuli's case. The former inquiry also embraced a E consideration of the nature of the contents of the documents in question. At this stage only the first inquiry will be addressed. The merits will be considered separately at a later stage. However, it may be recorded that, as will appear below, the merits of Mphaphuli's case also favoured the grant of condonation.

[35] It is necessary briefly to list what complaints were raised in the two F founding affidavits. Reference will, however, only be made to aspects that are relevant for purposes of this judgment.

[36] In the initial affidavit, Mphaphuli alleged that the arbitrator had awarded Bopanang amounts for work not done by it, nor even claimed G by it, and amounts in excess of those claimed by it, and had not made allowance for remedial work done by AA Electrical.

[37] In the supplementary affidavit, Mphaphuli alleged that the arbitrator failed to perform his mandate in a number of respects, that he committed manifest material errors, that he failed to afford Mphaphuli a H fair hearing, and that he was biased or at least that his conduct gave rise to a reasonable perception of bias. On this score Mphaphuli, in the first place, in substance repeated the allegations referred to in the preceding paragraph, giving details in amplification thereof, including the alleged non-adherence by the arbitrator to the pleadings and the terms of the agreement between the parties, and the award by him of interest on the I

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A total amount of the capital sum awarded as from 6 October 2002 while, at best, only the sum of approximately R140 000 was owing on that date. In addition, Mphaphuli invoked the fact that, as the record of the arbitration proceedings revealed, the arbitrator had held three 'secret' meetings with the representatives of Bopanang without the knowledge B and attendance of Mphaphuli as well as the fact, also revealed by the record, that correspondence having a material bearing on the dispute between the parties (to which Mphaphuli had not been made privy, and in which certain allegedly false and misleading information had been imparted by Bopanang) had passed between the arbitrator and Bopanang. In the result, the arbitrator had also misconducted himself or C committed gross irregularities in the conduct of the arbitration and/or had exceeded his powers.

[38] Apart from the contents of the various affidavits filed by Mphaphuli, a further aspect dealt with in the judgment of the High Court was the fact that after the arbitrator had notified the parties that the record had been D lodged with the registrar, Mphaphuli's then attorney advised Bopanang's attorney that Mphaphuli did not intend to amend its notice of motion. The court noted that there was no indication that either Mphaphuli or its attorney had demanded sight of the record. The court further commented that Mphaphuli was in any event in possession of all the E documents contained in the record. The court then recorded its finding that Mphaphuli had through its attorney taken a considered and informed decision not to amend its notice of motion.

[39] This approach cannot be endorsed. First, the record filed by the arbitrator with the registrar was wholly deficient, and what was filed was F not of any assistance to Mphaphuli in respect of the supplementation of its initial founding affidavit. Second, the comment that Mphaphuli was in any event in possession of all the documents contained in the record (or which should have been contained in the record) constituted a misdirection on the part of the court: specifically, Mphaphuli was not in G possession of the documents which revealed the material additional aspects adverted to in para [37] above. Third, Mphaphuli recorded that it had not been consulted by the attorney in respect of the question of amending its notice of motion, and the attorney in question confirmed that he had had no mandate on that score and that he had acted in ignorance. It is not necessary to consider the question whether H Mphaphuli was bound by the actions of its attorney. The communication by the attorney to his counterpart did not constitute a waiver of the right to amend the notice of motion and to supplement the grounds relied upon for the relief sought in the sense that the issue could not thereafter be revisited (nor did the High Court suggest otherwise).

I [40] For purposes of the present judgment it is necessary only to consider the applications for condonation of the late filing of the initial founding affidavit and of the supplementary founding affidavit.

[41] In its papers Mphaphuli set out comprehensive explanations of the delays in question. Save in one respect, to be referred to below, the High J Court judgment did not advert to these explanations. Instead, the High

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Court focused its attention on the substantive contents of the affidavits A and its interpretation thereof (an aspect to which I revert later). The basis of the finding that there was no proper explanation for the delays does not appear from the judgment.

[42] In sum, the explanation tendered by Mphaphuli for the late filing of the supplementary affidavit was as follows: B

(a) On 8 June 2005 an employee of Mphaphuli's current attorneys attended at the office of the registrar. On inspection of the court file it was discovered that it only contained the pleadings in the matter, but no record. Enquiries of members of the registrar's staff elicited the answer that despite a search for the record, it could not be C located.

(b) Mphaphuli's attorneys then contacted the arbitrator's attorneys in order to procure a copy of the record. Agreement between the attorneys was reached that, upon receipt of such copy from the arbitrator, the registrar would be deemed to have made the record available to Mphaphuli for the purpose of rule 53(3). 26 The record D was collected and received by Mphaphuli on 18 July 2005. (The supplementary affidavit was filed on 5 August 2005, some four days beyond the 10-day period prescribed in rule 53(4). It should be noted further that it was this record that revealed the additional aspects of the meetings and correspondence referred to in para [37] E above.)

(c) The arbitration record was voluminous, extending to more than 400 pages. Supplementation of Mphaphuli's papers required close scrutiny of the record and a comparison thereof with other relevant documentation. The process was extremely time-consuming and it was not feasible for it to be completed within 10 days. F

(d) No prejudice to the other parties resulted from the late filing.

(e) Mphaphuli would, however, be unjustly prejudiced if denied the opportunity of amplifying its case on the basis of the contents of the record.

[43] The only comments in the High Court judgment bearing on this G explanation are that there was no indication that Mphaphuli or its attorney had demanded sight of the record filed with the registrar, that Mphaphuli through its attorney took a considered decision not to amend its notice of motion or to supplement its founding affidavit and that it was only when a new set of attorneys appeared on the scene that H Mphaphuli relied on the 'so-called unavailability of the record to now amend its papers and to practically bring a new case before court'.

[44] The comments are unpersuasive. On the other hand the explanation furnished by Mphaphuli adequately explains the delay in question.

[45] The High Court held that with the supplementary founding affidavit I Mphaphuli was in fact bringing a completely new application on

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A completely different grounds from those relied on in the initial founding affidavit. That is, of course, so (subject thereto that allegations made earlier, and amplified in the later affidavit, were incorporated in support of the new application). But what the High Court appears to have overlooked is that the new case was dictated by what the record of the B arbitration proceedings revealed. I deal further with this aspect when considering the judgment of the Supreme Court of Appeal. Suffice it to say at this stage that in the circumstances the raising of the new case was justified, and it constituted no reason to refuse condonation. In adopting a contrary view the High Court erred. In doing so it failed, as will be C shown below, to consider the true nature of the case presented by Mphaphuli: In short, it viewed Mphaphuli's case as an attempt in effect to appeal against the award of the arbitrator in that it also engaged aspects that otherwise had a bearing on the merits of the award and it failed to recognise that what Mphaphuli invoked was the fundamental right to a fair hearing, although it did recognise that alleged bias on the D part of the arbitrator was relied upon. (The manner in which the High Court dealt with the last aspect is referred to below.) 27

[46] The High Court further commented that Mphaphuli's two affidavits in reply to the answering affidavits of the arbitrator and Bopanang in E response to the supplementary founding affidavit, again sought to make out a new case and further and more detailed grounds of review were put forward. In this regard, however, the High Court substantially misread the affidavits and misdirected itself. In the main the affidavits, first, answered the allegations by the arbitrator and Bopanang and, second, restated and amplified allegations it had already made, without raising F new matter. In limited respects new matter was raised, but this was of a relatively minor nature.

[47] In sum, the explanation tendered by Mphaphuli for the late filing of the initial founding affidavit was as follows:

(a) The affidavit was filed approximately 14 weeks after publication of G the award, and was accordingly some eight weeks out of time.

(b) The dispute arose in January 2003 and was referred to arbitration during October 2003. The arbitration award was published in August 2004. In this context, so it was contended, the further delay of some two months in bringing the review application was not an H unduly long period.

(c) The fundamental basis of the review application was the schedule prepared by Mphaphuli and annexed to the founding affidavit marked 'L7'. The preparation of the schedule entailed an enormous amount of work, requiring, inter alia, a comparison of Bopanang's I invoices and supporting documentation containing the quantities of the supply and installation of material claimed by it, with the quantities awarded by the arbitrator. The exigencies of Mphaphuli's normal business activities also hampered the preparation of the

schedule, which required to be completed to enable Mphaphuli's A attorneys to proceed with the review application.

(d) The attorneys made bona fide attempts to resolve the matter and thus obviate the necessity of bringing the review application. Communications were addressed to the arbitrator and Bopanang on 13 and 14 October 2004 in which Mphaphuli's objections to the B award were made known. Mphaphuli could not, however, secure agreement that the reference be remitted to the arbitrator in terms of s 32(1) of the Arbitration Act. 28

(e) Mphaphuli conducts business in Polokwane, a considerable distance from Pretoria, and difficulties in communication with its C attorneys contributed to the time taken to prepare and finalise the papers.

(f) No prejudice suffered by Bopanang weighed against the grant of condonation.

(It may be repeated that the review application included a prayer for the D remittal of the matter to the arbitrator, relief for which s 32(2) of the Arbitration Act makes provision.) 29

[48] As already recorded, the High Court did not advert to the above explanation. In my judgment, an adequate explanation for the delay in question was furnished. In so finding I have not lost sight of the fact that, E already in its own application and in its response to Mphaphuli's initial founding affidavit, Bopanang raised the issue of an absence of an application for an extension of time, and that same was only sought when the supplementary affidavit was filed.

[49] In *Giddey NO v JC Barnard and Partners* 30 this court had occasion F to deal with the question of the exercise of a discretion by the High Court in terms of the provisions of rule 47(3), which empowers a court to require a litigant to furnish security for the costs of its opponent in the litigation in question. It was noted, inter alia, that for courts to function fairly, they must have rules that regulate their proceedings; these rules G often require parties to take certain steps on pain of being prevented from proceeding with a claim or a defence; to that extent they constitute a limitation of the right to access to court; in the absence of a constitutional challenge to a particular rule having that effect a litigant's only complaint can be that the rule was not properly applied by the H court; very often the interpretation and application of the rule will require a consideration of the provisions of the Constitution, as s 39(2)

A of the Constitution instructs; 31 a court that fails adequately to consider the relevant constitutional provisions will not have properly applied the rules at all. 32

[50] Where the exercise of a discretion in the application of a rule contemplates that the court may choose from a range of options, it is a B discretion in the strict sense. 33 The ordinary approach on appeal to the exercise of such a discretion is that the appellate court will not consider whether the decision reached by the court of first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been C exercised based on a wrong appreciation of the facts or wrong principles of law. 34

[51] The issue of condonation in the present case required the exercise of a discretion in the strict sense. In the light of what has been set out earlier (and leaving aside considerations relating to the merits) the D refusal of the High Court to grant the condonation sought was vitiated by misdirection, did not constitute a judicial exercise

of discretion and resulted in an impermissible and unconstitutional denial of Mphaphuli's right of access to court. The refusal accordingly falls to be reversed.

E Condonation in the Supreme Court of Appeal

[52] The Supreme Court of Appeal stated as follows:

'The grounds for any review, as well as the facts and circumstances upon which a litigant wishes to rely, have to be set out in its founding affidavit amplified insofar as may be necessary by a supplementary affidavit after the receipt of the record from the presiding officer, obviously based on F the new information that has since become available. 35 The original founding affidavit filed by Lufuno comprised ten pages excluding annexures. Lufuno abused its right to amplify in this case by filing a supplementary affidavit of 80 pages in which it raised all manner of new allegations.

The only new information that emerged from the record of the G arbitration proceedings filed by Andrews in terms of rule 53(1)(b) was what Lufuno described as evidence of three "secret meetings" between Andrews and Bopanang's representative. That new information could hardly justify the lengthy supplementary affidavit that had been filed, ostensibly in terms of rule 53(4). Leaving aside for the moment the secret meetings to which I will return, Lufuno sought in effect to make H out a completely new case in its supplementary affidavit. That plainly was not authorised by rule 53 or by any other principle of our law. In

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those circumstances, it seems to me, the court below can hardly be A faulted for having exercised its judicial discretion against Lufuno under s 38 of the Act. It has not been suggested that the discretion was exercised capriciously or upon a wrong principle or upon any other ground justifying interference by a court of appeal. That, one would have thought, would have been the end of the matter.' 36

[Footnotes amended.] B

[53] In a number of respects these comments cannot be endorsed. The first and fundamental aspect is that there can, in my view, be no objection in principle to a new case being made out in terms of rule 53(4) where the record in question provides justification therefor. 37 C

[54] Second, neither the use of the word 'abused' nor the comment 'all manner of new allegations' was justified. Prolix in certain respects the affidavit may have been, but that is another matter, and an analysis of the affidavit (which, incidentally, also embraced the grounds for the applications D for condonation) does not reveal that any material allegation therein was not germane to the case being put forward. As stated above, Mphaphuli was entitled to raise the allegations in terms of rule 53(4), and it was also entitled to incorporate and amplify previously registered complaints, insofar as they were relevant, in support of the new case made out in the supplementary affidavit. E

[55] Third, evidence of the three meetings was not the only new information disclosed by the record. In addition, evidence of correspondence between the arbitrator and Bopanang, to which Mphaphuli was not made privy, was also revealed. The Supreme Court of Appeal made no reference thereto. (Nor for that matter did the High Court.) F

[56] The Supreme Court of Appeal approached the question of condonation on a restricted basis: in essence what it held (wrongly) to be an impermissible attempt by Mphaphuli to make out a new case in its supplementary affidavit. No consideration was given to the explanation G of Mphaphuli for the delay, nor to constitutional imperatives.

[57] In my view, therefore, while the Supreme Court of Appeal did go on to consider aspects relating to Mphaphuli's complaints on the merits of its case (an aspect to which I revert later), its endorsement of the High Court's refusal of condonation cannot be supported. H

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A Certain aspects arising out of the judgments of the High Court and the Supreme Court of Appeal

[58] It is unnecessary to consider in any detail the comments of the High Court concerning Mphaphuli's not having been entitled in effect to appeal against the arbitrator's award, which comments were valid (and B in fact the High Court recorded that Mphaphuli abandoned any relief which would have fallen under the rubric of an appeal). That is not the case that Mphaphuli asks this court to consider.

[59] Two observations require to be made, however, concerning the High Court's apparent interpretation of the arbitrator's mandate. First, C as will be shown later, it was not simply, as the High Court judgment suggests, a matter of inspection and remeasurement. Second, the statement by the court, said to be based on what the arbitrator had alleged, that after the remeasurement the parties reached agreement as to the work actually done by Bopanang, must be viewed against a reading D of the arbitrator's affidavits in their entirety. While there are statements in his affidavits to the effect that the remeasurement would be conclusive as the parties had reached agreement on the work done by Bopanang and that was the work measured, he in fact elsewhere made it clear that after the remeasurement (on which he said there was agreement) he was still required to embark on a determination of what part of the work E remeasured had actually been done by Bopanang (on which there was not agreement). An earlier comment by the arbitrator had recorded that on the correspondence a 'huge factual dispute' had arisen as to what remedial work had been done by AA Electrical and what work had actually been done by Bopanang, and it was imperative that he resolve F that dispute as well.

[60] Similarly, certain comments by the Supreme Court of Appeal concerning the nature of Mphaphuli's case appear to have been misplaced. Paragraph 14 of the judgment reads, in part, as follows:

'The legal principles applicable to an enquiry of this kind were recently G set out by Harms JA on behalf of this court. 38 Applying those principles to the facts of this case, which I have set out in some detail in this judgment, illustrates, to my mind, that Lufuno fundamentally misconceived the nature of its relief. Moreover, Lufuno's founding papers assumed, erroneously so - as was subsequently conceded by it - that the private arbitration process was an administrative one, which had to H be lawful, reasonable and procedurally fair. 39 That fundamental misapprehension permeated its founding application, which as I shall presently show, it subsequently sought in its supplementary papers, to remedy. The parties clearly intended Andrews to have exclusive authority to decide whatever questions were submitted to him and that each was precluded by virtue of the provisions of clause 2 of the I arbitration agreement from appealing against his decision. The parties

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had accordingly waived the right to have the merits of their dispute A re-litigated or reconsidered.' 40 [Footnotes added.]

[61] The first observation to be made is that, on the basis set out in paras 15 and 16 of the judgment, 41 the Supreme Court of Appeal held that Mphaphuli's 'attempt' to remedy what was referred to as its 'fundamental misapprehension' was unsuccessful in that the 'attempt' B sought, impermissibly, to make out a new case in its later papers. I have already shown 42 that that approach was fundamentally flawed. The second observation is that the case that Mphaphuli seeks this court to consider does not entail a relitigation or reconsideration of the merits of the dispute. C

[62] Mphaphuli's submission is in essence that it did not receive a fair hearing from the arbitrator and that at least a reasonable perception of bias on the part of the arbitrator arose. The submission is not only founded on the three meetings referred to earlier, the only aspect adverted to by both the High Court and the Supreme Court of Appeal; it is also based on the correspondence between the arbitrator and D Bopanang to which Mphaphuli was not made privy, as well as on aspects of the award made in favour of Bopanang by the arbitrator.

[63] Despite the conclusion reached by the Supreme Court of Appeal on the issue of condonation it went on to consider certain issues relating to E the merits.

[64] The court held 43 that Mphaphuli could only challenge the award by invoking the statutory provisions contained in s 33(1) of the Arbitration Act, 44 'as any further ground of review, either at common-law or otherwise, had by necessary implication been waived by it'. In this regard F it followed the approach in Telcordia. 45

[65] In Telcordia the Supreme Court of Appeal held, inter alia, that -

(a) private arbitrations would, as a starting point, fall within the ambit of s 34 of the Constitution; 46

(b) the rights contained in the section 'may be waived unless the waiver G is contrary to some other constitutional principle or otherwise contra bonos mores'; 47

(c) by agreeing to arbitration, parties waive their rights pro tanto; they usually waive the right to a public hearing; 48

(d) by agreeing to arbitration the parties to a dispute necessarily agree H

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A that the fairness of the hearing will be determined by the provisions of the Arbitration Act and nothing else; 49 and

(e) by agreeing to arbitration the parties limit interference by the courts to the grounds of procedural irregularities set out in s 33(1) of the Act, and, by necessary implication, they waive the right to rely on B any further ground of review, 'common-law' or otherwise. 50

[66] After an earlier comment that Mphaphuli, relying primarily on the 'secret meetings', alleged that the arbitrator exhibited conscious bias in favour of Bopanang, 51 the judgment of the Supreme Court of Appeal proceeded as follows:

C '[18] Were an arbitrator to discuss the merits of the matter with one of the parties to the exclusion of the other that, ordinarily at any rate, would constitute a serious irregularity, which may without more warrant the award being set aside. 52 But, against the backdrop of the arbitration agreement and the context of the arbitrator's mandate, D those meetings were quite innocuous and had no effect whatsoever on Andrews. To describe them as "secret meetings", as Lufuno does, is to give them a sinister connotation that is wholly unwarranted. The purpose of those meetings was simply to verify certain figures and to clarify the use of certain items. That fell within the parameters of Andrews' mandate. That being so, even if he had been wrong those would have been errors of the kind committed within the scope of his E mandate. 53

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[19] Proof that Andrews misconducted himself in relation to his duties A or committed a gross irregularity in the conduct of the arbitration is a prerequisite for the setting aside of the award. An error of fact or law, or both, even a gross error, would not per se justify the setting aside of the award. 54 It followed that Lufuno had to go further than that. For, as Smalberger ADP put it: B

'A gross or manifest mistake is not per se misconduct. At best it provides evidence of misconduct . . . which, taken alone or in conjunction with other considerations, will ultimately have to be sufficiently compelling to justify an inference (as the most likely inference) of what has variously been described as 'wrongful and improper conduct' . . . 'dishonesty' and 'mala C fides or partiality' . . . and 'moral turpitude'.'" 55

[20] Lufuno asserted bias. It was for it to establish a reasonable apprehension of bias. 56 The threshold for a finding of real or perceived bias is high. 57 The bias complained of was, according to Lufuno, grounded in the relationship between Andrews and Bopanang. Why D Andrews would have shown an inclination to favour the one party to the dispute does not emerge on the papers. The three "secret meetings", as I have just illustrated, were not only innocuous but also occurred within the scope of Andrews' mandate. The proceedings, on any yardstick, were thus not infected by them. No other overt act is relied upon in support of the proposition that the proceedings were contaminated and E that the award is therefore susceptible to attack. Simply put, there are no reasonable grounds to think that Andrews might have been biased. It must follow that the award, on this score, is immune from interference.' 58 [Footnotes amended.]

[67] I revert later to consider the validity of certain comments in these paragraphs. F

[68] One of counsel's main attacks on the approach of the Supreme Court of Appeal related to the fundamental question whether parties, by referring their dispute to arbitration, waive their rights to invoke any grounds of review beyond those provided for in s 33(1) of the Arbitration G Act. More specifically, the question is whether the parties agree that the

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A fairness of the hearing will be determined solely by the provisions of the Act and are precluded from invoking the provisions of s 34 of the Constitution, which enshrines the right to a fair and impartial hearing.

[69] A preliminary question is whether s 34 of the Constitution applies to private arbitrations. In Total Support 59 the Supreme Court of Appeal B commented that while at first blush it may seem that the fairness requirements of s 34 do apply to consensual or private arbitrations, closer analysis may lead to a different conclusion. The court further noted that -

'(i) it is a moot point whether the words "another independent and impartial tribunal or forum" in their contextual setting apply to private C proceedings before an arbitrator or whether they must be restricted to statutorily established adjudicatory institutions'. 60

The context referred to was the fact, as it was stated to be, that the word 'fair' in the section qualifies 'public hearing', and it was noted that D parties to a private arbitration may by agreement exclude any form of public hearing. However, the further comment was that the ambit and application of the section had not been fully argued and its proper interpretation had therefore to be left open.

[70] However, in my view, the word 'fair' qualifies any 'hearing' and not E only a 'public hearing', and the circumstance that the parties may waive the right to a public hearing (a proposition that was not disputed by counsel for Mphaphuli and in Telcordia it was stated that that was the usual position) 61 does not appear to be a reason why it should be questioned whether private arbitrations are subject to the provisions of F the section, specifically the fairness requirements set out therein.

[71] As already recorded, 62 in *Telcordia* the Supreme Court of Appeal took the view that s 34 was applicable to arbitrations, which, it noted, was in accordance with the approach in the European Court of Human Rights, as per the decision in *Suovaniemi v Finland*. 63 The conclusion in *Telcordia* commends itself for acceptance. As counsel for Mphaphuli G argued, the right provided for in s 34 is plainly capable of application in the private sphere, and it would be extraordinary if in deciding whether or not to make an arbitration award an order of court a judicial officer could turn a blind eye to a lack of fairness on the basis that s 34 was not of application.

H [72] It is not clear why in *Telcordia* the Supreme Court of Appeal held that by agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Arbitration Act and nothing else, or that they limit interference by the

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courts to the grounds of procedural irregularities set out in s 33(1) of the A Act and by necessary implication waive the right to rely on any further ground of review. It is so, as was commented in *Total Support*, 64 that even if the fairness requirement of s 34 of the Constitution applies to private arbitrations there is nothing which precludes the parties themselves from defining what is fair. I have difficulty, however, with the comment B following thereon, that the fairness requirement is satisfied where parties who resort to arbitration agree to forgo a right of appeal and accept that the well-known and well-established principles governing arbitration will apply and that therefore viewing the Arbitration Act through the prism of the Bill of Rights does not justify any departure from those principles (if the comment is to be interpreted as offering support for the approach C adopted in *Telcordia*).

[73] The principle of party autonomy, stressed in *Telcordia*, which requires a high degree of deference to arbitral decisions, and which implicitly informed the approach of the Supreme Court of Appeal in the present matter, is not a weighty consideration against a conclusion that D the fairness requirement of s 34 is of application to arbitrations. *Telcordia* itself, and the authorities it referred to in emphasising the principle, 65 were matters which concerned errors of fact or law to which the well-known and well-established principles governing arbitrations do apply. Procedural irregularities giving rise to unfairness are, however, a horse of a different colour. E

[74] In my view, there is no reason why the fairness requirement of s 34 of the Constitution cannot coexist with the requirements imported by the provisions of s 33(1) of the Arbitration Act. On the contrary, there is every reason why coexistence should be accepted: the fairness requirement F in s 34 is part of a fundamental constitutional right incorporated into the Bill of Rights and it is properly to be engrafted onto the principles applicable to arbitrations.

[75] This conclusion is in accordance with the principle that in interpreting any legislation the courts are enjoined to promote the spirit, purport and objects of the Bill of Rights, 66 including the right to a fair G and impartial hearing guaranteed by s 34. 67

[76] Reference may also be had to the South African Law Reform Commission Report on Domestic Arbitration, 68 in which recommendations were made concerning the contents of a proposed new Arbitration Act. H

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A (a) In paras 1.03 - 05 the Report records the following:

(i) The objective of a domestic arbitration is to obtain the fair resolution of disputes by an independent arbitral tribunal without unnecessary delay or expense;

(ii) the second objective should be the promotion of party B autonomy (arbitration being a consensual process in that the primary source of the arbitrator's jurisdiction is the arbitration agreement between the parties);

(iii) the third objective should be balanced powers for the courts: court support for the arbitral process is essential, the price thereof being supervisory powers for the court to ensure due C process.

(b) In the summary of the commission's recommendations it is stated:

'True to the principle of party autonomy the tribunal's statutory powers can be excluded or modified by the parties in their arbitration agreement. They are also subject to the tribunal's statutory duty to conduct D the proceedings in a fair and impartial manner.'

[77] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*, 69 a case dealing with statutory arbitrations under the Labour Relations Act 70 (the LRA), Ngcobo J made comments to the following E effect. In order to give effect to the intention that, as far as possible, arbitration awards would be final and only interfered with in very limited circumstances, the drafters of the LRA, in s 145(2)(a) thereof, chose to provide for narrow grounds of review similar to those provided for in s 33(1) of the Arbitration Act, and did so aware of the jurisprudence under the latter Act. 71 But they were equally aware that in construing the F provisions of s 145(2)(a), in particular the ambit of the grounds of review in the section, the Labour Courts would have regard inter alia to the right to fair labour practices guaranteed to everyone in terms of s 23 of the Constitution and the interpretative injunction contained in s 39(2) of the Constitution. 72 The crucial inquiry (in assessing irregularities) is whether the conduct of the decision-maker complained of G prevented a fair trial of issues. 73 The requirements of fairness in the conduct of arbitration proceedings are consistent with the LRA and the Constitution: s 138(1) of the LRA enjoins the commissioner to determine the dispute fairly; s 34 of the Constitution enshrines the right of everyone to, inter alia, a fair hearing. The right to a fair hearing before a H tribunal lies at the heart of the rule of law, and a fair hearing before a tribunal is a prerequisite for an order against an individual, and this is fundamental to a just and credible legal order. 74

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[78] Similarly, O'Regan J stated that it was beyond doubt that the A functions performed by a commissioner in an arbitration under the LRA clearly fall within the terms of s 34 of the Constitution. 75 In my judgment, private arbitrations are, as a starting point, not to be subjected to a lower standard of procedural fairness - once an arbitration award is made an order of court the legal effect thereof is identical to that of an B arbitration award under the LRA.

[79] I conclude therefore that the mere fact of a submission to arbitration does not import a waiver of the fairness requirement. This conclusion finds support in *Suovaniemi*. 76

[80] In the above discussion I have assumed that the constitutional right C to a fair hearing may validly be waived. 77

[81] The conclusion reached in para [79] above is in accordance with common-law principles regarding waiver of rights. Waiver is first and foremost a matter of intention; the test to determine intention to waive is objective, the alleged intention being judged by its outward manifestations D adjudicated from the perspective of the other party, as a reasonable person. 78 Our courts take cognisance of the fact that persons do not as a rule lightly abandon their rights. 79 Waiver is not presumed; it must be alleged and proved; not only must the acts allegedly E

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A constituting the waiver be shown to have occurred, but it must also appear clearly and unequivocally from those facts or otherwise that there was an intention to waive. 80 The onus is strictly on the party asserting waiver; it must be shown that the other party with full knowledge of the right decided to abandon it, whether expressly or by conduct plainly B inconsistent with the intention to enforce it. Waiver is a question of fact and is difficult to establish. 81

[82] What should be emphasised is that, as will appear from the authorities referred to below, the fairness rights invoked by Mphaphuli C lie at the core of a legitimate arbitration and it would require extremely strong evidence for a conclusion to be sustained that Mphaphuli waived such rights. Yet, neither the arbitrator nor Bopanang alleged, let alone proved, that there had been a waiver of rights sufficient to allow the arbitrator to engage with Bopanang in the absence of Mphaphuli.

D Arbitrator or valuer

[83] It was argued on behalf of Bopanang in the Supreme Court of Appeal (and in this court too, albeit without vigour) that in this matter an arbitration *stricto sensu* was not intended, that in fact the arbitrator acted as a valuer and not as an arbitrator whose position was governed E by the provisions of the Arbitration Act. Accordingly, the arbitrator had not been required to act in a quasi-judicial capacity in the discharge of his duties, but had merely to exercise an honest judgment. 82 While commenting that it seemed that the parties intended the Arbitration Act to apply to their dispute, the Supreme Court of Appeal found it F unnecessary to decide the issue whether the arbitrator had in fact been a valuer, on the basis that this would not have affected its decision on the merits. 83 Suffice it to say that, while elements of the functions of a valuer might have been embraced in the arbitrator's mandate (and while it is understandable that the parties preferred to appoint someone who had G expertise in the field covering their dispute), it is clear on a conspectus of all the circumstances that the arbitrator was required to act and in fact acted as an arbitrator (hence, Bopanang's application in terms of s 31 of the Arbitration Act for the award to be made an order of court). He was H accordingly obliged to act in a quasi-judicial capacity. 84

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The arbitrator's duty to act in a quasi-judicial capacity A

[84] A review of cases dealing with arbitrations reveals that the courts have emphasised the requirement of procedural fairness in the conduct of arbitral proceedings, where an arbitrator acts in a quasi-judicial capacity. It will be sufficient to consider some of these cases to illustrate the point. Needless to say of course that what they say must be B understood in the context in which the issue arose.

[85] In *Lazarus v Goldberg and Another* 85 the following passage appears:

'According to the practice of the Roman-Dutch law, a submission to arbitration (*Verblyf*) was always subject to the *conditio tacita* that the C arbitrator should proceed according to law and justice. Although our modern practice has somewhat departed from that of the Roman-Dutch law, in regard to the procedure for setting aside an award, the above principle, which has been well expressed by Cloete J, still exists at the present day. In *Croll qq Kerr v Brehm* (2 Searle 227 at 229), that learned Judge says: D

"Nothing is more clearly laid down in the textbooks than that arbitrators are judges in deciding the matters submitted to them, and that they ought to follow those broad rules laid down for judicial investigation; and no rule is more clear than that they should not proceed to examine parties or witnesses E in the presence only of one party, that nothing may be done *inaudita altera parte* - so as to give the opposite party the opportunity of answering or rebutting such evidence.

A similar view was taken by Bell and Watermeyer JJ, in the same case, which is one quite in point in the present instance, and must be considered as a leading authority on the subject. This principle has always been strictly observed by the Court, even although, as put by Watermeyer J in Croll's case, "substantial justice has been done between the parties", as appears from *MacDonald & Co v Gordon & Co* (1 R 251) and subsequent cases, as well as from the passage from *Russell on Arbitration* (7th ed p 191), cited at the Bar.' 86

[86] Citing a series of earlier cases, South African and English, the G decisions in *Shippel v Morkel and Another* 87 and *Chelsea West* 88 followed suit. In the former case Van Winsen J is reported as follows:

'Voet, 4.8.1., states that "there is a great correspondence between arbitrations and judicial proceedings" and that "there is the same sequence of proceeding and proof" as in judicial proceedings (Gane's H trans, vol 1 p 737); Van Leeuwen, bk 5 ch 94 (Kotzé trans), says that arbitrators are required to "pronounce an award according to the requirements of law and custom". Our Courts have accepted that in deciding upon matters submitted to them arbitrators are required to follow, at any rate in broad outline, the precepts which govern the I

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A procedure employed in the course of judicial proceedings. . . . This would also appear to be the position in England. . . .

The similarity between proceedings in Court and before an arbitrator are also apparent from the terms of the Arbitration Act, 42 of 1965.

It can thus be said with confidence that it is well established by the cases B in our Courts that the procedural rules applicable in an arbitration require that the proceedings should not be conducted in the absence of one of the parties. This appears from numerous cases in the South African Courts. . . .

Save in certain types of arbitration, the same principle has been applied by the English Courts

C As Mr Marais for second respondent rightly points out this rule can be modified were the parties to agree that the arbitrator be permitted to hear evidence in the absence of one of the parties. He submits that by clause 4 of the submission to arbitration the arbitrator may proceed ex parte in the event of either party failing after reasonable notice to . . . attend the hearing."

D If it could have been said that evidence has been received before the arbitrator in the absence of one party under the circumstances contemplated by clause 4 then that would have afforded protection to such proceedings.' 89

[87] In the latter case Seligson AJ expressed himself as follows:

E 'The position of an arbitrator in the true sense is very different[from that of a valuer]. He acts in a quasi-judicial capacity and must conduct himself accordingly. Whilst not obliged to observe the precision and forms of a court of law, the arbitrator must proceed in such a manner ". . . as to ensure a fair administration of justice between the parties" F This includes the duty to afford the parties a proper hearing. Inherent therein is that the arbitrator must not examine parties or witnesses or conduct a hearing in the absence of one or either of the parties. If he does so he commits an irregularity which will result in his award being set aside. This rule has been established in a long line of cases. . . .

G "Courts of law jealously guard the rights of a person to be present at and heard at proceedings to which he is a party, and will only tolerate a departure from the rule which recognises this right in very special circumstances.' 90

[88] In *Burns & Co* 91 the following passage appears:

H 'Amongst the rules governing the administration of justice there is the elementary one which is stated in *Russell on Awards*, 8th Ed at 134, in the following language:

"Except in the few cases where it is unavoidable, as where the arbitrator is justified in proceeding ex parte, both sides must be heard, and each in the presence of the other. However I immaterial the arbitrator may deem a point to be, he should

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be very careful not to examine a party or a witness upon it, A except in the presence of the opponent. If he err in this respect he exposes himself to the gravest censure, and the smallest irregularity is often fatal to the award.

Nor does it matter whether the arbitrator was influenced by it. Lord Eldon LC in *Walker v Forbisher*, 6 Ves 70, in setting aside an award, on B the ground that evidence had been improperly admitted, although the arbitrator swore that the evidence had no effect on his award, said that no Court should permit an arbitrator to decide so delicate a matter as to whether a witness examined in the absence of one of the parties had an influence on him or not; and in *Drew v Drew*, 2 Macq 1 Lord CRANWORTH said that the principles of universal justice required that C the person who is to be prejudiced by the evidence ought to be present to hear it taken; and that an arbitrator entirely misconceived his duty who took upon himself to hear evidence behind the back of the party interested in controverting it.

'It has been decided by a long string of cases that infringement of that rule by an arbitrator is misconduct within the meaning of section 18 of D our Arbitration Act, 24 of 1898. That being the principle of law which we are bound to apply.' 92

[89] In the result the arbitrator's award was declared abortive on the grounds that the arbitrator took evidence in the absence of one of the parties E and that he had received a communication from one of the parties bearing on the merits of the matter. On the latter score the judgment included the following comment:

'[That may or may not have influenced the arbitrator in changing the view which he had expressed in the afternoon that an allowance should be made for this particular work. He says that it did not. But, as was F said by Lord Eldon, it is not permissible to say whether it did or not. That letter never came to the knowledge of the respondent until the award was made.' 93

[90] A similar approach was adopted in *Sapiero and Another v Lipschitz and Others*, 94 as appears from the following passage: G

'It is also a question whether the whole award is not bad on the ground of irregularity. Although it is true that an arbitration is usually regarded as a somewhat informal procedure still there are certain legal principles which govern that procedure. One of these principles is that no evidence must be given or produced before the arbitrator or the umpire in the absence of any one of the parties. It is common cause in this case H that a certain letter was placed before Mr Potgieter [the arbitrator] and that he read it. That letter was undoubtedly placed before Mr Potgieter by Mr Hotz with the object of influencing him. Mr Potgieter very properly returned the letter to Mr Hotz and said that he would take no notice of it but would decide the matter independently of the letter. The Court cannot now, however, go into the question as to whether I Mr Potgieter was influenced by the letter or not. I hold that the mere

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A production and reading of that letter in the absence of the respondents constitute good ground for them to object to the award being made a rule of court.' 95

[91] In *Naidoo v Estate Mahomed and Others* 96 it was said, with reference to *Burns & Co*, that where an arbitrator hears evidence from one party in B the absence of the opponent such action -

'offends against the fundamental principles of justice, and although he may not appreciate in himself that he was doing an injustice, he in fact commits an injustice towards the other party to the submission, and his action would . . . be improper although not necessarily dishonest'. 97

C [92] Even an agreement in the reference to arbitration that the arbitrator may take evidence without both parties being present does not dispense with the duty to observe the precepts of natural justice. The headnote in *Landmark Construction (Pvt) Ltd v Tselentis* 98 reads as follows:

'The parties had agreed to submit a dispute arising from a building contract to an arbitrator and it was agreed that further evidence would D be taken without the presence of both parties at its taking. It appeared that the arbitrator had taken such evidence but had not apprised the respondent of the fact nor the contents of such evidence. In an application to have the award made an order of Court and a counter-application to have it set aside,

E Held, that, in deciding to receive further evidence, the arbitrator had to observe the requirements of natural justice, ie the need to apprise the parties of the content of the evidence so as to afford them a suitable opportunity for rebutting it or otherwise dealing with it, remained undisturbed.

Held, accordingly, that the application should be dismissed and the F counter-application should be granted.'

[93] The principle that nothing must be done in the absence of any of the parties to the arbitration is nicely encapsulated in the following passage by McKenzie: 99

'The rule that nothing must be done *inaudita altera parte* has been G strictly applied. Courts have refused to uphold awards in the following circumstances: where a party was given no opportunity of presenting his case, or was absent during the hearing, or during the giving of certain evidence; where a party was absent from a meeting with the arbitrators at which no new matter was introduced; and where one party was absent when another put a letter before the arbitrator who read it and H handed it back with the remark that he would take no notice of it in reaching his decision. In one case where the parties had agreed that evidence could be taken without both parties being present, an award was nevertheless set aside on the grounds that where such evidence was

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taken the other party should have been apprised of the fact and given an A opportunity to rebut such evidence. Where, however, a party was absent at a meeting of arbitrators at which the latter were not exercising any discretion or any judicial functions, but were merely calculating certain figures upon an agreed basis, it was held that there was no irregularity in the proceedings.' 100

[94] The same approach, in a criminal context, was taken by the B Supreme Court of Appeal in *Roberts*; 101 and in this court in *S v Jaipal* 102 where the following comment was made:

'As stated above, contact between judicial officers and one party to the trial in the absence of the other does not accord with the ideals and imperatives of independent courts that function impartially and free C from interference.' 103

[95] The common-law principles applicable to arbitrations set out above are, in my judgment, not at odds with the Constitution; rather, the converse. It is to be emphasised that notwithstanding the parallels drawn between arbitrations and court proceedings in the authorities referred to, D it is not suggested, nor does this judgment in any way do so, that the same level of procedural fairness required in court proceedings is to be required in arbitration proceedings. It is accepted that the concept of fairness in arbitrations is context-related.

[96] The arbitration agreement 104 in the present matter provided for E the arbitrator to receive such documentation as either party wished to place before him, by a date preceding the commencement of the arbitration hearing, to require the parties to make available such further documentation as he stipulated and to liaise with Eskom's representatives and request Eskom to furnish him with such documentation as he required. F Those provisions did not, however, entitle him to disregard the audi alteram partem rule.

Facts relating to the meetings and correspondence

[97] Two preliminary observations may be made. First, in their written G submissions counsel for Mphaphuli echoed its stance in describing the meetings and correspondence in question as 'secret'. (During argument

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A counsel preferred the less emotive and neutral epithet of 'ex parte' when referring to the meetings and the correspondence.) This approach flowed from the fact that Mphaphuli only became aware of the meetings and the correspondence after receipt of the arbitration record. Had the review proceedings not been instituted, Mphaphuli would not have B come to know thereof. Second, it is unnecessary in this judgment to give consideration to the first of the three meetings in question: counsel did not press reliance thereon during argument.

The two meetings

[98] It is common cause that the arbitrator held two further ex parte C meetings with Bopanang, in the absence of Mphaphuli, at which matters relating to the arbitration were discussed, namely on 2 June 2004 and on 29 July 2004 (the latter meeting being shortly before the arbitrator published his award on 23 August 2004).

[99] The deponent to Mphaphuli's supplementary founding affidavit in D the High Court states, inter alia, as follows: Mphaphuli has no idea what was discussed by the arbitrator and Bopanang at the meetings, other than what was stated by the arbitrator in his chronology. No notes of the contents of the meetings or the nature of the discussions were ever furnished to it. It presumed, however, that Bopanang furnished the E arbitrator with comments.

[100] In its supplementary answering affidavit in the High Court, Bopanang stated, in respect of the meeting of 2 June 2004, inter alia, as follows: On 29 April 2004 the arbitrator sent a query to both parties indicating that it was not clear to him where particular items were to be F installed as it was unclear from the drawings as to their intended usage. (It may be interposed here that in response to the query Mphaphuli, on 26 May 2004, furnished the arbitrator with a list of estimates of items which had been installed, but not measured; the list was copied by the arbitrator to Bopanang.) The arbitrator had clearly become confused G when he could not find the relevant items specified in the schedule of quantities with reference to the drawings. Bopanang pointed out 'the foregoing' to the arbitrator during a telephonic conversation, but he found it difficult to follow the explanation. Bopanang then volunteered to visit the arbitrator at his office as it would be easier to furnish an explanation inter praesentes. That visit took place and the explanation was H given. For that purpose Bopanang furnished the arbitrator with an explanatory sketch. The arbitrator recorded the explanation. Quantities were not addressed at the meeting as the items had already been measured. All that Bopanang did was to explain the 'practical realities' - why the particular items were there although same could not be related I to the drawings.

The technical aspects addressed were only for a better understanding by the arbitrator of the matters in question and in no way affected the quantities. As the items had already been measured the discussion did not concern the merits of the award, but only served to enlighten the arbitrator to a better understanding of the measurements already done and agreed to between the parties. The discussion, which J was not of long duration, did not at all affect the ultimate award.

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Mphaphuli, knowing full well that the relevant items had already been A measured, only had itself to blame if it elected not to point out to the arbitrator what the position was and to respond on the aspects of the technical issues in question.

[101] In respect of the meeting of 29 July 2004 Bopanang stated inter alia as follows: On 23 July 2004 Bopanang's attorney addressed a letter B to the arbitrator inquiring about the progress in the matter. The arbitrator's written response, dated 26 July 2004, recorded that he had arranged a meeting with 'Gerhard' (Bopanang's representative) on 29 July 2004 'to resolve the final outstanding issues' (my emphasis), and that the adjudication would follow shortly thereafter. These developments C were to be seen against the background of the arbitrator's earlier request, on 9 July 2004, to both parties 'to confirm certain outstanding queries'. Bopanang responded by way of certain handwritten notes on the documentation received from the arbitrator. The arbitrator experienced difficulty in securing a response from Mphaphuli and therefore had 'difficulties pertaining to the technical aspects'. The quantities were D already established by way of remeasurement and deductions therefrom and agreed to by the parties. A telephonic conversation between Bopanang and the arbitrator brought the latter's apparent confusion to the fore. It was apparent that the arbitrator did not understand the structures and the materials used, as measured. Again, it proved difficult E to furnish an explanation over the telephone and Bopanang then tendered its 'technical explanation' to the arbitrator at his offices on 29 July 2004. The meeting lasted a maximum of 30 minutes and did not canvass the quantities already measured and agreed to on site, but only why the particular items had to be installed. The discussion had nothing to do with the merits or the ambit of the arbitrator's mandate, but only F served 'to enlighten him to a better understanding of the issues involved' (my emphasis). The ultimate award was not affected, the measurements having already been done.

[102] In his supplementary answering affidavit in the High Court the arbitrator confirmed the statements of Bopanang and intimated that he G did not wish to comment further on Mphaphuli's averments, save that he added that the purpose of the meetings was 'simply to calculate certain figures, and to clarify the use of certain items by the parties'. He averred further that at no stage during the meetings was he expected to 'exercise a judicial function or discretion'. H

[103] The arbitrator acknowledged, however, that when he arranged the meeting of 29 July 2004 with Bopanang:

'I was during that period busy consolidating and finalising the results of our inspection and measurements with the aim of making the award. In this process, I picked up further crucial queries relating to the fundamental I method of determining the total length of the cables . . . which I immediately forwarded to the parties under cover of a letter dated 27 July 2004.'

He further stated:

'After receipt of the above information[ie the responses from the parties J

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A to his queries, including what was conveyed to him orally by Bopanang], I was in a position to determine what work had been done by the second respondent and what amount (if any) applicant owed it. I accordingly sat down and, after due consideration of all the facts placed before me, I firstly consolidated the results of our inspections and measurements on a single spreadsheet. Thereafter and on the basis B of the figures contained therein, I completed the award.'

[104] In response to the supplementary answering affidavits the deponent to Mphaphuli's replying affidavits pointed out, inter alia, that there were contradictions in the explanations proffered by Bopanang and the arbitrator and he registered a non-acceptance of the explanations. More C importantly, the deponent placed on record that 'the clarification of the use of certain items' related to allegations of fact which were still in dispute between the parties and were material to the dispute between them. A further averment was that the second meeting had resulted in the arbitrator rejecting certain of Mphaphuli's submissions in respect of Bopanang's claims and that 'misconceptions' revealed in the arbitrator's D findings could have been avoided had he liaised with Eskom. Bopanang's reply thereto was that Mphaphuli was impermissibly seeking to have his opinions preferred to those of the arbitrator. The response missed the point, that procedural unfairness was the subject of the complaint. In this regard it bears repetition that in its supplementary founding affidavit E Mphaphuli averred, and it was not denied, that Bopanang's comments to the arbitrator were at no stage communicated to it, Mphaphuli.

[105] It is apposite to add further that, by contrast, all discussions which the arbitrator had with Mphaphuli were held in the presence of Bopanang. This was pertinently alleged by Mphaphuli in its supplementary F founding affidavit, and was not placed in dispute by either the arbitrator or Bopanang.

The correspondence

[106] The first aspect requiring mention is that in its first answering affidavit Bopanang pertinently alleged that the arbitrator had 'requested G further information and/or documentation from both parties always with copies thereof and replies sent to the other party'. (My emphasis.)

[107] In its supplementary founding affidavit Mphaphuli confirmed that the record disclosed that all of its written comments in response to the arbitrator's various queries were copied to Bopanang or its attorneys. H Initially, all correspondence from Bopanang to the arbitrator was similarly copied to Mphaphuli. (In my judgment, this procedure speaks volumes of the intention of the parties when concluding the arbitration agreement.) However, the arbitrator subsequently failed to adhere to the policy of copying communications received from Bopanang to Mphaphuli. I Specifically, reference was made to three letters. Included was a letter dated 12 December 2003, addressed by Bopanang to the arbitrator in response to a request for submissions on various aspects. Therein Bopanang criticised the contents of a fault report by Eskom dated 13 March 2003 and claims for remedial work made by AA Electrical. Counsel offered no submissions in respect of this letter, however, and J focused on the two letters referred to below.

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[108] The first was a letter dated 24 February 2004, addressed by A Bopanang's attorneys to the arbitrator in which comments were furnished on, inter alia, certain claims registered by AA Electrical and certain transformer areas. It was correctly contended that these issues were closely connected to the arbitrator's assessment of amounts due. The arbitrator stated that the failure to favour Mphaphuli with a copy of the letter was the result of a bona fide oversight on his part. B

[109] The second was a letter dated 19 July 2004, addressed by Bopanang to the arbitrator. It had been preceded by a letter dated 9 July 2004, addressed by the arbitrator to both parties in which a detailed list of queries was

set out. Bopanang's letter of 19 July 2004 to the arbitrator furnished detailed answers to and comments on the arbitrator's queries. C

[110] The queries raised by the arbitrator were substantive and technical in nature. They related, inter alia, to the following aspects:

- (a) the occurrence of strain assemblies;
- (b) whether a terminal assembly would occur at each pole, other than D where it would be an intermediate assembly;
- (c) whether Bopanang supplied Delta structures for the remaining transformers supplied by other entities.

[111] It was Mphaphuli's averment that Bopanang's comments to the arbitrator contained numerous material misrepresentations and allegations E some of which were false or misleading, and all of which significantly influenced the arbitrator's award. Had Bopanang's comments been made available to it, Mphaphuli would have been able to point out to the arbitrator where the comments were false and/or misleading.

[112] By contrast, so Mphaphuli further averred, its comments on the F query letter of the arbitrator, which were furnished on 16 August 2004, were copied to Bopanang's attorneys. This averment was not placed in dispute.

[113] In its supplementary answering affidavit Bopanang registered the complaint that it was not afforded the opportunity of responding to G Mphaphuli's comments in that, in forwarding same to Bopanang, the arbitrator stated that no further submissions would be allowed unless specifically requested. It is clear, however, that no such request was made. If it had been, it would have had to be granted. Bopanang tendered no further response to the allegations of Mphaphuli set out H above. In particular, it did not deny that its letter contained numerous material representations, or that some of them were false or misleading, or that they all significantly influenced the arbitrator's award.

[114] As with the first letter, the arbitrator ascribed his omission to forward a copy of Bopanang's response to his list of queries to Mphaphuli I to a bona fide oversight on his part.

[115] The further response of the arbitrator to Mphaphuli's allegations proceeded as follows. He was not aware of any false and/or misleading allegations in Bopanang's comments, and in the absence of specific allegations on that score, he was unable to comment on the materiality J

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A or otherwise of his omission to copy Bopanang's comments to Mphaphuli. The arbitrator did not deny that the letter contained representations that were material to his award.

[116] In its replying affidavit Mphaphuli indicated various allegedly incorrect statements in Bopanang's reply to the arbitrator's queries. B Counsel highlighted three aspects. I briefly note each in turn, together with the arbitrator's response thereto (contained in the rejoinder affidavit filed by the arbitrator in the High Court). The reason I do so will appear later.

[117] The first related to terminal assemblies and Mphaphuli indicated C that on this score Bopanang's comments were incorrect in certain respects. The arbitrator's response was, however, that his award was in fact in accordance with Mphaphuli's objections.

[118] Mphaphuli's second objection was that Bopanang did not, as claimed, supply any Delta structures for transformers supplied by other D contractors (as had in fact earlier been conveyed by Mphaphuli to the arbitrator on 26 May 2004). It was pointed out that Delta structures are installed only where a particular type of transformer is involved, and there were only three such transformers in the whole project. It was further stated that in terms of the arbitrator's award there were no E transformers installed in eight of the 19 transformer zones, yet the arbitrator awarded 19 Delta structures with transformers despite the fact that Bopanang only claimed 14.

[119] The arbitrator responded as follows: In his letter of 9 July 2004 he had specifically asked whether Bopanang had supplied the Delta structures F for the main transformers supplied by other contractors. The response of Bopanang was unequivocal and affirmative. Mphaphuli did not answer the question, and from its silence the arbitrator inferred that the contractor had indeed supplied these Delta structures. He found it difficult to understand how Mphaphuli could say that Bopanang had supplied no Delta structures: the price list initially contained a quantity G of 19, which implied one Delta structure per transformer zone; the transformers were physically measured on site and the number (of Delta structures) included in the award was therefore correct.

[120] It may be noted en passant that this response of the arbitrator, contained in his rejoinder affidavit, was not in accordance with his H response in his initial answering affidavit. Although this latter response referred also to the letter of 9 July 2004, it appears that the arbitrator's comments therein related to the replies he received to an earlier letter of 29 April 2004. The comments read as follows:

'I specifically requested the parties in my letters dated 29 April 2004 and I 9 July 2004 to inform me what the estimated quantities thereof were and also to indicate who installed the Delta structures for the remaining transformers. In its reply, [the reference is to the letter of 26 May 2004 referred to in para [118] above], applicant [Mphaphuli] indicated that none of these items were used. I did not receive a specific response from second respondent [Bopanang]. However, I rejected applicant's J response for the simple reason that the pricing list makes it clear that all

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transformers had to be installed on Delta structures. Second respondent A installed 19 transformers and for that reason I allowed for a corresponding number of Delta structures.' [Footnotes omitted.]

[121] The third objection related to the quantity of strain assemblies. The complaint was that the arbitrator should have ascertained the correct state of affairs from Eskom's specifications and drawings. B

[122] The arbitrator's response was that the Eskom drawings did not form part of the record as same had never been placed before him. He emphasised that what was on site was physically measured and his award was based on those results.

The arbitrator's mandate in respect of amounts to be awarded to C Bopanang

[123] It will be remembered that when the parties reached agreement that their dispute be referred to arbitration they further agreed to exchange pleadings. Pursuant thereto Bopanang submitted its statement of claim in which it claimed payment of the sum of D R656 934,44 (together with interest on the component amounts thereof from various dates), made up as reflected in the invoices annexed to the statement of claim. Incorporated in the statement of claim were the papers filed by Bopanang in the High Court in its application for an interdict against Eskom, which included an affidavit by Bopanang's E representative verifying that the invoices constituted an accurate record of the work it had done. Further pleadings were filed by both parties. At the meeting with the arbitrator on 7 October 2003 he was furnished with copies of all the pleadings that had been filed. 105

[124] It is a fair inference that the above history was the genesis of the F contents of the preamble to the arbitration agreement, 106 which recorded the details of Bopanang's claim as set out in its statement of claim.

[125] It is common cause that the arbitrator, in making his award, failed to adhere to the pleadings and that, in the first place, he in fact awarded G Bopanang a series of amounts in excess of what it had claimed. Involved were some nine items in respect of which, in each case, the arbitrator's award substantially exceeded the amounts claimed by Bopanang. In the result, the award embraced a total of R352 007,50 in respect of the nine items as against a total of R91 100,00 claimed by Bopanang. H

[126] In the second place the arbitrator ruled that the total amount of R339 998,83 awarded was 'subject to interest at 0,5% per week from 6 October 2002, when the payment was originally due'. This was not in accordance with the relief sought in Bopanang's statement of claim, referred to in the preamble to the arbitration agreement, which sought I interest on the amount of R143 395,53 from 6 October 2002 and interest on the balance of its claim only from 21 April 2003.

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A [127] From the outset of the review proceedings Mphaphuli adopted the stance that in terms of the arbitrator's mandate any amounts to be awarded to Bopanang would be limited to those claimed by it. In its initial founding affidavit it stated that the arbitrator was expected to verify the work allegedly done by Bopanang, as well as the costs invoiced B therefor; he was not expected to award any costs for work not carried out or at prices higher than those provided for in the price list or for work never claimed by Bopanang.

[128] In its supplementary founding affidavit in the High Court, Mphaphuli persisted with the stance that the arbitrator was obliged to have C regard to the pleadings of the parties and the supporting documents attached thereto, which had been furnished to him. It stressed that Bopanang had at no stage sought to amend its pleadings to increase the amount claimed. Yet, so it was contended, the arbitrator failed to have regard to the pleadings, which were not even mentioned in his award. Accordingly, he had failed to perform his mandate and had exceeded his D powers. It was further stressed that the fact that the arbitrator could not award Bopanang higher quantities than those claimed by it was so obvious that neither party thought it necessary to remind the arbitrator thereof.

[129] It is also important to note that from the outset and on the basis of E Mphaphuli's founding papers, both Bopanang and the arbitrator, as appears from their answering affidavits, understood that one of Mphaphuli's grounds of review was that the arbitrator exceeded his powers by failing to have regard to the pleadings and invoices.

[130] Bopanang's response to Mphaphuli's averments was in essence F that Mphaphuli had misconstrued the arbitration agreement and submitted that in terms of clause 1 thereof 107 the arbitrator had to determine the value of the work done as determined by inspection and measurement by him as provided for in clause 7, with the cooperation of the parties; in other words that the arbitrator was not bound by the claim and invoices submitted by Bopanang.

G [131] In answer to Mphaphuli's allegations in its initial affidavit set out above, the arbitrator initially stated that, having studied the documentation handed to him (which at that stage essentially comprised only the pleadings of both parties), he realised that he would not be in a position to determine if any payment was in fact due in terms of the contract H unless the quantities were remeasured on site. The parties therefore agreed, at his instance, that his mandate be extended to include the physical measurement of the work done on site. This was formalised in the arbitration agreement concluded by the parties. 108 It was therefore envisaged that his adjudication should be based on a remeasurement of I the work executed, to be done in cooperation with the parties.

[132] I have already in another context recorded that the arbitrator made it clear that after the remeasurement (on which he said there was

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agreement) he was still required to embark on a determination of what A part of the work remeasured had actually been done by Bopanang (on which there was not agreement). 109

[133] His further response to Mphaphuli's allegations set out above was in consonance with this stance. He agreed that he had been obliged to verify the work done by Bopanang. However, so he said, it was at all B times understood that Bopanang was to be compensated for work it had actually done, irrespective of what was reflected in its invoices, ie it was never the understanding that it would be bound by the invoices and would therefore not be able to claim for work it had done but had failed to invoice or had incorrectly invoiced. The invoices had had no other function than to serve as a basis for interim payments claimed by C Bopanang during the currency of the agreement. That the parties had not understood his mandate to be restricted as contended for by Mphaphuli was borne out by the fact that neither party ever submitted that Bopanang would not be entitled to compensation for work actually done, but not included in an existing invoice. D

[134] He further sought to emphasise that it would not have made any sense to limit Bopanang's claim, irrespective of the amount of work done, to only that amount which it had in fact claimed. Otherwise the remeasurement exercise would have been a waste of time and resources if the sole purpose was only to 'reduce' Bopanang's claim. It was E inconceivable that Bopanang would have agreed to the arbitration under such conditions as it would have had nothing further to gain.

[135] In his answer to Mphaphuli's supplementary founding affidavit, however, the arbitrator stated as follows:

'I respectfully agree that on a strict reading of the arbitration F agreement, I was obliged to take into account the pleadings exchanged by the parties, and all supporting documents attached thereto.

However, as I have repeatedly indicated above, the parties (as they were entitled to do) restricted my mandate during the arbitration process to the physical re-measurement of the work that had been done, and a determination of what was reasonably due by any of the parties to the G other on the basis of such re-measurement.'

To that he later added the following:

'I categorically deny that it was at any stage contemplated that I could not award higher quantities than those claimed by [Bopanang] in its invoices and other documentation. The intention was, at all relevant H times, that the result of the physical re-measurement would be conclusive.'

[136] In his rejoinder affidavit the arbitrator made it clear that it was his contention that during the arbitration process the parties reached agreement that the result of the physical remeasurement would be I conclusive. He then for the first time added that the agreement was also that the quantities and figures stated in the invoices submitted by Bopanang had to be ignored.

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A [137] As regards the award in respect of interest the arbitrator explained that he had to 'make an equitable decision as far as interest was concerned', that it was 'not possible to determine on what date [Bopanang] became entitled to payment in respect of any particular work it had done' and that 'in view of this practical

difficulty' he simply B decided to take the date 6 October 2002 (which was in fact the earliest date possible) as the starting point for the running of interest on all the amounts.

The findings of the High Court and the Supreme Court of Appeal

[138] I have already noted 110 that for all practical purposes the High C Court failed to consider whether the award was made following on unfair procedural irregularities. It did not consider or even mention the constitutional right to a fair hearing. Instead, it insisted on viewing the review application before it as an impermissible attempt in effect to appeal against the arbitration award because it also engaged on aspects D which otherwise had a bearing on the merits of the award.

[139] After noting that the allegation of bias was founded on the meetings referred to earlier, the High Court briefly analysed what it considered were the relevant facts relating to the meetings and on the basis of that analysis it concluded that there was no merit in the E submission that the arbitrator was biased in favour of Bopanang.

[140] In respect of the second meeting the High Court contented itself with the following observations. The arbitrator requested the parties on 29 April 2004 to supply him with certain information. Bopanang made oral submissions. Mphaphuli replied in writing. Both parties were F therefore afforded the opportunity to be heard. They, however, chose to supply the arbitrator with the required information in their own way. In respect of the third meeting, the comments of the High Court were restricted to the following. This meeting too was the result of the parties responding to a query raised by the arbitrator. Again, Bopanang replied G in writing and made oral submissions, and Mphaphuli only furnished a written reply. It was significant, however, that the arbitrator decided the question raised in the third meeting in favour of Mphaphuli.

[141] It would seem that it was the High Court's view that the circumstance that both parties were given an opportunity of being heard H was all that was required of the arbitrator, and sufficient to dispose of the issue of bias (the only issue that the court was considering at that stage).

[142] What the High Court overlooked, however, was that whatever Mphaphuli had communicated to the arbitrator was copied to Bopanang, but on the other hand Mphaphuli was not made privy to the I 'oral submissions' made by Bopanang to the arbitrator on either of the occasions in question. The High Court failed, and in so doing misdirected itself, to consider the fact that the two ex parte meetings constituted a material infraction of the arbitrator's quasi-judicial duties

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(which, in respect of the last meeting, was not undone by the decision A reached by the arbitrator) laid down in the authorities referred to earlier 111 and the impact it had on the fairness of the arbitration proceedings. The remarks made below concerning the comments of the Supreme Court of Appeal on the third meeting are also relevant here. 112

[143] The Supreme Court of Appeal's approach to the meetings is set B out in paras 18 and 19 of its judgment. 113 I deal below with certain factual issues arising out of the comments made in these paragraphs. At this stage attention will be given to certain legal aspects. I have already found that s 34 of the Constitution finds application in arbitration proceedings and that Mphaphuli did not waive its right to a fair hearing C to which it was entitled in terms of the section. The approach of the Supreme Court of Appeal, as reflected in the stated paragraphs, does not take account of that right (and it may be pointed out in this regard that the inference referred to in the quotation from Total Support in para 19 of the judgment of the Supreme Court of Appeal, relating to an arbitrator's D state of mind, is not a requisite for a court to hold that the precepts relating to procedural fairness

were not adhered to). This approach was due to its finding that Mphaphuli was restricted to invoking the grounds of review set out in s 33(1) of the Arbitration Act.

[144] The Supreme Court of Appeal categorised the meetings as E 'innocuous'. 114 The categorisation is flawed, for reasons of fact and law.

[145] The Supreme Court of Appeal's comment that '(t)he purpose of those meetings was simply to verify certain figures and to clarify the use of certain items' was based on one of the arbitrator's averments, recorded in para [102] above. However, also recorded is the arbitrator's F confirmation of the statements made by Bopanang. The latter's explanations 115 demonstrate that the meetings did not have the restricted purpose found by the court, but were about substantive issues that were related to the issues to be determined by the arbitrator - notwithstanding Bopanang's claim that the discussions did not concern the merits of the award or affect the ultimate award. This is made the clearer by the G arbitrator's own further comments 116 and Mphaphuli's response thereto. 117 The arbitrator held repeated telephone discussions and meetings with one party on relevant issues. His final meeting with the party was arranged in formal fashion, on three days' notice, but without notice to the other side. It took place at a time where, on his own version, he was finalising his results and had found it necessary to raise further H 'crucial queries'. The purpose of the 29 July 2004 meeting was to

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A 'resolve the final outstanding issues' ahead of his decision which was to follow shortly thereafter. 'Innocuous' was in the circumstances a wholly inappropriate epithet.

[146] The Supreme Court of Appeal opined that the meetings were innocuous 'against the backdrop of the arbitration agreement and the B context of the arbitrator's mandate' and that the purpose of the meeting, as found by it, 'fell within the parameters of [the arbitrator's] mandate'. 118 (Seemingly, it is implied that all rights in terms of s 34 of the Constitution were waived by Mphaphuli.)

[147] This approach cannot be supported. As counsel for Mphaphuli C argued, there is no factual basis for the conclusion that the arbitration agreement or the arbitrator's mandate permitted him to hold meetings with Bopanang in the absence of Mphaphuli. No explicit or implicit provision to that effect is contained in the arbitration agreement and, indeed, as shown below, neither the arbitrator nor Bopanang contended D otherwise. On the contrary, clause 7 of the agreement provided expressly that '(e)ach party . . . shall appoint representatives to attend the physical inspection and measurement [by the arbitrator]'. As counsel further pointed out, as a matter of fact, both parties took their right (and obligation) to be present at the inspection and measurement seriously. E Bopanang recorded that both parties were represented at each site inspection and measurement held in terms of the arbitration agreement. In substance, the arbitrator confirmed this statement. In these circumstances counsel validly argued that, once it is clear that the parties had a right and duty to be present at a physical inspection and measurement, it is inconceivable that it was their intention that, following on the F conclusion of the inspection and measurement, the arbitrator would be allowed to have discussions thereanent and about the arbitration with one party without the other being present.

[148] In fact, in its supplementary founding affidavit in the High Court, Mphaphuli states, directly contrary to the finding of the Supreme Court G of Appeal, as follows:

'The arbitration agreement did not mandate the arbitrator to conduct meetings with the parties for the purposes of gathering evidence and in particular did not mandate the arbitrator to convene such meetings with only one of the parties. Had [Mphaphuli's] attorneys not obtained the arbitration record, [it] would never have known that these meetings H took place.

Such meetings were not authorised by the arbitration agreement.'

(Mphaphuli added that the meetings also 'go to bias', an aspect to which I revert later.)

I [149] Neither Bopanang nor the arbitrator takes issue with the above averments of Mphaphuli. Instead, in substance they seek to suggest only that the meetings did not affect the ultimate outcome of the arbitration (a stance, as will be shown below, which is impermissible in law).

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[150] The finding is inescapable that what occurred amounted to a A material procedural irregularity, resulting in unfairness sufficient, in terms of the authorities referred to earlier, to vitiate the arbitrator's award and warrant its setting-aside by this court. 119 In reaching a contrary decision, the High Court and the Supreme Court of Appeal failed to interpret the Arbitration Act in accordance with the Constitution. B

[151] For the sake of completeness, it may be added that the considerations discussed above at the same time vitiated the arbitrator's award on the basis that the arbitrator misconducted himself in relation to his duties as arbitrator and/or that he committed a gross irregularity in the conduct of the arbitration proceedings and/or that the award was improperly C obtained, as envisaged in s 33(1) of the Arbitration Act. 120

[152] However, even were the epithet 'innocuous' to be apt, that would, as a matter of law, not avail against Mphaphuli's claim. Counsel for Mphaphuli accepted that in the case of some irregularities resulting in unfairness it may be permissible and necessary to look at the nature of D the prejudice flowing therefrom. That issue, they argued, did not arise in casu where the nature of the infraction resulted in a failure of justice per se. I agree. Again, the authorities referred to earlier 121 (and those referred to below) have made clear that where a party is wrongly denied a hearing, where an ex parte meeting is held by the arbitrator with one of the parties and aspects bearing on or relating to the merits of the dispute E between the parties are the subject of discussion, the result is a fundamental infraction of the requirements of fairness. It matters not, and the court does not enquire into, what the party denied its lawful opportunity would have said or whether, on the face of it, justice was done between the parties, or whether or not the arbitrator was influenced F by what was said at the meeting. Neither the arbitrator nor the other party is entitled to proffer such latter propositions. The Supreme Court of Appeal accordingly misdirected itself in making the comment, and relying thereon, that the meetings 'had no effect whatsoever on [the arbitrator]'. 122

[153] Courts should not lightly assume that the right to be heard has no G application. As Goldstone J put it in Traube and Others v Administrator, Transvaal, and Others 122 (a matter involving an administrative decision):

'As I understand the law, if a person is wrongly denied a hearing in a case where he should have been given one, no matter how strong the case against him, the denial of the hearing is a fatal irregularity. In H General Medical Council v Spackman 1943 AC 627 at 664 - 5 Lord Wright said:

"If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision I

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A would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision.' 123

[154] In Administrator, Transvaal, and Others v Zenzile and Others 124 a similar approach was adopted:

B 'It is trite, furthermore, that the fact that an errant employee may have little or nothing to urge in his own defence is a factor alien to the inquiry whether he is entitled to a prior hearing. Wade Administrative Law 6th ed puts the matter thus at 533 - 4:

"Procedural objections are often raised by unmeritorious parties. C Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly.

'The learned author goes on to cite the well-known dictum of Megarry D J in *John v Rees* [1970] Ch 345 at 402:

"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable E conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.' 125

[155] The comments in paras [150] and [151] above are of application.

[156] As noted before, 126 neither the High Court nor the Supreme F Court of Appeal canvassed the ex parte correspondence. This omission is inexplicable.

[157] The authorities referred to earlier 127 reflect that the same principles applicable to ex parte meetings between an arbitrator and one of the parties apply mutatis mutandis to ex parte correspondence between an G arbitrator and one of the parties. Counsel for Mphaphuli accepted, correctly, that under appropriate circumstances the question of materiality may have to be considered in relation to ex parte correspondence, depending on the nature thereof.

[158] It is not in dispute that the letter of 19 July 2004 canvassed aspects H that were material to the issues between the parties.

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[159] The resolution of the factual disputes between Mphaphuli and the A arbitrator adverted to in paras [116] - [122] above is not, and cannot be, the subject of this judgment. They do, however, underscore the materiality of the contents of the letter.

[160] The important aspect is that on a material issue the arbitrator, on his own showing, received (and acted on) representations made to him B by Bopanang, without Mphaphuli being afforded an opportunity of responding thereto.

[161] It should be stated that the provisions of clause 5 of the arbitration agreement 128 are of no assistance to the arbitrator or Bopanang. The fact that the arbitrator was entitled to require any of the parties to make such C documentation available as he may have required did not entitle him to disregard the prescripts of natural justice. In terms of the authorities cited earlier, 129 he nevertheless incurred the obligation to refer Bopanang's ex parte correspondence to Mphaphuli.

[162] The fact that the two letters in question were not sent by the D arbitrator to Mphaphuli because of a 'bona fide oversight' is not a relevant consideration. As was explained in *Rose v Johannesburg Local Road Transportation Board*: 130

'The fact that they or any of them [the members of the board] acted from excellent motives and feelings will not avail them if they have acted contrary to a well-settled principle of law in circumstances which E may seem to affect the justice of their decision.' 131

[163] Again, the comments in paras [150] and [151] above are of application.

[164] Neither the High Court nor the Supreme Court of Appeal adverted pertinently to the issue whether the arbitrator, in making any F award in favour of Bopanang, was bound by Bopanang's pleadings, which detailed its claim as substantiated by the invoices incorporated in its statement of claim, or to the matter of amounts awarded which were in excess of those claimed. The High Court's relevant comments were that Mphaphuli's papers reflected an impermissible attempt in effect to appeal against the award of the arbitrator. The Supreme Court of Appeal G commented that by submitting their dispute to arbitration the parties had waived their right to have the merits of their dispute relitigated or reconsidered, and that an error of fact or law, even a gross error, would not per se justify the setting aside of the award - it would at best be evidence of misconduct. H

[165] In the remarks that follow I do not lose sight of the circumstance that it is often the case that arbitration is resorted to in order, inter alia, to avoid the niceties of pleading. However, I conclude that in fact the arbitrator was bound by the pleadings. The reasons for this conclusion follow. I

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A [166] It should immediately be emphasised, first, that the preamble to the arbitration agreement 132 states in terms what claim Bopanang was pursuing, as instituted by it. Second, as clause 4 of the arbitration agreement recorded, the arbitrator was placed in possession of Bopanang's pleadings, which incorporated the invoices. Third, clause B 10 of the arbitration agreement precluded any variation thereof unless same was reduced to writing and signed by, or on behalf of, the parties.

[167] Further, I do not lose sight of the fact that clause 1 of the agreement records that the purpose of the arbitration was to determine whether payment was due in terms of the contract between the parties C and, if so, the extent thereof, and that a final assessment of moneys reasonably due by either party to the other was required to be made by the arbitrator. The fact remains that the claim of Bopanang was placed on record and, as would be the position in ordinary civil litigation, that was the claim which Mphaphuli came to the arbitration to meet.

[168] As was stated in *Interbulk Ltd v Aidan Shipping Co Ltd*, The D 'Vimiera': 133

'The essential function of an arbitrator, indeed a judge, is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain alive issues. If an arbitrator believes E that the parties or their experts have missed the real point - a dangerous assumption to make, particularly where, as in this case, the parties were represented by very experienced counsel and solicitors - then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of material justice to put the point to them so that they have an F opportunity of dealing with it.' 134

[169] The arbitrator's initial response to Mphaphuli's averments 135 does not support his stance that he considered that he was entitled to ignore the pleadings or the invoices. Rather, on his own version, the agreement he refers to was simply that his mandate 'was extended' to include the G physical measurement, not that this would be the full extent of his mandate. However, he did later allege 136 that the common understanding was that Bopanang was to be compensated for work actually done by it, irrespective of what was reflected in its invoices. The comment may be made, however, that the basis on which the arbitrator sought to found this common understanding, namely that neither party ever suggested H otherwise, is unpersuasive. An

absence of contrary comment by either party would carry more weight in respect of a stance that Bopanang was bound by its pleadings. Moreover, as pointed out below, the arbitrator later changed tack, no longer relying on an understanding, but in fact alleging an actual agreement.

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[170] Two further averments in the arbitrator's initial response do not A bear scrutiny. First, the contention (not raised by Bopanang) that the invoices, previously sent by Bopanang to Mphaphuli, had solely served as a basis for interim payments during the currency of the agreement, may be based on the arbitrator's interpretation of the contract between the parties. Nevertheless, it bears emphasis that the selfsame invoices B were incorporated in Bopanang's statement of claim.

[171] Second, the arbitrator's comment that it would be a waste of time if the sole purpose of the remeasurement would be to reduce Bopanang's claim and that Bopanang would have had nothing to gain from the arbitration, 137 need only to be stated to be rejected. The very dispute C between the parties was whether Bopanang had done the work it claimed for. Remeasurement would have contributed to the resolution of that issue, but it could only have done so on the basis of the existing pleadings and invoices. The gain that would have accrued to Bopanang was obvious: to the extent that the remeasurement, and the arbitrator's determination of what portion of the work remeasured was done by Bopanang, established D Bopanang's existing claims, it would have been successful.

[172] The arbitrator's stance in his further answering affidavit and his rejoinder affidavit 138 was somewhat different to his initial response. He acknowledged that on a strict reading of the arbitration agreement he was obliged to take into account the pleadings exchanged by the parties and all E supporting documents attached thereto (to which the preamble to the arbitration agreement and clause 4 thereof made reference). But he contended that during the arbitration process the parties reached a further agreement and restricted his mandate to the physical remeasurement, the results of which would be conclusive, and that the invoices had F to be ignored.

[173] However, in the first place, this contention, which in itself embraced contradictions and inconsistencies, did not square with his other averment that after the remeasurement he was still required to embark on a determination of what portion of the work remeasured had G been done by Bopanang. This point was emphasised by Mphaphuli, which stated that the purpose of the inspections and measurements was to establish empirically what work had been done on site whereafter it had to be determined, in the light of the contract between the parties, which entity did what work and what compensation was due to Bopanang. Second, the arbitrator did not see fit to explain how or when H it was that the further agreement was reached. Third, any such further agreement would have been invalid in the light of the non-variation provision in clause 10 of the arbitration agreement. Fourth, even if there had been such a further agreement (to the effect that the result of the physical measurement would be conclusive and eclipse the invoices), it I would not have applied to at least some of the nine items referred to in para [125] above, in that these items were not measured by the arbitrator,

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A but the quantities thereof were the result of inferences based on assumptions by the arbitrator that the items would have been associated with other items that he did measure.

[174] The arbitrator's explanation 139 for the award of interest made by B him does not constitute justification for his failure to adhere to the pleadings.

[175] The circumstance that the arbitrator regarded himself as unconstrained by the pleadings and the invoices, notwithstanding that they gave rise to the dispute, not only had the result that he exceeded his C powers in terms of s 33(1)(b) of the Arbitration Act, 140 but also constituted a gross irregularity in the conduct of the proceedings in terms of the same section. It consequently adversely affected Mphaphuli's right to a fair hearing in terms of s 34 of the Constitution.

[176] This is made clear by the decision in *Goldfields Investment Ltd and D Another v City Council of Johannesburg and Another*. 141 The case concerned a review of the decision of a valuation court, but the principles adverted to apply equally to arbitrations. Schreiner J commented as follows. 142 For cognisance to be taken of irregularities there is no need that there be intentional arbitrariness of conduct or any conscious denial E of justice. It is not only high-handed or arbitrary conduct which is described as a gross irregularity - behaviour which is perfectly well-intentioned and bona fide, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues - if it did, it will amount to a gross irregularity. A mere mistake of F law relating to the merits will not constitute a gross irregularity, but if the mistake leads to the tribunal's not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the inquiry, or of its duty in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party G has not had a fair trial.

[177] These remarks find operation in the present case and the arbitrator, owing to his erroneous view of, and misconstruing, his functions in respect of the application of the pleadings and invoices to the matters that he had to decide, failed to deal with them in the manner contemplated H by the arbitration agreement. 143 The resultant gross irregularity constituted sufficient unfairness to vitiate his award.

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[178] Again, the comments in paras [150] and [151] are of application. A

Bias

[179] Counsel correctly did not persist in a contention of actual bias on the part of the arbitrator and confined their argument to the contention that there was a reasonable apprehension of bias on the arbitrator's part. B Counsel further accepted that Mphaphuli bore the onus of establishing the existence of such apprehension and that the test is an objective one. In *Van Rooyen*, 144 this court stated the following:

'That the appearance or perception of independence plays an important role in evaluating whether courts are sufficiently independent cannot be C doubted. The reasons for this are made clear by the Canadian jurisprudence on the subject, particularly in *Valente v The Queen* . . .

The jurisprudence of the European Court of Human Rights also supports the principle that appearances must be considered when dealing with the independence of courts.

When considering the issue of appearances or perceptions, attention D must be paid to the fact that the test is an objective one. Canadian courts have held in testing for a lack of impartiality -

"the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. E In the words of the Court of Appeal that test is 'what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude'." 145 [Footnote omitted.]

In *Jaipal*, the court cited this dictum with approval in the context of F criminal proceedings. 146

[180] The threshold for a finding of perceived bias is high. In *South African Commercial Catering* 147 this court discussed the apparent double requirement of reasonableness posed in *SARFU*, 148 that is, a reasonable person and a reasonable apprehension, and stated: G

'(T)he two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. As Cory J stated in a related context on behalf of the Supreme Court of Canada:

"Regardless of the precise words used to describe the test, the H object of the different formulations is to emphasise that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into

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A question an element of judicial integrity.' 149

[Footnotes omitted.]

The comments are of equal application where a quasi-judicial capacity is involved.

B [181] It matters not, however (as I accept was the position in *casu*), that the arbitrator's intentions were good or that he bona fide thought that he was acting within the terms of his mandate or was unconscious of any apprehension of bias that might arise from his conduct. 150

[182] For their contention of a reasonable apprehension of bias, counsel C placed reliance on the meetings, the correspondence and the award of amounts in excess of those claimed by Bopanang and reflected in its pleadings and invoices.

[183] As already recorded, 151 both the High Court and the Supreme Court of Appeal addressed the issue of bias only with reference to the ex D parte meetings, and the latter court commented that no other overt act was invoked to found the contention of a reasonable apprehension of bias. That restricted approach was incorrect and misdirected. Further, the comment by the Supreme Court of Appeal that no reason emerges from the papers as to why the arbitrator would have shown an inclination to favour one party, was misplaced. A desire to favour one party does not E require to be proved.

[184] In my judgment the factors invoked by Mphaphuli, viewed objectively, both separately but more particularly cumulatively, must result in a finding that a reasonable apprehension of bias has been F demonstrated: a reasonable person in Mphaphuli's position would reasonably apprehend that he/she had been the victim of bias, albeit unintentional, and that he/she had not received a fair hearing.

[185] Where a reasonable apprehension of bias is demonstrated, the court does not enter the debate whether there was actual influence and G it is at pains not to measure the degree of the bias apprehended. In *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 152 (a case involving what was considered to be a quasi-judicial tribunal, the Industrial Court) the following passage appears:

H 'Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing Court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the

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apparent risk. If suspicion is reasonably apprehended, then that is an A end to the matter.' 153

[186] Again, the comments in paras [150] and [151] above are of application.

Conclusion B

[187] In the light of the findings set out in this judgment it is my view that Mphaphuli is entitled to the relief it seeks from this court, and I would have granted Mphaphuli that relief with appropriate ancillary orders. However, this is a minority judgment and accordingly no order is made. C

Jafta AJ and Nkabinde J concurred in the judgment of Kroon AJ.

[zJDz]Judgment

O'Regan ADCJ:

[188] I have had the opportunity of reading the judgment prepared in D this matter by my colleague, Kroon AJ. Unfortunately I cannot concur in it. In my view, although leave to appeal should be granted, the appeal should be dismissed. As will appear from the reasons that follow, there are two differences between my approach and that of Kroon AJ. First, in my view, s 34 of the Constitution does not apply to private arbitration although I do hold that it is an implied term of every arbitration E agreement that it be procedurally fair. Secondly, it is my view that the arbitration agreement at issue in this case, properly construed, required the arbitrator to adopt an informal, investigative method of proceeding and not a formal, adversarial one.

[189] As Kroon AJ explains in his judgment, the applicant, Lufuno F Mphaphuli & Associates (Pty) Ltd (Mphaphuli) is an electrical infrastructure contractor who was awarded a contract by Eskom (the national electricity supplier) for the electrification of certain rural villages in Limpopo Province. In May 2002 Mphaphuli entered into a subcontract with the second respondent, Bopanang Construction CC (Bopanang). In January 2003 Bopanang vacated the site early without completing its G work on the ground that Mphaphuli had failed to pay moneys owing to it. Another contractor, AA Electrical, was then employed by Mphaphuli to complete the work and to undertake remedial work on the work performed by Bopanang.

[190] In April 2003 Bopanang issued summons in the High Court in H Pretoria against Mphaphuli seeking payment of R656 934,44 from Mphaphuli for work it had done but for which it had not been paid. Bopanang also sought to interdict the client, Eskom, from paying Mphaphuli further. Bopanang and Mphaphuli then agreed that such an interim interdict should issue and that the dispute concerning the I amount claimed by Bopanang should be referred to arbitration.

[191] Pursuant to this agreement Bopanang prepared a statement of claim and Mphaphuli a statement of defence, as well as a counterclaim. J

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A Mr Nigel Andrews, the first respondent, was appointed as arbitrator on 21 July 2003, which appointment was confirmed when the arbitration agreement was signed on 16 October 2003. Mr Andrews was furnished with copies of all the pleadings.

[192] The arbitration process then followed. It is described in some B detail later in this judgment. On 23 August 2004 Mr Andrews published his award in terms of which he found Mphaphuli to be liable to Bopanang in an amount of R339 998,83 and he ordered that interest be paid on that amount from 6 October 2002. Mphaphuli did not make C payment in terms of the award, and, on 18 October 2004, Bopanang approached the High Court for the award to be made an order of court. Mphaphuli opposed this application and launched a separate application to set aside the arbitration award and to have the matter remitted to the arbitrator. 1 Mphaphuli was unsuccessful in both the High Court and subsequently the Supreme Court of Appeal. 2 It now seeks leave to D appeal to this court.

[193] There are several issues that arise. A preliminary issue is that Mphaphuli's application for condonation for the late filing of its founding affidavit and its supplementary founding affidavit was refused ^E by the High Court, and this decision was upheld by the Supreme Court of Appeal. Kroon AJ concludes that both the High Court and the Supreme Court of Appeal misdirected themselves in this regard. Given the conclusion I reach on the merits, it is not necessary for me to traverse this issue at all and I refrain from doing so.

F [194] Turning then to the issues in the case before us. Mphaphuli identifies the following three constitutional issues: to what extent are courts entitled to exercise supervision over arbitral proceedings; whether parties waive their constitutional rights in terms of s 34 of the Constitution when they agree to refer a dispute to private arbitration; and what ^G the correct approach is to the grounds of review set out in s 33 of the Arbitration Act 42 of 1965 (the Arbitration Act). I think it may be more logical and helpful to pose the constitutional questions in the following manner: (a) does s 34 of the Constitution apply to private arbitrations?; (b) what, if any, is the relevance of the Constitution to the terms of ^H private arbitration agreements? and (c) what, if any, is the relevance of the Constitution to the judicial scrutiny of arbitration awards?

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Private arbitration ^A

[195] In approaching these questions, it is important to start with an understanding of the nature of private arbitration. Private arbitration is a process built on consent in that parties agree that their disputes will be settled by an arbitrator. It was aptly described by Smalberger ADP in Total Support Management (Pty) Ltd and Another v Diversified Health ^B Systems (SA)(Pty) Ltd and Another ³ as follows:

'The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement.'⁴ ^C

[196] Private arbitration is widely used both domestically and internationally. Most jurisdictions in the world permit private arbitration of disputes and also provide for the enforcement of arbitration awards by the ordinary courts. With the growth of global commerce, international commercial arbitration has increased significantly in recent decades. This growth has been fostered, in part, by the Convention on the ^D Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) ⁵ which provides for the enforcement of arbitration awards in contracting States and which has had a profound effect on arbitration law in many jurisdictions. ⁶ It has also been served by the adoption of the Model Law on International Commercial Arbitration (the UNCITRAL ^E Model Law) by the United Nations Commission on International Trade Law in 1985, which was amended in 2006 and which has been adopted in many jurisdictions. ⁷

[197] Some of the advantages of arbitration lie in its flexibility (as parties can determine the process to be followed by an arbitrator, including the ^F

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^A manner in which evidence will be received, the exchange of pleadings and the like), its cost-effectiveness, its privacy and its speed (particularly as often no appeal lies from an arbitrator's award, or lies only in an accelerated form to an appellate arbitral body). ⁸ In determining the proper constitutional approach to private arbitration, we need to bear in ^B mind that litigation before ordinary courts can be a rigid, costly and time-consuming process and that it is not inconsistent with our constitutional values to permit parties to seek a quicker and cheaper mechanism for the resolution of disputes.

[198] The twin hallmarks of private arbitration are thus that it is based on consent and that it is private, ie a non-State process. It must accordingly be distinguished from arbitration proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the Labour Relations Act 66 of 1995 which are neither consensual, in that respondents do not have a choice as to whether to participate in the proceedings, nor private. Given these differences, the considerations which underlie the analysis of the review of such proceedings are not directly applicable to private arbitrations. 9

Does s 34 apply to private arbitration?

[199] The first question that arises then is whether s 34 of the Constitution applies to private arbitration. Section 34 provides that:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

In *Chief Lesapo v North West Agricultural Bank and Another* 10 Mokgoro J on behalf of a unanimous court reflected on s 34 as follows:

'An important purpose of s 34 is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law.' 11

[200] This comment makes clear that the primary purpose of s 34 is to ensure that the State provides courts or, where appropriate, other tribunals, to determine disputes that arise between citizens. A similar understanding of the section was expressed by Langa CJ in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 12 where he reasoned:

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'The first aspect that flows from the rule of law is the obligation of the State to provide the necessary mechanisms for citizens to resolve disputes that arise between them. This obligation has its corollary in the right or entitlement of every person to have access to courts or other independent forums provided by the State for the settlement of such disputes. Thus s 34 of the Constitution provides as follows. . . ' 13

[My emphasis.] B

[201] On a straightforward reading, the section provides that everyone has the right to have disputes that are susceptible to legal determination decided in a fair, public hearing by a court or by another independent or impartial tribunal. Quite clearly, when parties decide to refer a dispute to be determined by an arbitrator, they are not seeking to have the dispute determined by a court. They are seeking to have it determined by an arbitrator of their own choice. The question that then arises is whether an arbitrator is 'another independent and impartial tribunal or forum' as contemplated in the section. It seems to be beyond doubt that these words apply to other tribunals established by law such as the CCMA. 14 Such tribunals must also conduct 'fair public hearings' as provided for in s 34. The more difficult question, however, is whether these words apply to private dispute mechanisms established by parties by consent.

[202] In *Total Support Management* 15 the court grappled with the question as follows: E

'It is a moot point whether the words "another independent and impartial tribunal or forum" in their contextual setting apply to private proceedings before an arbitrator or whether they must be restricted to statutorily established adjudicatory institutions. The word "fair" qualifies "public hearing" and the phrase "fair, public hearing" relates not only to proceedings before a court but also before "another independent and impartial tribunal or forum". In a private arbitration the parties may by agreement exclude any form of public hearing - the need for anonymity or secrecy may well underlie the decision to resort to arbitration. The proper

interpretation of s 34 may also involve the vexed question whether there may be a waiver of a constitutional right.' 16 G

[203] In *Telcordia Technologies Inc v Telkom SA Ltd* 17 Harms JA concluded that '(o)n balance' the provisions of s 34 would apply to private arbitration. Kroon AJ in his judgment in this matter finds that this conclusion 'commends itself for acceptance' and his judgment proceeds H

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A on the basis that s 34, and particularly the requirement of 'fairness' within it, applies to private arbitration. 18

[204] In reaching his conclusion Harms JA relied on the jurisprudence of the European Court of Human Rights which has held that art 6 of the B European Convention on Human Rights is applicable to private arbitration. 19 The text of art 6(1) is, of course, somewhat different to the text of s 34. Article 6(1) provides that:

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal C established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would D prejudice the interests of justice.'

[205] In *Suovaniemi and Others v Finland* 20 the applicants to the European Court of Human Rights complained that their right to a fair hearing in terms of art 6(1) had been violated since the Finnish courts E had upheld an arbitral award which the applicants alleged had been made by an arbitrator lacking impartiality. One of the arbitrators who had made the award had previously acted as counsel to one of the parties. They also objected to the manner in which the second of the three arbitrators had conducted the proceedings. The court held that a voluntary waiver of court proceedings in favour of arbitration is in F principle acceptable. 21 However, the court continued:

'Even so, such a waiver should not necessarily be considered to amount to a waiver of all the rights under Article 6. As indicated by the cases cited in the previous paragraph, an unequivocal waiver of Convention rights is valid only insofar as such waiver is "permissible". Waiver may G be permissible with regard to certain rights but not with regard to certain others. A distinction may have to be made even between different rights guaranteed by Article 6. Thus, in the light of the case-law it is clear that the right to a public hearing can be validly waived even in court proceedings (see, Eur Court HR, H\akansson and Sturesson v Sweden judgment of 21 February 1990, Series A No 171, H pp 20 - 21, §§ 66 - 67). The same applies, a fortiori, to arbitration proceedings, one of the very purposes of which is often to avoid publicity. On the other hand, the question whether the fundamental right to an impartial judge can be waived at all was left open in the *Pfeifer and Plankl v Austria* case, as in any case in the circumstances of that case I there was no unequivocal waiver.'

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[206] The European Court then went on to consider whether the fact A that the parties had known before proceeding to arbitration that one of the arbitrators had previously acted as legal counsel to one of the parties constituted an impermissible waiver. The court reasoned as follows:

'In the present case and insofar as concerns arbitrator M, the Court considers that the waiver made during the arbitration proceedings was B unequivocal

The Court considers that the Contracting States enjoy considerable discretion in regulating the question on which grounds an arbitral award should be quashed, since the quashing of an already rendered award will often mean that a long and costly arbitral procedure will become useless and that considerable work and expense must be C invested in new proceedings. . . . In view of this the finding of the Finnish court based on Finnish law that by approving M as an arbitrator despite the doubt, of which the applicants were aware, about his objective impartiality within the meaning of the relevant Finnish legislation does not appear arbitrary or unreasonable. . . . The Court D furthermore notes that in the proceedings before the national courts the applicants had ample opportunity to advance their arguments, inter alia, concerning the circumstances in which the waiver took place during the arbitration proceedings. Without having to decide whether a similar waiver would be valid in the context of purely judicial proceedings the Court comes to the conclusion that in the circumstances of the present case concerning arbitral proceedings the applicants' waiver of E their right to an impartial judge should be regarded as effective for Convention purposes.' 22

[207] The conclusion of the European Court was thus that, given that the applicants had known that one of the arbitrators had acted as legal counsel for one of the other parties prior to the arbitration, and given that F Finnish law provided that such knowledge gave rise to a valid waiver, the applicants had effectively waived their right to impartiality in the arbitration proceedings in terms of the Convention, and concomitantly their right to object on that ground. The precise relationship between private arbitration and art 6 remains difficult and is an issue increasingly G drawing the attention of commentators. 23

[208] Harms JA relied on Suovaniemi in Telcordia. Having found that s 34 did apply to private arbitration, like the judges in Suovaniemi, he then employed the concept of waiver. He reasoned as follows:

'The rights contained in s 34 (as the ECHR accepted) may be waived H unless the waiver is contrary to some other constitutional principle or otherwise contra bonos mores. Parties to a private dispute may, for instance, compromise their dispute and thereby forgo all their rights under s 34. By agreeing to arbitration, parties waive their rights pro tanto. They usually waive the right to a public hearing. They may even I

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A waive their right to an independent tribunal. Counsel gave the example of two children who ask a parent to arbitrate their commercial dispute.' 24 [Footnotes omitted.]

[209] The court then held that parties who agree to refer a dispute to arbitration 'necessarily agree that the fairness of the hearing will be B determined' by the provisions of the Arbitration Act only, that they waive the right to an appeal (unless they agree to an arbitral appeal panel), and that they limit the interference by courts to the procedural irregularities set out in s 33(1) of the Arbitration Act. 25

C [210] I find it difficult to reconcile the latter portion of the reasoning with the former portion. It seems to me that if one accepts that parties to an arbitration have waived their rights under s 34 in such a manner that the fairness of the hearing will be determined only by reference to the Arbitration Act, and that interference by courts with arbitration shall be limited to the irregularities spelt out in s 33(1) of the Arbitration Act, it D cannot be said that s 34 has any direct application to private arbitration at all. The thrust of the reasoning seems to me to be that when parties enter a private arbitration agreement, as long as that agreement is not contra bonos mores, they waive the rights that they would otherwise enjoy under s 34. However, we still need to consider whether s 34 does indeed E apply directly to private arbitration.

[211] As it is clear that a private arbitrator is not a court, the question posed by Smalberger ADP in Total Support Management remains. When s 34 refers to another independent and impartial tribunal, does it include F private arbitration? If it does not, then s 34 can have no application to private arbitration. In answering this question, one needs to read s 34 closely to see if its structure and purpose extend to private arbitration. It is clear that the section provides a right to have disputes resolved (a) by the application of law in (b) a fair (c) public hearing before (d) a court or (e) where appropriate an independent and impartial G tribunal. Properly read, an independent and impartial tribunal (if appropriate) must hold fair, public hearings when it resolves disputes by the application of law. It is not possible textually to detach the requirement of fairness from the requirement of being in public: both requirements apply to proceedings before courts and independent and H impartial tribunals.

[212] Underlying this right, as this court has held, is the rule of law and the positive obligation upon the State to provide courts and, where appropriate, other fora for the resolution of disputes. 26 Private arbitrators are, of course, not provided by the State but are private agents I employed by parties for the resolution of disputes.

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[213] In considering whether private arbitration fits into the framework A of s 34, we have to acknowledge that private arbitration, as conventionally understood, is ordinarily not held in public. It is, as its name implies, a private process. Nor can it ordinarily be said that arbitrators have to be independent in the full sense that courts and tribunals must be. As the Suovaniemi case suggests, parties can knowingly consent to an B arbitrator who may not be entirely independent. 27 Accordingly, it is not clear that arbitrators can accurately be described as 'independent . . . tribunals'. As private arbitration proceedings do not, and, if international practice is to be accepted, should not require public hearings, and similarly if private arbitrators need not, as long as parties knowingly accept this, always be C 'independent', then the language of s 34 does not seem to fit our conception of private arbitration.

[214] The only strong reason to read private arbitration to fall within the meaning of s 34 is the requirement imposed by that section that the hearing be 'fair' and, indeed, it seems to be on that basis that Kroon D AJ concludes that s 34 does apply to private arbitration. However, I am not persuaded that it is appropriate to understand the section to relate to private arbitration, which otherwise does not fit the language of the section, simply because it might be seen to be desirable to require arbitration proceedings to be fair. The section must be interpreted on its E own language and with integrity, and I cannot conclude, given the general lack of fit between private arbitration and the language of the section, that the section has direct application to private arbitration. 28

[215] In concluding that s 34 does not have direct application to private arbitration, I do not finally consider what indirect application it may F have, if any. Indirect application of rights in the Bill of Rights operates generally through s 39(2) of the Constitution which requires courts when interpreting statutes or developing the common law or customary law to promote the 'spirit, purport and objects' of the Constitution. No argument was addressed to us on this issue but, mindful of the role courts have in giving effect to arbitration agreements, it seems to me G that s 34 may have some relevance to the interpretation of legislation or the development of the common law.

[216] If we understand s 34 not to be directly applicable to private arbitration, the effect of a person choosing private arbitration for the H resolution of a dispute is not that they have waived their rights under s 34.

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A They have instead chosen not to exercise their right under s 34. 29 I do not think, therefore, that the language of waiver used by both the European Court of Human Rights in *Suovaniemi* and by the Supreme Court of Appeal in *Telcordia* is apt. Indeed, it may not be apt in relation to constitutional rights at all, 30 but that is a topic for another day.

B [217] Despite the choice not to proceed before a court or statutory tribunal, the arbitration proceedings will still be regulated by law and, as I shall discuss in a moment, by the Constitution. Those proceedings, however, will differ from proceedings before a court, statutory tribunal or forum. The first difference is that the process must be consensual - no C party may be compelled into private arbitration. The second is that the proceedings need not be in public at all. The third is that the identity of the arbitrator and the manner of the proceedings will ordinarily be determined by agreement between the parties. The party who opts for arbitration will have chosen these consequences.

D [218] In the light of the foregoing, on a proper construction of s 34 it should be understood not to apply directly to private arbitrations. I differ in this respect, therefore, from the conclusion of Koon AJ. This conclusion, however, does not mean that the Constitution will have no relevance to private arbitration, as I shall now discuss.

E The relevance of the Constitution to the terms of arbitration agreements

[219] The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, F the process to be followed in the arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters.

[220] However, as with other contracts, should the arbitration agreement contain a provision that is contrary to public policy in the light of G the values of the Constitution, 31 the arbitration agreement will be null

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and void to that extent 32 (and whether any valid provisions remain will A depend on the question of severability). In determining whether a provision is *contra bonos mores*, the spirit, purport and objects of the Bill of Rights will be of importance. 33 As stated above, it is not necessary to determine what role s 34 might play in this analysis.

[221] At Roman-Dutch law, it was always accepted that a submission to B arbitration was subject to an implied condition that the arbitrator should proceed fairly 34 or, as it is sometimes described, according to law and justice. 35 The recognition of such an implied condition fits snugly with modern constitutional values. In interpreting an arbitration agreement, it should ordinarily be accepted that when parties submit to arbitration, C they submit to a process they intend should be fair. 36 Fairness is one of the core values of our constitutional order: the requirement of fairness is imposed on administrative decision-makers by s 33 of the Constitution; on courts by ss 34 and 35 of the Constitution; in respect of labour practices by s 23 of the Constitution; and in relation to discrimination by D s 9 of the Constitution. The arbitration agreement should thus be interpreted, unless its terms expressly suggest otherwise, on the basis that the parties intended the arbitration proceedings to be conducted

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A fairly. Indeed, it may well be that an arbitration agreement that provides expressly for a procedure that is unfair will be *contra bonos mores*.

[222] The contractual obligation of fairness accords with the approach of recent legislation regulating arbitration in other jurisdictions. Most notably, perhaps, it accords with s 33 of the United Kingdom Arbitration Act, 1996, which provides that arbitrators have a general duty to act 'fairly and impartially giving each party a reasonable opportunity of putting his case and dealing with that of his opponent'.³⁷ This is a general duty that may not be varied by agreement between the parties. In a similar vein, art 18 of the UNCITRAL Model Law provides:

'The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.'

[223] Of course, as this court has said on other occasions, what constitutes fairness in any proceedings will depend firmly on context.³⁸ Lawyers, in particular, have a habit of equating fairness with the proceedings provided for in the Uniform Rules of Court. Were this approach to be adopted, the value of arbitration as a speedy and cost-effective process would be undermined. It is now well recognised in jurisdictions around the world that arbitrations may be conducted according to procedures determined by the parties. As such the proceedings may be adversarial or investigative,³⁹ and may dispense with pleadings, with oral evidence, and even oral argument.

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The relevance of the Constitution to the judicial scrutiny of arbitration awards

[224] The final question that arises for consideration before turning to the facts of this case is the extent to which the judiciary may scrutinise arbitration awards. This is a matter which is regulated by s 33(1) of the Arbitration Act. This section provides relatively narrow grounds for setting aside an arbitration award as follows:

'Where -

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(c) an award has been improperly obtained,

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.'

[225] The basis upon which a court may set aside an arbitration award is a difficult issue which has been the subject of much debate.⁴⁰ It should be noted that one of the important questions of modern arbitration law around the world is the extent to which courts may supervise arbitration awards. Both the New York Convention and the UNCITRAL Model Law limit the scope for intervention to a narrow range of complaints.

[226] In approaching this question, it should be borne in mind that arbitration awards are given effect by the ordinary courts. So if a party refuses to obey an award, the law provides for the enforcement of the award by the ordinary courts. Indeed, this is the very purpose of the New York Convention which provides for the recognition and enforcement of arbitration awards in member jurisdictions even where the arbitration has taken place in another jurisdiction. The New York Convention provides only narrow grounds for a court to refuse to give effect to an award. Article V of the Convention provides as follows: G

'1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement . . . were, under the law applicable H to them, under some incapacity, or the said agreement is not valid . . . ; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
I

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it

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A contains decisions on matters beyond the scope of the submission to arbitration . . . ;
or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties . . . ; or

B (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

C (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country.'

[227] Article 34(2) of the UNCITRAL Model Law provides the grounds D for setting aside an arbitral award by a court. Its terms are modelled on the provisions of art V of the New York Convention, so that the international regulation of arbitration sets the same standards for refusing to make an award an order of court as it does for setting aside the award. This has been described as 'a pleasing symmetry'. 41

E [228] A somewhat different approach to the courts' powers of intervention is provided in the United Kingdom Arbitration Act, 1996. Section 68 provides that a court may set aside an arbitration award on the grounds of serious irregularity if the court considers the irregularity 'has caused or will cause substantial injustice to the applicant'. The grounds F of serious irregularity listed include a failure to comply with the s 33 duty to act fairly; failure to conduct the proceedings in accordance with the procedure agreed by the parties; and failure by the tribunal to deal with all the issues that were put to it. This approach thus requires both a serious procedural irregularity and a showing of substantive injustice. G The explanation given for this section by the Departmental Advisory Committee on Arbitration Law in their 'Report on the Arbitration Bill and Supplementary Report on the Arbitration Act 1996' included the following comments:

'[Serious] irregularities stand on a different footing [from complaints H concerning lack of jurisdiction]. Here we consider that it is appropriate, indeed essential, that these have to pass the test of causing "substantial injustice" before the court can act. The court does not have a general supervisory jurisdiction over arbitrations. . . . The test of "substantial injustice" is intended to be applied by way of support for the arbitral process, not by

way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action.' 42

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[229] In considering the question of the powers of the courts to set aside arbitration awards, the South African Law Reform Commission, in its report on 'Domestic Arbitration', noted the following:

'One of the most controversial issues of arbitration law reform concerns the powers of the court in relation to arbitration. It is accepted that court support for the arbitral process, particularly as regards the enforcement of arbitration agreements and arbitral awards, is essential. It is also accepted that courts are entitled to certain supervisory powers as the price for their powers of assistance. A court cannot be expected to enforce an arbitral award which has been obtained as a result of an arbitral procedure which was fundamentally unfair and which has substantially prejudiced the losing party.' 43 [Footnotes omitted.] C

The report then notes that a difficult balance needs to be achieved between affording the courts appropriate powers to scrutinise arbitration awards and not empowering unscrupulous parties to use the courts to undermine the purpose of arbitration: the speedy resolution of disputes. 44 D

[230] The authors of the report continue:

'The drafters of the Model Law were well aware of this problem and gave careful attention to it. It is generally accepted that they achieved the right balance regarding the extent of the courts' powers and the time in the arbitration proceedings when they may be exercised. Even in England, which has traditionally been regarded as a jurisdiction where the courts have enjoyed excessive powers in the context of arbitration, there has been a clear and continuing trend since 1979 to curtail the powers of the courts.' 45

For these reasons, the commission concludes by recommending that the powers conferred upon the courts to set aside an arbitration award should be modelled on the powers contained in the Model Law, in preference to the provisions of s 33(1) of the Arbitration Act. 46 In addition, it also proposes, in s 52(5) of its draft Bill, that an award in conflict with public policy (one of the Model Law grounds for setting aside an arbitration award) includes - G

'(a) an award made in breach of the tribunal's duty under section 28 such as to cause substantial injustice to the applicant; or

(b) an award induced or affected by fraud or corruption.' 47 [Footnote omitted.] H

[231] This approach is in effect a hybrid between the Model Law and the United Kingdom Arbitration Act, 1996. The s 28 duty mentioned in s 52(5)(a) is the general duty of the arbitrator to act fairly (the equivalent I

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A of s 33 of the United Kingdom Arbitration Act), 48 so the effect of s 52(5)(a) is that an award can be set aside when a failure to act fairly causes substantial injustice.

[232] I set out the approach of the Model Law, as well as the United Kingdom approach and the debate in the South African Law Reform Commission, as I consider it to be important background in considering how one should properly and constitutionally interpret s 33(1) of the Arbitration Act insofar as private arbitration is concerned. Kroon AJ in his judgment concerning the proper approach to the interpretation of s 33(1) of the

Arbitration Act relies on the minority judgment of Ngcobo J. C in this court in *Sidumo v Rustenburg Platinum Mines Ltd.* 49

[233] In that case, the court was concerned with a statutory arbitration before the CCMA in terms of the Labour Relations Act 66 of 1995. Section 145(2) of the Labour Relations Act sets out the grounds upon which an award made by the CCMA can be set aside by a court in terms D nearly identical to those contained in s 33(1) of the Arbitration Act. In his reasoning, stating that the jurisprudence on s 33(1) provided a useful starting point for an analysis of s 145(2), Ngcobo J nevertheless emphasised the need not to overlook the differences in context between the two statutes. In this regard, he emphasised the importance of the fact that a CCMA commissioner 'performs a public function and exercises public E power'. 50

[234] The difference identified by Ngcobo J is indeed important, for it seems to me that the considerations set out in the preceding paragraphs which urge a court to be slow to set aside private arbitration awards are F not directly applicable to the award of a statutory tribunal performing an important public power and protecting a constitutional right (the right to fair labour practices). 51 To that extent, therefore, I do not think that the reasoning in *Sidumo* can, without more, be of great assistance in determining the proper constitutional approach to the interpretation of s 33 of the Arbitration Act in the context of private arbitration.

G [235] To return then to the question of the proper interpretation of s 33(1) of the Arbitration Act in the light of the Constitution. Given the approach not only in the United Kingdom (an open and democratic society within the contemplation of s 39(2) of our Constitution), but also the international law approach as evinced in the New York Convention H (to which South Africa is a party) and the UNCITRAL Model Law, it seems to me that the values of our Constitution will not necessarily best be served by interpreting s 33(1) in a manner that enhances the power of courts to set aside private arbitration awards. Indeed, the contrary seems to be the case. The international and comparative law considered in this I judgment suggests that courts should be careful not to undermine the

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achievement of the goals of private arbitration by enlarging their powers A of scrutiny imprudently. Section 33(1) provides three grounds for setting aside an arbitration award: misconduct by an arbitrator; gross irregularity in the conduct of the proceedings; and the fact that an award has been improperly obtained. In my view, and in the light of the reasoning in the previous paragraphs, the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration. B

[236] The final question that arises is what the approach of a court should be to the question of fairness. First, we must recognise that fairness in arbitration proceedings should not be equated with the process established in the Uniform Rules of Court for the conduct of C proceedings before our courts. Secondly, there is no reason why an investigative procedure should not be pursued as long as it is pursued fairly. 52 The international conventions make clear that the manner of proceeding in arbitration is to be determined by agreement between the parties and, in default of that, by the arbitrator. Thirdly, the process to be followed should be discerned in the first place from the terms of the D arbitration agreement itself. Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If courts are too quick to find fault with the manner in which an arbitration has been conducted, and too E willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of s 33(1), the goals of private arbitration may well be defeated.

Should the court grant the application for leave to appeal?

[237] After this somewhat lengthy introduction on the law and private F arbitration, I turn now to consider whether this case raises a constitutional issue within the jurisdiction of the court and one which it is in the interests of justice to hear. At the outset I should say that ordinarily the question whether a particular arbitration award should be set aside, turning as it must on the precise terms of the arbitration agreement G which regulated it, will not raise a constitutional issue of sufficient substance to warrant being entertained by this court.

[238] This case, however, being the first such challenge to be considered by this court, is different. The court has had to consider the relationship between private arbitration and the Constitution, the proper scope of H s 34 of the Constitution and the approach to the interpretation of s 33(1) of the Arbitration Act in the light of the Constitution. All these are constitutional matters of substance falling within the jurisdiction of this court and which, given the need to provide guidance in this regard, it is

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A in the interests of justice for this court to entertain. The application of these principles to the facts of this case, even if arguably not concerning a constitutional issue itself, concerns a matter connected to a decision on a constitutional issue which it is in the interests of justice to decide. In so doing, we will avoid the piecemeal determination of the case and provide B an application of the principles set out above which will hopefully elucidate those principles in a helpful manner. I would therefore grant the application for leave to appeal.

Should the arbitration award be set aside?

C [239] Mphaphuli argues that the arbitration award be set aside because, first, the arbitrator held what it terms three 'secret' meetings with Bopanang during the course of the arbitration. Secondly, Mphaphuli points to the fact that not all correspondence between Bopanang and the arbitrator was furnished to Mphaphuli; and, thirdly, Mphaphuli submits that the arbitrator committed a gross irregularity by 'effectively ignoring D the pleadings filed before him' and awarding amounts in excess of what had been claimed and invoiced. Before turning to consider these complaints in detail, it will be helpful to give some further background to the arbitration.

E The arbitration process

[240] As set out in the introductory paragraphs of this judgment, the arbitration agreement was entered into between the parties once litigation had been initiated by Bopanang to recover moneys it alleged Mphaphuli owed it in terms of a contract in which Bopanang had been F appointed as a subcontractor by Mphaphuli to electrify certain rural villages in Limpopo Province. In July 2003 Mphaphuli and Bopanang held a pre-arbitration meeting at which they agreed that Mr Andrews, a quantity surveyor, would be appointed as arbitrator. The note of this agreement reflected that Mr Andrews was appointed in the light of his qualifications and experience. The parties further agreed that G Mr Andrews would be furnished with Bopanang's particulars of claim, together with a list of documents upon which it relied. Further, Mphaphuli was to lodge its plea and counterclaim (if any) and its list of documents by a certain date, which would then be followed by Bopanang's reply and plea to the counterclaim (if any).

H [241] According to the arbitrator, once he had received this documentation he realised that he could not determine what, if anything, was due by Mphaphuli to Bopanang from the invoices alone and he concluded that he needed to remeasure the quantities on site. When the arbitration commenced on 6 October 2003, he informed the parties of this and the I parties agreed that the matter would have to be postponed, and the mandate of the arbitrator extended to include physical remeasurement on site. Thereafter, a further arbitration agreement reflecting this agreement was signed on 16 October 2003.

[242] Clause 1 of this agreement was titled 'Purpose of Arbitration'. It J provided as follows:

'The purpose of the arbitration is to determine whether payment is due A in terms of the contract concluded between the parties, and if it is determined that payment is in fact due, the extent of such payment due, having regard to the scope of the agreement; any agreed amendments or instructions for amendments thereto by the defendant or ESKOM; the value of the work that has been done by the plaintiff; the effect of any defects, if any, and the rectification thereof; any and all payments made B to the plaintiff. Therefore a final assessment of the moneys reasonably due by any one of the parties to the other needs to be made by the arbitrator.'

The clear purpose of the arbitration was therefore to determine what, if anything, was owed by Mphaphuli to Bopanang. C

[243] In relation to the procedure to be followed, the agreement provided in clause 4 that:

'The parties record that the arbitrator has already been provided with a bundle of documentation forming part of the plaintiff's particulars of claim. In addition hereto, each party shall be entitled to submit D such documentation as it may deem necessary to the arbitrator by not later than 10 October 2003 (sic).'

[244] Clause 5 provided that the arbitrator 'shall be entitled to require from any of the parties to make such further documentation available as he may require'. It further stated that the parties would furnish the documentation to the arbitrator within three days of his request. Clause 6 E provided that the arbitrator could liaise with representatives of Eskom and request Eskom to furnish any relevant documentation. Neither clause 5 nor 6 expressly stated that the documentation received by the arbitrator would be furnished to the parties. Clause 10 of the agreement stipulated that the terms of the agreement were the full agreement F between the parties and were not to be varied save in writing.

[245] Clause 7 of the agreement provided that the arbitrator would commence the 'inspection and measurement of the work' on site on 27 October 2003. It specifically added that each party should appoint representatives to attend the inspection and measurement. G

[246] I should pause here to note that the agreement makes no express provision for formal adversarial adjudicative proceedings at all in which evidence would be led or legal argument submitted. Both Mphaphuli and Bopanang accept this. The agreement provided only for the furnishing of documents to the arbitrator by the parties and Eskom (with H a power for the arbitrator to request further documents should he consider it necessary) and for a remeasurement process to take place on site. It was only in relation to the remeasurement process that the agreement stipulated that parties would appoint representatives. It is again worth noting that the representatives appointed were not lawyers. I

[247] The date for the inspection was delayed till 12 and 13 November 2003. In his affidavit, the arbitrator describes, in a largely undisputed version, what happened on those days as follows:

"Tatjane is a rural area situated in a remote and mountainous part of Limpopo province. It is a large area (totalling approximately 20 - 30 km²) and for most of it, inaccessible to vehicles. Since it became J

A clear to all of us that the inspection and measurements would have had to be done on foot, it was decided after consultation with the parties, that we split into two teams. Each team would comprise of representatives of both parties and would be tasked physically to re-measure all work done by second respondent. In the evening, we would then get together and combine the results of both teams. The first team

B comprised of myself, Mr Lufuno Mphaphuli . . . and Mr Shawem Kigole who represented the second respondent. The second team comprised of Mr Gerhard Esterhuizen (who represented the second respondent) and one Moses (who represented the applicant).'

[248] Rain washed out most of the efforts at measurement on C 12 November 2003 and the teams agreed to meet again on 1 December 2003. In the meanwhile the arbitrator consolidated the results of the inspection and forwarded them to the parties. The arbitrator notes that the equipment installed by Bopanang was physically counted and measured. He emphasises that work installed by other contractors was not measured. The arbitrator further states that on 1 and 2 December D 2003 the remainder of the area was inspected and remeasured. He notes that it became clear during the inspection process that Bopanang had to supply electricity to considerably more informal dwellings than had originally been estimated by Mphaphuli and that many of the dwellings in the area were new. It was also accepted, says the arbitrator, that E Bopanang was entitled to be compensated for these additional installations. He also noted that the mountainous nature of the area had resulted in the need to reroute some of the electricity cables. By 18 December 2003 the arbitrator had completed a schedule reflecting the results of the inspection and remeasurement process which he sent to the parties for their comment.

F [249] A flurry of correspondence occurred in the early months of 2004 when the parties wrote to the arbitrator setting out various concerns. From this correspondence and from his work on the measurements, the arbitrator recounts that it became clear that some measurements had been omitted and also that there was a significant factual G dispute between the parties as to the remedial work that had been undertaken by AA Electrical. He accordingly suggested a further meeting on site with representatives of AA Electrical to resolve this dispute and to complete the omitted measurements. The meeting took place on 24 March 2004. The arbitrator once again consolidated the results of the H remeasurement and inspection of 24 March and forwarded it to the parties.

[250] At this stage I should note that Mphaphuli now objects to the procedure followed by the arbitrator on the basis that, once the arbitrator had done the measurements, he should again have referred to the I invoices and claims of the second respondent to limit the amount due to the amount claimed by Bopanang. The arbitrator rebuts this argument on the basis that he had advised the parties that a determination on the invoices would be impossible and that inspection and remeasurement were required. He states that, once the parties had agreed on re-measurement, it would have made no sense to seek to do that in the light J of the invoices. I shall return to this issue in a moment.

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[251] On 29 April 2004 the arbitrator wrote to the parties identifying A certain outstanding issues upon which he needed guidance. Mphaphuli responded to this request in writing, but Bopanang felt that it could not explain its responses in writing. Accordingly, a meeting was held between the arbitrator and a representative of Bopanang on 2 June 2004 where Bopanang's clarification was provided to the arbitrator. This B was the second of the so-called secret meetings. According to the arbitrator, the result of this meeting was that the arbitrator wrote to the parties on 9 July 2004 in which he asked both parties to comment on the tentative conclusions he had drawn in the light of the meeting of 2 June 2004.

[252] Bopanang responded to this letter with a series of cryptic yes-or-no C answers pencilled onto the faxed copy of the original letter. A copy of this response was not sent to Mphaphuli. However, the same questions had been put to Mphaphuli who did not respond immediately. Finally, after being reminded to do so by the arbitrator in writing on 6 August 2004, Mphaphuli, on 16 August 2004, furnished its responses to the queries of D 9 July. It did not respond to all the queries raised by the arbitrator but where it did not respond, the arbitrator accepted that Mphaphuli did not disagree with his (the arbitrator's) tentative proposed conclusion.

[253] One final issue needs to be described here. When the arbitrator E received Bopanang's cryptic responses to his letter of 9 July 2004, the answer in relation to one issue was unclear to the arbitrator. That issue related to a proposed revision of prices. The arbitrator held a further meeting with Bopanang, in the absence of Mphaphuli, on 29 July 2004 to discuss this issue. This was the third so-called secret meeting and is discussed in greater detail below. After that meeting, the arbitrator F rejected Bopanang's proposal that revised prices should be awarded, and held in favour of Mphaphuli that Bopanang was not entitled to the revised prices as they had never been agreed in writing - the original contract required amendments to be in writing.

The proper interpretation of the arbitration agreement G

[254] Construed in its context, it seems to me that this arbitration agreement contemplated that the arbitrator would adopt an informal, investigative method of proceeding. The factors are the following. First, the arbitrator is a quantity surveyor, expressly stated to have been appointed because of his expertise and experience. This fact suggests H that the parties understood the process to be primarily a quantitative exercise which would require the accurate measurement of work done by Bopanang to determine the indebtedness of Mphaphuli.

[255] Secondly, the terms of the arbitration agreement itself contemplate I that the purpose of the arbitration was to determine -

'whether payment is due in terms of the contract concluded between the parties, and if it is . . . due, the extent of such payment due, having regard to the scope of the agreement; any agreed amendments or instructions for amendments thereto by the defendant or ESKOM; the value of the work that has been done'. J

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A It concluded by stating that 'a final assessment of moneys reasonably due by any one of the parties to the other needs to be made by the arbitrator'. Again, this emphasises that the function of the arbitrator was primarily quantitative.

B [256] Thirdly, the agreement contemplates that 'each party shall be entitled to submit such documentation as it may deem necessary to the arbitrator'. There is no express provision for the exchange of documentation between the parties. Similarly, the arbitrator is entitled to request documentation from the parties without an express provision for an C exchange of the documentation. Fourthly, the arbitrator was authorised to liaise with Eskom directly which was in turn authorised to furnish the arbitrator with any documentation he required. Again, the agreement does not stipulate that such documentation would be furnished to the parties. Fifthly, there is only one express provision that requires the D presence of the parties and that is at the remeasurement process itself. Sixthly, the agreement makes no provision at all for the leading of oral evidence or the submission of oral argument.

[257] I am strengthened in my conclusion that an informal, investigative process was envisioned by the process that was in fact adopted as I have E described it above. That process was one where the arbitrator received evidence, prepared a schedule of quantities based on the evidence he received, gave both parties a copy of the schedule or a letter setting out his concerns and gave each an opportunity to comment. A revised schedule containing the remeasured quantities was circulated to the F parties at least three times during the arbitration: on 17 November 2003, 18 December 2003 and at the end of March 2004 (after the meeting with AA Electrical). In addition, the arbitrator wrote to the parties at least three times asking for their comments on preliminary conclusions he had reached: on 18 December 2003, 25 February 2004 and on 9 July 2004. G Neither of the parties complained about the procedure followed to the arbitrator during the proceedings, and one can only assume that this was the process the parties had contemplated.

[258] I conclude therefore that, on a proper interpretation of this H arbitration agreement, the parties intended the arbitrator to follow an informal, investigative process and one in which no oral evidence would be led. The procedure was by and large aimed at the determination of facts and in particular the amount owed by Mphaphuli to Bopanang, if anything. No provision was accordingly made for legal argument. The I question that now arises is whether the conduct complained of by Mphaphuli constitutes a gross irregularity within the meaning of s 33(1) of the Arbitration Act in the light of this understanding of the arbitration agreement. I shall deal with each of the three complaints separately. Before doing so, I wish to deal briefly with the cases cited by Kroon AJ concerning the need for both parties to be present at all stages J during arbitration proceedings.

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[259] Kroon AJ relies on *Lazarus v Goldberg and Another*, 53 which cites A Cloete J in *Croll qq Kerr v Brehm* to state that 'no rule is more clear than that they [arbitrators] should not proceed to examine parties or witnesses in the presence only of one party, that nothing may be done *inaudita altera parte*'. This rule is clearly correct in the context of an adversarial process. It is not clear to me, however, that it is applicable to investigative B proceedings of the sort under examination here. Can it be said that it is unfair to one party for an arbitrator to obtain information, to form a preliminary view on the basis of that information and then to give both sides an opportunity to rebut that preliminary view? I do not think so.

[260] Another case relied upon by Kroon AJ is *Shippel v Morkel and Another* 54 in which Van Winsen J relied on a passage from Voet and C concluded that -

'our Courts have accepted that in deciding upon matters submitted to them arbitrators are required to follow, at any rate in broad outline, the precepts which govern the procedure employed in the course of judicial proceedings'. 55

In my view, this conclusion is incorrect. There is nothing in the D Arbitration Act which excludes investigative proceedings, as I have reasoned above, and judges should be cautious not to interpret s 33(1) of the Act so as to require arbitrators to proceed as if they were courts of law. Such an interpretation would undermine the purposes of arbitration which are to provide flexible and affordable alternatives to judicial E dispute resolution. Van Winsen J's conclusion that 'it is well established that the procedural rules applicable in an arbitration require that the proceedings should not be conducted in the absence of one of the parties' seems to me (particularly given the previous dictum) to assume that the proceedings must be adversarial. That is an assumption F that should not be made.

[261] It is not necessary to deal with each and every one of the authorities cited by Kroon AJ. Suffice it to say that, in the light of modern arbitration practice and procedure, courts should be careful not to require arbitrators to proceed in an adversarial fashion. To the extent G that these authorities stipulate requirements of fairness relevant to adversarial proceedings, they cannot be faulted. To the extent, however, that they suggest that investigative procedures may not be followed by arbitrators, they cannot be accepted. This does not mean that anything goes in an investigative process. The requirement of fairness obtains there, as it does in adversarial proceedings. Its content is simply different. H In each case, the question will be whether the procedure followed afforded both parties a fair opportunity to present their case.

The 'secret' meetings

[262] The three 'secret' meetings Mphaphuli refers to were held on I 17 March 2004, 2 June 2004 and 29 July 2004. According to Bopanang,

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A all that happened at the first meeting was that the arbitrator and a representative of Bopanang agreed to a date for a site meeting to discuss the extent of the remedial work conducted by AA Electrical. The meeting took place following a letter by Bopanang to the arbitrator enquiring about progress. Following the meeting of 17 March, the B arbitrator immediately wrote to Mphaphuli to advise it of the date set for the site meeting, being 24 March.

[263] In assessing whether this meeting constituted a gross irregularity, it should be added that it is clear from the record that there were a number of occasions on which the arbitrator contacted one or other C party to arrange a meeting or some similar administrative arrangement. 56 It is clear from the record that the process was an informal one and that neither party objected to this during the arbitration. It is also clear that nothing that happened on 17 March 2004 prevented Mphaphuli from presenting its case to the arbitrator within the framework of the D arbitration procedure adopted. Given that the proceedings followed were informal and investigative and based on a methodology whereby the arbitrator repeatedly placed his preliminary views before the parties and gave them an opportunity to respond, the meeting of 17 March 2004 does not constitute a gross irregularity, if it constitutes an irregularity at all.

E [264] The second meeting took place on 2 June 2004. 57 That meeting was held because Bopanang found it hard to respond in writing to the queries sent by the arbitrator to both parties on 29 April 2004. In the meeting, Bopanang's representative explained to the arbitrator the way in which certain equipment had been installed. On the arbitrator's F version, the result of this meeting was that the arbitrator wrote a letter on 9 July 2004 to both parties setting out his initial and tentative conclusions on some of the equipment issues and asked both parties to respond. Both parties did eventually respond.

[265] It may have been unwise for the arbitrator to meet alone with a G representative of Bopanang. The question that arises in this instance is whether it was unfair in the sense that it denied Mphaphuli an opportunity fairly to state its case. Mphaphuli was given an opportunity to respond to the explanations given by Bopanang to the arbitrator, in that the arbitrator formulated the issues and sent them to both parties H requesting confirmation. This followed the process that had been adopted throughout the arbitration. The arbitrator reached preliminary conclusions and then gave the parties an opportunity to comment thereon. At times, by consent, those conclusions were reached in the

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absence of one or other of the parties. As noted above, for example, the A site inspection on 24 March 2004 had gone ahead in the absence of Mr Mphaphuli as he chose to attend another meeting. It is to be assumed that he was willing to do this because he understood that the arbitrator would give him an opportunity to comment on the results of the inspection. This the arbitrator did in due course. B

[266] Given the nature of the proceedings agreed upon, and particularly the fact (consistent with the conduct of the arbitration throughout) that the arbitrator set out the preliminary conclusions he had reached arising from this meeting and gave both parties an opportunity to comment thereon, it cannot be said that the meeting prevented Mphaphuli from C presenting its case fairly to the arbitrator. It was indeed given an opportunity to do so. I cannot conclude therefore that the second meeting constituted a gross irregularity.

[267] The third meeting took place on 29 July 2004. In this meeting, the representative of Bopanang sought to persuade the arbitrator to award D certain revised prices. According to the arbitrator, he decided after consideration that these revised prices were not payable by Mphaphuli and ruled in its favour in this regard. I should add here (though it is not an issue upon which Mphaphuli relies) that Bopanang's version of this meeting is less crisp. It is clear from its version too that it related to the arbitrator's desire to get clarity in relation to the

cryptic responses E Bopanang had given to his queries of 9 July 2004, but it suggests that the discussion may have ranged more broadly than the question of revised prices.

[268] Again this meeting should not have been held alone with the representative of Bopanang. Yet, at the time, the arbitrator was having F difficulty contacting Mphaphuli at all which had still not responded to the letter of 9 July. When it did finally respond to the letter of 9 July, it appears to have agreed with many of the preliminary conclusions reached by the arbitrator in that it did not dispute them and instead mainly raised issues relating to quantities in the remeasurement schedule. Finally, on G the arbitrator's version, the result of the meeting favoured Mphaphuli. In all these circumstances, it does not seem to me that this meeting should be found to constitute a gross irregularity in the context of this arbitration sufficient to warrant the award being set aside.

Failure to disclose all correspondence H

[269] The second irregularity to which Mphaphuli points is the failure by the arbitrator to ensure that all correspondence received from Bopanang was forwarded to Mphaphuli. The arbitrator states that, to the extent that this happened, it was an oversight in his office, and that the vast majority of the correspondence received was circulated to both I parties.

[270] Mphaphuli points to three letters in this regard (though in written and oral argument only the second and third letters were raised). The first letter was a letter sent by Bopanang to the arbitrator on 12 December 2003 raising a report by Eskom and the remedial work done by J

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A AA Electrical. Whatever impact this letter may have had, if any, on the arbitrator's conclusions, Mphaphuli would have had an opportunity to respond given that the arbitrator furnished it with his tentative conclusions in a schedule of measurements at least twice after the letter was received. Although it may well have been a regrettable oversight not to B have forwarded the letter to Mphaphuli, it cannot be said that the failure to do so constituted an irregularity so material as to require this court to set aside the arbitration award.

[271] The second letter was a letter of 24 February 2004 in which Bopanang wrote to the arbitrator furnishing comments on the claims of C AA Electrical. This letter was one of a flurry of letters between the parties and the arbitrator at that time. The arbitrator generally forwarded letters of one party to the other, but in this case he admits the letter was not forwarded due to an oversight. However, it is also clear that this flurry of letters made plain to the arbitrator that there was a serious dispute of fact D between the parties concerning the work done by AA Electrical. As a result, the arbitrator called a further site meeting to be attended by both parties and AA Electrical to resolve this factual dispute. 58 After that meeting the arbitrator reworked his measurements and sent them to the parties again at the end of March.

E [272] Accordingly, although it may have been unfortunate that the arbitrator failed to provide Mphaphuli with a copy of Bopanang's letter of 24 February 2004, it cannot be said that this undermined Mphaphuli's ability fairly to make its case. It was given a full opportunity on 24 March 2004 to assist in the determination of the dispute concerning F what work had been done by AA Electrical, and again once the revised measurements were sent to it at the end of March. The failure to provide Mphaphuli with a copy of the letter of 24 February, therefore, cannot be said to have amounted to a serious irregularity which would warrant setting aside the arbitration.

G [273] The third letter to which Mphaphuli points in this regard is a letter from Bopanang to the arbitrator dated 19 July 2004. This letter is the cryptic response to the arbitrator's letter of 9 July 2004 described above in para [251]. It will be recalled that the arbitrator had given the parties a list of preliminary conclusions upon which he wanted their comment H before finalising his award. It is clear that both parties were given an opportunity

to respond to this preliminary set of conclusions. Although there is no doubt that it would have been desirable as a matter of practice for the arbitrator to have furnished a copy of Bopanang's letter of 19 July to the applicant, I am not persuaded that anything turns on this at all. I The process adopted is quite clear. The arbitrator made preliminary findings and asked each party for comment. This is a classic investigative process. Mphaphuli was given a fair opportunity to make out its own case. There is no suggestion that the arbitrator contemplated an

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adversarial exchange between the parties on his preliminary conclusions. A He simply asked each party whether the approach he adopted was correct or not.

[274] Each party then had an opportunity to persuade the arbitrator that his preliminary conclusions were wrong. In respect of several of the preliminary conclusions he had suggested in his letter of 9 July 2004, the B arbitrator ruled in favour of Mphaphuli. Moreover, Bopanang's responses were cryptic as has been described. By and large, they were yes-or-no answers. In my view, there is not much that Mphaphuli could have said to rebut these simple yes's or no's beyond what it said in its own response to the very same queries. I conclude on this point too that C Mphaphuli has not established a gross irregularity in this regard.

Ignoring the pleadings/arbitral mandate

[275] The final argument made by Mphaphuli is that the arbitrator, in pursuing a full remeasurement of the work undertaken by Bopanang, ignored the pleadings and thus misconstrued his mandate. This D complaint goes to the question of the proper construction of the arbitration agreement. In this regard, I disagree with my colleague Kroon AJ. In my view, it is clear from the record that it was the arbitrator's view that it was impossible to determine on the basis of the invoices alone what money if any was owing to Bopanang. The arbitrator told the parties this and E suggested that a fair process would be to conduct a remeasurement on site to identify what work Bopanang had in fact undertaken.

[276] It was further his view that once that remeasurement had been undertaken he would deduct from the remeasurement the amount F Mphaphuli had paid Bopanang. The arbitrator states that it was not the intention of the parties that the amounts owing would be limited to the amounts originally claimed by Bopanang or as stipulated in the contract. In asserting this, the arbitrator points to the fact that it became apparent during the site inspection that far more dwellings needed to be electrified than had originally been provided for in the contract, and that the parties G agreed that Bopanang was entitled to remuneration for work actually done. This Mphaphuli now disputes.

[277] During the arbitration, it must have been clear to Mphaphuli from the measurements repeatedly sent to it by the arbitrator that this is how the arbitrator construed his task. The arbitration agreement properly H construed did not require both the remeasurement and determination of what was due on the basis of the remeasurement, and also the determination of what was due on the invoices and, in the light of the invoiced amounts, somehow curtailing the amount found to be due on the remeasurement. Such an approach was inconsistent with the agreement I that a remeasurement was necessary, and that it would form the basis of a new schedule setting out the amounts Bopanang was entitled to in terms of the price schedule in the contract. Mphaphuli participated fully in this process. What is more, it was afforded at least three opportunities during the proceedings to dispute the remeasured quantities when the arbitrator furnished his preliminary remeasurements. One can only J

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A conclude that Mphaphuli did not dispute this manner of proceeding because its understanding of the arbitration agreement was precisely the understanding proffered by the arbitrator - the arbitration was to be based on the remeasured quantities and not on the invoiced amounts.

[278] I conclude in this regard that the arbitrator correctly understood B his mandate and that Mphaphuli's complaint in this respect must fail. Counsel for the applicant did not press the argument relating to bias on the part of the arbitrator in either written or oral argument. Given the conclusion I have reached, there is no basis for concluding that the manner in which the arbitrator conducted himself gave rise to a C reasonable perception of bias. No more need be said on this score.

Costs

[279] Mphaphuli has raised a constitutional issue in this court. The respondents were brought to this court to answer that argument. They did not rely on any constitutional right of their own but disputed the D constitutional argument made by the applicant. Properly construed, therefore, this is private litigation relating to a commercial matter and the applicant has lost. In my view, it should pay the costs, including those consequent upon the employment of two counsel.

Order

E [280] For the reasons set out above, I make the following order:

- (a) The application for leave to appeal is granted.
- (b) The appeal is dismissed.
- (c) The applicant is ordered to pay the costs of both respondents in F this court, such costs to include the costs of two counsel.

Langa CJ, Mokgoro J, Van der Westhuizen J and Yacoob J concurred in the judgment of O'Regan ADCJ. 59

[zJDz]Judgment

G Ngcobo J:

[281] I have read the judgments prepared by my colleagues O'Regan ADCJ and Kroon AJ. They both agree that the application for leave to appeal raises a constitutional matter and that it is in the interests of justice to grant leave to appeal. However, they reach different outcomes. I accept that the contentions advanced by Mphaphuli raise a constitutional H matter. However, I am unable to agree with my colleagues that it is in the interests of justice to grant leave to appeal. In my view, the application falls to be dismissed with costs. And for reasons set out in this judgment, I do not therefore express any view on the constitutional matter that Mphaphuli raises in this court.

I [282] The facts are set out in the judgments of my colleagues. I do not propose to repeat them in this judgment except to the extent necessary for this judgment.

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[283] Suffice it to say that this litigation has its genesis in a subcontract A entered into between Mphaphuli and Bopanang on 16 May 2002. A dispute that ensued between Mphaphuli and Bopanang over payment and execution of the agreement led to Bopanang vacating the subcontracted site during January 2003. High Court litigation ensued. This culminated in an arbitration agreement signed by the parties on 16 October B 2003. The arbitrator published his award on 23 August 2004. He found Mphaphuli liable to Bopanang in an amount of R339 998,83 together with interest on that amount calculated from 6 October 2002. The attempt by Mphaphuli to

have the award reviewed and set aside failed in the High Court in Pretoria. An appeal to the Supreme Court of Appeal suffered the same fate. Hence this application C for leave to appeal.

[284] In its application for leave to appeal to this court, Mphaphuli alleged that the crisp question on which it seeks the ruling of this court is whether or not, in behaving irregularly, the arbitrator compromised one of its constitutional rights. The constitutional right implicated was D said to be the right of access to court, which is enshrined in s 34 of the Constitution. In its written argument, it contended that the issue which lies at the heart of its application for leave to appeal is the relationship between arbitrations, the courts and the Constitution.

[285] It submitted that the application raises in particular: E

(i) To what extent are the courts entitled and required to exercise some control over arbitration awards before adopting them as their own and making them orders of court?

(ii) Does the mere conclusion of an arbitration agreement mean that the parties had undertaken to waive fundamental aspects of their right F to a fair hearing in terms of s 34 of the Constitution, and, if so, under what circumstances?

(iii) What is the correct approach to the grounds of review set out in s 33 of the Arbitration Act 42 of 1965 when that section is properly interpreted in the light of the right to a fair hearing contained in s 34 of the Constitution? G

[286] These contentions by Mphaphuli no doubt raise a constitutional matter. But these issues are being raised for the first time in this court. They were neither raised in the High Court nor in the Supreme Court of Appeal. And these are the kind of issues that, on Mphaphuli's version, arise from the manner in which the arbitrator conducted himself. They H are, therefore, issues which were always there and did not arise subsequent to the decisions of the High Court or of the Supreme Court of Appeal. The question is whether it is in the interests of justice to grant leave to appeal in these circumstances. It is instructive to trace Mphaphuli's cause of action as it developed in a series of affidavits filed by it I in the High Court.

[287] The cause of action relied upon by Mphaphuli in its founding affidavit of 10 December 2004 was based on administrative action. It alleged that the arbitration process constitutes administrative action and should therefore be lawful, reasonable and procedurally fair as required J

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NGCOBO J

A by s 33(1) of the Constitution. In support of this cause of action, Mphaphuli alleged that the arbitrator had awarded Bopanang costs for work that was neither performed nor claimed for by Bopanang. In its opposing affidavit, dated 12 May 2005, Bopanang raised, among others, two points. The first was that the arbitration process does not constitute B administrative action, and that the provisions of s 33(1) of the Constitution do not apply. The other point was that none of the grounds of review set out in the founding affidavit amounts to those envisaged in s 33(1)(a) - (c) of the Arbitration Act. 1

[288] In a supplementary founding affidavit, dated 3 August 2005, filed C ostensibly to deal with matters raised in the record filed by the arbitrator, Mphaphuli conceded that the private arbitration process does not constitute administrative action. It now alleged that the process should be more accurately described 'as a judicial or quasi-judicial process'. In amplification of this, Mphaphuli alleged that the arbitrator failed to perform his mandate, he was biased in favour of Bopanang and there D were manifest errors in the award. In response, Bopanang alleged that the arbitrator followed a transparent process which was fair to both parties and that he had applied his mind consistently with his mandate.

[289] In its four further replying affidavits filed between 3 October and 22 December 2005, Mphaphuli stood by its allegations that the arbitrator E failed to perform his mandate and that there were manifest errors in the award. In particular, in its replying affidavit, dated 22 December 2005, to Bopanang's first answering affidavit, Mphaphuli stated that it had been advised that in the initial application for review, it had erroneously invoked s 33 of the Constitution. Mphaphuli claimed that F this was due to its ignorance of the law and the fact that it relied upon its legal representatives.

[290] Now I have referred to these affidavits filed on behalf of Mphaphuli in order to show that despite modifying its cause of action as the litigation progressed, Mphaphuli did not raise any of the constitutional G issues that it now seeks to raise. Nor did it raise these issues in its 15-page application for leave to appeal to the Supreme Court of Appeal. These issues were not raised in the Supreme Court of Appeal either. Any doubt on this score is immediately removed by an affidavit filed by Mphaphuli's attorney in this court in support of the application for condonation.

H [291] In that affidavit, the attorney tells us that:

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'At the outset I must confess that although I have been a practising A attorney specialising in litigation for nearly 13 years, I have not ever dealt with a constitutional matter before this one. In addition, senior and junior counsel who appeared on behalf of the applicant before the Supreme Court of Appeal are also highly experienced in litigation, but have not previously appeared before the Constitutional Court. Accordingly B I deemed it necessary and received an instruction from the applicant, to brief a new counsel with specialist experience in constitutional matters. Initially the brief to new counsel was to consider whether there were reasonable prospects of success with an appeal to the Constitutional Court. In other words, was there a constitutional issue which was implicated in the matter?' C

[292] Mphaphuli itself confirms that the constitutional issues are being raised for the first time in this court. In dealing with the interests of justice, it acknowledges the reluctance of this court 'to hear matters concerning constitutional issues that have not first been ventilated in other courts'. It goes on to say, however, that '(w)hilst it is true that D the constitutional issue was not couched as crisply as it has been in these papers, the same or similar issues were nevertheless raised (albeit more obliquely) in the Supreme Court of Appeal'. But Mphaphuli goes on to admit that 'the point remains that the constitutional argument was never articulated the way it has been done here and was therefore not adequately ventilated in the judgment of the . . . Supreme Court of E Appeal'.

[293] It is patently clear from these statements that the constitutional issue was raised as an afterthought in order to get the ear of this court. F

[294] The Supreme Court of Appeal and the High Courts have jurisdiction to hear constitutional matters. The Constitution contemplates that this court will ordinarily sit as a final court of appeal on constitutional matters, except in those instances where it has original jurisdiction or where direct access to it is appropriate in the interests of justice. G A litigant who intends to raise a constitutional issue must, therefore, do so in the court of first instance. Parties should not, in an attempt to appeal further from the Supreme Court of Appeal, raise, for the first time in this court, a constitutional issue. This practice deprives both the High Court and the Supreme Court of Appeal of the opportunity to consider constitutional matters. But more importantly, it deprives this court of the H views of both the High Court and the Supreme Court of Appeal on the issue. In Carmichele, 2 we held that:

'There is an obligation on litigants to raise constitutional arguments in litigation at the earliest reasonable opportunity in order to ensure that our jurisprudence under the Constitution develops as reliably and harmoniously as possible. In the result this court has not had the benefit

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A of any assistance from either court on either stage of the inquiry referred to above.' 3

[295] This court has, on many occasions, indicated that it is undesirable to determine constitutional questions as the court of first and last instance. 4 This is even more so in a matter such as this which concerns B the interpretation and the application of a private arbitration agreement. In *S v Bierman* 5 we said the following concerning the failure to raise a constitutional issue in the lower courts:

'The applicant's failure to raise the constitutional issues concerning the admissibility of the Rev Bothma's evidence in her application to the C Supreme Court of Appeal inhibits her ability to raise them now in this Court. As a result of that failure, this Court has not had the benefit of that Court's consideration of these issues which relate directly to established principles of the common-law and to the application of such principles. The applicant's failure to raise the constitutional issues upon which her application to this Court is based in the Supreme Court of D Appeal may well have been sufficient of itself to mean that her application to this Court should have been refused.' 6

[296] It is no answer for Mphaphuli to suggest that this court has the benefit of the judgment of the Supreme Court of Appeal in *Telcordia* 7 on the constitutional issues raised together with the judgment of the E Supreme Court of Appeal in the present matter. In the present matter, the Supreme Court of Appeal did not consider the role of s 34 in private arbitrations nor did it consider any of the questions now raised by Mphaphuli in its application for leave to appeal. That judgment is therefore of no benefit to this court on the issues that Mphaphuli seeks F to raise.

[297] In *Telcordia*, the Supreme Court of Appeal did not consider any of the questions that Mphaphuli is inviting us to consider in its intended appeal. What the Supreme Court of Appeal considered in that case is whether s 34 was applicable to private arbitration and held that it was. 8 G It is true, the court held, that 'there is nothing to prevent parties from defining . . . what is fair for the purposes of their dispute'. 9 It also held, relying on the approach of the European Court of Human Rights, that the rights contained in s 34 may be waived unless the waiver is contrary to some other constitutional principle or is otherwise contra bonos

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mores. 10 But it also held that by agreeing to arbitration, the parties A 'necessarily agree that the fairness of the hearing will be determined by the provisions of the [Arbitration] Act'. 11 This case therefore does not help us to resolve the issues that Mphaphuli seeks to raise in its intended appeal.

[298] What must be stressed here is the role of this court and that of B the Supreme Court of Appeal. This court is not just another court to which an appeal from the Supreme Court of Appeal lies. This court has a special role to play in the context of our judicial system. It is the highest court, not in all matters, but in constitutional matters only. It follows from this that its appellate jurisdiction is limited to appeals against decisions on constitutional matters. This means that the appellate C jurisdiction of this court may be invoked only in respect of a constitutional matter that has been raised and considered by the lower courts. As we have recently held, albeit in a different context, 'the jurisprudence of this court is greatly enriched by being able to draw on considered opinion of other courts'. 12 D

[299] Apart from this, the Constitution carves out our jurisdiction from that of the Supreme Court of Appeal. The Supreme Court of Appeal is 'the highest court of appeal except in constitutional matters'.¹³ By constituting the Supreme Court of Appeal as the final court of appeal in 'non-constitutional' matters, the Constitution seeks to achieve finality in *E* litigation. If parties were to be allowed to raise a constitutional matter for the first time in this court, this would not only undermine the role of the Supreme Court of Appeal, but it would also undermine the principle of finality in litigation.

[300] For these reasons, this court should be very reluctant to entertain *F* a constitutional matter that could have been, but was not, raised in the High Court or the Supreme Court of Appeal. This does not mean that this court would never entertain a constitutional issue that is raised for the first time in the appeal before it. There may be circumstances where the interests of justice may well require this court to entertain a constitutional issue raised for the first time in an appeal before it. *G* However, such circumstances 'would . . . be rare and . . . would have to be exceptional'.¹⁴

[301] The applicant has not demonstrated the existence of exceptional circumstances.

[302] There are two further considerations which militate against granting *H* leave to appeal. The first relates to the prospects of success.

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A [303] As is clear from the arbitration agreement, the parties could not agree on the value of the work performed by Bopanang. To this extent they agreed on arbitration and defined as one of the purposes of the arbitration to 'determine the value of the work that has been done by [Bopanang]' (clause 1 of the arbitration agreement). With this purpose *B* in mind, they looked for an arbitrator with skills in evaluating work done. They agreed on Mr Andrews, a practising quantity surveyor and a project manager from Johannesburg. In order to enable the arbitrator to carry out his mandate effectively, they gave him the power 'to require from any of the parties to make such further documentation available as he may require' (clause 5); they authorised him 'to liaise with *C* ESKOM . . . and to request any documentation' from Eskom (clause 6); and, in turn, they authorised Eskom to make available to him any documentation that he required (clause 6). Perhaps more importantly, they gave the arbitrator the power to inspect and measure work done on the site (clause 7). And, as O'Regan ADCJ finds, neither clause 5 nor *D* 6 expressly stated that the documentation received by the arbitrator would be made available to the parties.

[304] This was an investigative arbitration where the arbitrator had to play an active role in identifying and requesting information that was required for the purposes of carrying out his mandate. I therefore agree *E* with the High Court that Mphaphuli misconceived the nature of the proceedings before the arbitrator. This was not a formal hearing where evidence was to be led and the arbitrator was obliged to receive submissions from the parties. The arbitrator had to inspect and re-measure the work done. The arbitrator's qualification bears this out.

F [305] And for the reasons advanced by O'Regan ADCJ, I agree that the arbitration agreement contemplated that the arbitrator would adopt an informal, investigative method of arbitration as opposed to a formal, adversarial one.

[306] My colleague O'Regan ADCJ has analysed the facts and reached conclusions on the nature of the arbitration process involved here, the *G* 'secret' meetings, the failure to disclose all correspondence and the alleged ignoring of pleadings or arbitral mandate. I find her analysis and conclusions persuasive. However, in the view I take of the matter, it is sufficient for me to say that her analysis and conclusions amply demonstrate that Mphaphuli has no prospects of success in the intended appeal.

H [307] The other consideration relates to the ultimate dispute between the parties. The judgments by my colleagues amply demonstrate that this case is essentially about the proper meaning and application of an arbitration agreement between the parties. Reduced to its essence, this case is therefore about whether or not the arbitrator's award draws its essence from the arbitration agreement. As is apparent from what I have said above, the purpose of raising the constitutional issues was merely to get the opportunity of a further appeal. This, in my view, cannot be countenanced.

[308] For all these reasons, I consider that it is not in the interests of justice to grant leave to appeal. The application therefore falls to be dismissed with costs, including the costs of two counsel.

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NGCOBO J

Applicant's Attorneys: Knowles Hussain Lindsay Inc, Sandton, Johannesburg. A

First Respondent's Attorneys: Barnard's Inc, Rosebank, Johannesburg.

Second Respondent's Attorneys: Schulz Lewis, Pretoria.

1 Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another 2008 (2) SA 448 (SCA) (2008 (7) BCLR 725; [2007] ZASCA 143).

2 Bopanang Construction CC v Lufuno Mphaphuli & Associates (Pty) Ltd; Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another (GNP case Nos 27225/2004 and 33188/2004, 22 February 2006, unreported).

3 Sections 31(1) and (3) provide as follows:

'(1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.

...

(3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect.'

4 Section 32(2) provides as follows:

'The court may, on the application of any party to the reference after due notice to the other party or parties made within six weeks after the publication of the award to the parties, on good cause shown, remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the court may direct.'

5 The rule required the arbitrator to lodge the record, together with such reasons as he may wish to furnish, with the registrar within 15 days after receipt of the notice of motion, and to notify the applicant that he had done so.

6 The rule provides as follows:

'The applicant may within 10 days after the Registrar has made the record available to him, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit.'

7 As recorded in n4 above, an application in terms of s 32(2) for the remittal of a matter to the arbitrator is required to be brought within six weeks of the publication of the award. Similarly, s 33(2) provides that an application for the setting-aside of an award on any of the grounds set out in s 33(1) must be brought within six weeks of the publication of the award. (The full text of s 33(1) is reproduced in n14 below.)

Section 38 of the Arbitration Act provides as follows:

'The court may, on good cause shown, extend any period of time fixed by or under this Act, whether such period has expired or not.'

8 Above n4.

9 Section 167(3)(b) of the Constitution. See *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) (2006 (2) BCLR 274; [2005] ZACC 15) at para 30; *S v Boesak* 2001 (1) SA 912 (CC) (2001 (1) SACR 1; 2001 (1) BCLR 36; [2000] ZACC 25) in para 11.

10 *S v Shaik and Others* 2008 (2) SA 208 (CC) (2008 (1) SACR 1; 2007 (12) BCLR 1360; [2007] ZACC 19) at para 15; *Magajane v Chairperson, North West Gambling Board and Others* 2006 (5) SA 250 (CC) (2006 (10) BCLR 1133; [2006] ZACC 8) at para 29; *National Education Health and Allied Workers Union v University of Cape Town and Others* 2003 (3) SA 1 (CC) (2003 (2) BCLR 154; [2002] ZACC 27) at para 25.

11 See in this regard *Armbruster and Another v Minister of Finance and Others* 2007 (6) SA 550 (CC) (2007 (12) BCLR 1283; [2007] ZACC 17) at para 24; *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another* 2005 (4) SA 319 (CC) (2005 (3) BCLR 231; [2004] ZACC 24) at para 19.

12 See the cases cited above in n9.

13 Section 34 reads as follows:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

14 Section 33(1) provides as follows:

'(1) Where -

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(c) an award has been improperly obtained,

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.'

15 Section 167(7) of the Constitution.

16 Section 167(3)(c) of the Constitution.

17 The provisions of s 39(2) are quoted in full in n31 below.

18 1922 NPJ 461 at 462.

19 *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) (2005 (8) BCLR 786; [2005] ZACC 5) at paras 39 - 43.

20 South African Law Reform Commission Project 94 Domestic Arbitration Report: May 2001 at para 2.16; Redfern & Hunter Law and Practice of International Commercial Arbitration 4 ed (Sweet & Maxwell, London 2004) at 65 - 6; Kerr 'Arbitration and the Courts - The UNCITRAL Model Law' (1984) 50 Arbitration 3 at 4 - 5; London Export Corporation Ltd v Jubilee Coffee Roasting Co. Ltd [1958] 1 WLR 271 at 278.

21 2007 (3) SA 266 (SCA) (2007 (5) BCLR 503; [2007] 2 All SA 243; [2006] ZASCA 112) at para 4.

22 Above n1 at para 14.

23 Above n13. The question of the applicability of s 34 to the present matter is considered below, paras [69] - [78].

24 Above n21.

25 Compare Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC) (2004 (7) BCLR 687; [2004] ZACC 15) at para 27 which dealt pertinently with the provisions of the Promotion of Administrative Justice Act 3 of 2000.

26 Rule 53(3) provides, inter alia, that the registrar shall make available to the applicant the record despatched to him upon such terms as the registrar thinks appropriate to ensure its safety.

27 Below in paras [138] - [142].

28 Section 32(1) makes provision for the parties to remit by written agreement any matter, which was referred to arbitration, to the arbitrator for reconsideration.

29 Above n4.

30 2007 (5) SA 525 (CC) (2007 (2) BCLR 125; [2006] ZACC 13).

31 Section 39(2) of the Constitution provides as follows: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

32 Above n30 at para 16.

33 Id in paras 19 - 23.

34 Id.

35 Reference was made to Telcordia above n21.

36 Lufuno Mphaphuli above n1 at paras 15 - 16.

37 Cf Pieters v Administrateur, Suidwes-Afrika, en 'n Ander 1972 (2) SA 220 (SWA); Muller and Another v The Master and Others 1991 (2) SA 217 (N) at 220D - E. See also Telcordia above n 21 at para 32, which reads as follows:

'The grounds for any review as well as the facts and circumstances upon which the applicant wishes to rely have to be set out in the founding affidavit. These may be amplified in a supplementary founding affidavit after receipt of the record from the presiding officer, obviously based on the new information which has become available.' (Footnote omitted.)

38 Reference was made to Telcordia above n21.

39 Reference was made to Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another 2002 (4) SA 661 (SCA) ([2002] ZASCA 14) at para 25.

- 40 The reference was to Telcordia above n21 at para 50.
- 41 The paragraphs are quoted in para [52] above.
- 42 See paras [53] - [57] above.
- 43 Above n1 at para 14.
- 44 The provisions of s 33(1) are set out in full in n14 above.
- 45 Above n21 at paras 50 - 51.
- 46 Id in para 47. The provisions of s 34 are set out in n13 above.
- 47 Above n21 at para 48.
- 48 Id.
- 49 Id in para 50.
- 50 Id in para 51.
- 51 Lufuno Mphaphuli above n1 at para 16.
- 52 Reference was made to *S v Roberts* 1999 (4) SA 915 (SCA) (1999 (2) SACR 243) at para 23, which reads, in part, as follows:
- 'That justice publicly be seen to be done necessitates, as an elementary requirement to avoid the appearance that justice is being administered in secret, that the presiding judicial officer should have no communication whatever with either party except in the presence of the other: *R v Maharaj* 1960 (4) SA 256 (N) at 258B - C. That is so fundamentally important that the discussion between the magistrate and the prosecutor in the instant case warranted on its own, without anything more, the setting aside of the sentence. Had such a discussion occurred before conviction in this matter there can be no question but that the conviction would have been fatally irregular: *S v Seedat* 1971 (1) SA 789 (N) at 792F.'
- 53 Reference was made to Telcordia above n21 at para 86 which reads as follows:
- 'Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly. Errors of the kind mentioned have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate. To illustrate, an arbitrator in a "normal" local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd.' [Footnote omitted.].
- 54 Reference was made to Total Support above n39 at para 35.
- 55 The quotation is from Total Support above n39 at para 21.
- 56 Reference was made to *S v Basson* 2007 (3) SA 582 (CC) (2005 (12) BCLR 1192; [2004] ZACC 13) at para 30.
- 57 Reference was made to *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) (2000 (8) BCLR 886; [2000] ZACC 10) at para 15.

- 58 Above n1 at paras 18 - 20.
- 59 Above n39 at paras 27 - 28.
- 60 Id in para 27.
- 61 Telcordia above n21 at para 48.
- 62 Above at [65](a).
- 63 ECHR case No 31737/96 (23 February 1999), cited in Telcordia above n21 at para 47.
- 64 Above n39 at para 28.
- 65 Above n21 at para 4.
- 66 Section 39(2) of the Constitution, quoted above at n31.
- 67 See, for example, *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) (2000 (10) BCLR 1079; [2000] ZACC 12) at paras 22 - 26.
- 68 South African Law Reform Commission Project 94 'Domestic Arbitration' Report: May 2001.
- 69 2008 (2) SA 24 (CC) (2008 (2) BCLR 158; [2007] ZACC 22).
- 70 66 of 1995.
- 71 Sidumo above n69 at para 245.
- 72 Id in para 246.
- 73 Id in para 265.
- 74 Suovaniemi above n63. See too the similar comments in *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2002 (1) SA 429 (CC) (2001 (11) BCLR 1109; [2001] ZACC 9) at para 11; and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU)* 1999 (4) SA 147 (CC) (1999 (2) BCLR 175; [1998] ZACC 21) at para 35.
- 75 Sidumo above n69 at para 124.
- 76 Above n63. This case concerned an arbitration and the applicability of art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides: 'In the determination of his civil rights and obligations . . . everyone is entitled to a fair . . . hearing . . . by an independent and impartial tribunal.' At p 5 of the decision the following statement appears:
- 'There is no doubt that a voluntary waiver of court proceedings in favour of arbitration is in principle acceptable from the point of view of Article 6 Even so such a waiver should not necessarily be considered to be a waiver of all rights under Article 6.'
- In the result, it was held, on the facts, that there had been an enforceable waiver of the right to challenge the award on the basis of the alleged lack of impartiality of one of the arbitrators.
- 77 See the discussion on the permissibility of the waiver of certain constitutional rights in *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC) (2001 (7) BCLR 685; [2001] ZACC 18) at paras 61 - 68.

- 78 Road Accident Fund v Mothupi 2000 (4) SA 38 (SCA) ([2000] ZASCA 27) at paras 15 - 17.
- 79 Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another 1993 (2) SA 451 (A) ([1993] ZASCA 3) at 469.
- 80 Pretorius v Greyling 1947 (1) SA 171 (W) at 177; Mothupi above n 78 at para 19.
- 81 Laws v Rutherford 1924 AD 261 at 263. See too Mahomed above n77 at paras 62 and 64; Mothupi above n78 at para 19.
- 82 See Estate Milne v Donohoe Investments (Pty) Ltd and Others 1967 (2) SA 359 (A) at 373H - 374C; and Chelsea West (Pty) Ltd and Another v Roodebloem Investments (Pty) Ltd and Another 1994 (1) SA 837 (C) at 843E.
- 83 Above n1 at para 22.
- 84 See the comprehensive discussion of the different approaches required of arbitrators and valuers in Chelsea West, above n82. I revert later to consider specific aspects arising out of the approach required of an arbitrator.
- 85 1920 CPD 154.
- 86 Id at 157.
- 87 1977 (1) SA 429 (C).
- 88 Above n82.
- 89 Above n87 at 434A - G.
- 90 Above n82 at 845F - G.
- 91 Above n18.
- 92 Id at 462 - 463.
- 93 Id at 464.
- 94 1920 CPD 483.
- 95 Id at 486.
- 96 1951 (1) SA 915 (N).
- 97 Id at 920.
- 98 1972 (1) SA 435 (R).
- 99 The Law of Building and Engineering Contracts and Arbitration 5 ed (Juta, Cape Town 1994).
- 100 Id at 188 - 9.
- 101 Above n52.
- 102 2005 (4) SA 581 (CC) (2005 (1) SACR 215; 2005 (5) BCLR 423; [2005] ZACC 1).
- 103 Id in para 46. See too SARFU above n74 at para 35 which reads as follows:

'A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-

judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes.'

104 Quoted above in para [7], clauses 4, 5 and 6.

105 Above paras [5] - [7].

106 Quoted above in para [7].

107 Above in para [7].

108 Above in para [7], clause 7.

109 Above in para [59].

110 Above in paras [38] - [48].

111 Above at paras [84] - [94].

112 Below in paras [145] - [146].

113 Above n1. See also above in para [66].

114 Above n1 at para 18.

115 Above paras [100] - [101].

116 Above para [103].

117 Above para [104].

118 Above n1 at para 18.

119 Above in paras [84] - [94]. See further the comments in para [153] et seq below.

120 Above n14.

121 Above in paras [84] - [94].

122 1989 (1) SA 397 (W).

123 Id at 403D - E.

124 1991 (1) SA 21 (A).

125 Id at 37C - F. See too the quotation from Roberts, above n52; *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) (2008 (1) BCLR 1; [2007] ZACC 20) at para 204; and *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) (2005 (4) BCLR 347; [2005] ZACC 18) at para 112.

126 Above in paras [55] and [62].

127 Above in paras [84] - [94].

128 Quoted above in para [7].

129 Above paras [84] - [94], specifically, *Landmark Construction*, above n98.

130 1947 (4) SA 272 (W).

- 131 Id at 289.
- 132 Above in para [7].
- 133 [1984] 2 Lloyd's Rep 66.
- 134 Id at 76.
- 135 See above in para [131].
- 136 See above in para [133].
- 137 Above in para [134].
- 138 Above in paras [135] and [136].
- 139 Above in para [137].
- 140 Above n14. See Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others 2008 (2) SA 608 (SCA) ([2007] ZASCA 163) at paras 28 - 30.
- 141 1938 TPD 551. The decision was endorsed by the Supreme Court of Appeal in Telcordia, above n21, in the context of the Arbitration Act.
- 142 Goldfields Investment above n141 at 560 - 561.
- 143 Hos+Med above n140.
- 144 Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening) 2002 (5) SA 246 (CC) (2002 (8) BCLR 810; [2002] ZACC 8).
- 145 Id in paras 32 - 33.
- 146 Above n102 at para 15.
- 147 Above n57.
- 148 Above n74 at para 45. See too Roberts above n52 at para 32.
- 149 Above n57 at para 15.
- 150 Naidoo above n96 and Goldfields Investment above n141. Cf Sidumo above n69 at para 264 where Ngcobo J commented that for a gross irregularity to be found it is not necessary to find 'intentional arbitrariness of conduct or any conscious denial of justice'.
- 151 Above in paras [66], [139] and [156].
- 152 1992 (3) SA 673 (A) ([1992] ZASCA 85). Cf James v Magistrate, Wynberg, and Others 1995 (1) SA 1 (C).
- 153 Id at 694J - 695A.
- 1 Bopanang's application was launched in the High Court in Pretoria under case No 27225/2004. Mphaphuli's separate application was launched in the same court under case No 33188/2004. The applications were consolidated and decided together - Bopanang Construction CC v Lufuno Mphaphuli & Associates (Pty) Ltd; Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another, case Nos 27225/2004 and 33188/2004, North Gauteng High Court, Pretoria, 22 February 2006, unreported.
- 2 Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another 2008 (2) SA 448 (SCA) (2008 (7) BCLR 725; [2007] ZASCA 143).

- 3 2002 (4) SA 661 (SCA) ([2002] ZASCA 14).
- 4 Id in para 25.
- 5 The New York Convention was entered into in June 1958 in New York. It now has 144 signatories see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (accessed on 16 March 2009). South Africa has ratified the Convention and brought it into force by enacting the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 (although the Act has been criticised by the South African Law Reform Commission - see South African Law Reform Commission Project 94 'Arbitration: An International Arbitration Act for South Africa' Report: July 1998 at paras 3.13 - 3.15). The Convention has been described as the 'most effective instance of international legislation in the entire history of commercial law' (Mustill 'Arbitration: History and Background' (1989) 6(2) Journal of International Arbitration 43 at 49 quoted in the South African Law Reform Commission Report: July 1998, op cit, in para 3.3).
- 6 See Sutton, Gill & Gearing Russell on Arbitration 23 ed (Sweet & Maxwell, London, 2007) at 21.
- 7 For a discussion in the South African context see Christie 'Arbitration: Party Autonomy or Curial Intervention II: International Commercial Arbitrations' (1994) 111 South African Law Journal 360; and Turley 'The Proposed Rationalisation of South African Arbitration Law' (1999) 2 Tydskrif vir die Suid-Afrikaanse Reg 235.
- 8 For a fuller discussion, see Redfern & Hunter Law and Practice of International Commercial Arbitration 4 ed (Sweet & Maxwell, London, 2004) at 22 - 35.
- 9 See Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC) (2008 (2) BCLR 158; [2007] ZACC 22) at paras 258 - 260. See also Total Support Management above n3 at para 26, and see further discussion below in paras [211] - [218].
- 10 2000 (1) SA 409 (CC) (1999 (12) BCLR 1420; [1999] ZACC 16).
- 11 Id in para 13.
- 12 President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae) 2005 (5) SA 3 (CC) (2005 (8) BCLR 786; [2005] ZACC 5).
- 13 Id in para 39. See also the remarks of Ngcobo J in Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC) (2005 (4) BCLR 347; [2005] ZACC 18) in paras 60 - 63.
- 14 Established in terms of s 112 of the Labour Relations Act 66 of 1995. See Sidumo above n9 at paras 123 - 124 and 207 - 209 and see the further discussion below in paras [233] - [235].
- 15 Above n3.
- 16 In para 27.
- 17 2007 (3) SA 266 (SCA) (2007 (5) BCLR 503; [2007] 2 All SA 243; [2006] ZASCA 112) at para 47.
- 18 Above in paras [71] and [73] - [74].
- 19 Telcordia above n17 at paras 47 - 48.
- 20 ECHR case No 31737/96 (23 February 1999).
- 21 Id at 5 and relying on Bramelid and Malmström v Sweden ECHR case Nos 8588/79 and 8589/79 (12 December 1982).
- 22 Id at 5 - 6.

23 See, for example, the full discussion of the relationship between art 6 and arbitration in Liebscher *The Healthy Award - Challenge in International Commercial Arbitration* (Kluwer Law International, The Hague, 2003) at 61 - 80 and the authorities cited therein.

24 *Telcordia* above n17 at para 48.

25 *Id* in paras 50 - 51.

26 See Chief Lesapo above n10 at paras 13 and 22; *Modderklip* above n12 at para 39; and *Zondi* above n13 at paras 60 - 63.

27 See also the remarks by Harms JA in *Telcordia* above n 17 quoted above at para [209].

28 No argument was addressed to us on the question of whether an arbitrator appointed by the parties would himself or herself directly bear obligations under s 34 of the Constitution within the contemplation of s 8(2) of the Constitution. It seems to me that for the reasons given in this judgment, the answer to that question is probably 'no'. However, I refrain from firmly deciding the matter given that no argument was addressed to this court in this regard.

29 For a discussion of the difference between waiver and a choice not to exercise a constitutional right, see *Mohamed and Another v President of the Republic of South Africa and Another (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC) (2001 (7) BCLR 685; [2001] ZACC 18) at para 61, n 55. Some constitutional rights inhere in the individual and do not fall to be exercised and may, arguably, therefore never be waived (see the authorities in *Mohamed*, *op cit*). The question is a difficult one and need not be further elaborated here.

30 See the interesting discussion by Woolman 'Category Mistakes and the Waiver of Constitutional Rights: A Response to Deeksha Bhana on *Barkhuizen*' (2008) 125 South African Law Journal 10.

31 See the reasoning of Cameron JA in *Brisley v Drotzky* 2002 (4) SA 1 (SCA) (2002 (12) BCLR 1229; [2002] ZASCA 35) at para 91, cited with approval in *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) ([2002] ZASCA 73) at para 18; and also *Barkhuizen v Napier* 2007 (5) SA 323 (CC) (2007 (7) BCLR 691; [2007] ZACC 5) in para 59 (per Ngcobo J).

32 See the similar but not identical reasoning in *Telcordia* above n17 at para 48.

33 See s 39(2) of the Constitution and the authorities cited above at n31.

34 Voet Commentary on the Pandects 4.8.26: 'since every approval of an award still to be made by an arbitrator rests on this implied condition that the arbitrator shall have given a fair decision'. See Gane (tr) *The Selective Voet, Being the Commentary on the Pandects vol 1* (Butterworth and Co (Africa) Ltd, Durban, 1955) 760. Although the Latin word used in Voet is 'tacita', I think this is, in modern usage, best translated as 'implied' rather than 'tacit'. The distinction in our modern law was nicely explained by Corbett AJA in *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532G - H as follows:

'The implied term . . . is essentially a standardised one, amounting to a rule of law which the Court will apply unless validly excluded by the contract itself. While it may have originated partly in the contractual intention, often other factors, such as legal policy, will have contributed to its creation. The tacit term, on the other hand, is a provision which must be found, if it is to be found at all, in the unexpressed intention of the parties. Factors which might fail to exclude an implied term might nevertheless negative the inference of a tacit term.'

35 See *Lazarus v Goldberg and Another* 1920 CPD 154 at 157.

36 See in this regard s 1 of the United Kingdom Arbitration Act, 1996, which provides as follows:

'The provisions of this Part are founded on the following principles, and shall be construed accordingly

(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.'

37 In this regard see also the Report of the South African Law Reform Commission Project 94 'Domestic Arbitration' Report: May 2001, which, in its draft Bill, proposes a similar provision to the provision in the United Kingdom Arbitration Act. They propose a general principles clause in s 2 of the Bill which would provide that 'the object of arbitration is to obtain the fair resolution of disputes'. See also the proposed s 28(1) which establishes a general duty of fairness similar to that contained in s 33 of the United Kingdom Arbitration Act.

38 Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal 1999 (2) SA 91 (CC) (1999 (2) BCLR 151; [1998] ZACC 20) at para 39.

39 So, for example, s 34(1) of the United Kingdom Arbitration Act, 1996, provides that the tribunal may decide all procedural and evidential matters, subject to the agreement between the parties. Procedural and evidential matters are defined in s 34(2)(g) to include 'whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law'. I have opted to use the term 'investigative' to describe a manner of proceeding in which the arbitrator, rather than the parties, takes the initiative in ascertaining the relevant facts and law. I could perhaps have used the term 'inquisitorial', but have avoided it, preferring 'investigative' which suggests immediately that what the arbitrator must do is investigate, in contrast to adversarial proceedings in which the contending parties lead evidence and proffer argument before the arbitrator.

40 See Christie 'Arbitration: Party Autonomy or Curial Intervention III: Domestic Arbitrations' (1994) 111 South African Law Journal 552.

41 Redfern & Hunter above n8 at 412.

42 See Sutton, Gill & Gearing above n6 Appendix 2 at 693.

43 South African Law Reform Commission Report: May 2001 above n37 at para 2.16.

44 Id in para 2.20.

45 Id in para 2.21.

46 Id in para 2.22.

47 Id at 157.

48 See para [222] above.

49 Above n9.

50 Id in para 260.

51 Section 23(1) of the Constitution.

52 In this regard, see s 34(2)(g) of the United Kingdom Arbitration Act, 1996, and art 19(2) of the UNCITRAL Model Law which provides that in the absence of agreement between the parties, 'the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate'. This right is subject, of course, to the parties being treated equally in terms of art 18 of the UNCITRAL Model Law.

53 1920 CPD 154, cited above in para [85] of Kroon AJ's judgment.

54 1977 (1) SA 429 (C).

55 Id at 434.

56 So, for example, on 16 October 2003, Mphaphuli's representative contacted the arbitrator to inform him that the revised arbitration agreement had been signed and to suggest a site meeting with representatives on 27 October 2003. Again at the site meeting of 24 March 2004, Mr Mphaphuli declined to accompany the arbitrator on a site inspection saying he had to attend another meeting.

57 It is discussed above in para [251].

58 See para [249] above.

59 Although Madala J sat in the case, ill-health prevented him from participating in the judgment.

1 Section 33(1) of the Arbitration Act provides:

'(1) Where -

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(c) an award has been improperly obtained,

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.'

2 Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC) (2001 (10) BCLR 995; [2001] ZACC 22).

3 Id in para 41.

4 Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another 2006 (6) SA 103 (CC) (2006 (6) BCLR 669; [2006] ZACC 5) at para 26 and the cases cited therein.

5 2002 (5) SA 243 (CC) (2002 (1) SACR 219; 2002 (10) BCLR 1078; [2002] ZACC 7).

6 Id in para 8.

7 Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA) (2007 (5) BCLR 503; [2007] 2 All SA 243; [2006] ZASCA 112).

8 Id in para 47.

9 Id.

10 Id in para 48.

11 Id in para 50.

12 AParty and Another v Minister for Home Affairs and Others; Moloko v Minister of Home Affairs and Others 2009 (3) SA 649 (CC) ([2009] ZACC 4) at para 56.

13 Section 168(3) of the Constitution.

14 Phillips and Others v National Director of Public Prosecutions 2006 (1) SA 505 (CC) (2006 (2) BCLR 274; [2005] ZACC 15) at para 44.

PATCOR QUARRIES CC v ISSROFF AND OTHERS

1998 (4) SA 1069 (SE)

Citation	1998 (4) SA 1069 (SE)
Case No	2340/96
Court	South Eastern Cape Local Division
Judge	Mpati J
Heard	June 25, 1997
Judgment	February 11, 1998
Counsel	LA Schubart for the applicant. RP Van Rooyen for the first and second respondent. No appearance for the third respondent.
Annotations	Link to Case Annotations

G

Flynote : Sleutelwoorde

Arbitration - The award - Remittal of under s 32(2) of Arbitration Act 42 of 1965 - Court having discretion to order remittal where further evidence discovered after award published - Such evidence to be so weighty and material as to be 'practically conclusive' - Parties not entitled to go on fishing expedition. H

Arbitration - Arbitration proceedings - Nature of - Adjudication of dispute in terms of Arbitration Act 42 of 1965 not constituting 'administrative action' for purposes of s 24 of Constitution of the Republic of South Africa Act 200 of 1993 - Accordingly s 24 cannot be invoked to challenge award. I

Arbitration - The award - Finality of - Prohibition against appeal in s 28 of Arbitration Act 42 of 1965 - Whether encroaching on right of access to court of law enshrined in s 22 of Constitution of the Republic of South Africa Act 200 of 1993 - Prohibition against appeal in s 28 of Arbitration Act not absolute in that arbitration agreement itself may provide for right of appeal - No reasonable prospects that Constitutional Court will J

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declare s 28 to be unconstitutional - Court in terms of s 103(4) of Constitution refusing to refer s 28 to Constitutional Court. A

Practice - Applications and motions - Rule 6(5)(a) of Uniform Rules - Rule peremptory but use of Form 2 of the First Schedule in circumstances where Form 2(a) appropriate not necessarily resulting in unpardonable nullity of notice of motion. B

[zHNz]Headnote : Kopnota

The applicant had in November 1994 concluded a mineral lease with the first and second respondents ('the respondents') in terms of which the applicant was granted the right to conduct mining operations on the respondents' immovable C property for a period of three years. It was common cause that the applicant had in contravention of clause 10 of the agreement commenced mining operations without obtaining the required

permit. When disputes arose between the parties regarding the interpretation of certain material terms of the agreement, they submitted to arbitration in terms of the Arbitration Act 42 of 1965 ('the Act') as provided for in clause 29 of the agreement. The arbitrator, the third respondent, D found in favour of the respondents. On respondents' application the award was made an order of the Court. The applicant then sought an order under s 33(1)(a) (misconduct of the arbitrator) and s 33(1)(c) (improper obtainment of the award) for the setting aside of the award and the rescission of the order of Court. Essentially the applicant's attack on the award was based on the allegation that it had not been obliged to comply with clause 10 of the agreement because even if E it had applied for the permit in question the application would have been turned down. The applicant alleged that the arbitrator had ignored evidence in this regard and that the award was accordingly 'entirely iniquitous', 'grossly unreasonable' and 'so obviously wrong that the only (possible) inference . . . was that the (arbitrator) misdirected himself' with the result that the decisions arrived at were null and void. The applicant in addition sought an order in terms of s F 103(4) of the Constitution of the Republic of South Africa Act 200 of 1993 referring ss 28 and 33 of the Act to the Constitutional Court for a decision on their constitutionality. The applicant subsequently also applied for an order in terms of s 32 of the Act referring the matter back to the arbitrator for the hearing of further evidence and moved for an amendment to the notice of motion so as to include an alternative prayer in this regard. G

Held, as to the applicant's preliminary contention, that the respondents had contravened Rule 6(5)(a) of the Rules of Court in their application to have the award made an order of the Court by using Form 2 instead of Form 2(a), that, although the provisions of Rule 6(5)(a) were peremptory, the use of Form 2 in circumstances where Form 2(a) was H appropriate did not necessarily result in the notice of motion being a nullity that could not be condoned. In any event, the issue of the rescission of the order depended upon the outcome of the enquiry as to whether the award itself had to be set aside on one or more of the grounds raised by the applicant. (At 1075A/B--D.)

Held, further, that the arbitrator had not ignored evidence on which he had been obliged to reflect. He gave fair I consideration to the matter and his award accordingly could not be set aside under s 33(1)(a) of the Act. (At 1078C--F and I, paraphrased.)

Held, further, that, even if the probabilities were that a permit would not have been granted had it been applied for, the arbitrator's mistake in holding otherwise had not been so gross as to constitute evidence of misconduct or partiality on his part warranting an interference with his award. The award J

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could therefore not be set aside under s 33(1)(b) (gross irregularity in the conduct of the proceedings). (At A 1079D/E--E/F.)

Held, further, as to the argument that the respondents might have lacked locus standi and that for this reason the award had to be either referred back to the arbitrator under s 32(2) or set aside under s 33(1)(c), that the relief sought in terms of s 32(2) was out of time: notice had not been given to the respondents within six weeks of the award and, although a formal application was not required, there had been no application for the extension of this period as contemplated by s B 38 even in the applicant's affidavits. (At 1080F--H/I.)

Held, further, that the new evidence relied on was in any event far from being 'practically conclusive' as required for the introduction of fresh evidence. The applicant was out on a fishing expedition on this issue, and this could not be permitted. (At 1080H/I--1081C/D.) C

Held, further, as to the contention that the award was unconstitutional because it infringed s 24(d) of the Constitution (which entrenched the right to administrative justice), that an arbitrator performed a judicial rather than an administrative function when adjudicating in arbitration proceedings and that s 24 of the Constitution could accordingly not be invoked to challenge the award. (At 1082D--G.) D

Held, as to the contention that s 28 of the Act (which prohibited appeals against arbitration awards 'unless the arbitration agreement provides otherwise') encroached on an individual's right of access to the courts and thereby infringed s 22 of the Constitution (which entrenched the right to have justiciable disputes settled by a court of law), that the prohibition of an appeal was clearly not absolute: the agreement itself could provide for a right of appeal. There were accordingly no reasonable prospects that the Constitutional Court would declare s 28 to be unconstitutional. (At 1084G--H/I and 1085H/I--I/J.)

Held, further, as to the prayer for the setting aside of the order which made the award an order of the Court, that such an order would only cause further complications and serve to delay the inevitable. (At 1085I/J--1086B.)
F

Held, accordingly, that the application had to be dismissed with costs. (At 1087B/C.)

Annotations

Reported cases

Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd 1994 (1) SA 162 (A): G dicta at 169D and 169F--H applied

Benjamin v Sobac South African Building and Construction (Pty) Ltd 1989 (4) SA 940 (C): dictum at 964B--D applied

Blaas v Athanassiou 1991 (1) SA 723 (W): dictum at 725B--D applied

Colman v Dunbar 1933 AD 141: dictum at 161--2 applied

Dickenson & Brown v Fisher's Executors 1915 AD 166: dictum at 176 applied H

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) (1996 (1) BCLR 1): dictum in para [6] applied

Gallagher v Norman's Transport Lines (Pty) Ltd 1992 (3) SA 500 (W): dictum at 502E applied

Hyperchemicals International (Pty) Ltd and Another v Maybaker Agrichem (Pty) Ltd and Another 1992 (1) SA 89 I (W): dictum at 100C applied

Interciti Property Referrals CC v Sage Computing (Pty) Ltd and Another 1995 (3) SA 723 (W): dictum at 727I--728D applied

Kollberg v Cape Town Municipality 1967 (3) SA 472 (A): dictum at 481F applied

Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd 1971 (2) SA 388 (W): dictum at 391D applied J

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M M Fernandes (Pty) Ltd v Mahomed 1986 (4) SA 383 (W): dictum at 389C--E applied A

S v Mhlungu and Others 1995 (3) SA 867 (CC) (1995 (2) SACR 277; 1995 (7) BCLR 793): dictum in para [59] applied

SA Freight Consolidators (Pty) Ltd v Chairman, National Transport Commission, and Another 1988 (3) SA 485 (W): distinguished B

Standard Bank of Bophuthatswana Ltd v Reynolds NO and Others 1995 (3) SA 74 (B): distinguished

Stuart Nixon Estate Agency (Pty) Ltd v Brigadoon (Pty) Ltd and Another 1970 (1) SA 97 (N): compared

W C Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board and Others 1982 (4) SA 427 (A): distinguished.

[zRLz]Rules Considered

Rules of Court

The Uniform Rules of Court, Rule 6(5)(a): see Erasmus and Barrow The Supreme Court Act 59 of 1959 and the Magistrates' Courts Act 32 of 1944 11th ed (1997) Part A at 38.

[zSTz]Statutes Considered

Statutes

The Arbitration Act 42 of 1965, ss 28, 32(2), 33(1), 38: see Juta's Statutes of South Africa 1997 vol 1 at 2-9, 2-10, D 2-11

The Constitution of the Republic of South Africa Act 200 of 1993, ss 22, 24(d), 103(4) see Juta's Statutes of South Africa 1996 vol 5 at 1-135, 1-150--1-151.

[zClz]Case Information

Application for the review and setting aside, alternatively for the remittal, of an arbitration award, as well as for ancillary relief. The facts appear from the reasons for judgment.

L A Schubart for the applicant.

R P van Rooyen SC for the first and second respondents.

No appearance for the third respondent. F

Cur adv vult.

Postea (February 11).

Judgment

Mpati J: On 23 November 1994 the applicant, as lessee and the respondents, as lessors, concluded a notarial mineral lease, in terms of which the applicant was granted the sole right to conduct mining operations on the respondents' immovable property, being portion 52 of the farm 'Kuyga' No 8, division of Port Elizabeth (the property) for a period of three years. According to the lease agreement (the agreement), which was signed by or on behalf of the parties, the lease was to commence on 1 December 1994. In terms of clause 10.1 of the agreement the applicant, as lessee, was obliged, at its own cost, to obtain the necessary permit or licence to conduct the mining operations aforementioned. Clause 10.2 of the agreement prohibits the applicant from commencing with mining operations on the leased premises until such time as the necessary licence or permit has been obtained. It is common cause, however, that the applicant commenced with mining operations without having obtained the required licence or permit and that it made certain payments to the respondents in consideration of its activities. In due course certain disputes arose between the parties relating to the interpretation of certain material terms in the agreement J

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and to the parties' obligations thereunder. As provided for in clause 29 of the agreement, the parties submitted to an arbitration in terms of the Arbitration Act 42 of 1965 (the Arbitration Act). The third respondent, Advocate

John T Whitehead SC, was agreed upon as arbitrator. The hearing of oral evidence was concluded before him on 14 March 1996, whereafter the parties' legal representatives were permitted to submit heads of argument. The last set of heads (the B applicant's) was received by the third respondent on 13 June 1996. The third respondent then furnished his award on 29 August 1996.

It is common cause that on 4 September 1996 the respondents caused the award to be made an order of Court, having given notice of their intention to do so to the applicant's attorneys of record at the time, Loon and Connellan Inc. The C applicant now seeks an order, in terms of s 33(1) of the Act, setting aside the award, together with other ancillary relief. The order sought is in the following terms:

'1.1 Rescinding the order of Court obtained on 4 September 1996.

1.2 Reviewing the award made by the third respondent, and setting aside such award. D

1.3 Ordering the first and second respondents to pay the costs of this application, and in the event of the third respondent opposing this application, ordering the respondents to pay the costs of the application jointly and severally, the one paying the other to be absolved.' E

As an alternative to prayer 1.2 above, the applicant seeks an order:

'2.1 Setting aside the third respondent's award and declaring same to be of no force and effect.'

As a further alternative to prayers 1.2 and 1.3 the following order is sought: F

'3.1 Referring (to) the Constitutional Court for its decision the constitutionality of the provisions of ss 28 and 33 of the Arbitration Act 42 of 1965, as amended and suspending these proceedings pending the decision of the Constitutional Court.'

Although he has filed an answering affidavit in which he refutes certain allegations made against him, the third respondent G does not oppose this application and abides the decision of this Court. Accordingly, I shall, for purposes of convenience, refer to the first and second respondents collectively as 'the respondents' and to the third respondent as 'the arbitrator'.

The respondents' answering affidavits were filed and delivered on 14 November 1996 and the applicant filed a replying H affidavit only on 27 May 1997, more than six months after the answering affidavits were filed of record. In the replying affidavit the applicant states that it appointed its present attorneys of record, Van der Merwe & Bester, on 16 May 1997. They advised the applicant that it should have replied to the respondents' answering affidavits and that it should in fact do I so. Such advice, the applicant avers, was not given to it by its erstwhile attorneys of record. On this ground the applicant sought an order condoning the late filing of the replying affidavit. However, in addition to replying to the respondents' allegations in the answering affidavits the applicant also sought to introduce before this Court what it considers to J

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be new evidence, which it wishes to place before the arbitrator. Accordingly, and in the alternative to the order sought in A the notice of motion, the applicant seeks an order that the matter be referred back to the arbitrator for the hearing of further evidence and in order to enable him (the arbitrator) to reconsider his award in the light thereof. Mr Schubart, for the applicant, therefore moved, at the commencement of the hearing of this matter, for an amendment to the notice of B motion so as to include the alternative prayer just mentioned. The applications for condonation and for the amendment were not opposed and were accordingly granted.

With regard to the issue of rescission of the order of Court obtained on 4 September 1996, the applicant relies on the C provisions of Rule 42(1)(a) of the Uniform Rules of Court as well as the common law. Rule 42(1)(a) provides that:

'The Court may, in addition to any other powers it may have, mero motu or upon application of any party affected, rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.' D

Mr Schubart submitted that the order sought to be rescinded was improperly sought in that an incorrect procedure was followed. He submitted that the application to have the award made an order of Court was brought on the short form and E not in accordance with Form 2(a) of the First Schedule to the Rules and that in any event the said order was sought and granted within a period of less than a week. Mr Schubart referred me to Rule 6(5)(a), which specifies the form to be used in application proceedings. The argument was that the applicant was not advised of the application and ought to have been given adequate notice thereof. Cornelis van der Touw, who is the managing member of the applicant and who F deposed to the founding affidavit on behalf of the applicant, states in the founding papers that when the award was furnished he was involved in preparations for his daughter's wedding at Fish River. His attorneys could not contact him. He returned to Port Elizabeth on 3 September 1996, on which day he was advised by one Craig Swart, a candidate G attorney at his attorney's offices, that the award had gone against the applicant. He was distressed by the outcome of the arbitration and made arrangements to consult with the applicant's attorney, Dr Beyleveld, who acted on the applicant's behalf in the arbitration proceedings. Due to circumstances beyond his control he could only consult with Dr Beyleveld on H 11 September 1996, after which he decided to take the arbitrator's award on review. In a supporting affidavit Craig Jonathan Swart confirms that he informed the applicant on 3 September 1996 of the outcome of the arbitration. Although he was shown the notice of motion in terms of which the award was sought to be made an order of Court by Dr I Beyleveld's secretary on 2 September 1996, he only made mention of the fact that the award had been made an order of court after Van der Touw had consulted with the applicant's said attorney. He (Swart) did not appreciate the implications of the award being made an order of Court at that stage and thought that the application (to have the award made an order of Court) was a mere J

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formality. The applicant avers that had it been informed of the respondent's intentions, the application to make the award A an order of Court would have been opposed.

The provisions of subrule 6(5)(a) of the Uniform Rules of Court are peremptory (Gallagher v Norman's Transport Lines (Pty) Ltd 1992 (3) SA 500 (W) at 502E). However, where Form 2 is used in circumstances where Form 2(a) is B appropriate, this does not necessarily result in the notice of motion being a nullity which cannot be condoned. (See Erasmus Superior Court Practice at B1--43 and the cases there cited.) Mr Van Rooyen SC, for the respondents, submitted that an application to have an arbitrator's award made an order of Court is in the nature of an interlocutory C application and that the use of the short form is, therefore, appropriate. The way I see the position, the issue of rescission of the order of Court in this matter will depend upon the outcome of the enquiry as to whether the award itself should be set aside on one or more of the grounds raised by the applicant. It seems to me, therefore, that it would be convenient to D first embark upon that enquiry, whereafter I shall return to the issue of the rescission.

The applicant summarises its attack against the arbitrator and his award as follows:

'... (I)t is clear that the third respondent's award was entirely iniquitous, and so patently wrong that it could only have been E formulated with absolute partiality in favour of the first and second respondents.'

The applicant alleges further that:

'... (I)t is patently clear ... the third respondent motivated his award with complete indifference to applicant's defence. The award is so obviously wrong that the only inference that can be drawn is that the third respondent misdirected himself in coming to a decision. He failed to apply his mind properly to the matter at hand.' F

It appears to be common cause that prior to the agreement concluded between the applicant and the respondents, other parties had been conducting mining operations on the property. At the time that the agreement was concluded, the areas mined by these other parties had not been rehabilitated. As has been mentioned above, the applicant was obliged, in G terms of clause 10.1 of the agreement, to apply for the necessary licence or permit to conduct its mining operations. It is common cause that the applicant failed to apply for such licence or permit for the mining operations and had not done so by the time the parties submitted to arbitration. The applicant states in its founding affidavit that it did not 'make proper H application' for the mining permit or licence, because it had been informed (through Van der Touw) by one Carr, who testified in the arbitration on behalf of the respondents, that 'in order to obtain the necessary mining authority, applicant would be required to rehabilitate the whole area at a substantial cost'. This was confirmed by Carr when he testified I before the third respondent, so the applicant alleges. The applicant avers further that Carr also confirmed, in his evidence, that the applicant would only be responsible for those areas which it had previously mined and that the mining authority would only be successfully processed once all other areas had been rehabilitated by 'every other party' other than the applicant, who previously conducted J

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mining operations on the property. He (Carr) conceded that the rehabilitation of the other areas may be impossible as A certain of the parties responsible therefor could not readily be identified. In essence, therefore, the applicant's case is that even if it had applied for the necessary licence or permit it would not have been successful and it was therefore not B obliged to perform in terms of the agreement. It alleges that in formulating his award the arbitrator ignored Carr's evidence that the mining authority would not have been granted.

The applicant also avers that in interpreting clause 10.3 of the agreement the arbitrator failed to read the contract in its entirety and ignored the provisions of clauses 10.1 and 10.2. The arbitrator accordingly 'failed to grasp that the agreement C had suspensive as well as resolute conditions'. The applicant concludes that the arbitrator 'failed to take cognisance of relevant considerations and his award under the circumstances was so grossly unreasonable that it cannot be said that he applied his mind to the matter at hand' and that the arbitrator's 'failure to take into account all these relevant considerations D leads to only one conclusion ... namely that he was partial towards the first and second respondents in deciding the matter'.

In his award the arbitrator says the following:

'At a pre-arbitration meeting between the parties the main issue between them was formulated in the following terms: E

"The parties agree that the main issue is whether the permit would have been granted to the defendant on the basis that it would only be required to rehabilitate areas that it mined. Claimants contended that defendant would have been granted the permit. Defendant denied this." F

That this was the main issue between the parties to the arbitration is not disputed. After quoting what he considers to be G the terms of the agreement which are material to the arbitration the arbitrator says in his award:

'The first question which must be resolved is whether the agreement was enforceable from the beginning of the lease period, or whether it will only become enforceable from the date upon which the

condition relating to the granting of the requisite licence has G been fulfilled. The answer to this question is dependent upon whether the condition is resolute or whether it is to be interpreted as being suspensive.'

He concluded that the condition was resolute and that the agreement was enforceable from the beginning and ordered the applicant to pay to the respondents arrear rental and further rental as may have accrued and the other relief sought as H per the respondents' 'statement of claim'. The applicant had, on the other hand, demanded repayment of moneys paid by it to the respondent 'in anticipation of the fulfilment of the condition relating to the obtaining of the necessary mining authority'.

Section 28 of the Arbitration Act provides that: I

'Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms.'

The circumstances under which an arbitrator's award may be set aside are set out in s 33(1) of the Arbitration Act, which reads: J

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'Where - A

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(c) an award has been improperly obtained,

the Court may, on the application of any party to the reference after due notice to the other party or parties, make an B order setting the award aside.'

The applicant does not rely on s 33(1)(b) of the Arbitration Act for the setting aside of the third respondent's award, but indeed on s 33(1)(a) and (c). There is no suggestion in the papers that the arbitrator has committed a gross irregularity in the conduct of the arbitration proceedings or that he has exceeded his powers. C

As to what constitutes misconduct (s 33(1)(a)), the following was said in *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A) at 169D:

'As to misconduct, it is clear that the word does not extend to bona fide mistakes the arbitrator may make whether as to fact or law. D It is only where a mistake is so gross or manifest that it would be evidence of misconduct or partiality that a Court might be moved to vacate an award: *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 174--81. It was held in *Donner v Ehrlich* 1928 WLD 159 at 161 that even a gross mistake, unless it establishes mala fides or partiality would be insufficient to warrant interference.' E

See also *Hyperchemicals International (Pty) Ltd and Another v Maybaker Agrichem (Pty) Ltd and Another* 1992 (1) SA 89 (W) at 100C; *MM Fernandes (Pty) Ltd v Mahomed* 1986 (4) SA 383 (W) at 389C--E.

In *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 176, Solomon JA is reported as having said: F

'Now if the word misconduct is to be construed in its ordinary sense it seems to me impossible to hold that a bona fide mistake either of law or of fact made by an arbitrator can be characterised as misconduct, any

more than that a Judge can be said to have misconducted himself if he has given an erroneous decision on a point of law.

. . . Cases may no doubt arise where, as was said by the late Chief Justice in the case of *Landeshut v Koenig* (20 SCR at 34), "the G mistake is so gross or manifest that it could not have been made without some degree of misconduct or partiality on the part of the arbitrator". . . . It may be also that an arbitrator has been guilty of the grossest carelessness and that in consequence he had come to a wrong conclusion on a question of fact or of law; and in such a case I am not prepared to say that a court might not properly find that there had been misconduct on his part. But in ordinary circumstances where an arbitrator has given fair H consideration to the matter which has been submitted to him for decision, I think it would be impossible to hold that he had been guilty of misconduct merely because he had made a bona fide mistake either of law or of fact.'

In his heads of argument Mr Schubart submitted that the arbitrator ignored uncontroverted evidence which he was obliged to reflect on and that in the circumstances the decisions arrived at by the arbitrator are null and void. The evidence I referred to is to the effect that a certain Leipolt of the Department of Mineral and Energy Affairs had informed Van der Touw that a permit would not be granted unless the applicant rehabilitated all previously mined areas on the property. This evidence, so it was argued, was not refuted by Carr. Mr Schubart relies for his J

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submissions in this regard on the judgments in *W C Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road A Transportation Board and Others* 1982 (4) SA 427 (A), especially at 448H--449A; *SA Freight Consolidators (Pty) Ltd v Chairman, National Transport Commission, and Another* 1988 (3) SA 485 (W) and *Standard Bank of Bophuthatswana Ltd v Reynolds NO and Others* 1995 (3) SA 74 (B) at 89F et seq. I do not consider it necessary to B embark upon a discussion of these authorities referred to by Mr Schubart. Suffice it to say that all three judgments did not deal with the review of an arbitration award, the setting aside of which may only be obtained on the grounds set out in s 33(1) of the Arbitration Act. Those cases dealt with situations where the Court is approached for relief by way of C common-law review. In my view, therefore, these authorities referred to by Mr Schubart are of no assistance to him. In any event, I am not persuaded that the arbitrator ignored uncontroverted evidence on which he was obliged to reflect. He clearly held that whatever was said to Van der Touw, as to whether the necessary permit would be granted or not, was D merely a statement of opinion on which the applicant could not rely without in fact having applied for the permit as it was obliged to do in terms of clause 10.1 of the agreement. In my view, the arbitrator in essence held that the authority which is responsible for the issuing of the necessary permit could not, in the face of s 9 of the Minerals Act 50 of 1991, impose a E condition on the applicant that the applicant should rehabilitate areas on the property which were previously mined by other parties before a permit is issued to it and that the applicant could not, therefore, contend that a permit would in any event not have been granted had it submitted an application therefor. In my view, it cannot be said that the arbitrator ignored uncontroverted evidence as was submitted by Mr Schubart. F

With regard to the allegation that the arbitrator did not apply his mind to the relevant clauses of the agreement in interpreting clause 10.3 thereof, I am also not persuaded that that is the case. The arbitrator says the following in his award: G

'I do not consider that clause 10.2 of the agreement imposes a suspensive condition. It is merely a prohibition upon the commencement of mining operations until the permission referred to in clause 10.1 has been obtained. The continuation of the agreement itself is dealt with in clauses 10.3 and 10.4.'

I fail to appreciate how it can ever be contended that the arbitrator ignored the provisions of clause 10.1 and 10.2 in interpreting clause 10.3. At best for the applicant the clauses referred to may have been wrongly

interpreted, which I do not hold to be the case. But even if the said clauses were wrongly interpreted, that would be a mistake of law, which cannot lead me to conclude that the arbitrator has been guilty of gross carelessness and that therefore he has been guilty of misconduct on his part. I

I am accordingly of the view that the arbitrator has given fair consideration to the matter which was submitted to him for decision.

Although s 33(1)(b) of the Arbitration Act is not relied upon by the applicant in the papers, Mr Schubart submitted that the arbitrator could not find that a permit would have been granted to the applicant and that the arbitrator therefore overstepped his powers or mandate in finding in J

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favour of the respondents. Mr Schubart argued further that the probabilities are such that a permit would not have been A granted had the applicant made a 'proper' application at the time. It is so that the arbitrator does not make a specific or clear finding that the mining permit would have been granted. In my view, however, the finding that a permit would have been granted can clearly be read into or inferred from the award. The arbitrator found that the authority which would have B considered the application would not have imposed a condition that the applicant should rehabilitate those areas of the property previously mined by other parties, but could only impose a condition that the applicant should rehabilitate those areas which it (the applicant) had itself mined. On that basis, therefore, ie the requirement that the applicant would only be C required to rehabilitate areas that it mined, a permit would have been granted. That, to my mind, is the arbitrator's finding, although not expressed in the clearest possible terms. The position is that in interpreting an arbitration award a meaning must be given such as shall render the award conclusive, so far as the terms will admit (Interciti Property D Referrals CC v Sage Computing (Pty) Ltd and Another 1995 (3) SA 723 (W) at 727I--728D). Even if Mr Schubart's argument that the probabilities are such that a permit would not have been granted is correct, I am unable to find that the arbitrator's mistake in holding otherwise is so gross or manifest that it is evidence of misconduct or partiality E on his part, so as to warrant interference with his award.

The applicant also relies on s 33(1)(c) of the Arbitration Act, which makes provision for the setting aside of an arbitration award where it has been improperly obtained. In this regard it was argued on behalf of the applicant that the award ought F to be set aside, alternatively it ought to be referred back to the arbitrator for his further consideration and decision. In support of this contention the applicant avers, in the replying affidavit, that the respondents might not have had locus standi with regard to the property at the time of the arbitration; that the award might accordingly have been improperly G sought and obtained and that the applicant would not be liable for the payment of rental after date of the sale of the property. The background facts are stated in the applicant's replying affidavit and a brief summary follows. On 20 May 1997 the applicant's attorneys conducted a Deeds Office enquiry pertaining to the property. It was then established that on 13 March 1996 and prior to the arbitration proceedings, which commenced on 14 March 1996, the first respondent H sold his two-thirds interest in the property to a trust. On 20 March 1996 the second respondent sold her one-third interest in the property to another trust. The whole property was transferred into the names of the purchasers on 4 October 1996. Armed with this information the applicant requested a copy of the relevant deed of sale from the I respondents, so as to ascertain what the effective date of sale was, as well as other information. In response the respondents said that the information required was irrelevant and that they were at all material times the registered owners of the property. The applicant accordingly asks that these review proceedings be stayed and the whole matter referred back to J

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the arbitrator for the hearing of further evidence pertaining to the sale of the property, which might move the arbitrator to A reconsider his award in the light thereof.

Section 28 of the Arbitration Act provides that an arbitration award shall be final and binding unless the arbitration agreement provides otherwise. Section 33 stipulates the circumstances under which an award may be set aside and s 32 B the circumstances under which an award may be remitted back to the arbitrator. The subsection applicable to the instant case is ss (2) of s 32, which is in the following terms:

'The Court may, on the application of any party to the reference after due notice to the other party or parties made within six weeks C after the publication of the award to the parties, on good cause shown, remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the Court may direct.'

(My emphasis.)

Mr Van Rooyen argued that the relief sought by the applicant in terms of this section is out of time. Notice was not given D to the respondents within six weeks after the publication of the award. Mr Schubart, in reply, argued that where a new fact has come to a party's knowledge after six weeks had expired since the publication of the award, the period of six weeks provided for in s 32(2) should commence from the date on which such new fact came to the knowledge of such E party. I do not agree. Section 38 of the Arbitration Act provides for the extension of periods fixed by or under the Act. The section reads:

'The Court may, on good cause shown, extend any period of time fixed by or under this Act, whether such period has expired or not.'

In my view, the section envisages a substantive application wherein a party will set out the reasons (good cause) why the F period of time sought to be extended was not complied with. (Compare *Stuart Nixon Estate Agency (Pty) Ltd v Brigadoon (Pty) Ltd and Another* 1970 (1) SA 97 (N).) It may be that a Court will not insist on a formal application embodied in a notice of motion, but it must be clear, at least from the affidavits, that there is an application for an G extension of time (*Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 391D). An allegation, in such application, that a party obtained knowledge of a new fact only after the prescribed period had expired will be a factor a Court will take into account in considering whether the extension sought H should be granted. No such application for the extension of the six weeks' period provided for in s 32(2) has been placed before me. It follows that Mr Van Rooyen's argument that the relief sought under that section is out of time must be upheld.

In any event, I am of the view that the fresh evidence sought to be introduced does not conform to the guidelines I enunciated in *Colman v Dunbar* 1933 AD 141 at 161--2. These guidelines are succinctly summarised by Selikowitz J in *Benjamin v Sobac South African Building and Construction (Pty) Ltd* 1989 (4) SA 940 (C) at 964B--D as follows:

'The first guideline is the necessity for finality and its corollary that issues raised and decided should not normally be reopened. Secondly, the applicant must show that he could not by reasonable diligence have adduced the evidence J

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in time. Thirdly, the evidence must be weighty and material. It must be evidence which would be practically conclusive. Fresh A evidence which only corroborates evidence which has already been considered will not suffice. Finally, the prejudice to the opponent must be considered.'

In my view, the fresh evidence sought to be introduced in this matter is far from being 'practically conclusive'. The B applicant does not allege that the respondents did not have locus standi; but that they might not have had locus standi at the time of the arbitration. It is common cause that the property was only transferred into the names of the purchasers on 4 October 1996. The respondents admit in the answering affidavit that they were the registered owners of the property at all material times prior to that date. The fact that they were not owners in undivided half shares, but in fact in undivided C shares of two-thirds and one-third respectively is, in my view, of no moment. It seems to me that the applicant is out on a fishing expedition on this issue, an exercise which cannot be permitted.

In the replying affidavit it was alleged further that it was the applicant's case at the arbitration that the applicant was unable to obtain a permit from the Department of Mineral and Energy Affairs and that Carr had indicated that the said D Department would not grant a permit unless the applicant was prepared to rehabilitate all the areas on the property that had previously been mined by other parties. On the other hand, Carr testified that the Department could not require the E applicant to rehabilitate all areas before considering the granting of a permit. It is further alleged that after the arbitration proceedings the applicant applied for a mining permit. It is not clear whether this was done before or after the award had been furnished by the third respondent. The application for a permit was unsuccessful, the Department stating that it would not consider granting the permit unless the applicant provides an undertaking that rehabilitation of the areas previously F mined would be done concurrently with the proposed mining operations. The applicant therefore avers that the evidence tendered at the arbitration, on its behalf, has been vindicated and that it (applicant) would not have obtained a mining permit as it indeed originally contended. It was accordingly submitted on behalf of the applicant that these developments G are further reason for this Court to refer the matter back to the arbitrator for further evidence to be led and for reconsideration of the award, this on the grounds of fairness and equity.

In my view, the applicant would not have succeeded on this point either. It is precisely because the applicant failed to H apply for a mining permit as required by clause 10.1 of the agreement that the matter was submitted to arbitration. It is this very issue - of whether or not a mining permit would be granted - that was raised and decided in the arbitration proceedings. It cannot now be reopened (*Benjamin v Sobac South African Building and Construction (Pty) Ltd* (supra at 964B--D)). I

Finally, on the question of remittal of the award, the applicant has annexed to the replying affidavit a copy of a writ of execution against the applicant's property, issued on 11 September 1996, for arrear rental in terms of the award. According to the writ the respondents claim arrear rental also for the period May to August 1996. The applicant submits that in view of the fact that rental is claimed for the period after the J

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arbitration proceedings and after the sale of the property, the third respondent might alter his award 'in the light of the A further evidence pertaining to ownership of the property'. This issue centres around the question of ownership and locus standi, which I have already dealt with above. There is, in my view, no merit in this submission.

The applicant has also raised two constitutional issues. The first, which was pertinently raised in the founding affidavit, is B that the arbitrator's award 'was not justifiable in relation to the reasons given for it' and therefore infringes the applicant's rights in terms of s 24 of the Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution). This C section is commonly referred to as the administrative justice section and is headed accordingly. Subsection 24(d) is the relevant part of that section as regards this matter and provides that 'every person shall have the right to administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened'. It is quite clear that the section provides protection against the violation of a person's rights, which may be affected or D threatened by administrative action. The

question is whether an arbitrator, in the performance of his duties as such, performs an administrative act when he adjudicates in arbitration proceedings and whether his decision (award) can be said to be an administrative decision. I think not. An arbitration is in the nature of litigation. There is a dispute between two or more parties, which, more often than not, may be adjudicated upon by the Courts, but in a quest for speedy and less costly resolution, the parties agree to submit such dispute to arbitration. One of the characteristics thereof 'is the finality of the arbitrator's award' (Kollberg v Cape Town Municipality 1967 (3) SA 472 (A) at 481F), hence the provisions of s 28 of the Arbitration Act. (See also the definition of the word 'arbitration' in Butler and Finsen Arbitration in South Africa, Law and Practice and in Jacobs The Law of Arbitration in South Africa.) I am accordingly of the view that an arbitrator does not perform an administrative function when adjudicating over a dispute in arbitration proceedings but rather a judicial function. It follows that s 24 of the interim Constitution cannot be invoked to challenge his award. The first constitutional point must fail.

The second constitutional issue was not pertinently raised in the founding papers. It is only in the replying affidavit that the applicant alleges that its right to have justiciable disputes settled by a court of law, including a Court of appeal (s 22 of the interim Constitution) has been infringed, in that it is barred from taking the arbitrator's 'findings' on appeal. It was argued, on behalf of the applicant, that a statutory prohibition to appeal - in this instance s 28 of the Arbitration Act - encroaches on the right to access to a court of law and that this is more so where the review proceedings are qualified by the provisions of s 33 of the same Act. Relying on the judgment in Standard Bank of Bophuthatswana Ltd v Reynolds NO (supra at 96D--G), Mr Schubart submitted that a Court's power of intervention in review proceedings 'should be based on unreasonableness and not on the more restricted ground of gross unreasonableness'. (My emphasis.) Mr Schubart accordingly submitted that 'with regard to the wording of s 33(1)(b) of the Arbitration Act, J

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mere unreasonableness ought to be a ground for intervention by a court of review'. Mr Schubart concludes his argument as follows in his supplementary heads of argument:

'It is submitted that ss 28 and 33 of the Arbitration Act, and in particular s 33(1)(b) constitute such a limitation on an individual's rights of access to a court of law that the sections are not justified in terms of the interim Constitution to the extent that their limitation is neither reasonable nor justifiable in an open and democratic society based on freedom and equality.'

I was accordingly urged upon to stay the proceedings and to refer the matter to the Constitutional Court for that Court to adjudicate on the constitutionality of these two sections. C

As to the attack on s 33 of the Arbitration Act, no mention is made in the applicant's papers, nor in Mr Schubart's heads of argument (main and supplementary), of ss (1)(a) and (c) of that section. Nor did Mr Schubart advance any argument before me that these two subsections are unconstitutional. This is not surprising, because as they stand the two subsections make no reference to 'gross unreasonableness' as a ground for review. It may well be that in certain decided cases - I have not been referred to any - the concept of gross unreasonableness has been imported into the two subsections in their interpretation and application. In any event, I am of the view that it is incumbent upon a party, who contends that a particular statute is unconstitutional, to be specific as to what part of that statute is alleged to be unconstitutional and should be referred to the Constitutional Court. I shall assume therefore, as I believe I must, that the attack on the constitutionality of s 33 of the Arbitration Act is not directed at ss (1)(a) and (c) of that section. Insofar as s 33(1)(b) is concerned, I have already stated above that the applicant relies on s 33(1)(a) and (c) of the Arbitration Act for the setting aside of the third respondent's award. Section 33(1)(b) does not come into the picture at all in this matter. If it does, only the second part thereof, viz the exceeding of his powers by the arbitrator, came into play, which was in any event

never raised on the papers. The present is, therefore, not the appropriate case where the referral to the Constitutional Court of s 33(1)(b) of the Arbitration Act can be considered. G

I now consider s 28 of the Arbitration Act. I have already quoted its text above and do not intend to repeat it. As I have mentioned, the argument advanced by Mr Schubart is that the prohibition in s 28 to appeal against the findings of an arbitrator encroaches on an individual's right of access to a court of law and that this constitutes a limitation which is neither reasonable nor justifiable in an open and democratic society based on freedom and equality. The provision in the interim Constitution which provides for the referral of issues to the Constitutional Court is s 102(1), which reads as follows:

'If, in any matter before a Provincial or Local Division of the Supreme Court, there is an issue which may be decisive for the case, and which falls within the exclusive jurisdiction of the Constitutional Court in terms of s 98(2) and (3), the Provincial or Local Division concerned shall, if it considers it to be in the interest of justice to do so, refer such matter to the Constitutional Court for its decision. . . .'

It was held in *Ferreira v Levin NO and Others; Vryenhoek and Others v J*

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Powell NO and Others 1996 (1) SA 984 (CC) at 998 para [6] (1996 (1) BCLR 1), that the section does not confer a general discretion on the Court in question, eg this Court, to refer an issue to the Constitutional Court. The referral is mandatory and the power and duty to refer only arises when three conditions are fulfilled. These are: firstly, that there is an issue in the matter before Court which may be decisive for the case; secondly, that such issue falls within the exclusive jurisdiction of the Constitutional Court; and thirdly, that the Court considers it to be in the interests of justice to refer such issue to the Constitutional Court. All these conditions must be fulfilled before this Court is empowered to refer an issue to the Constitutional Court. C

The issue of the constitutionality of s 28 of the Arbitration Act is, in my view, decisive in casu, in that should that section be found to be unconstitutional the applicant will, it seems clear, appeal against the arbitrator's findings. It does not appear to be in dispute that the decision as to the validity or otherwise of the said section falls exclusively within the jurisdiction of the Constitutional Court. The position, then, is that the first two conditions have been fulfilled. The question now is whether it is in the interests of justice to refer the validity of the section to the Constitutional Court. If this remaining condition is fulfilled, I will be obliged to grant the order for the referral. In *S v Mhlungu and Others* 1995 (3) SA 867 (CC) (1995 (2) SACR 277; 1995 (7) BCLR 793) Kentridge AJ said the following at 895 para [59]: E

' . . . (T)he referring Provincial or Local Division must in addition be of the opinion "that there is a reasonable prospect that the relevant law or provision will be held to be invalid". . . . The reasonable prospect of success is, of course, to be understood as a sine qua non of a referral, not as in itself a sufficient ground.' F

That there must be a reasonable prospect of success that the relevant law or provision will be held to be invalid is provided for in s 103(4) of the interim Constitution.

Section 28 of the Arbitration Act provides that an arbitration award shall be final and binding and not subject to appeal G 'unless the arbitration agreement provides otherwise'. The prohibition to appeal is not absolute. It does not apply to all parties who may wish to submit disputes to arbitration. An arbitration agreement may provide for an appeal in the event of one of the parties to the arbitration being dissatisfied with the award. The section merely requires the parties to make H provision in the arbitration agreement, which they conclude voluntarily, for an appeal should they wish to appeal against the arbitrator's findings. Where a party signs an arbitration agreement, as in the instant case, which provides that disputes shall be submitted to arbitration for adjudication in terms of the Arbitration Act, but which agreement does not provide for I an appeal, then such

party voluntarily abandons his right to appeal. In this regard, Mr Schubart argued that when Van der Touw entered into the agreement on behalf of the applicant, he was not advised of the implications of agreeing to submit a dispute to arbitration and was not advised that there was no right of appeal against the arbitrator's decision. Had he been so advised, Van der J

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Touw would not have concluded the agreement, so the argument continued. It was argued that it cannot be said that the A applicant waived its right to access to the courts.

In *Blaas v Athanassiou* 1991 (1) SA 723 (W) at 725B--D Hartzenberg J is reported as having said:

'It is accepted that the respondent would not have entered into the agreement if he had known that he could not appeal to the B Appeal Court against the arbitrator's award. Even if it is accepted that that error juris can in these circumstances vitiate the contract, which I definitely do not say is the case, then in any event it has to be decided if the respondent's error was justus or not. (See *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 471C--E.) There is no suggestion of any fraud or other improper conduct on the side of the applicant, which led the respondent to his mistaken belief. He has only himself to blame for it. In the circumstances I C cannot accept that his error was justus. . . . In my view the respondent is bound by the agreement.'

I was informed from the Bar that Van der Touw, who is the managing member of the applicant, is an experienced businessman. This is fortified, in my view, by the allegation in the founding affidavit, that the applicant is a highly successful D business of substantial size and reputation. It is highly improbable, in my view, that Van der Touw would have signed the agreement without having perused and understood same. If he chose to ignore the reference to the Arbitration Act in the arbitration clause (clause 29) in the agreement, he has only himself to blame. I respectfully agree with the approach of E Hartzenberg J in *Blaas v Athanassiou* (supra). I think it is appropriate to echo the words of Goldstone JA (as he then was) in *Amalgamated Clothing and Textile Workers Union v Veldspun* (supra), where the learned Judge of Appeal said the following at 169F--H:

'When parties agree to refer a matter to arbitration, unless the submission provides otherwise, they implicitly, if not explicitly (and, F subject to the 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. There are many reasons for commending such a course, and especially so in the labour field where it is frequently advantageous to all the parties and in the interests of good labour G relations to have a binding decision speedily and finally made. In my opinion the Courts should in no way discourage parties from resorting to arbitration and should deprecate conduct by a party to an arbitration who does not do all in his power to implement the decision of the arbitrator promptly and in good faith.'

Although Goldstone JA was here dealing with a labour relations situation, I think what he said is apposite in respect of all H arbitrations. As was said in *Kollberg v Cape Town Municipality* (supra at 481F), one of the characteristics of arbitration is the finality of the arbitrator's award.

In my view, therefore, it cannot be said that s 28 of the Arbitration Act offends against s 22 of the interim Constitution. I am not persuaded that there are reasonable prospects that the Constitutional Court will declare s 28 to be I unconstitutional. The second constitutional point must also fail.

Returning now to the prayer for the setting aside of the order in terms of which the third respondent's award was made an order of Court, it seems to me that it will serve no purpose to set aside such order, even if J

1998 (4) SA p1086

MPATI J

the argument that an incorrect procedure was used is correct. Such an order will cause further complications and would A simply delay the inevitable. It would seem to me, though, that an application to have an arbitration award made an order of Court, especially where the parties were legally represented in the arbitration, is in the nature of an interlocutory B application, in which event the short form would be permissible. I express no firm opinion on this issue.

There remains the question of costs. The respondents indicated in the answering affidavits that they would seek a costs order on the scale as between attorney and client. Mr Van Rooyen argued that the applicant's actions of instituting review C proceedings in this matter were nothing less than frivolous. In this regard Mr Van Rooyen referred me to the judgment of Preiss J in *Hyperchemicals International v Maybaker Agrichem* (supra), where an order of costs in the terms sought in this matter was awarded. In that case serious allegations were levelled against the arbitrator, which the learned Judge found to be vexatious. In casu, the applicant has alleged that the arbitrator 'failed to grasp and realise' that the D agreement had suspensive as well as resolute conditions and that 'he was partial towards the first and second respondents'. These attacks are, to my mind, unfounded, the former bordering very much on being vexatious, if not in fact vexatious. The latter, though unfounded in this instance, is not an attack which is foreign to these types of review E proceedings. Although I have found the allegations made against the arbitrator to be unfounded, I do not think that this is a case where the applicant should be visited with the penalty of attorney and client costs. It is indeed so that arbitrators are entitled to the protection of the Court where 'intemperate and unfounded' allegations are made against them (*Hyperchemicals International v Maybaker Agrichem* (supra) at 101B--C), but I am not disposed to awarding F attorney and client costs in this matter. As to the submission that the applicant's actions were frivolous, it appears from the supporting affidavit of Swart that the applicant first sought an independent opinion on the award. It seems to me, therefore, that the applicant acted on legal advice in instituting these review proceedings. This does not mean that in all G cases where a party acts on legal advice such party's actions can never be said to be frivolous. I propose, therefore, to award costs against the applicant on the scale as between party and party.

Subsequent to the arbitrator's award having been made an order of Court the respondents caused a writ of execution to H be issued on the strength of which an attachment on the applicant's property was made. A further attachment was made on the strength of a second writ of execution which was obtained on 11 September 1996. The applicant brought an application to stay the sale in execution, which was scheduled for 16 October 1996. Nepgen J granted the stay on I condition that the applicant would provide a bank guarantee as security for the sum of R108 268,50. It appears that such guarantee was provided. The costs of that application were reserved for decision by this Court. It was contended on behalf of the applicant that the applicant was obliged to bring the application for a stay of the sale in execution because the respondents did not accede to requests to hold over the sale in execution J

1998 (4) SA p1087

pending the finalisation of this application. The applicant is, therefore, entitled to the costs of that application, so it was A argued. Mr Van Rooyen, on the other hand, submitted that the stay of execution was based on the prospects of success in this matter and that if the applicant had no case in casu, then it was not entitled to a stay. This argument commends itself to me. The respondents had an order of Court in their favour and were entitled to execute thereon. They cannot now B be expected to bear the costs of the application for the stay of execution. I am of the view that the applicant should bear those costs.

RESSELL v RESSELL

1976 (1) SA 289 (W)

Citation	1976 (1) SA 289 (W)
Court	Witwatersrand Local Division
Judge	Davidson J
Heard	August 10, 1972
Judgment	August 11, 1972
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Arbitration - Matters excluded from being the subject of - Act 42 of 1965, sec. 2 - Matter concerning what was in best interests of a small boy in relation to access by non-custodian parent - Husband and wife - Divorce - Custody - Access - Clause in agreement made order of Court on divorce making provision therefor and B arbitration in event of dispute - Court refusing to give effect to arbitration provision - Custodian father not shown to have been at fault in declining to approve of mother's arrangements for a holiday with the boy - Court refusing mother's application for an order of Court allowing it - Mother ordered to pay costs on attorney C and client scale - Semble: Undesirability of too much litigation over a small child.

[zHNz]Headnote : Kopnota

Section 2 of the Arbitration Act, 42 of 1965, keeps out of arbitration matters which deal with the fate, albeit the temporary fate, of a small boy whose mother wishes to exercise her rights of access in a certain way, contrary to the wishes D of the custodian father. The intention of the statute, as was the intention of the common law hitherto, was to reserve jealously for the Court control of this and the right to determine what was good or what was not good for a child in a matrimonial dispute, whether the dispute was before or after divorce.

On divorce the father had been awarded custody of a boy now eight years of age. In terms of an agreement which had been made an order of Court it was provided that the mother, in E exercising the rights of access which had been granted to her to have the child for half of each school holiday, subject to his right to disapprove of the company the boy would keep, should advise the father of the arrangements made for his supervision or accommodation and, in the event of any dispute arising in regard thereto, it 'shall immediately be referred for summary decision by an advocate of the Johannesburg Bar of not less than ten years' standing'. The father having disapproved of the arrangements for a certain holiday, the mother now applied for an order for arbitration or, F alternatively, an order of Court permitting her to take the child on holiday.

Held, that there was nothing to be said for the proposition that this was a fit subject for arbitration.

Held, further, on the facts, that the mother had not shown that the father had not been within his rights in raising the objections he did to the holiday which the mother had planned: it had not been shown that the father was seeking to deprive G either the mother or the boy of a holiday.

Held, further, that it had not been shown that the father had acted in a misguided or in a mistaken manner or contrary to the best interests of the child.

Held, further, as there had been no reason for the mother to launch her application as a matter of urgency and on the flimsy basis which she had chosen, that costs on the attorney and client scale should be ordered against her.

Semle: that it was an undesirable thing for so much litigation H to proceed over the head of a boy of this age.

[zClz]Case Information

Application for a declaratory order. The facts appear from the reasons for judgment.

P. Lakier, for the applicant.

R. H. Zulman, for the respondent.

Cur. adv. vult.

1976 (1) SA p290

DAVIDSON J

Postea (August 11).

[zJDz]Judgment

DAVIDSON, J.: The applicant has come to Court for an order compelling her former husband, who is the custodian of their child, to give consent to her taking the child on holiday with A her to Natal for two weeks. The respondent, who was given custody of this boy in the divorce action, has, in terms of an agreement made an order of Court on the granting of this divorce, been given certain rights, specifically to approve or disapprove of the company which the boy would be brought into touch with while he happened to spend any time B with the applicant. She was entitled under the same agreement to have him for half of each school holiday. It is clear that the matter is something much deeper than whether the boy would benefit by a holiday in Natal with his mother.

The applicant launched her petition after certain correspondence about the proposed holiday had passed between the parties. She stated her intention of going to Court if her C husband would not give her the right to take the child to Natal to spend a holiday in a garden cottage at a home belonging to her friend Mrs. Brophy. She cast her application on a very simple basis which Mr. Zulman, for the respondent, has said was insufficient. The petition says fairly baldly in para. 14:

'Respondent has adopted the attitude that he would not permit D Bryn to accompany me to spend the holiday in a garden cottage at the home belonging to Mrs. Brophy. I respectfully submit there are no valid grounds for respondent's objection but respondent has adopted this attitude with a view to obstructing my rights of access and preventing me spending time with the child away from Johannesburg.'

Mr. Zulman, I want to say at once, is, in my view, correct in saying that this is not a fair and proper setting out of what passed between the parties. It should not have been said, as E she says here, that his attitude was adopted merely with a view to obstructing her right of access and to prevent her spending time with the child away from Johannesburg. No such issue was ever raised in the correspondence and she should properly have made certain disclosures in this affidavit, namely that her husband, who has been given custody of F this boy and therefore has the rights of the custodian parent, disapproved from early in July of the proposed visit to Mrs. Brophy on the part of the applicant, having regard to the fact that his son would be present. I do not intend to detail all the correspondence, but it was perfectly clear that from an early stage in July he was seeking some reassurances about the applicant's intentions with regard to the holiday. He wanted to know more fully whether certain suspicions that he G had about Mrs. Brophy were correct. Now, it is common cause that Mrs. Brophy is a woman who was divorced from a husband who now lives in Johannesburg while she lives in Natal. Apparently she has there taken to herself a new companion with whom she lives. She has the younger children of her marriage, her dissolved marriage, with her, and the respondent points out, in the H course of the papers, that not only does he disapprove of this relationship between Mrs. Brophy and the man with whom she lives, but that the applicant herself has in the past indicated her distaste for the type of life lived by Mrs. Brophy

and her attitude to her family and her marriage. It may be said, and it has been said, that the attitude of the respondent is that of a narrow-minded prudish man who does not wish to concede that the world allows for certain things in 1972 which were not allowed 60 years ago. It doesn't seem to me to be the issue here. The issue seems to me to turn on the question of the right of the custodian father to determine what is best for his child, subject to any rights

1976 (1) SA p291

DAVIDSON J

which the applicant has to show that what he is seeking to enforce or alternatively seeking to prevent her from doing, is not in the best interests of the child.

The first prayer in the notice of motion is a prayer for a declaration that the aspect of whether the applicant is A entitled to take her minor child Bryn to live with her in the grounds of Mrs. Brophy's home during the coming school holidays from 11 August 1972 to 24 August 1972, falls within the ambit of clause 4 (c) (iii) of the agreement of settlement between the applicant and the respondent dated 5 April 1972. The second prayer is that in the event of the above Honourable Court declaring that the relief sought in the first prayer B falls within the ambit of clause 4 (c) (iii) of the agreement then to appoint an advocate to be arbitrator, and, alternatively, to grant the applicant an order permitting her to take her son to Natal and allowing him to spend the holiday with her there. The agreement which is referred to was one which was concluded at the end of lengthy divorce proceedings and in which unpleasantness, bitterness and possibly venom were C obvious in the relationship of the parties. The clause in question is clause 4 (c) with its components (i), (ii) and (iii). It provides that in exercising the rights of access which have been granted to the applicant, to have the child for half of the school holidays each time -

(c) 'the following conditions shall apply

(i) whenever the defendant visits the child in D terms of (b) (i) above, she shall so arrange the visits so that same will not interfere with Bryn's normal daily routine;

(ii) the defendant shall take every reasonable precaution to avoid Bryn being exposed to the physical, audial or visible presence of the said Du Plooy, save in the event of the defendant and the said Du Plooy becoming married to each other;

(iii) on each occasion when the defendant takes E the child, either during weekends or during school holidays, the defendant shall advise the plaintiff of the place or places to which Bryn will be taken by her and the arrangements she has made for the child's supervision. In the event of any dispute arising in regard to defendant's supervision or the accommodation provided for Bryn by defendant whilst he is with her, any such dispute shall immediately be referred for summary decision by an advocate of the Johannesburg Bar of not less than 10 years F standing.'

It is in terms of that provision that the first prayer is cast.

The Arbitration Act, 42 of 1965, makes a specific prohibition of the submission to arbitration of certain subjects. It says in sec. 2:

'2. A reference to arbitration shall not be permissible in respect of:

(a) any matrimonial cause or any matter incidental to any such cause. or

G (b) any matter relating to status.'

The Afrikaans version, for what it is worth in this present matter, is as follows:

"n verwysing na arbitrasie word nie toegelaat nie ten opsigte van 'n huweliksaak of aangeleentheid wat met so 'n saak in verband staan'.

The wording, 'any matter incidental to such matrimonial cause' H or the Afrikaans version, "n aangeleentheid wat met so 'n huweliksaak in verband staan', seems to me to have been adequately wide enough to keep out of the field of arbitration matters which, like the present one, deal with the fate, albeit the temporary fate, of a small boy whose mother wishes to exercise her rights of access in a certain way, contrary to the wishes of the custodian father.

Mr. Lakier has argued that, because the written agreement in this case was made an order of Court by a learned Judge of this Division, that means

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DAVIDSON J

that this is no longer governed by the Arbitration Act which talks about providing for the settlement of suits by arbitration in terms of written arbitration agreements. I am unable to uphold that point. It seems to me to be wide of the mark. It seems to me perfectly clear that the intention of the A statute, as was the intention of the common law hitherto, was to reserve jealously for the Court control of this and the right to determine what was good or what was not good for a child in a matrimonial dispute, whether the dispute was before or after divorce. In my view there is nothing to be said for the proposition that this is a fit subject for arbitration. I B cannot avoid the conclusion that this agreement in this respect must have been made an order of Court per incuriam.

The wider field of argument in this matter was the question whether the father, the respondent, was within his rights in raising the objections that he did to the holiday which the mother intended to enjoy at the cottage of Mrs. Brophy in Maritzburg together with this eight year old boy. The C application was brought in the first instance on an urgent basis. I do not want to say much about that aspect save that it seems to me to have been a matter which could have been brought at an earlier stage, having regard to the fact that well before the end of July it was known to the applicant that the respondent was firm in his opposition to the holiday: D the applicant then had adequate time to bring it on proper notice. However, that seems to be of minor importance having regard to the view I take of the case.

The applicant merely says in her affidavit that she wishes to go to Natal to enjoy a holiday, which was going to be without cost to her, in the garden of the Brophy home in Maritzburg. Nothing is said at all about her means, nothing is suggested in E the affidavit or in the letters that she in fact was not able to afford any alternative to this form of holiday, or any alternative to this place of holiday. Indeed, when the respondent, in a fairly full affidavit, indicated that he had grave misgivings as to the advisability of the holiday in the cottage in the garden of the Brophy home, he indicated that he had not been given sufficient information to assuage his fears F as to what was happening there. No reply was made to that by the applicant who could very easily have indicated then that she could not afford any other form of holiday and that therefore the child would be deprived of a holiday merely because the respondent took up the attitude that the Brophy home was not a proper place. Without going in detail through the affidavit of the respondent, it seems to me to convey G reasonably what he had attempted to find out about this particular person, Mrs. Brophy, and his giving every opportunity to the applicant to, as he puts it, assuage his anxiety.

It cannot be said, as Mr. Lakier sought to argue, that the respondent here was seeking to deprive either the respondent or the small boy of a holiday. In view of her failure to make out H a case that this was the only possible holiday that could be had, that argument cannot succeed.

Mr. Zulman has argued that the respondent here, whatever attitude any person in the modern days might take as to his view, possibly considering it narrow and severe, whatever views one has of that, nevertheless because he was the custodian parent and bona fide held certain views, before those views could be set aside it would have to be shown that in fact they were misguided and they were not for the benefit of the child. He relied on Segal v. Segal, 1971 (4) SA 317 (C), in which TEBBUTT, A.J., considered the question of the exercising by the custodian parent of his rights to object to

1976 (1) SA p293

DAVIDSON J

the manner in which a child was treated by the non-guardian custodian parent during the period of access. At p. 322 TEBBUTT, A.J., refers to the Natal case of Du Preez v. Du Preez, 1969 (3) SA 529 (D), and in the course of his judgment also referred to the case of Vucinovich v Vucinovich, 1944 A T.P.D. 143, and he says at p. 322:

'In Du Preez v. Du Preez, supra, MILLER, J., stated that in considering the exercising of the custodian's rights the Court takes upon itself a great responsibility if it decides to override such parent's decision as

to what is in the best interests of the child and will only do so after the most careful consideration of all the circumstances including the reasons for the custodian parent's decision and the emotions or impulses which have contributed to it. At p. 533 he says: 'If B the custodian parent has bona fide and sincerely resolved upon a particular course because he feels it to be in the best interests of the child, the Court will not substitute its discretion for his merely because it is considered that it would have followed a different course. It would have to be satisfied that the custodian parent, although bona fide, was misguided or mistaken and not acting in the best interests of the child.'

I want to say at once that it has certainly not been shown to C me that the respondent here has acted in a misguided manner or in a mistaken manner or contrary to the best interests of the child.

The real basis of the applicant's unhappiness in this case might to my mind be considered as being the fact that she is being deprived of the opportunity to go for a holiday where she has chosen to go for a holiday. Without her showing that the D child could not be taken to any other place, she certainly fails to show that the child has been deprived of a holiday. It does not seem to me to be any justification for the suggestion that the respondent here, in setting a severe and perhaps narrow standard, was wrong, having regard to his own matrimonial experiences with the applicant, and again I don't wish to refer in detail to these as set out in the papers. Standing as they do, uncontradicted, they show somewhat lurid E background to the living of the applicant, in the sense that it was her misconduct with a man which caused the marriage between herself and the respondent to break down and end up in the divorce Court. Her attitude to her other children seems to be somewhat lacking in responsibility. It is said in the respondent's affidavit:

'No clearer indication could be given of the applicant's F attitude towards children and her disregard for them inasmuch -

- (a) the applicant before her first marriage gave her own child out for adoption;
- (b) custody of the child born from her first marriage was awarded to her first husband by the Cape Courts because the applicant 'wanted her freedom'; and
- (c) the Court granted me custody of Bryn.

In all the applicant has not the custody of any of the three G children that were born to her.'

The respondent stresses the fact that the applicant's association with the undesirable persons to whom he refers was flagrant and frequently took place in the presence of the child.

I do not feel that I am in the position to determine that the attitude of the respondent here is not the correct attitude, as H the custodian parent, and nothing has been shown in these papers to indicate that he is irresponsible or unbalanced in his attitude to the matter, or that he has erred at all in saying that he wishes the child to be brought up in an atmosphere other than that in which the element of a broken home plays such a strong part. I cannot say that he is not entitled to take that line, and I cannot say that there is anything to indicate his lack of sincerity and genuineness in this. In view of the fact that I cannot find that the child himself would suffer in any way, by not staying at this cottage in Natal where the respondent feels the atmosphere is

1976 (1) SA p294

DAVIDSON J

undesirable, I cannot find that there is any reason to interfere with his expressed view.

I would like to say, in conclusion, that it is an undesirable thing for so much litigation to proceed over the head of a boy A of this age of eight years who cannot fail to be aware of it and be influenced in some way by what is happening between his parents in Court, and I think the parties would be very well advised to show some reasonableness in their dealings with each other and have regard to the interests of the child as being paramount and not the interests of themselves.

Now in this case I think the finger points more clearly to B applicant than to respondent, but I think it is a matter that deserves consideration by both of them.

In my view the application must be dismissed.

Mr. Zulman has asked that costs on the attorney and client scale be ordered against the applicant. I think there is C justification for such an order. The application should not have been launched as a matter of urgency and I think that the applicant should not have brought the respondent to Court on the flimsy basis she chose. She should have disclosed fully to this Court the nature of the respondent's apprehension about Mrs. Brophy's character because she knew this was the basic D reason for his refusing his consent. I feel she was more imbued with the idea of getting him to Court than with her responsibility to present a proper case reflecting all the facts known to her.

I order the applicant to pay the costs on the attorney and client scale.

Applicant's Attorneys: Cyril Wade & Ian Radus. Respondent's E Attorneys: T. T. Baskin.

DE LANGE v PRESIDING BISHOP, METHODIST CHURCH OF SOUTHERN AFRICA AND ANOTHER

2015 (1) SA 106 (SCA)

Citation	2015 (1) SA 106 (SCA)
Case No	726/13 [2014] ZASCA 151
Court	Supreme Court Of Appeal
Judge	Ponnan JA, Wallis JA, Pillay JA, Fourie AJA and Mathopo AJA
Heard	August 26, 2014
Judgment	September 29, 2014
Counsel	A de Vos SC (with AF Schmidt) for the appellant. W Trengove SC (with I Goodman) for the respondents.
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Voluntary association — Disciplinary proceedings — Methodist minister announcing intention to enter same-sex marriage — Contravention of church's law — Church disciplinary tribunals terminating ministry — Minister C referring matter to arbitration — Arbitration prescribed by church laws — Whether good cause to set aside arbitration agreement — Doctrine of entanglement — Whether arbitration agreement concluded — Arbitration Act 42 of 1965, s 3(2).

Arbitration — Matters excluded — Matters of status — Semble: Matter of status D possibly including person's right to hold an office — Such office might include position of ordained minister of religion — Arbitration Act 42 of 1965, s 2(b).

[zHNz]Headnote : Kopnota

De Lange, a Methodist Church minister, announced to her congregations her intent to enter into a same-sex marriage. This caused the church to charge E her with breaking its rules. The rule in question was that ministers shall obey church policy, and church policy was to recognise only heterosexual marriages. The church's district disciplinary committee later found her guilty, and De Lange appealed to its connexional disciplinary committee. It confirmed the verdict, and as sentence discontinued her holding of the F office of minister. De Lange then referred the matter to arbitration, and its convenor entered into an arbitration agreement on her behalf. (The church rules provided that arbitration had to be used for resolution of disputes between ministers and the church.) However before the arbitration proceeded, De Lange approached a high court. There she applied to set aside the arbitration agreement; for a declaration that the decision to discontinue G her ministry was unlawful in its being based on a policy that was unfairly discriminatory on the ground of sexual orientation; for the review and setting-aside of the disciplinary committee's decisions; and for her reinstatement. (De Lange later abandoned the claim of unfair discrimination in her replying affidavit.) (Paragraphs [1] and [19] – [20] at 109A – 110B and 116D – 117B.)

H The high court dismissed the application, holding that De Lange ought first to have concluded the arbitration. It granted leave to appeal to the Supreme Court of Appeal. In issue was whether De Lange had shown good cause to set aside the arbitration agreement (s 3(2) of the Arbitration Act 42 of 1965). (Paragraphs [15] and [23] at 114F – G and 118D – I.)

The SCA held that she had not. This on the basis that the grounds De Lange I advanced as constituting good cause were without merit; and because the dispute — concerning church rules — ought to be left to the church to determine. Held in this regard, that a court should only become involved in such a dispute if it were strictly necessary; and if it did become involved, it ought to refrain from deciding issues of religious doctrine. Accordingly it dismissed the appeal. (Paragraphs [29] – [30], [39] and [41] – [42] at J 122D – 123B, 127E – G and 127J – 128B.)

2015 (1) SA p107

In a concurring judgment Wallis JA considered two issues. The first was whether A this was a 'matter relating to status'. (Section 2(b) of the Arbitration Act provides that 'a reference to arbitration shall not be permissible in respect of any matter relating to status'.) Held, that it might be. This in that 'a matter relating to status' possibly included a person's right to hold office; and an office could include the position of an ordained minister of religion. Were this the case, De Lange's dispute — concerning her right to hold office — could not be arbitrated. (Paragraph [45] at 128I – 129D.) B

The second issue was whether there was an arbitration agreement. (The litigants assumed there was.) Held, that there was not. This because Methodist ministers did not contract with the church to be bound by the Laws and Discipline, the document containing the terms of the purported arbitration agreement. Ministers followed the Laws rather as a discipline. (Paragraphs C [47], [51], [56] – [57] and [67] at 129G – 130D, 131E, 133C – I and 138C – E.)

[zCAz]Cases Considered

Annotations

Case law D

Southern Africa

Allen and Others NNO v Gibbs and Others 1977 (3) SA 212 (SE): referred to

Church of the Province of Southern Africa Diocese of Cape Town v Commission for Conciliation, Mediation and Arbitration and Others 2002 (3) SA 385 (LC): referred to

Commission for Conciliation, Mediation and Arbitration and Others v Law Society of the Northern Provinces E 2014 (2) SA 321 (SCA): dictum in para [19] applied

De Villiers v Jacobsdal Saltworks (Michaelis and De Villiers) (Pty) Ltd 1959 (3) SA 873 (O): referred to

Gohlke and Schneider and Another v Westies Minerale (Edms) Bpk and Another 1970 (2) SA 685 (A): referred to F

Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others 2002 (5) SA 449 (SCA): dictum in para [20] applied

Jacobs v Old Apostolic Church of Africa and Another 1992 (4) SA 172 (Tk): referred to

Mervis Brothers v Interior Acoustics and Another 1999 (3) SA 607 (W): referred to G

Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd 1971 (2) SA 388 (W): dictum at 391 applied

Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others 2006 (1) SA 524 (CC) (2006 (3) BCLR 355; [2005] ZACC 20): referred to H

Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others 2008 (2) SA 184 (SCA): dictum in para [43] applied

Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A): applied

Ryland v Edros 1997 (2) SA 690 (C) (1997 (1) BCLR 77; [1996] 4 All SA 557): dictum at 703E applied I

Salvation Army (South African Territory) v Minister of Labour (2005) 26 ILJ 126 (LC): referred to

Schreuder v Nederduitse Gereformeerde Kerk, Wilgespruit (1999) 20 ILJ 1936 (LC): referred to

South African Forestry Co Ltd v York Timbers Ltd 2003 (1) SA 331 (SCA): dictum in para [14] applied J

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A Taylor v Kurtstag NO and Others 2005 (1) SA 362 (W) (2005 (7) BCLR 705; [2004] 4 All SA 317): dictum in para [39] applied

Telecall (Pty) Ltd v Logan 2000 (2) SA 782 (SCA): referred to

Transnet Ltd v Rubenstein 2006 (1) SA 591 (SCA) ([2005] 3 All SA 425): dictum in para [28] applied

B Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd and Others 2009 (4) SA 89 (SCA): referred to

Universiteit van Stellenbosch v JA Louw (Edms) Bpk 1983 (4) SA 321 (A): dictum at 334A applied

Wittmann v Deutscher Schulverein, Pretoria and Others 1998 (4) SA 423 (T) (1999 (1) BCLR 92): referred to

C Yiba and Others v African Gospel Church 1999 (2) SA 949 (C): referred to.

Australia

Attorney-General (NSW) v Grant [1976] HCA 38: referred to.

Canada

Coombes v National Phoenix 1984 Firearms Information and Communication D Association 2009 ABQB 566: referred to

Lakeside Colony of Hutterian Brethren v Hofer [1992] 3 SCR 165: referred to

Street v BC School Sports 2005 BCSC 958: referred to.

England

Amphill Peerage Case [1976] 2 All ER 411 (HL): referred to

E Davies v Presbyterian Church of Wales [1986] 1 All ER 705 (HL): referred to

Percy v Church of Scotland Board of National Mission [2005] UKHL 73: referred to

President of the Methodist Conference v Parfitt [1983] 3 All ER 747 (CA): referred to

President of the Methodist Conference v Preston [2013] UKSC 29: referred to

F R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann [1993] 2 All ER 249 (QB) ([1992] 1 WLR 1036): referred to

R v St Edmundsbury and Ipswich Diocese (Chancellor), Ex parte White [1946] 2 All ER 604: referred to

Rogers v Booth [1937] 2 All ER 751: referred to

G Shergill v Khaira [2014] UKSC 33: referred to.

United States

Presbyterian Church in the United States v Mary Elizabeth Blue Hull Memorial Presbyterian Church 393 US 440 (1969): referred to

Serbian Orthodox Diocese v Milivojevich 426 US 696 (1976): referred to

United States v Ballard 322 US 78 (1944): referred to.

[zSTz]Statutes Considered

H Statutes

The Arbitration Act 42 of 1965, ss 2(b) and 3(2): see Juta's Statutes of South Africa 2013/14 vol 1 at 2-5.

[zClz]Case Information

A de Vos SC (with AF Schmidt) for the appellant.

I W Trengove SC (with I Goodman) for the respondents.

An appeal from the Western Cape High Court, Cape Town (Veldhuizen J). The order is in para [42].

Order

J The appeal is dismissed.

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[zJDz]Judgment

Ponnan JA (Wallis JA, Pillay JA, Fourie AJA and Mathopo AJA A concurring):

[1] 'People, as Kant said somewhere, are ungregariously gregarious. They may associate for some purpose and then may quarrel. The group, its majority or those in power, may want to expel the troublemaker; and B he, in his turn, may complain of unfair treatment. Both sides may have their points, though an impartial observer may think the quarrel not worth the ado, nor the offence perhaps worth expulsion. But the observer may feel reluctant to take sides, where the dispute is between one and many. The many may seem too hasty or severe, but then they also represent, if anyone represents, the group's collective wish or purpose C ' 1 This is an appeal against the judgment and order of the Western Cape High Court (per Veldhuizen J) dismissing with costs an application by the Reverend Ecclesia De Lange (the appellant) against the Methodist Church of Southern Africa (the church), represented by its Presiding Bishop, as the first respondent, and its Executive Secretary, as the second respondent, 2 in which the following relief was sought: D

'1. Setting aside the arbitration agreement between the parties in terms of the First and Second Respondent's Laws and Discipline, alternatively an order that such arbitration agreement shall cease to have effect with reference to any dispute as set out herein; E

2. A declaratory order that the decision by the Methodist Church of Southern Africa to discontinue the Applicant as a minister of the Methodist Church of Southern Africa is unconstitutional and unfair discrimination based on sexual orientation;

3. Reviewing and setting aside the decision whereby the First Respondent's F Cape of Good Hope District Disciplinary Committee's decision dated 12 January 2010, whereby the Applicant was suspended as a minister, which was confirmed by the First Respondent's Connectional Disciplinary Committee, whereby the Applicant was discontinued as minister, dated 17 February 2010, and which discontinuation was sanctioned by the Presiding Bishop on 20 February 2010 as a minister of the Methodist Church of Southern Africa; G

4. Reinstating the Applicant as a minister of the Methodist Church of Southern Africa with retrospective effect, which includes that the First and Second Respondents are ordered to pay to the Applicant all station and emoluments to which the Applicant would have been entitled had she not been suspended and discontinued; H

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A 5. Costs as follows:

5.1 of the application including the costs of two counsel.

5.2 declaring the costs of the arbitration and the assistance of Applicant's attorney as necessary costs preceding this application.'

B [2] According to the appellant:

'13.2 During my late teens I came to the conclusion that I am a lesbian. I realised that this discovery would not be acceptable to my family or Church and so I concealed it, totally oblivious as to my human identity and rights. I tried to fit in by being in heterosexual relationships, appearing to be normal and acceptable to the C community.

13.3 However, my ability to pretend to be heterosexual did not last and it wasn't long before others found out about my sexual orientation. I was told in no uncertain terms that I cannot be Christian and lesbian. My family relationships and support system were shattered. The Church's stance on homosexuality sent a clear D message of rejection to me which forced me to leave the Church. The pain and loss was immense.

13.4 Several years later I had an encounter with God that made me return to the Church. I knew that God loved and accepted me and I renewed my commitment. I then set out to find a Church. It did not take me long to discover the hidden or unspoken E approach of the Church was unchanged on same sex relationships. At the time the only way for me to be included in the community was either to deny my sexual orientation and live a life of secrecy or live a life of celibacy, contrary to my true and natural orientation.'

F [3] Having decided to return to the fold and feeling called to the ordained ministry, the appellant commenced her training to become a minister of the church. On 15 June 2006 she acquired a Master of Social Sciences degree in religious studies from the University of Cape Town. She was ordained as a minister and received into the full connexion of the church during August 2006. With effect from 1 January 2007 the G appellant served as a minister of both the Brackenfell and Windsor Park Methodist Churches. During April 2004 the appellant commenced what she described as a love relationship with her then partner. During 2008, according to the appellant, she and her then partner first discussed the possibility of getting married and by the next year they had become firm H in their resolve to do so. The date for the wedding having been fixed, the appellant decided to inform her congregants of her impending nuptials. Accordingly on Sunday 6 December 2009 she read the following letter to both congregations served by her at a combined church service:

'Dear friends,

I You have given me much joy in sharing your life with me and this morning is my turn to share some very exciting news with you. I am getting married on 15th Dec.

Some of you have met and know Amanda. We have a wonderful relationship of love, respect and companionship. I would love for you to celebrate with me. However, I do understand that this might be J controversial to you. What I do ask is that you respect our decision.

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Ponnan JA (Wallis JA, Pillay JA, Fourie AJA and Mathopo AJA concurring)

I have encountered many struggles to get to this place. I invite you to A read and familiarize yourself with this, by taking a copy, which I have prepared for you. It will give you some insight into aspects of my journey. (There will be copies available at the door as you leave.)

By making this announcement we are moving into uncharted water in B the life of our church. The Methodist Church of SA (MCSA) has not yet had to deal with the nature of these circumstances before. This leaves me extremely vulnerable and uncertain about my future in the MCSA.

I will keep you abreast of what is happening. It is likely that a pastoral commission will be set up to investigate my position and then make a recommendation.

My desire is to be a minister in the MCSA, to be true to God, to be true C to myself and to be faithful to God and my calling as well as to be accepted for who I am. My hope is that I would continue as your minister.

I will give you some time to absorb my story and if you would like to connect with me (after you've gained some insight into my journey), D I would make myself available. I thank you for your love and care for me and the church.'

[4] That same afternoon the appellant was informed by her superintendent minister that he had contacted the district bishop of the church to enquire as to how they should proceed after the announcement of her intended marriage. The next day according to the appellant: E

'I met with the District Bishop . . . in Rondebosch and gave him copies of a letter entitled My Story, which expressed the attitude of the Church to be a community of love rather than rejection. The idea of the letter was to explain to the Church via my version of the events why I did not see any problem with my announcement to the congregations of my intended marriage.' F

The response of the district bishop was that he first wanted to peruse the information before he made his views known. On 8 December 2009 the appellant was informed by her superintendent minister that a charge had G been laid against her. Two days later the appellant was suspended from the ministry pending the outcome of a disciplinary hearing.

[5] The appellant was thereafter informed by email that her disciplinary hearing was scheduled for 22 December. The email continued: H

'I am sure everyone understands that this will not include any discussion on the merits or otherwise of same-sex unions, but purely the application of the current MCSA policy to this charge.'

Prior to the disciplinary hearing and as foreshadowed in the letter to her congregations, the appellant and her partner married each other on 15 December 2009. I

[6] The charge levelled against her in terms of the Laws and Discipline of the Church (the L & D) was:

'That you have acted in breach of paragraphs 4.82 and 11.3 . . . contrary to Laws and Discipline and/or Policies, Decisions, Practices and Usages of the Methodist [Church] of Southern Africa. You have J

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Ponnan JA (Wallis JA, Pillay JA, Fourie AJA and Mathopo AJA concurring)

A announced to the Brackenfell and Windsor Park societies your intention to enter into a same sex civil union on the 15th December 2009, it being the Churches' policy, practice and usage to recognise only heterosexual marriages.'

[7] Rules 4.82 and 11.3 of the L & D provide:

B 'Ministers shall observe and implement the provisions of Laws and Discipline and all other policies, decisions, practices and usages of the Church.

. . .

Ministers who have an accusation against them in respect of character, C doctrinal beliefs, fitness for the work of the ministry, or observance of Methodist Laws and Discipline may have a complaint laid against them by another Member with the DDR.'

[8] The disciplinary hearing proceeded as scheduled before the district disciplinary committee (DDC). The appellant appeared before the DDC together with her representative, the Rev Tim Attwell. The DDC D concluded:

'Verdict:

The Committee finds Rev De Lange guilty of failing to observe the provisions of the Laws & Disciplines and all other policies, decisions, practices and usages of the Church (L & D 11th Edition 4.82 & 11.3) E by announcing her intention to enter into a same-sex civil union, and especially by doing this without consultation with her Superintendent and the Bishop.

Sentence:

Time already served under suspension.

F Recommendation:

As Rev De Lange has subsequently entered into the civil union while the MCSA has specifically instructed that such action should not happen while the debate in the Church continues (Yearbook 2008 2.5.1(vi)), the Committee recommends that she continue under suspension until G such time as the MCSA makes a binding decision on ministers in same-sex unions. Out of consideration for the needs of Circuit and Societies, this suspension should be without station or emoluments.'

[9] On 18 January 2010 the appellant filed a notice of appeal against the decision of the DDC to the connexional disciplinary committee (CDC). She contended:

H '1.2. . . .The verdict fails to take account of the fact that the church has not formulated any policy regarding same-sex civil unions. I therefore believe it is deeply unfair, and misdirected, for the DDC to have made a finding against me in that regard. As may be seen within the Record of the hearing, much of the debate centred on differing interpretations of various Conference discussions and debates. I This serves to illustrate the lack of definitive policy or decision by the MCSA. Indeed the MCSA has previously decided not to make any decision, or enact any policy, regarding the rules and protocols regarding such unions.'

In respect of the recommendation by the DDC following upon its verdict, J the appellant asserted:

Ponnan JA (Wallis JA, Pillay JA, Fourie AJA and Mathopo AJA concurring)

'2. . . I would like to strenuously argue that the L & D does not grant A the DDC any powers to make such recommendations. L & D 11.21 clearly delineates the responsibilities, powers and duty of the DDC regarding sentencing. I contend that the DDC has exceeded its powers and therefore request that the Recommendation be stricken from the Record. Furthermore, the Recommendation would have the effect of imposing a sentence that is not only B beyond the DDC's verdict, but which is open-ended until such time as Conference may, or may not, decide to formulate policy in this regard. . . .'

[10] On 17 February 2010 the CDC confirmed the verdict of the DDC and in respect of the sentence it ordered that the appellant 'be discontinued C from the ministry of the Methodist Church of Southern Africa'. The effect of the appellant's discontinuation was that she remains an ordained minister but is precluded from exercising any ministerial functions, holding any station or receiving any emoluments.

[11] In terms of rule 5.11 of the L & D if the appellant wished to D challenge the decision of the CDC she was required to have that dispute referred to arbitration. Rule 5.11 provides:

'No legal proceedings shall be instituted by any formal or informal structure or grouping of the church or any minister or any member of the church, acting in their personal or official capacity, against the E church or any formal or informal structure or grouping of the Church, Minister or member thereof for any matter which in any way arises from or relates to the mission work, activities or governance of the church. The mediation and arbitration processes and forums prescribed and provided for by the church for conflict dispute resolution (Appendix 14) must be used by all Ministers and members of the church. If a matter is referred to arbitration, the finding of the Arbitrator shall be final and F binding on all Ministers and members of the church. . . .'

[12] On 31 March 2010 the appellant filed a formal request with the convener of the connexional arbitration panel of the church (the convener) for the dispute to be referred to arbitration. The convener responded to her request thus: G

'2. As I need to finalise an arbitration agreement that needs to be signed in terms of the paragraph 2.2(ii) of appendix 14 of the L & D I attach a draft agreement containing the usual clauses that I insert in such agreements. In terms of the same paragraph I also need to H determine and clarify what the issues are from the party/ies, which I shall then set out in the agreement (paragraph 3).

3. The terms of your referral in your notice are very broad and the nature of the relief you wish to seek is not clear to me. I need to know specifically what aspects of the charges and the disciplinary process you wish to challenge, and what outcome you wish to I achieve. At this stage I do not even know what you were charged with or on what grounds you were found guilty and sentenced. I am not requesting you to compile a full statement of claim at this stage, but I do need some more detail about your specific complaints. I shall be happy to have a telephonic discussion with you and/or your attorney if that would help to clarify any of the issues that I have raised.' J

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A [13] On 19 August 2010 the convener wrote in response to a letter from the appellant's attorney informing him that Advocate Gerald Bloem SC of the Grahamstown Bar had been appointed arbitrator. And in an attempt to address certain concerns that had been raised on behalf of the appellant, the convener's letter continued:

B '2.3.1 Clearly if the arbitrator acts unlawfully or improperly in any manner the Complainant will have the right to take the decision on review. In any event it is recorded in paragraph 6 that the Complainant's right to object to any constitutional principles is reserved.

2.3.2 The manner of how the arbitration is to be conducted must be C left to the arbitrator without being prescribed to in this agreement. He may wish to conduct a pre-arbitration meeting to determine the rules of the arbitration, but I shall leave that to his discretion. Should the arbitration be conducted unfairly or improperly in any way it shall of course be open to the Complainant to take the matter on review in an appropriate court.'

D [14] However, there were difficulties in proceeding to arbitration immediately because of a difference of opinion on various issues between the parties. On 5 February 2011 the parties attended a preliminary meeting under the auspices of the arbitrator. After much negotiation as to the E terms of the arbitration agreement, eventually in June 2011 the convener, acting in terms of rule 5.11 read with appendix 14 of the L & D, signed an agreement on behalf of the appellant, which fleshed out the terms of, and the process that would govern, the arbitration. The arbitrator then requested dates for the hearing and suggested that it take place during F September 2011.

[15] According to the appellant: 'It was at that point in time that I decided to take legal action.' The legal action in question was instituted some 10 months later during June 2012. The high court concluded that the appellant's 'application is premature and that she should first submit to arbitration'. It accordingly dismissed the application with costs, but G granted leave to the appellant to appeal to this court.

[16] In support of the relief sought the appellant stated in her founding affidavit:

'33. Thereafter followed a series of correspondence, the contents [of] H which are self explanatory and dealt [with] herein in chronological order. Through all of this I made my position clear, namely a valid arbitration agreement existed and the parties should thus proceed with the arbitration.'

Later she added:

I '1 I submit that in view of the history of this matter good cause exists why the arbitration proceedings should not proceed on the basis of the revised arbitration agreement. Even if my view that a valid arbitration agreement came into being is not correct, I have lost all confidence in the arbitration proceedings and the Arbitrator. I am also of the view that the arbitration agreement forces me to waive my fundamental rights as J protected in the Constitution and is therefore contra bonis morae.'

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[17] In the answering affidavit filed on behalf of the church, the A Presiding Bishop stated:

'In the present case, there was considerable delay in finalising an arbitration agreement between the parties . . . Suffice to state that the applicant and the Convener . . . disagreed on three issues:

45.1 First, they disagreed on the characterisation of the dispute B between the parties. The applicant has consistently sought to contend that she was discontinued on the basis of her sexual orientation and the issue for determination was thus whether the Church was entitled to expel her for being gay. As I have made clear above, the Church discontinued the applicant for contravening the policies, decisions, practices and usages of the Church, by taking positive steps to enter into a union when the Church C had determined to recognise only heterosexual marriages pending the outcome of an internal engagement process.

45.2 Second, the applicant sought to create a right of appeal to court in the event that she did not succeed in the arbitration proceedings. But clause 5.11 of the L & D provides that an arbitrator's decision is final

and binding, subject to only judicial review to this D Court in appropriate circumstances. The Convener was accordingly not entitled to agree to a term that created a right of appeal.

45.3 Third, the applicant has sought to include a term in the arbitration agreement that she be entitled to legal representation in the arbitration — notwithstanding clause 2.2(vii) of Appendix 14, which provides that legal representation is not generally allowed E in arbitration.'

[18] The appellant's response in her replying affidavit was:

'4. I accept for the purposes of this application that the Church is entitled to make a law forbidding members of the Church to enter F into same sex marriages. I understand that freedom of religion and freedom of association are also basic human rights guaranteed in our constitution as is the right not to be discriminated against based on one's sexual orientation. However what the Church cannot do is not have a clear and pre-announced law forbidding people to enter into same sex marriages and after the fact then try to create the impression that such a law exists. G

...

6. The Church has not determined that same sex partners should not take positive steps to enter into civil union. This is a slant put on the decision taken by the Executive Committee by the First Respondent. If regard is had to the context in which the decision H was taken it is clear that the decision meant to indicate that the Church are not taking any positive steps in deciding the issue whether they should recognise same sex marriages or not. There is simply no room for the interpretation given by the First Respondent when the rule is considered.

...

8.2 The fact that the Church does not recognise same sex marriages or I civil unions does not necessarily mean that they do not allow same and if one enters into a same sex marriage that you are now suddenly contravening the Laws and Discipline of the Church.

...

10. I deny that my actions were in direct contravention of the Churches' policies and decisions on same sex unions. I have also J

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Ponnan JA (Wallis JA, Pillay JA, Fourie AJA and Mathopo AJA concurring)

A never said that I was unaware that I contravened the Churches' policies and decisions in relation to same sex unions. All I said and I reiterate was that if the Rule is read within the context that it was made there is simply no law forbidding a Minister to enter into a same sex union. I did not pre-empt the decision of the conference and accept the Churches' constitutional right to practi[s]e religion in B association with others and in conformity with the dictates precepts and ethical standards and moral discipline that the faith exacts and to which the Church adheres. I simply argue that the Church is also bound by their own Rules and cannot fabricate Rules after the fact for their own purpose.

11. I submit that in terms of the Doctrinal Prescript as described above C the policy and the practice of the Church there is de facto and de iure no impediment to same sex unions. The decision taken by the First Respondent is not based on non-compliance with the policies and practices of the Church but based on his personal view of my sexual orientation which is not excluded by the Laws and Disciplines nor the Doctrine of the Church.'

D [19] Despite having sought a declaratory order to the effect that the decision by the church to discontinue her as a minister constituted 'unconstitutional and unfair discrimination based on sexual orientation', the appellant in her replying affidavit tellingly stated:

'I am not seeking to advance a claim of unfair discrimination based on E sexual orientation. I am advancing a case based on the administrative common law namely that I am entitled to fair administrative action and that the decision by the First Respondent does not comply with the common-law prescripts in this regard.'

F That notwithstanding, in her heads of argument and from the bar in this court, counsel for the appellant sought to advance a case that the church's 'decision to discontinue the appellant as minister of the church was unconstitutional and unfair discrimination based upon the appellant's sexual orientation'. The fundamental problem with that is twofold: First, such a case lacks any factual foundation. And, as held in *Transnet Ltd v Rubenstein* G 2006 (1) SA 591 (SCA) ([2005] 3 All SA 425) para 28, in motion proceedings the affidavits constitute both the pleadings and the evidence. Second, as emerges from her replying affidavit, the appellant had unequivocally disavowed 'a claim of unfair discrimination based on sexual orientation'. What is worse is that this case, which it H seems was not pursued before the high court, is sought to be advanced for the first time before this court on appeal (*Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) para 43). However much the appellant may believe that the church's failure to recognise same-sex marriages is a product of discriminatory attitudes, she deliberately chose, with legal advice, not to pursue I this case on that ground. We cannot therefore decide it on a basis that she disavowed.

[20] I proceed to decide the case on the basis it was presented, in which a claim based on discrimination on grounds of sexual orientation was disavowed. This means that it is unnecessary to engage with the collision J between the rights to freedom of association and religious freedom on

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the one hand, and the right to equality on the other, or to enter into the A very enlightening and thought-provoking debate on that score. 3 We can thus avoid what De Freitas describes as the 'journey between the shoals of strongly held religious beliefs and the affirmation of otherness whose marginalisation has been justified by those very beliefs'. 4

[21] In arriving at its conclusion that the appellant had to submit to B arbitration, the high court found it unnecessary to engage with the merits of the review. Despite the fact that the high court had refrained from entering into the merits of the review, counsel for the appellant made so bold as to suggest that we should do so. We were thus invited to determine on the papers as they stood whether there was indeed a rule C in place as contended by the church. According to the church, the testimonies of painful experiences of exclusion by some of its members and ministers have 'given it pause to consider whether its attitudes and practices towards homosexual people have been consistent with the message of Christ, and whether its use of Scripture in this matter has D been faithful to the biblical witness as a whole'. But marriage, the church maintains, is an institution of central importance to it. Historically, the church has only recognised marriage as between one man and one woman. That is still its policy and practice. And, because it has a number of gay members and ministers, none of whom, it says, are excluded on E the basis of their sexual orientation, the recognition of same-sex unions has become an issue of importance within the church. It has therefore been facilitating debate and engagement around the issue, which it asserts is a deeply divisive one, with factions of members and ministers holding starkly divergent doctrinal views. It has thus sought to avoid conflict and schism within the church in its approach to the issue. F

[22] According to the Presiding Bishop:

'At the 2007 Conference, the issue of same-sex unions remained fraught. In response to the heated debate it triggered, the Conference issued the following statement and resolution: G

"... Conference recognises that any decision and subsequent action on the issue of civil unions between same-sex partners must await the outcome of the ongoing process of engagement as specified by Conference 2005 (Yearbook 2006, 8.3, p 75) and, in the interim, expects Methodist ministers to continue to offer pastoral care to homosexual individuals. H

'...

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Ponnan JA (Wallis JA, Pillay JA, Fourie AJA and Mathopo AJA concurring)

A By 2010, it was clear that the recognition of same-sex unions generated passionately and sincerely held but divergent views among both ministers and members of the Connexion. The Church determined not to permit these differing viewpoints to divide its congregation and adopted an approach that sought to accommodate the opposing doctrinal views B of its members. At the 2010 Conference, the Church again called on its members to engage with the complexities and emotions around homosexual relationships and, in the interim, to allow this divergence of conviction to be held without the freedom for such divergence of conviction to be exercised. Simply put, the Church continued to embrace its gay members and did not interfere with their relationships, but did not recognise or allow same-sex marriage.'

C That notwithstanding, it was submitted that any such dispute as may have existed in relation to whether or not there was a rule in existence, could be resolved by this court in the appellant's favour on the papers as they stood. To determine a profoundly important doctrinal issue, in line with the well-settled approach to be adopted in matters where final relief D is sought on application (as to which see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)), is wholly undesirable. It would thus be imprudent to accede to counsel's invitation.

[23] The high court ruled that the dispute between the parties was E subject to arbitration. That a court has a discretion whether to enforce an arbitration agreement is evident from s 3(2) of the Arbitration Act 42 of 1965 which provides that:

'(2) The court may at any time on the application of any party to an arbitration agreement, on good cause shown —

(a) set aside the arbitration agreement; or

F (b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or

(c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred.'

The question therefore is whether the appellant has shown good cause G within the meaning of the subsection for avoiding arbitration. Such an onus is not easily discharged (per Colman J in *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 391E – F). It has been said that the discretion of the court is to be exercised judicially, and only when a very strong case has been H made out (*Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A) at 334A). As Nugent JA pointed out (*South African Forestry Co Ltd v York Timbers Ltd* 2003 (1) SA 331 (SCA) para 14), 'good cause' is a phrase of wide import that requires a court to consider each case on its merits in order to achieve a just and equitable result in the particular circumstances.

I [24] I shall endeavour to consider with such brevity as will suffice for the purposes of this judgment the various reasons advanced by the appellant for wanting to avoid the arbitration: First, she contends that there is no valid arbitration agreement. In that she is not entirely consistent, having initially maintained in her founding affidavit that there was in place a J valid agreement and that she was intent on arbitration. We do not have

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to enter upon the question whether the relationship between the church A and its ministers is contractual as would be the case with a member of a voluntary association, because it was agreed that the agreement signed by the presiding bishop on behalf of the church and the convener on behalf of Ms De Lange brought the matter within the ambit of the Arbitration Act. 5 That the convener was entitled to do in terms of rule 5.11 read with appendix 14. The relevant portion of appendix 14 B reads:

'(T)he Convener shall determine and clarify what the issues are from the party/ies. The Convener shall hereafter decide what the correct forum or process is for the matter. The Convener's decision in this regard shall be binding on all members of the church. C

. . . If arbitration is the correct forum, the Convener shall finalise a written arbitration agreement which both parties shall sign. If either party refuses to sign the said agreement, the Convener shall have the power to sign on their behalf. If the Convener is [not] to be the arbitrator in the particular matter, the said Convener shall designate another arbitrator to this responsibility.' D

The appellant accepts that the convener was entitled to sign on her behalf, thereby bringing a binding agreement into force. It follows that a valid arbitration agreement was concluded between the parties and that the appellant should be bound by its terms. E

[25] Second, the appellant complains of the delay in concluding the arbitration agreement. The delay for the most part is explicable. There were significant disputes between the appellant and the convener as to the proper delineation of the issues for referral. The appellant sought to have issues referred that were not encompassed by the charge or the findings against her. She also sought to create a right of appeal to the high F court and a right to legal representation while the convener considered that the L & D did not provide for those rights. The delay is explained on the papers and is attributable, at least in part, to the appellant and her attorney — the latter having adopted an increasingly emotive and argumentative stance in the exchange of correspondence. In the event G different versions of a written agreement came to be signed by each of the parties. The matter was then wrongly referred to the appointed arbitrator without an agreement having been concluded and signed by the parties. Absent an agreement the arbitrator correctly declined to assume jurisdiction in respect of the dispute. Following the abortive pre-arbitration meeting and at the arbitrator's suggestion, the parties were offered a H further opportunity to conclude an agreement. The appellant then refused to engage further with the convener and did not make any further representations. The convener thereupon formulated an agreement that defined the issues with regard to the charges and the findings of the DDC and CDC, which was then signed by the presiding bishop, and by the convener on behalf of the appellant. I

[26] Third, the appellant complains that the arbitration agreement signed on her behalf by the convener is weighted heavily against her

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A inasmuch as it: (a) requires her to waive her constitutional rights; (b) ousts the power of the courts; and (c) denies her the right to legal representation. As to (a): Not only can the appellant not be taken to have waived her constitutional rights, but the agreement specifically preserves her rights by providing:

B 'The parties, by signing this agreement, do not waive any legal rights they may have to raise any objections in the statement of claim or other pleading allowed, or at the arbitration hearing, in relation to the proceedings or any actions taken or omitted in the disciplinary or appeal proceedings of the Claimant, be it on merits or procedural in nature. . . .'

C As to (b): Clause 7.2 of the agreement permits 'an application to a competent court to review the findings of the arbitrator'. In any event the church has always accepted that the arbitrator's decision may be amenable to review on the grounds of legality. This the presiding bishop made plain in the answering affidavit in these terms:

D 'The applicant contends that the arbitration provisions of the L & D contain an unenforceable ouster of the Court's jurisdiction. I deny that contention. The Church has always accepted that the arbitrator's decision may be amenable to review on grounds of legality — as the decisions of all domestic tribunals are. It is neither unconstitutional nor unlawful for a body like the Church to require its members to resolve E disputes primarily through internal processes, including arbitration.'

As to (c): The agreement is silent on the right to legal representation, having left that to the discretion of the arbitrator. In the exercise of that discretion the arbitrator made the following ruling:

F 'I have thought of when this matter came up, I thought hard about whether I should allow legal representation in these proceedings. I am not convinced that I have heard any reasons why I should deviate from the L & D and in the absence of such reasons, the ruling that I make, in these procedures — no legal representation would be allowed for either Rev De Lange or the church. Both parties I find or rule would be G represented by lay representatives. That is the question of legal representation being dealt with.'

In any event our courts have consistently denied any entitlement to legal representation as of right in fora other than courts of law (Commission for Conciliation, H Mediation and Arbitration and Others v Law Society of the Northern Provinces 2014 (2) SA 321 (SCA) para 19; Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others 2002 (5) SA 449 (SCA) para 5).

[27] Fourth, the appellant complains that the arbitrator, as a member of the church, acts at the behest of I the church and is thus biased or is reasonably perceived to be biased. The church's appointment of members to its arbitration panel from which arbitrators are appointed is entirely understandable. It is to ensure that only those persons who are familiar with the rules, procedures and practices are appointed to the rather sensitive task of adjudicating disciplinary disputes. In J Lakeside Colony of Hutterian Brethren v Hofer it was stated:

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'There is no doubt that an unbiased tribunal is one of the central A requirements of natural justice. However, given the close relationship amongst members of voluntary associations, it seems rather likely that members of the relevant tribunal will have had some previous contact with the issue in question, and given the structure of a voluntary association, it is almost inevitable that the decision makers will have at B least an indirect interest in the question. Furthermore, the procedures set out in the rules of the association may often require that certain persons make certain kinds of decisions without allowing for an alternate procedure in the case of bias.'

There is nothing objectionable in private associations seeking to exclude outsiders from disciplinary processes and to ensure that those proceedings C are kept 'within the family' (Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee paras 18 and 20). To ensure that the arbitrator is conversant with both the church's doctrine and processes and the legal requirements of a fair process, the church only appoints senior counsel to preside at arbitrations. The arbitrator in this case is a senior counsel at the Grahamstown Bar. It must be assumed, in D the absence of evidence to the contrary, that he can disabuse his mind of irrelevant personal

beliefs and predispositions. Importantly, one finds no support for the complaint of bias in the papers. Quite the contrary, when the arbitrator expressed his willingness to step down if the appellant was not comfortable with him acting as arbitrator, she responded: E

'Secondly, I deny the negative assumptions that you have read into my email concerning your competence as an arbitrator. Your impression with respect, is a creation of your own — nowhere in any correspondence have I created any impression whatsoever of that nature in the least. Really, this is totally a silly argument and [with] respect to you, F such an assumption is totally ridiculous. I did not mention a single word about your competence. To the contrary I would not have signed the agreement document if I had any doubts about you being the appointed arbitrator for the case. In particular now that you have been appointed as judge, I have even got more faith and confidence that you will deal with my arbitration in a fair and even handed manner. My complaint concerns the delay of the arbitration and not in the least . . . your competence.' [Emphasis original.] G

The appellant reiterated her confidence in the arbitrator towards the end of the abortive preliminary meeting held on 5 February 2011, when she stated:

'I have said it more than once in my correspondence to you — I am more H than happy for you to be the arbitrator in this case. I have full confidence in you, in your ability and I think you are the right person to be the arbitrator in this case and if I have offended you with what I have written then I apologise and . . . I ask you to forgive me.'

[28] Fifth, the appellant contends that she should not be required to I submit to the arbitration because it would be a futile process. As she puts it:

'The arbitration proceedings will in any event be pointless in view of the fact that the Arbitrator has already expressed his attitude namely that he cannot interfere with the merits of the decision taken but only look at the processes that were applied.' J

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A That claim is similarly unfounded. At the heart of this matter is the question whether the church had adopted a rule that precluded the appellant from announcing her intention to marry her partner from the pulpit. The church contends that such a rule was in place, while the appellant contends that it was not. That is a factual dispute which can be B determined in arbitration proceedings. It goes to the question of whether the DDC and the CDC misdirected themselves in finding the appellant guilty of breaching the church's policies, decisions, practices and usages. The written agreement delineates the issues between the parties to accommodate that very dispute. It identifies one of the issues for determination as whether the DDC and the CDC 'have the jurisdictional C authority to deal with the charges that were laid against the Complainant'. Put differently, the arbitrator is called upon to determine whether the CDC and the DDC acted correctly in finding that the appellant had breached the church's policies, decisions, practices and usages.

[29] In the result none of the grounds advanced by the appellant for D seeking to avoid the arbitration pass muster.

[30] Moreover, in addition to certain advantages, such as expedition, finality and cost-effectiveness, which a party to an arbitration is likely to enjoy over one who has to pursue their rights in the courts, the nature of the dispute is important. That dispute, according to the church, is E quintessentially the kind of dispute that a secular court should avoid becoming entangled in because, as the Presiding Bishop sought to emphasise:

'The issues in dispute in these proceedings go to sensitive matters of Church doctrine and governance. I am advised that these are issues that F the Church should be left to determine domestically, as far as is

possible, without interference from the Court. The Court should only become involved in the dispute where it is strictly necessary to do so. Even then, I am advised and submit that it will refrain from determining doctrinal issues, in order to avoid religious entanglement.

...

G . . . As I have already explained, marriage is a sacrosanct institution within the church. The question[s] of who can enter into marriage and when marriages will be solemnized and recognised by the Church are issues of religious doctrine, and are at the heart of ecclesiastical concern.

H As I have described above, the question of whether the Church should recognise same-sex unions is an intensely contested issue within the Church. Both those in favour of, and those against, the recognition of same-sex marriage believe that their position is doctrinally correct and justified by the scriptures. Because of the importance of the issue and its potential to create divisions within the Church, the Conference has I called for a process of engagement whereby the Church and its adherents seek to determine this doctrinal issue together, through discussion. That process is designed to accommodate diversity, insofar as possible within the constraints of the Church's doctrine and its need for proper governance. I refer to what I have stated above.

. . . It is also inappropriate for this Court to require the Church to J recognise same-sex unions as religiously ordained — particularly when

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the Church is itself involved in a complex and lengthy process to A determine that doctrinal issue itself. To do so would be to prescribe religious tenets to the members and ministers of the Church, in violation of the rights to freedom of religion and religious association. Indeed, the doctrine of entanglement militates strongly against the Court becoming involved in religious doctrinal disputes.' B

[31] It is so that our Constitution protects an individual's rights to practise his or her religion, as well as the rights of members of a particular religion to practise that religion in association with others and in conformity with the dictates, precepts, ethical standards and moral discipline which that faith exacts. 6 Protecting the autonomy of religious C associations is considered a central aspect of protecting religious rights. Indeed such protection has been described as 'vital to a conscience-honouring social order'. 7 As the Constitutional Court held in Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae); Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others 2006 (1) SA 524 (CC) D (2006 (3) BCLR 355; [2005] ZACC 20) para 94:

'In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other.' E

[32] Witte states that:

'(A)ctive religious rights require that individuals be allowed to exercise their religious beliefs privately and groups be allowed to engage in private worship assembly. More fully conceived, active religious rights F embrace an individual's ability to engage in religious assembly, religious speech, religious worship, observance of religious laws and ritual, payment of religious taxes, and the like. They also embrace a religious institution's power to promulgate and enforce internal religious laws of order, organisation, and orthodoxy, to train, select, and discipline religious officials, to establish and maintain institutions of worship, G charity, and education, to acquire, use, and dispose of property and literature used in worship and rituals, to communicate with co-believers and proselytes, and many other affirmative acts in manifestation of the beliefs of the institution.' 8

Furthermore, the determination of who is morally and religiously fit to H conduct pastoral duties, or who should be excluded for non-conformity with the dictates of the religion, falls within the core of religious functions. For, as Gerhard van der Schyff puts it:

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A 'The right to admit members and clergy would also imply the right to discipline such people in order to enforce conformity and encourage conduct in harmony with religious precepts and teaching.' 9

[33] Prior to the coming into force of the Constitution, the court refused to 'adjudicate upon a doctrinal dispute between two schisms of a sect B unless some proprietary or other legally recognised right was involved' (Allen and Others NNO v Gibbs and Others 1977 (3) SA 212 (SE) at 218A – B). Subsequently, Farlam J observed in Ryland v Edros 1997 (2) SA 690 (C) (1997 (1) BCLR 77; [1996] 4 All SA 557) at 703E:

'It seemed to me that s 14 of the [interim] Constitution might well have changed the position and that the doctrine of doctrinal entanglement C may now be part of our law.'

This doctrine entails a reluctance of the courts to become involved in doctrinal disputes of a religious character (Taylor v Kurtstag para 39). The reason underlying the rule has been expressed by Woolman & Zeffertt D as follows:

'(I)n a radically heterogeneous society governed by a Constitution committed to pluralism and private ordering, a polity in which both the state and members of a variety of religious communities must constantly negotiate between the sacred and the profane, courts ought to avoid enmeshment in internecine quarrels within communities regarding E the content or the truth of particular beliefs.' 10

This approach is consistent with that taken in comparative foreign jurisdictions.

[34] In the United States the establishment clause prevents courts from determining doctrinal disputes. As it was put in United States v Ballard F 322 US 78 (1944):

'The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect The First Amendment has a dual aspect. It not only forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship but also G "safeguards the free exercise of the chosen form of religion".'

As a result American courts will not entertain religious disputes at all. Decisions of religious tribunals are subject only to such appeals as the religious body itself allows. In Presbyterian Church in the United States v Mary Elizabeth Blue Hull Memorial Presbyterian Church 393 US 440 (1969) H it was stated:

'But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them (sic) reversed. It is of the essence of these religious unions, and of their right to establish I tribunals for the decision of questions arising among themselves, that

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those decisions should be binding in all cases of ecclesiastical cognizance, A subject only to such appeals as the organism itself provides for.'

[35] Further, the United States Supreme Court has cautioned against reviews that challenge the rationality of an ecclesiastical body's decision. The approach was expressed thus in *Serbian Orthodox Diocese v Milivojevic* 426 US 696 (1976): B

'The fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitutes its own inquiry into church C polity and resolutions based thereon of those disputes. Consistently with the First and Fourteenth Amendments civil courts do not inquire whether the relevant (hierarchical) church governing body has power under religious law (to decide such disputes) Such a determination . . . frequently necessitates the interpretation of ambiguous religious law and usage To permit civil courts to probe deeply enough into the allocation of power within a (hierarchical) church so as to D decide . . . religious law (governing church polity) . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine.'" . . . For where resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal E within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them.

. . . F

For civil courts to analyze whether the ecclesiastical actions of a church judicatory are in that sense arbitrary must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits; recognition G of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them.'

[36] Similarly, in the United Kingdom the decisions of ecclesiastical H courts are generally not amenable to correction or challenge in the secular courts. That rule, as *R v St Edmundsbury and Ipswich Diocese (Chancellor), Ex parte White* [1946] 2 All ER 604 at 605 emphasises in the following excerpt, is of long standing: I

'I think that the reason is to be found in this. There has always been in England more than one system of law. I will not say that the canon and civil law is as old as the common law, but it is, at any rate, of antiquity approaching the common-law, and was very vigorous and had great effect in the days of the Plantagenets. The common-law existed side by side with the civil law, and there were the two sets of courts, the courts spiritual and the common-law courts.' J

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Ponnan JA (Wallis JA, Pillay JA, Fourie AJA and Mathopo AJA concurring)

A Thus in *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1993] 2 All ER 249 (QB) ([1992] 1 WLR 1036) at 255 the court held:

'That consideration apart, the court is hardly in a position to regulate what is essentially a religious function — the determination whether B someone is morally and religiously fit to carry out the spiritual and pastoral duties of his office. The court must inevitably be wary of entering so self-evidently sensitive an area, straying across the well-recognised divide between church and state.

One cannot, therefore, escape the conclusion that, if judicial review lies here then one way or another this secular court must inevitably C be drawn into adjudicating upon matters intimate to a religious community.'

More recently *Shergill v Khaira* [2014] UKSC 33 para 45 held:

'This distinction between a religious belief or practice and its civil D consequences underlies the way that the English and Scottish courts have always, until recently, approached issues arising out of disputes within a religious community or with a religious basis. In both jurisdictions the courts do not adjudicate on the truth of religious beliefs or on the validity of particular rites. But where a claimant asks the court to enforce private rights and obligations which depend on religious issues, the judge may have to determine such E religious issues as are capable of objective ascertainment. The court addresses questions of religious belief and practice where its jurisdiction is invoked either to enforce the contractual rights of members of a community against other members or its governing body or to ensure that property held on trust is used for the purposes of the trust.'

F [37] Australian law also prohibits courts from determining questions of religious doctrine, practice or procedure. In *Attorney-General (NSW) v Grant* [1976] HCA 38 it was put thus:

'Many of the appellant's submissions would require this Court to inquire into and decide controversial questions of doctrine (or departure G from doctrine) or practice or procedure in ecclesiastical government. In my opinion, however forceful these arguments appear to be, they are outside the judicial sphere.'

[38] Canadian courts are generally reluctant to interfere in the internal management of voluntary associations, because, as it has been put, they H have no interest in the day-to-day activities of those associations. However, as was noted in *Lakeside Colony of Hutterian Brethren v Hofer* and *Street v BC School Sports* 2005 BCSC 958 para 45, there are certain basic principles that govern relationships between people, which all people are bound by, and which cannot be contracted out of. The courts I have always retained the jurisdiction to govern those basic principles, and so long as the jurisdiction remains restricted and limited to those rarest of cases, the courts have jealously guarded it. The courts have thus traditionally maintained a real and important interest in the processes by which those organisations govern themselves. In *Lakeside Colony of Hutterian Brethren v Hofer* Gonthier J said of the complex issues involved J in reviewing the decisions of a religious tribunal in Canadian law:

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'It is not incumbent on the court to review the merits of the decision to A expel. It is, however, called upon to determine whether the purported expulsion was carried out according to the applicable rules, with regard to the principles of natural justice, and without mala fides. This standard goes back at least to this statement by Stirling J in *Baird v Wells* (1890), 44 Ch D at p 670:

The only questions which this Court can entertain are: first, B whether the rules of the club have been observed; secondly, whether anything has been done contrary to natural justice; and, thirdly, whether the decision complained of has been come to bona fide."

'. . . The content of the principles of natural justice is flexible and C depends on the circumstances in which the question arises. However, the most basic requirements are that of notice, opportunity to make representations, and an unbiased tribunal.

. . .

Hence the root dilemma of legal intervention: on the one hand, you do D not wish to intervene because you cannot specify, often cannot understand, the parties' respective merits; on the other hand, the courts are open to everyone, and can thus be called upon to intervene, which means they must either grant or deny the "right" of expulsion. But whether the courts recognise or resist that right, their task is difficult and delicate. For theirs is not a political task of shielding the "greatest number" or of protecting one's right to be different. The legal task is to E formulate rules which will be neutral and equal in relation to all parties.'

[39] As the main dispute in the instant matter concerns the internal rules adopted by the church, such a dispute, as far as is possible, should be left F to the church to be determined domestically and without interference

from a court. A court should only become involved in a dispute of this kind where it is strictly necessary for it to do so. Even then it should refrain from determining doctrinal issues in order to avoid entanglement. It would thus seem that a proper respect for freedom of religion precludes our courts from pronouncing on matters of religious doctrine, G which falls within the exclusive realm of the church.

[40] High-court judgments such as *Taylor v Kurtstag* and *Wittmann v Deutscher Schulverein*, Pretoria and Others 1998 (4) SA 423 (T) (1999 (1) BCLR 92) appear to accept that individuals who voluntarily commit themselves to a religious association's rules and decision-making bodies H should be prepared to accept the outcome of fair hearings conducted by those bodies. Here, on discovering that the CDC had found against her, the appellant invoked the arbitration provision of the L & D and referred the matter to the convener so that he could take the necessary steps to convene the arbitration. The appellant has never challenged the relevant provisions of the L & D. What is more is that, having initiated the I arbitration process and having participated in it for almost a year, the appellant thereafter seeks to avoid the arbitration by having the matter determined by a court.

[41] All things considered, I am not persuaded that the appellant has discharged the onus of establishing good cause within the meaning of J

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Wallis JA (Fourie AJA concurring):

A s 3(2) of the Arbitration Act. I therefore conclude that the dispute between the parties is best determined by arbitration. It follows that the appeal must fail. The church commendably agreed to forgo the costs of the appeal.

B [42] In the result the appeal is dismissed.

[zJDz]Judgment

Wallis JA (Fourie AJA concurring):

[43] I have had the privilege of reading the judgment prepared by Ponnan JA. I agree with him that in view of Ms De Lange's express disavowal of any contention that she was discriminated against on the C grounds of her sexual orientation, we do not have to explore the relationship between her equality rights and the rights of freedom of religion enjoyed by the church and all people in this country. The case is therefore about an alleged arbitration agreement and whether it should be set aside or avoided. The case both here and below was argued on the D footing that there was a binding arbitration agreement concluded by the parties. That is accepted in Ponnan JA's judgment and he proceeds to hold that the application by Ms De Lange to set aside or avoid that agreement was ill-founded. On that footing I agree with him and the conclusion he reaches. I write separately because I have considerable reservations about the correctness of the proposition that there is a E binding arbitration agreement between the parties that can be the subject of the order sought by the appellant, Ms De Lange. If my doubts were justified, they would not affect the outcome of the appeal. It would still fall to be dismissed but for different reasons. But my areas of concern relate to fundamental questions relating to the nature of the relationship F between a minister ordained in the Methodist Church of Southern Africa and the church, as well as to the application of the Arbitration Act 42 of 1965 (the Act) in this case. In those circumstances I think it appropriate to deal with them.

[44] The Act deals with arbitration agreements. These are defined in s 1 as meaning:

G '(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; . . . '

Section 2 provides that a reference to arbitration is not permissible in respect of any dispute over any matrimonial cause or any matter incidental to such a cause or any matter relating to status. Apart from those restrictions any dispute can be the subject of arbitration, but there must be a dispute, not a mere expression of dissatisfaction over the conduct of the other party. The dispute must be capable of formulation in a manner where opposing contentions are or can be advanced so that the arbitrator may make a decision on those contentions. 11

[45] My first and lesser concern is whether the present dispute relating to the decision by the church to discontinue Ms De Lange as an ordained

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Wallis JA (Fourie AJA concurring):

minister is a dispute over her status and therefore one that it is impermissible to subject to arbitration. The answer to that depends on the meaning to be given to the word 'status' in the context of s 2(b) of the Act. It does not appear that this has ever been the subject of judicial decision in this country. Plainly it includes questions of a person's matrimonial status; whether they are a minor or have been tacitly emancipated; whether they have for any reason, such as physical or mental disability, become incapable of managing their affairs; their domicile and similar matters. 12 But it is conceivable that the right of persons to hold an office, which could include a person in the position of a minister of religion ordained to serve within a particular faith or denomination, is also a matter of status that cannot be the subject of an arbitration agreement. 13 If that is the case, and I mention it only as a possibility, the deprivation of the right to perform the duties of that office (in the case of a minister of religion, the rites and rituals of that faith) would affect their status and thus preclude resolution by way of arbitration. However, my second concern is more important and I deal with it without further ado.

[46] The requirement that an arbitration agreement be in writing does not mean that it has to be signed or otherwise executed by both parties to the arbitration. All that is required is that the parties have agreed that the dispute in question, or all disputes of a particular character, be submitted to arbitration, and that agreement has been reduced to writing. Thus it matters not that the agreement is concluded orally, provided that a written memorial thereof is produced. 14 The important requirement is, however, that there has been an agreement to arbitrate the dispute that is in issue between the parties. That agreement arises contractually. 15 In the absence of such an agreement the Act has no purchase. It does not apply in relation to other dispute-resolution procedures, however closely they may resemble arbitration under an arbitration agreement. An oral agreement to arbitrate not reduced to writing is therefore not subject to the provisions of the Act and nor are other forms of dispute-resolution proceeding, however similar they may appear to be in the manner in which they are conducted to an arbitration agreement in terms of the Act.

[47] The point is relevant because the application brought by Ms De Lange is one in terms of s 3(2) of the Act. She sought an order that an

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Wallis JA (Fourie AJA concurring):

An arbitration agreement between her and the Presiding Bishop of the Methodist Church be set aside, or alternatively declaring that the arbitration agreement between them cease to have effect to any dispute between them. In order for that relief to be granted it was essential that there was in existence an arbitration agreement as defined in the Act. Ms De Lange claimed that there was such an agreement in the form of a document that she signed and made available to the convener of the arbitration panel on 1 November 2010, which she was led to believe had been signed on behalf of the Presiding Bishop on 9 November 2010. The Presiding Bishop for his part contended that the agreement is in the form of a document signed on behalf of Ms De Lange by the convener

in June C 2011. Her response to this document was that she had no role in it and that it excluded her voice from the process. Notwithstanding this difference of views that emerges from the affidavits the parties have proceeded as if there is an arbitration agreement in place and addressed their arguments on that assumption. In case Ms De Lange chooses to D pursue further her grievances in relation to the church's treatment of her, it is as well that the problems in regard to that assumption be identified.

[48] Counsel for the church advanced the following argument. Paragraph 5.11 in the Laws and Discipline (L & D) of the church provides:

'No legal proceedings shall be instituted by any formal or informal E structure or grouping of the church or any minister or any member of the church, acting in their personal or official capacity, against the church or any formal or informal structure or grouping of the Church, Minister or member thereof for any matter which in any way arises from or relates to the mission work, activities or governance of the church. The mediation and arbitration processes and forums prescribed and F provided for by the church for conflict dispute resolution (Appendix 14) must be used by all Ministers and members of the church. If a matter is referred to arbitration, the finding of the Arbitrator shall be final and binding on all Ministers and members of the church. . . .'

They contended that this paragraph obliged Ms De Lange to raise her G grievances about the disciplinary processes to which she had been subjected by way of arbitration under appendix 14 of the L & D. The further elements of the arbitration agreement, so the argument proceeded, were to be found in the application of the procedures laid down in appendix 14.

H [49] Appendix 14 provides for an aggrieved party to refer the dispute to the convener of the connexional arbitration panel. In dealing with the role and functions of the convener the material portion of appendix 14 reads as follows:

'(T)he Convener shall determine and clarify what the issues are from the I party/ies. The Convener shall hereafter decide what the correct forum or process is for the matter. The Convener's decision in this regard shall be binding on all members of the church.

. . . If arbitration is the correct forum, the Convener shall finalise a written arbitration agreement which both parties shall sign. If either party refuses to sign the said agreement, the Convener shall have the J power to sign on their behalf. If the Convener is [not] to be the

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Wallis JA (Fourie AJA concurring):

arbitrator in the particular matter, the said Convener shall designate A another arbitrator to this responsibility.'

[50] There is an immediate oddity about this provision. Whilst para 5.11 suggests that there is an obligation to arbitrate disputes rather than resort to secular courts, appendix 14 suggests that it is for the B convener to determine whether the dispute in question should be resolved by arbitration. That interposes the convener between the aggrieved church member, structure or institution and the other party, who may be, as here, the presiding bishop, representing the church (bearing in mind that para 5.11 does not bind the presiding bishop when acting in his or her official capacity in the interests of the church). It is the C convener who decides whether arbitration will occur in relation to any dispute and the convener's decision is final. While I have no doubt that the convener for the time being, as did the convener in this case, would discharge their functions openly and with integrity, if the convener has the power to determine whether or not an arbitration will take place at all, it is hard to see on what basis it can be said that para 5.11 creates a D binding arbitration agreement. Put simply, a reference to the convener made under it may not result in an arbitration governed by the Act.

[51] The argument that clause 5.11 imposes an obligation to arbitrate disputes is dependent upon the proposition that it, and indeed the entire E contents of the L & D of the church, constitutes a contract between church and member and church and minister. It is here that the principal difficulty arises. In order to understand that difficulty it is necessary to examine the structure of the church and the L & D in somewhat greater detail.

[52] The church consists of members who become such after a profession F of faith at a public service, also called confirmation, which is described as a 'solemn service of recognition, commitment, prayer and blessing' in which the member accepts responsibility as a member of the church to live in accordance with the Methodist Rule of Life. 16 The L & D is adopted by the conference, which clause 5.1 identifies as the G governing authority of the church. Its function is to provide direction and inspiration for the church and it is the sole legislative body of the church. It is also the sole and final authority in respect of the doctrines of the church and their interpretation. Unlike a club, the church's members and clergy do not become such by subscribing to a constitution H and the conference is not established by democratic election among the membership. The conference draws its membership from the different organisations of the church. Neither the ordinary members nor the body of ministers has any right to attend or vote in its deliberations or any direct role to play in the formulation or contents of the L & D. That serves to distinguish the church from clubs and other similar voluntary I associations, where membership affords a right of participation in all the affairs of the organisation, or a company where the articles of association define the voting rights of all members. The constitutions of voluntary

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Wallis JA (Fourie AJA concurring):

A associations and the articles of association of a company are commonly seen to give rise to contractual relationships between the member and the association or company. 17 As the reported decisions show there are churches and other religious organisations that have constitutions adopted and approved by members but the Methodist Church of B Southern Africa is not one of them. The L & D is not the same as the constitution of a voluntary association and fulfils a different purpose.

[53] That purpose emerges from the foreword to the 11th edition written by the then presiding bishop. He expressed the desire that it would be 'a useful mission tool' in the task of proclaiming 'the gospel of Jesus Christ C for healing and transformation'. He said that its purpose is to facilitate the work of the church. Chapter 1 describes the nature of the church and the role of Methodism within the church universal. Its objects and purposes are exclusively in the religious realm. The primary vocation and responsibility of every member of the church is to declare 'the universality of the grace of God by preaching the gospel'. To that end it D reaffirms the 'New Testament truth of the universal priesthood of believers'. Chapter 1 proceeds to explain the origins of Methodism, to describe the sacraments of baptism and the Lord's Supper and their administration, and to set out the basic doctrines of the church. It suffices for my purposes to say that it reflects the faith and beliefs of E Methodists and the Methodist Church in South Africa.

[54] Chapter 1 sets out the basic principles that govern ministers of the church such as Ms De Lange. The following clauses in the L & D are relevant to this:

F 1.19 Christ's ministers in the Church are stewards in the household of God, and shepherds of His flock. Some are called and ordained to this sole occupation, and have a principal and directing part in these great duties.

1.20 It is the universal conviction of the Methodist people that the office of the Christian Ministry depends upon the call of God, who bestows the gifts of the Spirit, the grace and the fruit of which G indicate those whom God has chosen.

1.21 Those whom the Church recognises as called of God, and therefore receives into its Ministry, shall be ordained by the imposition of hands with prayer to the Holy Spirit for authority for the office and work of a Minister in the Church of Christ, thus expressing the Church's recognition of the Minister's personal H call.'

2015 (1) SA p133

Wallis JA (Fourie AJA concurring):

On this basis the ministers of the church 'are set apart by ordination to A the Ministry of the Word and Sacraments'. 18

[55] Chapter 4 of the L & D deals with the process by which a person can become an ordained minister in the church. It encourages 'those who are called of God and who have the qualities of Christian character, B evangelical zeal and preaching ability to offer for the Ministry', identifying the primary qualifications as being 'the sense of a divine call, spiritual and intellectual gifts, the graces of Christian character, and the fruits of Christian service'. 19 It spells out the training that the candidate for the ministry must undergo leading eventually to ordination 'by the solemn imposition of hands'. 20 The minister is then received into full C connexion, which includes the authority to perform the work of a minister and to administer the sacraments. 21

[56] It is difficult to discern in this any intention to create a contractual relationship between the minister and the church, any more than it is possible to discern an intention by a member or the church to enter into D contractual relations when the member is confirmed. The nature of the process, its origin in the ordinand's sense of divine call, the manner in which ordination occurs and the description of the task undertaken by the minister once admitted to full connexion, is wholly inconsistent with the minister and the church, at the point of ordination, separately having an intention to enter into a contractual relationship (the animus contrahendi). E It is no surprise therefore to find that such a relationship is expressly disavowed in clause 4.3 which provides that:

'The Church recognises its pastoral responsibility to care for the welfare of its Ministers. Nevertheless, notwithstanding any provision contained F in the Laws and Discipline or the decisions of Conference or of the Connexional Executive which seem to indicate the contrary, no legally enforceable contract shall exist at any time between the Church or any of its circuits on [the] one hand and a Minister on the other hand, in respect of the payment of stipends, allowances or any other material benefit, in cash or kind, the provision of a station or any benefit of any kind which may have at any stage accrued to a minister.' G

[57] Apart from her ordination Ms De Lange did not point to any other occasion upon which the provisions of the L & D could have become the record of a contractual relationship between her and the church. Her approach was simply that as a minister of the church she was bound by the L & D. Whilst it is true that this is accepted by all ministers in the H Methodist Church, that does not mean that they have concluded a contract to that effect. It seems more likely that their acceptance of the L & D is an obligation and discipline flowing from their calling to be a minister and the acceptance of that call by going through the process of ordination. I

2015 (1) SA p134

Wallis JA (Fourie AJA concurring):

A [58] Apart from her ordination Ms De Lange did not point to any other occasion on which the provisions of clause 5.11, read with appendix 14, of the L & D were accepted by her, acting with the intention to bring about a contractual relationship at least in regard to arbitration. Indeed in her replying affidavit she expressly said that she was not bound by B clause 5.11. Had she signed the arbitration agreement prepared by the convener, that document would then have reflected a binding arbitration agreement, but she declined to do so and it was signed on her behalf by the convener. His authority to do that was derived from clause 5.11, read with clause 2.2.ii of

appendix 14, and, if that lacked contractual status, C then he lacked the necessary authority to bind Ms De Lange.

[59] These issues are not novel. They have arisen in various denominations within the broad Christian community when disciplinary steps have been taken against ministers and they have sought to invoke the jurisdiction of tribunals set up to resolve disputes arising in the field of employment. On three occasions the question has come before the D labour court in this country. 22 The first case dealt with a minister of the Dutch Reformed Church who had been given a letter of appointment by a particular congregation of the church setting out his duties and salary and other benefits that would be due to him in return for the performance of those duties. That was held to constitute a contract of E employment. By contrast the second case dealt with the dismissal of an Anglican priest who sought to challenge his dismissal before the CCMA. The priest had been ordained in accordance with the rites and canons of the Anglican Church, which were similar in nature and effect to those in the L & D, and said that this gave rise to a contract of employment. The Labour Court rejected this contention, holding that there was no F intention to enter into a contractually binding relationship. The basis of the entire process was religious. Similarly in the third case it was held that officers in the Salvation Army did not enter into a contract of employment with the Salvation Army, because their position flowed from their understanding that they were called of God to a spiritual G ministry and the relationship between them and the Army was a spiritual one governed by religious conscience. 23

[60] Similar conclusions have been reached in cases elsewhere. Waglay J in *Church of the Province*, supra, 24 referred to judgments in Australia and New Zealand to the same effect. Most of these cases in turn refer to H judgments in the United Kingdom where there is a fairly substantial body of case law on the topic. It is helpful to refer to the most important of these. Their effect, which is I believe equally applicable in this country, is that in each case one must examine the rules and practices of the

2015 (1) SA p135

Wallis JA (Fourie AJA concurring):

particular church and any special arrangements that have been made A with the minister or priest to determine whether their actions were intended in any respect to give rise to contractual rights and obligations. In making that assessment one cannot disregard either the religious background to the relationship or the fact that for doctrinal reasons the church and the minister do not regard contractual arrangements as necessary and organise their relationship accordingly. B

[61] In *President of the Methodist Conference v Parfitt* 25 a Methodist minister was dismissed by the governing body of the church in England and sought to challenge his dismissal in the industrial tribunal. The church contended that he fell outside the jurisdiction of the tribunal because there was no contract of employment between him and the C church. This contention was upheld and Dillon LJ said: 26

'... (I) In my judgment, the spiritual nature of the functions of the minister, the spiritual nature of the act of ordination by the imposition of hands and the doctrinal standards of the Methodist Church which are so fundamental to that Church and to the position of every minister D in it make it impossible to conclude that any contract, let alone a contract of service, came into being between the newly ordained minister and the Methodist Church when the minister was received into full connection. The nature of the stipend supports this view. In the spiritual sense, the minister sets out to serve God as his master; I do not think that it is right to say that in the legal sense he is at the point of ordination undertaking by contract to serve the Church or the E Conference as his master throughout the years of his ministry.'

[62] That judgment was followed in *Davies v Presbyterian Church of Wales*. 27 Again the case involved a minister dismissed from his pastorate and seeking relief before the industrial tribunal. In rejecting the claim on behalf of the House, Lord Templeman said: 28 F

'My Lords, it is possible for a man to be employed as a servant or as an independent contractor to carry out duties which are exclusively spiritual. But in the present case the pastor of the Church cannot point to any contract between himself and the Church. The book of rules does not contain terms of employment capable of being offered and G accepted in the course of a religious ceremony. The duties owed by the pastor to the Church are not contractual or enforceable. A pastor is called and accepts the call. He does not devote his working life but his whole life to the Church and his religion. His duties are defined and his activities are dictated not by contract but by conscience. He is the servant of God. If his manner of serving God is not acceptable to the H Church, then his pastorate can be brought to an end by the Church in accordance with the rules. The law will ensure that a pastor is not deprived of his salaried pastorate save in accordance with the provisions of the book of rules but an industrial tribunal cannot determine whether a reasonable Church would sever the link between minister and congregation.' I

2015 (1) SA p136

Wallis JA (Fourie AJA concurring):

A [63] The subsequent decision of the House of Lords in *Percy v Board of National Mission of the Church of Scotland* 29 suggested that some of this reasoning might be questionable. Percy involved a minister who resigned in the face of disciplinary proceedings and then sought to challenge her treatment by the church on the grounds of sex discrimination. She B accepted that she was not employed under a contract of employment, but claimed that the circumstances in which she had been offered and had taken up her appointment amounted to a contract to execute work and she therefore fell within the definition of an employee in the relevant legislation.

C [64] That contention was upheld. It appeared that the post had been advertised and applications invited on the basis that the successful candidate would be appointed on certain terms and conditions relating to the duties attaching to the post, stipend, accommodation, leave and the like. When the post was offered to Ms Percy these conditions were set D out in full and she accepted them. In those circumstances the majority speech by Lord Nicholls of Birkenhead rejected the proposition that the holding of an office is inconsistent with a contractual relationship and concluded in regard to the question of an intention to give rise to a legally binding relationship that: 30

E '... (T)his principle should not be carried too far. It cannot be carried into arrangements which on their face are to be expected to give rise to legally-binding obligations. The offer and acceptance of a church post for a specific period, with specific provision for the appointee's duties and remuneration and travelling expenses and holidays and accommodation, seem to me to fall firmly within this latter category.

F ... Further, in this regard there seems to be no cogent reason today to draw a distinction between a post whose duties are primarily religious and a post within the church where this is not so. In *President of the Methodist Conference v Parfitt* ... Dillon LJ noted that a binding contract of service can be made between a minister and his church. G This was echoed by Lord Templeman in your Lordships' House in *Davies v Presbyterian Church of Wales* ... Lord Templeman said it is possible for a man to be employed as a servant or as an independent contractor to carry out duties which are exclusively spiritual.'

[65] Percy was decided on the footing that although Ms Percy's ordination H did not create a contract between her and the church, the circumstances of her appointment to the particular charge were such as to give rise to a contract under which she performed her duties, albeit not a contract of employment. 31 It did not invalidate the earlier decisions that held that the nature of a minister's relationship with the church flowing I from ordination was not intended by the parties to be of a contractual nature. This is clear from the summary of the legal position in the

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Wallis JA (Fourie AJA concurring):

majority judgment of Lord Sumption in the recent decision in *A President of the Methodist Conference v Preston*, 32 where he said:

'It is clear from the judgments of the majority in Percy's case that the question whether a minister of religion serves under a contract of employment can no longer be answered simply by classifying the B minister's occupation by type: office or employment, spiritual or secular. Nor, in the generality of cases, can it be answered by reference to any presumption against the contractual character of the service of ministers of religion generally The primary considerations are the manner in which the minister was engaged, and the character of the rules or terms governing his or her service. But, as with all exercises in contractual construction, these documents and any other admissible C evidence on the parties' intentions fall to be construed against their factual background. Part of that background is the fundamentally spiritual purpose of the functions of a minister of religion.'

[66] That case was also one in which a minister who had been dismissed sought to challenge her dismissal before an employment tribunal because D she claimed her dismissal was unfair. Lord Sumption reviewed the structure of the Methodist Church in the United Kingdom, which shares many of the features of its sister church in this country, and concluded: 33

'If the arrangements governing the ministry described in the Deed of Union and the standing orders are a contract between the minister in E that capacity and the Methodist Church, then it seems to me inevitable that they must be classified as a contract of employment. But that only increases the difficulty of regarding them as a contract at all. Three points seem to me to be cumulatively decisive. First, the manner in which a minister is engaged is incapable of being analysed in terms of contractual formation. Neither the admission of a minister to full F connexion nor his or her ordination are themselves contracts. Thereafter, the minister's duties are not consensual. They depend on the unilateral decisions of the Conference. Secondly, the stipend and the manse are due to the minister by virtue only of his or her admission into full connexion and ordination. While he or she remains in full connexion and in the active life, these benefits continue even in the G event of sickness or injury, unless he or she is given leave of absence or retires. In addition to the stipend and the manse, the minister has certain procedural rights derived from the disciplinary scheme of the Deed of Union and the standing orders, which determine the manner in which he or she may be suspended or removed from ministerial duties. But the disciplinary scheme is the same for all members of the H Church whether they are ministers or ordinary lay members. Third, the relationship between the minister and the Church is not terminable except by the decision of the Conference or its stationing committee or a disciplinary committee. There is no unilateral right to resign, even on notice. I conclude that the ministry described in these instruments is a vocation, by which candidates submit themselves to the discipline of I the Church for life. Unless some special arrangement is made with a particular minister, the rights and duties of ministers arise, as it seems

2015 (1) SA p138

Wallis JA (Fourie AJA concurring):

A to me, entirely from their status in the constitution of the Church and not from any contract.'

One difference between that description and the position in the Methodist Church in South Africa is that a minister may resign, but, beyond that, the considerations mentioned by Lord Sumption are equally B applicable to Ms De Lange's situation. For the same reasons it seems to me that her relationship with the church is not a contractual relationship but an expression of her vocation to ministry exercised under the discipline of the church.

[67] I appreciate that the cases I have been discussing are cases where C the issue has been whether ordination in accordance with the prescripts of a particular church gives rise to a contract of employment between the minister and the church. But if on her ordination there was no intention by Ms De Lange and the church to enter

into a contract in relation to her employment in terms of the L & D, there was likewise no intention to D enter into any other contract embodied in that document. And if that is so then in this case there is no arbitration agreement between the parties and no agreement that can be the subject of an application under s 3(2) of the Act. As I have mentioned there would have been a valid arbitration agreement had Ms De Lange and the Presiding Bishop been able to agree upon the terms of such an agreement, but they did not.

E [68] For those reasons I have the reservations I have mentioned about the basis upon which the application was argued before us. On the face of matters it was misconceived. If I am correct in that view then the appeal was in any event doomed to fail, but I have expressed these views as they may influence the course of events hereafter. I add, as did F Baroness Hale in *Percy*, that I hope that the parties will now seek to settle their differences outside the secular courts, as is clearly the intention of clause 5.11 of the L & D, an intention that I understand to have scriptural support. 34

Appellant's Attorneys: Pieter van R Coetzee, Centurion; Webbers, Bloemfontein. G

Respondents' Attorneys: Malherbe Rigg & Ranwell Inc, Boksburg; Symington & De Kok, Bloemfontein.

h

1 S Stoljar 'The Internal Affairs of Associations' in *Legal Personality and Political Pluralism* (1958) at 66 – 7, cited in *Lakeside Colony of Hutterian Brethren v Hofer* [1992] 3 SCR 165; and *Coombes v National Phoenix 1984 Firearms Information and Communication Association* 2009 ABQB 566.

2 In terms of the rules and discipline of the church all legal proceedings by or against the church shall be instituted in the name of the Presiding Bishop and the Executive Secretary.

3 For the scope of this debate see inter alia D Bilchitz 'Why Courts Should Not Sanction Unfair Discrimination in the Private Sphere: A Reply' (2012) 28 SAJHR 296; S de Freitas 'Freedom of Association as a Foundational Right: Religious Associations and *Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park*' (2012) SAJHR 258 at 262; P Lenta 'In Defence of the Right of Religious Associations to Discriminate: A Reply to Bilchitz & De Freitas' (2013) SAJHR 429.

4 De Freitas n3 at 271.

5 See *Yiba and Others v African Gospel Church* 1999 (2) SA 949 (C).

6 See ss 15 and 31 of the Constitution. *Taylor v Kurtstag NO and Others* 2005 (1) SA 362 (W) (2005 (7) BCLR 705; [2004] 4 All SA 317) para 37.

7 De Freitas above n3 at 262. For a narrower reading of the right see Lenta above n3.

8 J Witte 'The South African Experiment in Religious Human Rights' (1993) *Journal for Juridical Science* 1 at 24 – 5.

9 G van der Schyff *The Right to Freedom of Religion in South Africa* (2001), dissertation Rand Afrikaans University at 102.

10 S Woolman & D Zeffertt 'Judging Jews: Court interrogation of rule-making and decision-taking by Jewish ecclesiastical bodies' (2012) SAJHR 196 at 205.

11 *Telecall (Pty) Ltd v Logan* 2000 (2) SA 782 (SCA) paras 10 – 12.

12 See *Amphill Peerage Case* [1976] 2 All ER 411 (HL) at 424 per Lord Simon of Glaisdale: 'Status means the condition of belonging to a class in society to which the law ascribes peculiar rights and duties, capacities and incapacities.'

13 In the United Kingdom, until recently, a priest in the Church of England held an office. See *President of the Methodist Conference v Preston* [2013] UKSC 29 para 4.

14 *Mervis Brothers v Interior Acoustics and Another* 1999 (3) SA 607 (W) at 610.

15 DW Butler (original text by C Smith) Joubert 'Arbitration' in Joubert LAWSA (vol 1, 2 ed) para 555. This is no longer the position in English law as a result of s 6(1) of the Arbitration Act 1996 (c 23).

16 Chapter 3 of L & D.

17 As to voluntary associations see the authorities in *Jacobs v Old Apostolic Church of Africa and Another* 1992 (4) SA 172 (Tk) at 173B – F; and *Yiba and Others v African Gospel Church* 1999 (2) SA 949 (C) at 960 – 961. As to companies see *De Villiers v Jacobsdal Saltworks (Michaelis and De Villiers) (Pty) Ltd* 1959 (3) SA 873 (O) at 876 – 877; *Gohlke and Schneider and Another v Westies Minerale (Edms) Bpk and Another* 1970 (2) SA 685 (A) at 692F – G; *Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd and Others* 2009 (4) SA 89 (SCA) para 22. The authors of *Henochsberg on the Companies Act 71 of 2008* vol 1, 74 (looseleaf, issue 8) express the view that this situation has not been altered by the 2008 Companies Act.

18 Clauses 1.22 and 1.23.5.

19 Clause 4.2 of the L & D.

20 Clause 4.49 of the L & D.

21 Clause 4.48 of the L & D.

22 *Schreuder v Nederduitse Gereformeerde Kerk, Wilgespruit* (1999) 20 ILJ 1936 (LC); *Church of the Province of Southern Africa Diocese of Cape Town v Commission for Conciliation, Mediation and Arbitration and Others* 2002 (3) SA 385 (LC); and *Salvation Army (South African Territory) v Minister of Labour* (2005) 26 ILJ 126 (LC).

23 See also *Rogers v Booth* [1937] 2 All ER 751.

24 Paragraphs 22 and 23.

25 *President of the Methodist Conference v Parfitt* [1983] 3 All ER 747 (CA).

26 At 751j – 752b.

27 *Davies v Presbyterian Church of Wales* [1986] 1 All ER 705 (HL).

28 At 709g – j.

29 *Percy v Church of Scotland Board of National Mission* [2005] UKHL 73.

30 Paragraphs 24 and 25.

31 See also in this regard Lord Hope of Craighead paras 112 – 115.

32 *President of the Methodist Conference v Preston* [2013] UKSC 29 para 10.

33 Paragraph 20.

34 1 Corinthians 6 vs 1 – 6. It is the practice and preference of both Islam and Judaism, and may well be the practice of other faiths, to prefer that religious, and even commercial, disputes between members of the faith be resolved internally and not by the secular courts.

AB v JB

2016 (5) SA 211 (SCA)

Citation	2016 (5) SA 211 (SCA)
Case No	20808/2014 [2016] ZASCA 40
Court	Supreme Court Of Appeal
Judge	Maya AP, Swain JA, Tsoka AJA, Baartman AJA and Kathree-Setiloane AJA
Heard	February 26, 2016
Judgment	March 24, 2016
Counsel	JG Wasserman SC (with C Woodrow) for the appellant. H Epstein SC (with M Smit) for the respondent.
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Arbitration — Matters excluded — Matters having matrimonial cause or any matter incidental to such cause — Whether including delictual claim for damages arising from negligent misrepresentation or deliberate non-disclosure of true value of accrual in settlement agreement incorporated in divorce order — Arbitration Act 42 of 1965, s 2(a) C

Marriage — Divorce — Proprietary rights — Accrual system — Proof of accrual — Whendetermined — Date of dissolution of marriage determinative (not of litis contestatio) — Matrimonial Property Act 88 of 1984, s 3(1).

Headnote : Kopnota

This case concerned Mr AB's appeal to the Supreme Court of Appeal against a D High Court decision which upheld an appeal tribunal's arbitration award in favour of his ex-spouse, Mrs JB. The award was for delictual damages arising from Mr AB's negligent misrepresentation or deliberate non-disclosure of the true value of his estate's accrual in the settlement agreement incorporated in their divorce order.

At issue were: E

(1) Whether Mrs JB's claim was excluded from referral to arbitration as having a 'matrimonial cause' or being 'a matter incidental to such cause' as contemplated in s 2(a) of the Arbitration Act 42 of 1965.

Held, that all of the matrimonial issues were disposed of when the court granted the order incorporating the settlement agreement — all its natural consequences came to an end, and anything relating thereto, such as proprietary F consequences, became res judicata — so that the delictual claim that was referred to arbitration could not be said to be incidental to any matrimonial cause. (Paragraph [12] at 215C – E.)

(2) Whether the arbitrators erred in assessing the extent of an accrual as at the date of the dissolution of the marriage (and not at the date of litis contestatio), and if so whether it warranted setting the award aside. G

Held, that the time when a right came into existence was determinative in calculating its value, and s 3 of the Matrimonial Property Act 88 of 1984 was clear and unambiguous that a spouse acquired a right to claim an accrual at the 'dissolution of a marriage'. Case law which held that the date for determination of the accrual was at litis contestatio rather than at the dissolution of the marriage, was wrongly decided. (Paragraphs [16], [19] and [20] at 216B – D and 217A – F.) H

Cases Considered

Annotations

Case law I

Eke v Parsons 2016 (3) SA 37 (CC) (2015 (11) BCLR 1319; [2015] ZACC 30): dictum in para [31] applied

JA v DA 2014 (6) SA 233 (GJ): approved

KS v MS 2016 (1) SA 64 (KZD): criticised

Le Roux v Le Roux [2010] JOL 26003 (NCK): criticised

MB v DB 2013 (6) SA 86 (KZD): criticised

MB v NB 2010 (3) SA 220 (GSJ): criticised J

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A Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13): dictum in para [18] appl

Pitt v Pitt 1991 (3) SA 863 (D): distinguished

Taylor v Kurtstag NO and Others 2005 (1) SA 362 (W) (2005 (7) BCLR 705; [2004] 4 All SA 317): distinguished.

Statutes Considered

B Statutes

The Arbitration Act 42 of 1965, s 2(a): see Juta's Statutes of South Africa 2015/16 vol 1 at 2-5

The Matrimonial Property Act 88 of 1984, s 3(1): see Juta's Statutes of South Africa 2015/16 vol 7 at 4-195.

Case Information

JG Wasserman SC (with C Woodrow) for the appellant.

H Epstein SC (with M Smit) for the respondent.

An appeal from the Gauteng Local Division of the High Court, Johannesburg (Nicholls J).

Order

The appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.

Judgment

Tsoka AJA (Maya AP, Swain JA, Baartman AJA and Kathree-Setiloane AJA E concurring):

[1] The issues for determination in this appeal are twofold. First, whether the respondent's delictual claim for damages is a 'matrimonial cause or matter incidental to such cause', as contemplated in s 2 of the Arbitration Act 42 of 1965 (the Act), and is therefore incapable of F referral to arbitration. Secondly, whether the arbitrators erred in assessing the extent of an accrual in a matrimonial dispute, as at the date of the dissolution of the marriage, and not at the date of litis contestatio. If so, whether this constituted an error of law resulting in the arbitrators misconceiving the whole nature of the enquiry, with the consequence G that the award falls to be set aside in terms of s 33(1) of the Act.

[2] The facts giving rise to the appeal are, briefly, the following. The appellant, Mr AB, and the respondent, Mrs JB, were married out of community of property but subject to the accrual system on 14 February 1987. The antenuptial agreement which governed their marital regime H was entered into before their wedding, on 13 February 1987. The marriage did not survive and, on 30 November 2006, the respondent instituted a divorce action in the Gauteng Local Division of the High Court, Johannesburg. She sought a decree of divorce and ancillary relief, including a claim under s 3 of the Matrimonial Property Act 88 of 1984 (the MPA) for half of the accrual of the latter's estate, as her estate I showed no accrual or a smaller accrual than that of the appellant.

[3] On 5 May 2008, pursuant to a settlement agreement that was made an order of court, a final decree of divorce was granted. The appellant was ordered to pay the respondent the amount of R8 007 340 in instalments, in respect of her portion of the accrual. However, two J months later it became public knowledge that a listed company on the

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Tsoka AJA (Maya AP, Swain JA, Baartman AJA and Kathree-Setiloane AJA concurring)

Johannesburg Stock Exchange, Esorfranki Ltd, was interested in purchasing A the shares and claims of the Patula Group of Companies (Patula) in which the appellant had a substantial interest. The respondent got wind of this information. As a result, in 2010, she successfully launched an ex parte application with a view to verify the information. Pursuant to the application, the sheriff attached management accounts B and other documents of Patula which confirmed that, for the period before the granting of the divorce, the appellant's estate had shown a substantial accrual in excess of R167 million.

[4] On 4 February 2010 the respondent instituted a claim for delictual damages in the sum of R83,9 million on the basis that the appellant C falsely or negligently represented that his shares in that company were worth only R20 712 527, when in truth the shares were worth more than R167 million. According to her, had she known the truth, she would not have settled as she did but would have settled for more. In the alternative, she asserted that the appellant knew the true value of the shares but fraudulently or negligently failed to disclose this information D thereby inducing her to settle to her detriment.

[5] The respondent obtained judgment by default against the appellant as he had failed to defend the action. For reasons irrelevant to the appeal, that judgment was thereafter rescinded by the court and the matter E proceeded on an opposed basis. The trial was set down for August 2012 but it did not proceed as the parties, on the eve of the trial, entered into an arbitration agreement referring, on an urgent basis, 'the dispute in the action' to arbitration.

[6] The arbitration proceeded from 20 August 2012 to 21 November 2012 F before the retired Deputy President of the Supreme Court of Appeal, Harms. The main issue for determination in the arbitration was whether the appellant had misrepresented the value of the accrual, ie his interest in Patula. This claim was dismissed on the basis that a misrepresentation had not been established. Also at issue was the non-disclosure by the appellant of his loan account, in respect of which G the respondent alleged that a dividend had been declared for the 2008 financial year, of which R7,8 million had been credited to the appellant's account. This claim was upheld and the respondent was awarded R3,9 million with costs plus interest. Dissatisfied with these findings, the appellant, on 7 December 2012, lodged an appeal before an appeal tribunal, while the respondent cross-appealed. H

[7] On 5 October 2013 the appeal proceeded before the appeal tribunal comprising retired Judges of Appeal, President Howie and Streicher JA, and Mr Van der Linde SC. On 15 October 2013 they upheld the respondent's cross-appeal and dismissed the appellant's appeal. I The appellant was ordered to pay the respondent the amount of R35 739 287 with interest, less the maintenance payable or paid to her in terms of the divorce order. The appeal tribunal agreed with the finding of the arbitrator that misrepresentation had not been established but found that non-disclosure, in circumstances where the appellant had a duty to disclose, had been established. The appeal tribunal also held that J

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Tsoka AJA (Maya AP, Swain JA, Baartman AJA and Kathree-Setiloane AJA concurring)

as the action was for pure economic loss, the requirements for factual and legal causation, for purposes of delict, had been proved. It also found that the non-disclosure was deliberate and intended to induce the respondent into agreeing to an accrued value of the appellant's estate that was materially understated. The appeal tribunal was satisfied that all B the other elements of a delictual damages claim for pure economic loss had been established. Accordingly, it awarded to the respondent damages, being the difference between the true value of the accrual and the amount she agreed to in terms of the settlement agreement.

[8] In December 2013 the appellant launched an application in the court C a quo (Nicholls J) against the appeal award. The appellant's two principal arguments in the court a quo as set out above were the following. First, the dispute referred to arbitration was incidental to the matrimonial cause and was accordingly prohibited for

referral to arbitration in terms of s 2 of the Act. Secondly, the appeal tribunal D misconceived the nature of the enquiry by assessing the accrual as at the date of divorce rather than at *litis contestatio*, which had the effect that the calculation of the value of the accrual was incorrect. This resulted in an irregularity that rendered the entire enquiry procedurally unfair.

[9] Dealing with the first issue, the court a quo held that the words any E 'matrimonial cause or a matter incidental to such cause' in s 2 of the Act must be interpreted to mean any live matrimonial cause either pending, or in the process of being instituted. Once the settlement agreement was made an order of court on 5 May 2008 the matrimonial cause and all matters incidental thereto, including the claim for half of the accrual, were no longer alive. The matrimonial cause had come to its natural conclusion. It also held that whilst the duty to disclose the accrual was a statutory duty arising from s 7 of the MPA, the delictual claim was for payment of damages suffered as a result of fraudulent or negligent misrepresentation, alternatively non-disclosure with regard to the true amount of the accrual. This was incidental to a delictual cause and not G incidental to a matrimonial cause. Regarding the second point, the court held that as the claim arises on dissolution of the marriage, the assessment of the value of the accrual must take place at that date. The court went on to hold that even if it could be said that the assessment date was incorrect, this did not result in the appeal tribunal misconceiving the enquiry. It simply meant that it had erred in law which H was not reviewable in terms of the Act. The court a quo accordingly dismissed the application with costs. This appeal is with its leave.

[10] Counsel for the appellant submitted that, on the pleadings, the real issue for determination was the accrual of the appellant's estate. I He asserted that the appeal tribunal's frequent use of the words 'accrual', 'the accrual system', 'the Act and its provisions' and the fact that the delict was committed in the context of an accrual had as a consequence that the action, in essence, was a 'matrimonial cause or matter incidental to such cause'. The referral to arbitration was therefore incompetent and void ab initio. Respondent's counsel on the other hand, submitted that J the issue referred to arbitration was a delictual claim which was neither

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Tsoka AJA (Maya AP, Swain JA, Baartman AJA and Kathree-Setiloane AJA concurring)

a 'matrimonial cause nor matter incidental to such cause', although its A genesis lay in the accrual of the appellant's estate.

[11] It is necessary for the determination of the first issue to examine the legal consequences of a settlement agreement being made an order of court. At the stage when the respondent instituted the delictual action B against the appellant, the parties' marriage had been dissolved in terms of the court order which incorporated their settlement agreement. The effect of the settlement agreement being made an order of court —

'is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the *lis* between the parties; C the *lis* becomes *res judicata* (literally, a matter judged). It changes the terms of a settlement agreement to an enforceable court order.' 1

[12] After the order was granted, there was no longer any matrimonial cause to speak of. Neither was there anything incidental to such cause, as all of the matrimonial issues were disposed of when the court granted D the order incorporating the settlement agreement. Consequently, there cannot be any issue still outstanding relating to the marriage. The inevitable result is that the marriage and all its natural consequences came to an end, and anything relating thereto, such as proprietary consequences, became *res judicata*. That being so, the delictual claim that was referred to arbitration cannot be said to be incidental to any matrimonial cause. E

[13] Although the failure to disclose the true value of the accrual arose in the context of the accrual regime which existed between the parties, it was, accordingly, unavoidable that the pleadings and the tribunal would refer to F the accrual system and the Act. That, however, does not detract from the true cause of action that was referred to arbitration, which was rooted in delict. The respondent's contention and argument that the delictual claim is therefore a matter 'incidental to matrimonial cause' is unsustainable and offends the clear and unambiguous language of s 2 of the Act. G

[14] The appellant's reliance on *Taylor v Kurtstag* NO 2 was misplaced. In that matter the referral of custody of the children, maintenance and proprietary consequences of a pending marriage to an ad hoc Beth Din (Jewish Ecclesiastical Court) for determination 'according to arbitration laws of the Republic' was held impermissible.

Correctly so, as the matrimonial cause was still alive including the issues of custody, maintenance H and the proprietary consequences of such marriage. The appellant's reliance on *Pitt v Pitt* 3 was similarly misplaced. In that matter the applicant sought an order enforcing the terms of a settlement agreement which regulated the proprietary consequences of their divorce.

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[15] I turn to the issue as to when the value of an accrual should be determined, ie whether the value of the accrual should be determined at the close of pleadings or at the dissolution of the marriage, either by death or by divorce.

[16] The provisions of the MPA are clear and unambiguous. In terms of B s 3 thereof a spouse acquires a right to claim an accrual at the 'dissolution of a marriage'. An exception arises in terms of s 8 of the MPA. In terms of this section a spouse is entitled to approach the court for immediate division of the accrual where his or her right to share in it at dissolution of the marriage 'will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse'. It is only then that the C date for determination of an accrual is brought forward, instead of at 'dissolution of the marriage'. Furthermore, in terms of s 4 of the MPA the net value of the accrual of the estate of a spouse is determined at the dissolution of the marriage.

[17] This issue has given rise to dissenting decisions in two lines of cases D in the High Court. The one view is that the correct date upon which the accrual must be determined is at the stage of *litis contestatio*, whereas the other view is that this must be calculated at the date of dissolution of the marriage. In *MB v NB* 4 Brassey AJ held that although s 3 establishes the moment at which the contingent right possessed by a spouse E becomes perfected, ie at the dissolution of the marriage, it does not establish the moment by reference to which the respective estates of the parties must be assessed. The learned acting judge was of the view that the problem was one of procedure, not substance, and owed its origin to the fact that litigation takes time to complete. In his view the established principle was that the operative moment was *litis contestatio*, for that was F the moment when the dispute crystallises and can be presented to court for decision. The view in *MB v NB* was followed in *MB v DB* 5 and *KS v MS*. 6

[18] However, in *JA v DA* 7 Sutherland J correctly pointed out in para 11 that the views of Brassey AJ were obiter and disagreed with the view G that the date of the close of pleadings is the date upon which to determine the content and value of the estates. In his view, that date was irrelevant for this exercise and the date of dissolution was the only relevant date upon which to calculate the respective estates. Because the event of *litis contestatio* was purely procedural, it had no bearing on the H definition of, or identification of, any alleged right which was the subject of litigation, nor had it any bearing on the determination when, by operation of law, or upon any given facts, any right comes into being. Sutherland J then stated the following in para 17:

'When, as in this case, a claim is based on the existence of a right and the claim is for a performance measured by value it is not possible to calculate I that value at a moment prior to the coming into existence of the right.'

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Tsoka AJA (Maya AP, Swain JA, Baartman AJA and Kathree-Setiloane AJA concurring)

[19] The view of Sutherland J that the time when the right comes into A existence is determinative of the calculation of the value of that right is undoubtedly jurisprudentially correct. I do not agree with the view expressed in *Le Roux v Le Roux* 8 which was followed in *KS v MS*, 9 that this conclusion will result in a piecemeal adjudication of issues resulting in further litigation between the parties. This view was based upon the B proposition that a litigant would have to engage in two distinct actions. The first would be for a divorce and the second for an order in terms of s 3 of the MPA. I agree, however, with the view of Sutherland J that it would not be inappropriate to sue for both a divorce and an order pursuant to s 3 of the MPA in a single action, in which the accrual order is made dependent upon the grant of a divorce order. C

[20] The other problems averted to by Brassey AJ and Sutherland J, which may result from this determination of the date upon which the accrual must be calculated, cannot obscure what is the clear meaning of the Act. As stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*: 10 D

'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;'

Consequently MB v NB and MB v DB, as well as KS v MS, which held E that the date for determination of accrual is at *litis contestatio* rather than at the dissolution of marriage, were wrongly decided.

[21] In argument counsel for the appellant was constrained to concede that, jurisprudentially, the passage of Sutherland J quoted above in JA v DA was correct. The tribunal accordingly made no error in calculating F the accrual as at the date of the divorce order. In the result, I find that the date at which the accrual of the value of a spouse married in terms of the MPA is to be determined, is the date of dissolution of the marriage either by death or divorce.

[22] It was common cause that para 87 of the appeal-tribunal award G contains an error, which has to be referred back to the tribunal for correction, as the court *a quo* ordered. I agree.

[23] It is ordered that:

The appeal is dismissed with costs, including the costs consequent upon the employment of two counsel. H

Appellant's Attorneys: Thomson Wilks Inc, Johannesburg; Webbers Attorneys, Bloemfontein.

Respondent's Attorneys: David C Feldman Attorneys, Johannesburg; Lovius Block Attorneys, Bloemfontein. I

- 1 Eke v Parsons 2016 (3) SA 37 (CC) (2015 (11) BCLR 1319; [2015] ZACC 30) para 31.
- 2 Taylor v Kurstag NO and Others 2005 (1) SA 362 (W) (2005 (7) BCLR 705; [2004] 4 All SA 317).
- 3 Pitt v Pitt 1991 (3) SA 863 (D).
- 4 MB v NB 2010 (3) SA 220 (GSJ).
- 5 MB v DB 2013 (6) SA 86 (KZD).
- 6 KS v MS 2016 (1) SA 64 (KZD).
- 7 JA v DA 2014 (6) SA 233 (GJ).
- 8 Le Roux v Le Roux [2010] JOL 26003 (NCK).
- 9 Supra n6 para 23.
- 10 Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13) para 18.

V v V

1998 (4) SA 169 (C)

Citation	1998 (4) SA 169 (C)
Case No	16150/96
Court	Cape Provincial Division
Judge	Foxcroft J
Heard	August 6, 1997; September 8, 1997
Judgment	September 10, 1997
Counsel	E Steyn for the plaintiff until 18 August The plaintiff appearing in person from 18 August PK Weyerfor the defendant until 18 August The defendant appearing in person from 18 August

Annotations **None**

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[Flynote : Sleutelwoorde](#)

Husband and wife - Divorce - Custody of children - Joint custody - When to be ordered - Husband seeking custody of two minor children with very limited access to wife - Husband objecting to children being exposed to lesbian relationship in which wife involved - Husband's other concern being wife's state of mind - Wife maintaining that she had fully recovered from psychiatric condition - Parties having exercised joint custody for two years in terms of separation agreement - Most of factors proffered as disadvantages of joint custody not holding water - Court, on facts, having no doubt that defendant suitable and good mother - Court finding that joint custody in best interests of children - In order to prevent further disputes, Court including direction in order that, if agreement could not be reached on issue where joint decision required, dispute to be referred for mediation to two mediators and, if mediators unable to agree, dispute to be referred to arbitrator whose decision would be final. Husband and wife - Divorce - Custody of children - Joint custody - Husband seeking custody of two minor children with very limited access to wife - Situations might arise where best interests of child required that action be taken for benefit of child which effectively cut across parents' rights - Right of child to have access to its parents complemented by right of parents to have access to child - Essential that proper two-way process occurred so that child might fully benefit from relationship with each parent - Access not unilateral exercise of right by child, but part of continuing relationship between parent and child - The more extensive the relationship with both parents, the greater the benefit to child likely to be - Approach that imperative for child to know with whom ultimate say lay salutary in resolving deadlocks but, if situation could be regulated so that threatened dangers of deadlock removed as far as possible, need for ruling of one

authoritarian person receding considerably - Fact that child should know 'where it stands' not only consideration of importance - Such fact being part of pattern for child's future which Court attempting to construct, and which had to be balanced against benefits to be obtained when both parents contributing on regular and reasonably equal basis to upbringing of child. Husband and wife - Divorce - Custody - Joint custody - Husband seeking custody of two minor children with very limited access to wife - Husband objecting to children being exposed to lesbian relationship in which wife living - Husband entitled to protect children against what he perceived to be harmful influences - Court having to decide whether fear soundly based or not - In terms of equality clause in s 9 of Constitution of Republic of South Africa Act 108 of 1996, wrong in law to describe homosexual orientation as abnormal - In custody cases, however, dealing only indirectly with parents' rights, child's rights paramount and needing to be protected - Situations might arise where best interests of child requiring that action be taken for benefit of child which effectively cuts across parents' rights - Court having no doubt that defendant suitable and good mother - Would be unjust to compel mother to exercise access rights to children in position of visitor to father's home - Image of a mother's access being restricted in such way because of her lifestyle unfair to her and children - Children would grow up feeling that mother being punished because of risk that her lifestyle might influence them in wrong direction - No better protection against that than to allow children to continue living with both parents and eventually to judge for themselves whether lifestyle of mother or father more or less harmful than other - Court deciding that joint custody in best interests of children. **Headnote : Kopnota**

In an action for divorce and ancillary relief the plaintiff (husband) sought sole custody of the two minor children born of the marriage. He was prepared to allow the defendant only supervised access to the children, asking that unsupervised access should be granted only if a psychiatrist certified that it was in the best interests of the children that the defendant had access to the children and that such access should be subject to the condition that no third person would sleep under the same roof as the defendant and the children. His attitude was based, firstly, on the fact that his wife had become involved in a lesbian relationship and, secondly, on the fact that his wife was allegedly still suffering from a condition known as 'borderline personality disorder'. Witnesses called by the plaintiff substantiated the continuing effects of the condition. The defendant and her witnesses maintained, however, that the condition had been a consequence of a major posttraumatic stress situation, precipitated when the defendant's suppressed memories of childhood abuse had been rekindled by the discovery that one of her own children was being abused, and that she had recovered from the condition. The defendant was content that an order of joint custody be granted. The parties had in fact been exercising joint custody in practice for two years as a result of a separation agreement in terms of which the children moved between the homes of their mother and father, spending part of every week with each parent.

The Court held that children's rights were no longer confined to the common law, but had also found expression in s 28 of the Constitution of the Republic of South Africa Act 108 of 1996, as well as in a wide range of conventions. The rigours of the common law in regard to guardianship had also been tempered by the Matrimonial Affairs Act 37 of 1953 and then removed by the Guardianship Act 192 of 1993, in terms of which husbands and wives shared equally the right to make decisions affecting their children. (At 176D and 176H/I--I/J.) The Court discussed the factors which had been suggested as major disadvantages of joint custody. The first was the imagined need for the security of one decision-maker; secondly, the view that, if parents had been unable to maintain a stable marriage, they could not be expected to achieve the degree of

co-operation required for joint custody; thirdly, the view that joint custody ran counter to the so-called 'clean-break' principle in divorce; fourthly, logistical objections to joint custody where former spouses did not live in close proximity to each other; and, lastly, the view that joint custody might be seen to be the easy way out of relieving the Court from making a decision on a question of sole custody. In regard to these factors, the Court held that the first objection harked back to the patriarchal legal past of South Africa and assumed that there would always be disagreement requiring resolution by one authoritarian parent. The second objection had little to commend it since there were many situations where the parents could not abide each other any longer, but continued to love their children in the same way as they had always done. Thirdly, the so-called 'clean-break' principle seemed to have little to do with the best interests of the child. Fourthly, it was obviously beneficial for joint custodian parents to live reasonably near to each other. The last objection, relating to the perception of an abdication by the Court of its responsibilities might apply in some situations where a decision was reached in the Motion Court in an unopposed trial with a consent paper, but it could have no application to a situation like the present one, where a month had been spent grappling with the respective merits of sole custody or joint custody. (At 179C/D--F.)

The Court further held that the defendant *in casu* had demonstrated, by the manner in which she had conducted herself during the proceedings, that she had grown emotionally during the preceding years. It was thus unnecessary to determine the precise nature of her medical condition. (At 186D--G/H, paraphrased.)

The Court pointed out that it was common cause during the trial that the question of sexual orientation of the defendant was not regarded as an issue between the experts called by the parties. The Court held, however, that the fact that the expert witnesses felt that the defendant's sexual orientation did not present a problem did not mean that the plaintiff was not entitled to believe that it was problematic. He was fully entitled to protect his children against what he perceived to be harmful influences. In the end, however, what had to be decided was whether his fear was soundly based or not. (At 181G/H--I and 182D--E.) One of the cases to which the Court was referred by the plaintiff was *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W), a decision given before the Constitution of the Republic of South Africa Act 200 of 1993 came into force, where the Court made a moral judgment about what was normal and correct insofar as sexuality was concerned. It was clear that the Judge in that case had regarded homosexuality as being *per se* abnormal. The Court discussed the question whether the above judgment would have been in breach of chap 3 of the Constitution of the Republic of South Africa Act 200 of 1993 if it had been delivered after the Constitution had come into effect. In terms of the present equality clause in the Constitution of the Republic of South Africa Act 108 of 1996, discrimination on the grounds of sexual orientation was not allowed. It was thus, in law, wrong to describe a homosexual orientation as abnormal (as had been done in the *Van Rooyen* case). (At 189A--B.)

The Court held that part of the difficulty in dealing with that question was that, in a custody case, one was only indirectly dealing with the parents' rights. The child's rights were paramount and needed to be protected, and situations might well arise where the best interests of the child required that action be taken for the benefit of the child which effectively cut across the parents' rights. Although access rights were often spoken about as the rights of the child, it was artificial to treat them as being exclusive of parents' rights. The right which a child had to have access to its parents was complemented by the right of the parents to have access to the child. It was essential that a proper two-way process occurred so that the child might fully benefit from its relationship with each parent in the future. Access was therefore not a unilateral exercise of a

right by a child, but part of a continuing relationship between parent and child. The more extensive that relationship with both parents, the greater the benefit to the children was likely to be. (At 189B/C--E.)

The Court considered the question whether it would be possible to use the limitation clause in the Constitution (s 33(1)) to limit the rights of the lesbian mother. An argument to justify such limitation could be that while there was nothing inherently wrong or abnormal about a lesbian relationship, there might be strong social recrimination from peers and other parents against the child as it became known that his or her mother was a lesbian, and that it might therefore be in the best interests of the child to discriminate against the lesbian mother. The Court held that the approach in certain cases, that it was imperative that a child should know with whom the ultimate say lies and should not be afforded the opportunity of playing one parent off against the other, was obviously salutary in resolving deadlocks and the many disputes which might arise in families without the necessity of recourse to the Courts. If the situation could be so regulated, however, that the threatened dangers of deadlock or disagreement were removed insofar as it was possible to do so, then the need for the ruling of one authoritarian person receded considerably. The fact that a child should know 'where it stands' was not the only consideration of importance. It was part of a pattern for a child's future which a Court attempted to construct, and which had to be balanced against the great benefits to be obtained when both parents contributed on a regular and reasonably equal basis to the upbringing of the child. (At 191D--G.)

The Court held that, on the facts of the present case, no one could predict the future, or say that deadlock between the plaintiff and the defendant would inevitably arise. They had both retained a measure of respect for each other, and the Court was hopeful that, when the traumatic events of the previous two years had faded a little, they would be able to resume their lives for the benefit of the children. There was no evidence that they had ever used the children as weapons of war to get at each other, in which case joint custody would be unthinkable. The children seemed to want to protect their parents for whom they had sympathy and there was no evidence of antipathy against either parent. (At 191G/H--J.) The shock of discovery of his wife's past must have been traumatic for the plaintiff. His need to protect his children was obviously very strong. His belief that he was a more suitable parent was probably equally strong. The Court was, however, struck by the way in which the defendant had been able to cope as well as she had. The Court had no doubt that she was a good and suitable mother, and thought that it would be most unjust to compel her to exercise access rights to her children in the position of a visitor to the father's home. The image of a mother's access being restricted in such a way because of her lifestyle would be unfair to her and also to her children. They would grow up with the feeling that their mother was being punished, not for anything which she had done to them, but because of the risk that her lifestyle might influence them in the wrong direction. The Court held that there could be no better protection against that than allowing the children to continue living with both parents and eventually to judge for themselves whether the lifestyle of the father or of the mother was more or less harmful than the other. (At 192A--E.) For these reasons the Court held that joint custody was in the best interests of the two children. In order to prevent further disputes, the Court included such directions in the order as would hopefully iron out many difficulties. The order provided, *inter alia*, that, if the parties were unable to reach agreement on any issue where a joint decision was required, the dispute would be referred for mediation to two mediators, who would attempt to resolve the dispute as speedily as possible and without recourse to litigation; that each party would be entitled to nominate a mediator to act on such party's behalf when the need for such mediation arose, and that, if the mediators were unable to agree on a resolution of the dispute, they would jointly refer the dispute to an arbitrator who would decide the issue and whose

decision would be final. (At 192H and 194B/C--C/D.)

Annotations:

Reported cases *Best v Wellcome Foundation Ltd and Others* 1994 (5) Medical Law Reports: referred to

Calitz v Calitz 1939 AD 56: considered

Dipper v Dipper [1980] 2 All ER 722 (CA): considered

Fletcher v Fletcher 1948 (1) SA 130 (A) : referred to *Heimann v Heimann* 1948 (4) SA 926 (W) : referred to

Kastan v Kastan 1985 (3) SA 235 (C) : discussed

McCall v McCall 1994 (3) SA 201 (C) : considered

Pinion v Pinion 1994 (2) SA 725 (D) : considered

R v Oakes (1986) 26 DLR (4th) 200: referred to

Schlebusch v Schlebusch 1988 (4) SA 548 (E) : doubted *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W) : criticised

Venton v Venton 1993 (1) SA 763 (D) : considered

Whiteley v Leyshon 1957 (1) PH B9 (D): doubted.

Statutes Considered

Statutes

The Constitution of the Republic of South Africa Act 200 of 1993, s 33: see *Juta's Statutes of South Africa* 1996 vol 5 at 1-136 The Constitution of the Republic of South Africa Act 108 of 1996, ss 9, 28: see *Juta's Statutes of South Africa* 1997 vol 5 at 1-172, 1-174

The Guardianship Act 192 of 1993, s 1(2): see *Juta's Statutes of South Africa* 1997 vol 5 at 2-107

The Matrimonial Affairs Act 37 of 1953: see *Juta's Statutes of South Africa* 1997 vol 5 at 2-119.

Case Information

Civil trial in an action for divorce. The facts appear from the reasons for judgment.

E Steyn for the plaintiff until 18 August.

The plaintiff appearing in person from 18 August. *P K Weyer* for the defendant until 18 August.

The defendant appearing in person from 18 August.

Cur adv vult.

Postea (10 September 1997).

Judgment

Foxcroft J: This is an action for divorce and ancillary relief. It is admitted in the pleadings that the parties were married to each other in community of property on 13 September 1982. It was also common cause that the marriage has ended and that a divorce should be granted. The outstanding issues related to the custody of the children and access arrangements, the proprietary consequences of the marriage and costs. The major dispute related to the question of the custody of the children.

The children were born on 30 May 1984 and 29 October 1985 respectively. Plaintiff sought an order for custody of the children and was prepared to allow defendant access to the children under the supervision of plaintiff or his nominee. Prayer (c) of the claim included a further provision that unsupervised access should be granted during alternate weekends and school holidays if a psychiatrist were to certify that 'it is in the interests of the minor children that defendant has reasonable access to them, which access shall be limited to the following . . .'. Thereafter follow the access arrangements to which I have referred.

An important provision in these access conditions was that 'whenever defendant exercises her access in terms of (i), (ii) and (iii) above, no third person will share the same residence and/or sleep under the same roof as defendant and the children, save with plaintiff's consent in writing'.

This restriction is cast in very wide terms. On the face of it, it would include a new marriage partner, companion, friend or even relative. The reason for the condition became apparent during the trial, since it is a continuing concern of plaintiff that his children may become subjected to the allegedly harmful influence of a relationship between their mother and her partner in a lesbian relationship.

Plaintiff made it clear on a number of occasions during this protracted trial and during argument that he is genuinely concerned that his children may grow up with a homosexual orientation if subjected, as he puts it, to the influence of a home where their mother openly lives with a lesbian partner.

In his own testimony, plaintiff said that his other concern was the state of mind of his wife. Indeed, when asked whether his objection to his children spending time with their mother in her home would remain if she were living alone, he answered in the affirmative. He maintained that he was concerned, on the advice of psychiatrists and psychologists, that the state of mind of defendant was such that she could harm the children. He made it clear at various stages during the trial that he did not suggest that defendant would physically harm the children. This had never happened in the past. His objection was that the children would be mentally, emotionally and spiritually harmed by the influence of the lifestyle of their mother and her companion. This was a recurring theme throughout the trial, and I have no doubt that plaintiff sincerely believes that his wife, the defendant, is not yet cured of the problems which beset her a few years ago, and with which I shall deal presently. It is also undoubtedly so that a number of medical specialists and other persons have supported his view that defendant is suffering from a condition known to psychiatrists as 'borderline personality disorder'. In short, he believes that this condition is pervasive, has existed since her teenage years and is still present. Plaintiff asserts that so long as psychiatrists cannot explain to his satisfaction that it is safe for him to leave his children with their mother, he simply cannot do so. He sees such action as a dereliction of his duty to his children. Again, I am satisfied on the evidence presented in Court that plaintiff is a most dutiful father. Defendant underwent a period of behavioural disorder, to use neutral language, for a period of some two years, culminating in admission to the psychiatric casualty ward at Groote Schuur Hospital in April 1991, and she has been seen by a therapist ever since. The manifestation of her disorder, which loomed large throughout the trial, was the ingestion of rat poison, containing a Warfarin compound which is a decoagulant.

Medications of this kind are commonly used in medical practice to prevent clotting of the blood. The effect of the substance is to cause thinning of the blood and over lengthy periods of time a degree of bleeding.

This subcutaneous bleeding manifested as a skin disorder, and plaintiff spent a great deal of time, effort and money in an attempt to discover the cause of this disorder. He was told by medical persons whom he consulted that it was a rare disease, and it took something like two years for the truth to come out. Defendant eventually confided in the persons treating her in Groote Schuur Hospital that she had been taking rat poison for about two years. There is no

suggestion that she is still abusing this substance. The medical and psychological battle which raged before me often concerned this substance abuse. Plaintiff and his cohorts used it as a basis for attempting to prove a borderline personality disorder which had in all probability not been properly treated and had certainly not been cured, while defendant and the witness led on her behalf maintained that the ingestion of Warfarin was a consequence of a major post-traumatic stress situation from which she had recovered.

There was no dispute as to the fact that defendant had been severely abused as a child in Ireland between the ages of six and twelve. Ritual sexual abuse had occurred in the context of a misuse of the Catholic religion and some of its central features and symbols. The psychiatrists and psychologists were not in serious dispute as to the probability that she had repressed her memories of this abuse, or that they had been suppressed in a sense, and that when her daughter told her that she had been abused by a member of plaintiff's family, the memories of defendant's own abuse during her childhood started to surface. The bubble burst, as Mr Dowdall put it in his evidence, and the pain of the past came flooding back. Fears of further sexual harassment by plaintiff's father followed, and she became very depressed. The death of plaintiff's stepmother, with whom she had formed a close bond, contributed to the onset of this condition. Defendant's case is that she eventually recovered from that psychiatric crisis and that she is a much stronger personality today than she was five or six years ago.

The importance of these issues is that plaintiff sought custody with limited access to defendant, while defendant was content that an order of joint custody be granted. She made it clear in her own evidence that she would prefer to have custody and not joint custody, from her own point of view, but that she was convinced that her children wanted the Court to order joint custody and that she did not want to stand in their way. The parties have in fact been exercising joint custody in practice for the past two years as a result of a separation agreement reached by them in terms of which the children moved between the homes of their mother and father, spending part of every week with each parent. This memorandum of agreement is annexed to the notice of motion in case No 15693/96 as annexure GJ2. In para 35 of plaintiff's affidavit in support of that application, which was for interim custody *pendente lite* to be awarded to him, he said the following:

'It was agreed between respondent and myself during October 1995 that the family violence interdict would be withdrawn, as well as a proposed Rule 43 application that she wanted to institute. A settlement was reached, a copy of which is annexed hereto, marked GJ2. At this stage I did not want to take the children away from respondent as I was fearful of what her reaction would be. In a last attempt to see whether or not respondent could *normalise her life* we agreed to joint custody of the children. As a result of respondent's involvement with the lesbian community, a paragraph was specifically inserted in the agreement to protect the children prohibiting respondent from allowing anyone to stay in the house with her, other than visiting friends of the family.'

(Emphasis added by me.) In para 34 of the same affidavit, applicant also spoke of his concern for the emotional and physical well-being of his children.

There is no doubt that over the last number of years the emphasis in thinking in regard to questions of relationships between parents and their children has shifted from a concept of parental power of the parents to one of parental responsibility and children's rights. Children's rights are no longer confined to the common law, but also find expression in s 28 of the Constitution of the Republic of South Africa Act 108 of 1996, not to mention a wide range of international conventions.

In South African law, parental power, to be understood in the sense which I have just mentioned, is made up of two distinct elements. The one is guardianship, the other is custody. Guardians take decisions regarding a child's property and person, whereas in general custodians have control over the day-to-day life of the child. Normally, on divorce, the determination of custody and access issues results in the fixing of the place where children will live and, as a concomitant, which of the parents will be confined to a right of access or visitation. The old position where fathers were almost always left with guardianship on divorce while the custody of young children was invariably granted to mothers has changed. As far as young children are concerned, the pendulum has swung to accommodate the possibility of a father being a suitable custodian parent to young children. The evidence in this case amply demonstrates that plaintiff was a highly suitable father to his two children six years ago, when they would have been aged respectively seven and five (now 13 and almost 12), during the time of their mother's hospitalisation for 4½ months, beginning in April 1991. Equally, the care which he has bestowed upon them in the past two years after the separation between plaintiff and defendant shows that he is a capable father. I should also point out that the rigours of the common law in regard to guardianship were tempered by the Matrimonial Affairs Act 37 of 1953 and then removed by the Guardianship Act 192 of 1993, which came into operation on 1 March 1994. In terms of this last Act, husbands and wives now share equally the right to make decisions affecting their children and have the same rights to appoint testamentary guardians to succeed them. Each is entitled independently to exercise any right or power and to carry out any duty arising from guardianship, except in matters pertaining to consent to the marriage of a minor, adoption, removal of the child from the Republic, the application for a passport or the alienation or encumbrance of immovable property belonging to the minor. In these cases the consent of both parents is required unless a competent Court orders otherwise. (Section 1(2) of the Guardianship Act.)

I have already pointed out that s 28 of the Constitution entitles children under the age of 18 years to have family or parental (not maternal or paternal) care, and provides in ss (2) that their best interests are of paramount importance '*in every matter concerning the child*'.

As far as custody is concerned, the law has advanced a great deal since *Calitz v Calitz* 1939 AD 56. In that case Tindall JA reaffirmed the patriarchal character of the Roman-Dutch law of custody *stante matrimonio*. What is said at 61 of that judgment was the following:

'Although the *patria potestas* of the Roman law was not recognised in the Roman-Dutch Law and the parental power belongs to the mother as well as the father (*Voet* 1.6.3), there is no doubt that under our law at any rate, as it exists today in the Union, the rights of the father are superior to those of the mother. *Grotius* states that the guardianship of children whose parents are alive, belongs to their father who, as father and guardian, appears for them in court and also has the management of all property which may come to them by inheritance or otherwise. *Voet* (26.1.1) states that it is beyond dispute that the children are ruled according to the judgment of the father, if he has them under his authority.

In dealing with a difference of opinion between parents as to whether a child should be allowed to marry, he states that the father's decision governs.'

At 62 Tindall JA remarked that it was not correct to suggest that until the father's death, the mother would have no rights at all. He went on to say:

'The learned Chief Justice's remarks (De Villiers CJ in *Van Rooyen v Werner* 9 SC 425), read with that qualification, fully bear out the view that the father's authority is superior to that of the

mother. The management of the minor's property and the control of the minor's education belong to the father solely. As to the control of the minor's person, though the mother shares it with the father, in case of difference of opinion the father's authority prevails. There is no doubt that such is the law.'

It was inevitable that this view of the superior rights of guardianship and custody of the father during marriage should affect the Court's approach to guardianship and custody on termination of marriage. Except in the case of very young children, custody was frequently awarded to 'innocent' fathers until the interests of the children began to be placed properly in focus. Before the best interests of a child took their proper place, Courts were often influenced by the moral question of the guilt or innocence of the spouses. It was only in 1948 that the Appellate Division in *Fletcher v Fletcher* 1948 (1) SA 130 (A) placed at the pinnacle of its consideration the 'paramount or best interests rule'. In his work on *The Law of Access to Children*, Professor I D Schäfer refers at 27 footnote 143 to many of the factors which operate in decisions of this kind. It is a truism that a child of tender years normally goes to the mother, a son often goes to the father and a daughter to the mother, except, of course, where there are a son and daughter and where it is obviously desirable to keep them together. Schäfer rightly makes the point that '(d)etermining what is or is not in the best interests of a child depends to a large extent on making predictions. But as Schwartz "Towards Presumptions of Joint Custody" (1984) 18 *Fam LQ* 231--2 points out: "A Judge cannot look into the future and predict what is in the best interests of the child. Lawyers cannot. Mental health professionals cannot. Gurus cannot. When there are two 'good enough' parents, one cannot choose who should parent." '

I have much sympathy for this view, having listened to a number of such predictions in the course of the last month, I have at times felt like the man in the *Rubaiyat of Omar Khayyam*, who said:

'Myself when young did eagerly frequent Doctor and Saint, and heard great argument about it and about: but evermore came out by the same door as in I went.'

I am also mindful of the words of the Supreme Court of Ireland recorded not many years ago in the matter of *Best v Wellcome Foundation Ltd and Others* referred to in 1994 (5) *Medical Law Reports* in which it was pointed out that:

'It was not possible either for a Judge of trial or for an Appellate Court to take upon itself the role of a determining scientific authority resolving disputes between distinguished scientists in any particular line of technical expertise. The function which a Court could and must perform in the trial of the case in order to acquire a just result was to apply common sense and a careful understanding of the logic and likelihood of events to conflicting opinions and conflicting theories concerning a matter of that kind.'

Professor Schäfer, to whom I have already referred, discussed the problem of joint custody in a lecture reported in (1987) 104 *SALJ* at 149. He pointed out that a marked process of evolution has occurred in England in recent years. In 1980 Ormrod LJ, sitting in the Court of Appeal in *Dipper v Dipper* [1980] 2 All ER 722 (CA) at 731, said the following:

'It used to be considered that the parent having custody had the right to control the children's education, and in the past their religion. This is a misunderstanding. Neither parent has any pre-emptive right over the other. If there is no agreement as to the education of the children, or their religious upbringing, or any other major matter in their lives, that disagreement has to be decided by the Court. In day-to-day matters the parent with custody is naturally in control. To suggest that a parent with custody dominates the situation so far as education or any other serious matter is concerned is quite wrong.'

In that case, a joint custody order was made since it seemed entirely right to the Court that the father had an intention to play an active part in his children's lives. Ormrod LJ added that '(i)t is right, therefore, that the order of the Court should be in a form which recognises the situation as it will be'.

English Law certainly separates the concepts of custody meaning decisions in regard to important matters on the one hand, and care and control on the other. It is, however, important to note that at 731 of *Dipper v Dipper* Ormrod LJ also said:

'The basis of the Judge's order giving custody to the father and care and control to the mother was, in my view, unsound. In any event, these split orders are not really desirable. There are cases where they serve a useful purpose, but care has to be taken not to affront the parent carrying the burden day-to-day of looking after the child by giving custody to the absent parent.'

At 160 of his reported lecture, *Schäfer* lists the major disadvantages of a joint custody order. The first is the imagined need for the security of one decision-maker. The second argument is that, if parents have been unable to maintain a stable marriage, they cannot be expected to achieve the degree of co-operation required for joint custody. I interpose to say that plaintiff has emphasised this aspect, pointing to the welter of litigation which has occurred in the past year or two. Thirdly, it is said that joint custody runs counter to the so-called 'clean-break' principle in divorce. This objection obviously relates to the ex-spouses themselves and not their children. Fourthly, there are logistical objections to joint custody where ex-spouses do not live in close proximity to each other, and, fifthly, joint custody might be seen to be the easy way out of relieving the Court from making a decision on a question of sole custody.

The first objection harks back to the patriarchal legal past of South Africa, and assumes that there will always be disagreement requiring resolution by one authoritarian parent. The second objection has little to commend it, since there are many situations - and the present case demonstrates this - where parents cannot abide each other any longer, but continue to love their children in the same way as they always have done. The so-called 'clean-break' principle seems to have little to do with the best interests of the child. It is obviously beneficial for joint custodian parents to live reasonably near to each other. The last objection relating to a perception of an abdication by the Court of its responsibilities might apply in some situations where a decision is reached in the Motion Court in an unopposed trial with a consent paper. It can have no application to a situation like the present one, where a month has been spent on grappling with the respective merits of sole custody to the father, or joint custody. I know of only one reported case in this Division where an order was granted in terms of a consent paper which provided for joint custody. That was the matter of *Kastan v Kastan* 1985 (3) SA 235 (C). The judgment is criticised by Professor *Schäfer* on the basis that it did not spell out whether joint physical custody or joint legal custody was granted, or both, but welcomed as a landmark decision.

In the matter of *Schlebusch v Schlebusch* 1988 (4) SA 548 (E) Mullins J refused to grant an order in terms of a consent paper which provided for joint custody. The learned Judge relied on remarks by James J in *Whiteley v Leyshon* 1957 (1) PH B9 (D) to the effect that '(t)he rule that gave the custodian parent the right to direct the whole life of a child and deal with such matters as his education, health and associations, was merely an offshoot from the principle that the Court was concerned primarily with the true interests of the child, it being recognised that it was in the child's interests that it should know that there was one definite person who in the last instance controlled it and who made not only the long-range decisions concerning its future, but also the day-to-day decisions relating to its food, clothes, conduct and friends. It was because of this that

the Courts have always been loath to put the non-custodial parent in a position where he could dispute or undermine the authority of the custodian parent; for a child must know where he stood.'

While these remarks may well have reflected a practice in 1957, I have said enough, particularly in reference to the attitude in the English Court of Appeal, to show that it must at least be questionable to say that it is recognised that it is in the child's interest to know where he stands. Mullins J was aware of the article to which I have referred. He did not regard the judgment in *Kastan v Kastan* as a landmark decision, since he felt that King AJ, as he then was, had reiterated the inherent risks in joint custody orders. It is true that King AJ said that orders for joint custody are rare, and that he said that to leave decisions involving the day-to-day life of children and longer and more permanent issues to two parents who have been involved in acrimonious divorce proceedings would be 'courting disaster'. Mullins J accepted that Judges claim no expert knowledge which excludes the possibility of a wrong decision in determining custody issues, yet he viewed with concern any trend towards the granting of joint custody orders. To my mind, a failure to consider the desirability of a joint custody order is as much an abdication of the responsibility to reach the best possible solution as any other. Mullins J felt that the award of joint custody would not, nor was it even likely to, ensure 'a continuing relationship between the child and both its parents, so that it need not feel deserted, abandoned or rejected by the absent parent'. I agree that such a 'continuing relationship' cannot be ensured, but I do believe that there is a better prospect of a 'continuing relationship' with both parents where custody is shared.

Another reported decision which I have come across is the more recent one in *Venton v Venton* 1993 (1) SA 763 (D). In that matter, Didcott J referred to the fact that requests for joint custody are rare and that the reason seems obvious. As he said, the personal circumstances of parents who live separately are seldom conducive to the request. He referred to the two cases to which I have referred, and *Heimann v Heimann* 1948 (4) SA 926 (W). There are no reasons provided in *Heimann's* case for the refusal to grant joint custody. It was simply regarded as undesirable. Didcott J felt that Mullins J had decided the case before him in *Schlebusch v Schlebusch* on the facts and went on at 765B to say:

'Neither decision lends support to the notion that, in principle and irrespective of the circumstances, joint custody is unobtainable and should never be decreed.'

Didcott J then referred to *Kastan v Kastan*, and at 766E he went on to say:

'Everything depends, however, on the particular circumstances of each individual matter. Joint custody will not be awarded unless they satisfy the Court that no practical impossibility of any consequence seems likely to ensue. And, if some unforeseen trouble happens to develop after the grant of the order and a dispute erupts over it, that will hardly be a calamity. The Court will simply have to be approached to resolve the dispute.'

Didcott J went on to say that he fully agreed with the approach in *Kastan v Kastan* and that the power to award joint custody should be cautiously used in order to avoid the obvious pitfalls. On the facts of *Venton v Venton* the situation positively cried out for a joint custody order. The parties were sensible, mature, responsible and temperamentally stable; the relationship had been remarkably good despite the collapse of the marriage; they respected, trusted and remained fond of each other; they had shared the duties of parenthood amicably and constructively; they had similar outlooks and values; compromise rather than altercation had been their way of coping with differences; they never disparaged either parent in the eyes of the children, and in fact made a point of praising each other in their presence. They had also acted as joint custodians ever since

their separation.

Would that that were the position in the present case.

The parties before me were at arms' length, although relatively civil to each other. Each accuses the other of the undermining of respective positions with the children. Hostility and anger are often present in their relationships with each other, but it does not seem that any untoward anger or irritation has been expressed by either parent towards the children. It is true that there is much evidence that the children feel intimidated by their father, although he resolutely denies this and says it is part of a plot to undermine him.

What was obvious, however, was that both parents are very concerned for their children, and plaintiff, in particular, has expended an enormous amount of money on this case, asserting that he had to do this for the sake of his children. Even if he has become obsessive in his desire to protect the children from a harm which he perceives, I have, as I have already said, no doubt that this belief is genuine. There is therefore no reason to believe that he will cease to be a dutiful and supportive parent after the divorce. If one accepts that custodian parents will share their duties and responsibilities in the same way as guardians of children do, and if one is satisfied that there is no obvious risk of conflict in that area, then the objection to joint custody really relates to the objection to what is called 'care and control' in English law. It is here where the father's main anxiety lies. He does not wish to have his children exposed to what he regards as unhealthy practices in their mother's home. It is for that reason that he insists upon free access to the children by their mother at his home, or visits to their mother when her lesbian companion is not physically present. I shall deal presently with the evidence of the psychiatrists and psychologists in this case, but I would say at once that it was common cause, and never in issue during the trial, that the question of sexual orientation of the mother is not regarded as an issue between the experts called by the parties. Mr Dowdall, a registered clinical psychologist and executive director of the Child Guidance Clinic at the University of Cape Town, as well as the head of Clinical Psychology Training at that University, said at p 98 of the 'Expert Bundle' under the heading 'Central issues in the current application':

'1. Does homosexual orientation and lifestyle *per se* constitute a moral or other threat to the wellbeing of the children?

There is no evidence that sexual orientation as such constitutes a "moral" or psychological threat to the wellbeing of children. Inappropriate sexual behaviour which impinges on children by persons of whatever sexual orientation is a different matter, but no evidence has thus far been given in this regard, nor has any such information come to my attention. I have not, however, canvassed this matter thoroughly thus far, since beyond the generalisation the matter has not really been raised thus far by any parties to the dispute.

Embarrassment or stigmatisation on the part of the children is certainly possible, and must weigh in any such overall assessment. However, in my conversations with the children they stated that their mother had explained that she was involved with a woman, and that they had accepted this. I cannot, of course, given the situation in this particular case, rule out the possibility that they are to a greater extent "protecting" their mother by this blanket denial; neither can I comment at this stage on the likelihood of future embarrassment.'

In the report of Drs Quail and Teggins and Mr Loebenstein in the urgent application and dated 12 February 1997, which has been known as the 'joint report', it is stated that '(t)he question of homosexual orientation is irrelevant at this stage'.

This statement which I have quoted above was an answer to the remarks of Mr Dowdall.

The professional witnesses called by plaintiff did not expand on this during the trial. The fact that the experts feel that this does not present a problem does not, of course, mean that plaintiff is not entitled to believe that it may present a problem. He is fully entitled to protect his children against what he perceives to be harmful influences. In the end, however, I have to decide whether his alleged fear is soundly based or not. Professor Robbertze, called by the Family Advocate, took a strong view on this issue. I am going to read from the English translation of his report for the benefit of the defendant, who, being Irish, does not speak or understand Afrikaans. Dr Teggin had undertaken the translation. Professor Robbertze said: 'Mrs V contracts Ms F not for a clinical psychological therapeutic relationship but for a healing process with Ms F as the healer, whereby Mrs V becomes the victim of what I, for want of a better term, have to call the "F cult". Over the following years, Mrs V is liberated by Ms F of amongst other things her marriage, her feminine identity, her beautiful long hair and her womb. She is introduced to the RAPCAN association and, according to unconfirmed reports, she has been sexually abused. She has now established a lesbian marriage and unofficially she has become Ms F's in-law relative.' It is not clear where this information allegedly came from, but Professor Robbertze did say during his evidence that he had relied on a lengthy document which had been provided to him by plaintiff in this case. He had also seen the defendant in preparing his report. Professor Robbertze went on to say things like '(t)he possibility exists that the professional team in the case also forms part of the network . . .' and that he thought that Mrs V had been trapped in a cult, which he then defined and referred to in quasi-religious overtones, ending this part of his report by saying: 'The fact of the matter is that, in terms of the Medical Dental and Supplementary Health Service Professions Act 56 of 1974, the South African Medical and Dental Council has an obligation in respect of the psychological profession to look after and protect the community against what has been here perpetrated by a registered psychologist, Ms F, against Mrs V and which destroyed her personal and feminine identity.'

These are very strong views and Professor Robbertze kept coming back to this Act 56 of 1974, which he apparently had had something to do with. He felt it his duty to protect the public from people like those to whom he was referring in his report.

Professor Robbertze, an emeritus professor of Pretoria University and a man who is a psychiatrist as well as a psychologist, produced four reports and adopted an attitude at the trial which I found quite extraordinary. He was led by the Family Advocate, who asked him very few questions, but which led to the delivery of lengthy expositions as to his diagnosis of defendant. He had been appointed by the Court to assess the psychiatric state of both plaintiff and defendant, and he had decided that defendant was suffering from borderline personality disorder. He supported the plaintiff's claim for sole custody and he went further in later reports to accuse the medical and related experts who had delivered expert summaries on defendant's behalf as members of some imagined cult. I agree with Mr Dowdall, who testified on behalf of defendant, that the references to these persons as being members of some malevolent cult were bizarre and unsubstantiated. Professor Robbertze gave a clue as to why he held this belief when he explained that he had been the object of an attack by certain members of the Church of Scientology over some period of time and that he had seen it as his duty to protect the public from persons giving treatment to others with mental illnesses or disorders. It was clear that he simply lumped the professionals on defendant's side into the category of what many people would call 'quacks'. He even took exception to their use of the word 'healing', saying that this showed them for what they were. Perhaps he was thinking of 'faith healers' as opposed to other healers of the sick. He repeatedly

referred to Act 56 of 1974 which had been passed to prevent this kind of amateurish practice. As his evidence progressed, it became more and more bizarre, extending to a description of the persons who had been treating defendant, and in particular her therapist, as some sort of 'sangomas', as he put it. He started to compare the treatment given to that in traditional African medicine, and he showed strong bias for plaintiff's case. I put it to him at one stage that he seemed to be arguing plaintiff's case rather than presenting a professional opinion, but he denied this. It was almost impossible for counsel to cross-examine him in the sense that he either evaded the question, or simply made another speech. I also regret to say that he displayed what I would regard as dishonesty when simply excluding certain diagnostic criteria when it suited him. An example of this relates to his answer in regard to his diagnosis of factitious disorder (also known as Baron von Munchausen syndrome). The diagnostic criteria are set out in the *Standard Text Book DSM IV* (exh L, p 24). They are:

- 'A. Intentional production or feigning of physical or psychological signs or symptom
- B. The motivation for the behavior is to assume the sick role.
- C. External incentives for the behavior (such as economic gain, avoiding legal responsibility or improving physical well-being, as in malingering) are absent.'

In his first report, Prof Robbertze refers only to the first and second diagnostic criteria for factitious disorder. These were obviously quoted from *DSM IV*. Even the American spelling of the word 'behavior' was slavishly followed. When asked why he had not mentioned 'C', his answer was that he had not been aware of any external factors. At best, this was to misunderstand the nature of diagnostic criteria. At worst, and this was how I saw it, it was a shabby attempt to avoid the obvious inference, viz that he left out what did not suit his diagnosis. In a later report he tried to qualify this by saying that he should have said 'Primêre sielkundige (as opposed to psychiatric) siekte toestand' (para 11.1 and 11.2 of report of 13 May).

If this is true, why are only two of the *DSM IV* (psychiatric) criteria referred to? In the end plaintiff quite properly abandoned any reliance upon Professor Robbertze's diagnosis of factitious disorder or the Baron von Munchausen syndrome. The theory obviously drew no real support from the other psychiatrists.

Doctor Teggin, who was a psychiatrist also called on behalf of plaintiff, described Professor Robbertze as a witness who expressed himself badly. Dr Teggin said, however, that he agreed with the medical view of Prof Robbertze and supported the diagnosis of borderline personality disorder.

Dr Teggin was not led in any great depth, and what was disturbing about his support of the diagnosis of Prof Robbertze was that he had not even seen the defendant. He explained that he had wanted to see defendant, but that she had refused to see him. That is undoubtedly so, but does not detract from the fact that one can have little regard to the view of a psychiatrist who reaches a conclusion as to the mental state of a person without ever having spoken to that person. Dr Teggin's answer was that he had studied Ms F's therapy notes and that these notes, which were very full, had led him to the clear view that defendant was suffering from a borderline personality disorder.

Dr Teggin gave his evidence in a refreshingly candid manner, even suggesting that it was quite possible that the therapy which defendant had received for the last six years from Ms F was as good as any that might have been received at the hands of a professional psychiatrist. He felt that defendant was still suffering from this disorder, but acknowledged that he was somewhat at odds

with other members in the plaintiff's team, since he felt that the condition was treatable in the long term. He felt that it was possible that defendant might be restored to full health, but that in the interim she should be given sole custody so as to assist in her recovery process, but that custody should be immediately removed from her and placed in the hands of a curator. Admittedly, Dr Teggin gave this opinion when pressed by me as to what he thought should be done. The suggestion is unhelpful, from a practical point of view. Mr Larry Loebenstein had signed a joint three-page interim report by Drs Quail and Teggin and himself. He had also not seen the defendant, and had not carried out a proper investigation at all. Indeed, he seems to have simply supported a view reached by Dr Quail in the first place.

Dr Quail did not give evidence and, as Dr Teggin commented, 'he had probably had enough of this case'.

Mr Dowdall gave full and clear evidence in regard to his view that defendant was not suffering from a borderline personality disorder. Insofar as he is not a psychiatrist, he acknowledged that he could not reach a medical diagnosis. He accepted that a psychiatrist should reach such a diagnosis and pointed out that Dr Gittelsohn, who had also provided an expert notice and summary, had reached the conclusion that borderline personality disorder was not properly demonstrated in this case. He referred to the fact that the discharge report from Groote Schuur Hospital had also not mentioned this as the diagnosis and that there was at least an equal possibility that all that defendant was suffering from at the time was depression and a posttraumatic stress disorder.

In regard to the Groote Schuur Hospital Report, Dr Jedaar gave evidence that he had treated defendant from April to August 1991. Exhibit J shows an admission date of 3 April 1991. He explained that the diagnosis was one of major depression in terms of Axis 1 (DSM III R criteria) and self-defeating personality disorder (ICD 9) in respect of Axis 2. (The letters DSM relate to an American diagnostic system and ICD to the British equivalent.) He added that this diagnosis 'would be interpreted in today's terms as a borderline personality disorder'. This, he explained, was necessitated by the fact that the self-defeating personality disorder no longer appears in the ICD 9 system. 'Borderline personality disorder' as it is now understood in the DSM system would be the diagnosis closest to the obsolete 'self-defeating personality disorder' of the ICD 9 classification. It was not clear to me why one should not look for the closest diagnosis in the ICD 9 system.

Dr Jedaar also felt that it was unlikely that there would be a risk that defendant would cause harm to the children in the next ten years. She would require long-term psychotherapy or psychoanalysis or both, with intermittent medication to control her properly. Dr Jedaar's evidence that borderline personality disorder 'was the closest alternative to self-defeating personality disorder' supported Mr Dowdall's view that, while they may present in a similar fashion, they are not the same disorders.

Dr Jedaar was also at pains to distinguish between personality disorder on the one hand and mental illness or psychiatric disorder on the other. The latter requires hospitalisation and treatment. He added:

'Now we need to very clearly clarify or distinguish between personality disorders and mental illness in that, if one suffers a mental illness or a psychiatric disorder, which requires hospitalisation and treatment, then those are then referred to as mental illness in terms of the Mental Health Act. So personality disorder itself *per se* is not a mental illness, it is not a

psychiatric disorder, a major psychiatric illness, but it does require assessment and management from time to time as a result of its effects on the individual and on society. Later, Dr Jedaar conceded that associated conditions (like the ingestion of harmful substances) would require treatment if they recurred. He adhered to the view expressed in his letter of 9 December 1996 (exh Y) that defendant's qualities of 'concern and protectiveness of her children qualifies her to be a capable custodian of their on-going care and well-being and I therefore support her application for custody'.

That view was stated in a letter supporting interim custody, and Dr Jedaar readily conceded that 'one would need to do an in-depth assessment and analysis of the individual together with collateral sources of information to make a complete assessment' of defendant's 'fitness as a custodian parent or anything else for that matter or her state of recovery or her state of management' since 1991.

This, of course, shows the weakness of the views of Dr Teggin and Mr Loebenstein, who carried out no analysis of the individual, ie defendant. Mr Dowdall, who testified on behalf of defendant, was subjected to a barrage of hostile and often offensive cross-examination from plaintiff himself, who by this time had been conducting his case in person for several weeks, as was the position with defendant.

As I pointed out to plaintiff several times during his cross-examination, there seemed to me little point in solving the riddle of the precise nature of the mental condition. What was important was to demonstrate the risks of the respective custodial possibilities in the case. Plaintiff also conceded a number of times during the cross-examination and in argument that he was not concerned that defendant would cause any physical harm to the children if her support structure remained in place. He was concerned that she posed, in his view, a potential emotional and psychological threat to the children in her home.

Plaintiff and defendant gave evidence themselves and were cross-examined at great length. I was particularly struck by the manner in which defendant coped with courteous but hard cross-examination from plaintiff. She showed that she was fully able to cope with the onslaught, and indeed showed some compassion for plaintiff during this episode. Far from being unable to stand on her own feet, as had been suggested by Professor Robbertze, she demonstrated that she was a match for her husband. In the end I became convinced that defendant had grown in the past few years, particularly in her work with survivors of violence, incest and sexual abuse, while plaintiff had become obsessed by the case and his quest for the salvation of his children from an imagined enemy or monster in the shape of a lesbian relationship, on the one hand, and the perceived risk that his wife might harm the children when entering another psychotic phase, on the other.

Defendant called a number of friends and associates, who testified to her work and to her mothering skills. Plaintiff had no quarrel with this aspect of her life, but viewed her case as an untrue reflection of her real state of mind. He was obliged to mount his major attack on Mr Dowdall, whom plaintiff described in argument as 'an opportunistic mental health professional who sells his professional qualification by his own admission to one legal practice'. This was a gross distortion of Mr Dowdall's evidence that he had recently done most of his work in Court for the firm of Messrs Miller Gruss, Katz and Traub, and ignored his evidence that he had in a recent case been called by the other side when he disagreed with those first consulting him. It would also be absurd for a professional to behave in this way - his bias would rapidly become apparent. The way in which plaintiff attempted to demean the evidence of Mr Dowdall was unfair, and an

unedifying spectacle which did the plaintiff no credit. When viewed against the evidence of Dr Teggins and Mr Loebenstein, who diagnosed defendant without examination, it is ridiculous to suggest that Mr Dowdall, the only professional to conduct a thorough in-depth assessment of the children in both parents' homes, adopted a one-sided approach.

I have already made clear my view in regard to Professor Robbertze. He allowed his preconceptions, personal opinions and emotions to get the better of him. At times they ran riot. His evidence was unreliable and he did plaintiff and the Court a disservice in the way in which he reported on the parties, and in the extraordinary way in which he testified.

In the end, it became clear that plaintiff's prime objection to joint custody was his wife's sexual orientation. Because Mr Dowdall would not join in condemnation of lesbian lifestyles, plaintiff attempted to smear him. In this he failed signally, in my opinion.

In the course of argument, plaintiff referred me to two decisions where the best interests of the children were examined. One is the decision in *McCall v McCall* 1994 (3) SA 201 (C). Plaintiff referred to the criteria to which King J referred at 205 of that decision, and claimed that he qualified as a proper custodian parent in respect of all of the criteria there stated. There are a number of similar 'checklists' used in such situations. For the most part they represent accumulated case law and obviously serve only as guides. Each case is different and must be determined on its own facts. Apart from the question of the preference of the children, I have no reason to dispute plaintiff's suitability as a custodian parent. Whether the children truly prefer to remain with their father in his house, only to be visited by their mother in his house, is a matter which was contested at the trial. The defendant and Mr Dowdall testified to the effect that the children expressed a wish to live with both parents, as they have done for some time. While it seems that the children have told their father that they would prefer to be with him in a sole custody situation, they have also told their mother that they only told him this because they felt sorry for him and did not want to hurt him. Of course, I make these comments on the basis of what the parents and the witnesses have told me. I have not spoken to the children since I was not specifically asked to do so, and I would in any event have considered it unwise to question the children where the possibility exists that they have been saying different things to different parents. It was common cause before me that children will often give different versions to different parents in stressful situations like the present. More particularly will this be the case where they spend time with each parent separately every week and where they wish the relationship with each parent to be as harmonious as possible. If the children had 'admitted' to me that they have indeed not been entirely truthful with their father or their mother, one can well imagine the consequences in the next years before they reach majority.

The list of criteria provided in *McCall v McCall* is obviously not intended to be exhaustive. Indeed, para (m) is 'any other factor which is relevant to the particular case with which the Court is concerned'. Plaintiff did not challenge defendant's ability to pass the test as reflected in these criteria of being a good custodian parent, save in two respects. He objected to his children being exposed to the lesbian relationship in which his wife was living. He did not want his children to be aware of this relationship in the sense of being physically present at any place where the relationship was being carried on. Effectively, this meant that while the children could visit their mother at her house, her lesbian partner should not be present during such visits.

The other objection concerned her mental and physical health. It is noteworthy that plaintiff was not so concerned about this possible risk as to let it stand in the way of the separation agreement

in October 1995, which introduced a *de facto* joint custody situation.

The other case to which I was referred by plaintiff was that of *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W). This decision was given before the interim Constitution of the Republic of South Africa Act 200 of 1993 came into force. As is pointed out in an article by Pierre de Vos in (1994) 111 SALJ at 687, Flemming DJP, who presided in that matter, commented as follows in regard to what he regarded as 'wrong signals' in a situation similar to the present one:

'The signals are given by the fact that the children know that, contrary to what they should be taught as normal or what they should be guided to as to be correct (that is male and female who share a bed), one finds two females doing this . . . as a matter of preference and a matter of mutual emotional attachment. . . . It is detrimental to the child because it is the wrong signal. . . .'

(At 329I--330B.) It is so that the Court made a moral judgment about what is normal and correct insofar as sexuality is concerned, and there can be no doubt that the learned Judge regarded homosexuality as being *per se* abnormal. It is clear to me that plaintiff has used the thinking of this judgment to influence a good deal of the presentation of his case before me. He also regarded it as only right that defendant should separate her personal position from the best interests of the children. He said that the children should come first and defendant's sexual orientation and lifestyle should come second. That is what Flemming DJP said at 329F--G: 'But, insofar as the interests of the children require it, she will have to make the choice between persisting in those activities or part thereof and having access on a wider basis than would otherwise be permitted. The choice, as in regard to her bedroom life, is hers. She cannot, however, make a choice which limits what should be appropriately done in regard to the children.' The author of the article to which I have referred poses the question whether the judgment would have been in breach of chap 3 (the 'Bill of Rights' chapter) of the Constitution of the Republic of South Africa Act 200 of 1993, if it had been delivered after the Constitution had come into effect. The present equality clause (s 9) in the Constitution, Act 108 of 1996, makes quite clear that the State may not unfairly discriminate, directly or indirectly, against anyone on one or more grounds, including sexual orientation, and in ss (4), that no person may unfairly discriminate directly or indirectly against anyone on one or more of those same grounds. In law, it is therefore wrong to describe a homosexual orientation as abnormal. Part of the difficulty in dealing with this question is that, in a custody case, one is only indirectly dealing with the parents' rights. The child's rights are paramount and need to be protected, and situations may well arise where the best interests of the child require that action is taken for the benefit of the child which effectively cuts across the parents' rights. Although access rights are often spoken of as the rights of the child, it is artificial to treat them as being exclusive of parents' rights. To my mind, the right which a child has to have access to its parents is complemented by the right of the parents to have access to the child. It is essential that a proper two-way process occurs so that the child may fully benefit from its relationship with each parent in the future. Access is therefore not a unilateral exercise of a right by a child, but part of a continuing relationship between parent and child. The more extensive that relationship with both parents, the greater the benefit to children is likely to be.

I raised this difficulty with plaintiff during argument, asking him in particular whether it was not being punitive to deny full unsupervised access in the shape of joint custody to the children in their mother's home, but he remained adamant in his view that he had been advised by lawyers and medical specialists that it was his duty to protect his children from the influence which his wife's unnatural, in his eyes, relationship would have. At 691 of the same law journal article, the author says the following:

'Section 33(1) (of the Constitution) allows for these rights to be limited by law of general application, where the limitation is reasonable and justifiable in an open and democratic society based on freedom and equality, and where it does not negate the essential content of the right. Does this mean that a more subtle justification for the same order would be constitutionally valid? In other words, will currently existing bigotry and its consequences be a valid reason to limit the constitutionally guaranteed rights of the lesbian mother? The argument could be formulated as follows:

There is nothing inherently wrong or abnormal about a lesbian relationship. But while the child is growing

up, there will be strong social recrimination from peers and other parents against the child as it becomes

known that his or her mother is a lesbian. The child might also become confused and distressed by his or

her mother's unwillingness to conform to a generally accepted norm. It might therefore be in the best interests of the child to discriminate against the lesbian mother, because that will be the only way in which her children could be spared unnecessary suffering.'

It will be seen that this was very much the argument of plaintiff in the present case. The article continues, suggesting that there may well be situations where a Court will override the equality clause in the best interests of protecting the child, but would then do so on the basis of the leading Canadian case on the meaning of the reasonableness of such limitations (*R v Oakes* (1986) 26 DLR (4th) 200). The writer reaches the conclusion after considering the further question which arises that

'a discriminatory order by the Court against a lesbian mother in an application for access rights to her children that is solely based on her sexual orientation will not easily pass constitutional muster. In the same way that the Court cannot take cognisance of racism or religious intolerance when it decides on the access of a mother to her children, the Court cannot take cognisance of prejudice in our society. To do that would be to unreasonably limit, or perhaps even negate, the essential content of the right not to be discriminated against on the ground of sexual orientation.'

As I have already said, the problem before me is not merely one of a mother's right of access to her children *per se*, but the extent of the children's rights of access and right to parental care.

Section 28 of the Constitution provides that every child has the right

'(1)(b) to family care or parental care, or to appropriate alternative care when removed from the family environment'.

In an article entitled 'Sexual Orientation, Family Law and the Transitional Constitution' (1995) 112 *SALJ* at 481, it is stated at 488 as follows:

'That there were no reported South African cases in which homosexual parents sought to retain custody of or have access to their children until *Van Rooyen v Van Rooyen* is unsurprising, given the moral and legal climate predating the transitional Constitution.'

At 498 of this article the writer deals with the point of ridicule by friends, which reared its head a number of times in the proceedings before me.

On the evidence before me, the children are not so embarrassed by the situation that they let this prevent them from having friends to stay with them at their mother's house overnight, even while the mother's partner is there. There probably will be a certain amount of talk about the situation. Whether it will be elevated to the level of ridicule is something which I cannot predict.

The article to which I have just referred obviously deals in the main with the rights of homosexuals to enjoy family rights which heterosexuals have enjoyed for centuries. It is largely concerned with the rights of the homosexuals and not the children, who form part of that 'family unit'. I have, in the limited time available, looked at another article in the same volume of the *SA Law Journal*, ie vol 112 (1995). This appears at 315 and is headed 'Joint Custody: Perspectives and Permutations'. The writers, Brigitte Clark and Belinda van Heerden, point out that legal encouragement of joint custody has been most evident in the United States, with California being the first state to enact that agreed joint custody is presumed to be in the child's best interest. They add that the initial enthusiasm has diminished slightly, and although nearly 80% of divorced parents in California have joint legal custody, the State has recently amended its legislation to remove a presumption in favour of joint custody being in a child's best interests when agreed. The English position is that the Courts are not in favour of a wholesale adoption of joint custody, but the problem is skirted - as has already been pointed out in relation to the remarks of the Court of Appeal in *Dipper v Dipper* - since equal status in important areas is bestowed on both parents, each parent having the power independently to make decisions about the child (s 2(1) and (2), (7) and (8) of the Children Act, 1989). The language of the English statute is couched in terms of parental responsibility rather than rights, which is in accordance with international trends. In England, even after parental separation or divorce, both parents in theory retain full independent decision-making power in relation to the child's upbringing. The authors point out that the practical effect is that the Legislature is in fact supporting the sole custody of the parent who has physical day-to-day care of the child.

In discussing the beneficial effect in some cases of joint custody, the writers say that what is obviously required is a situation where both parents are committed to making it work because of their love for their children. The authors also refer to the decision in *Pinion v Pinion* 1994 (2) SA 725 (D) and comment that this was a situation where the Court refused to grant joint custody in circumstances where it appeared, in the view of the authors, to be a thoroughly appropriate order. Page J took the traditional view, which forms the basis of much of the thinking in earlier decisions, that:

'It is, in my view, imperative that a child should know, in such a situation, with whom the ultimate say lies, and not be afforded the opportunity of playing one parent off against the other.'

(At 730J.) This approach is obviously salutary in resolving deadlocks and the many disputes which might arise in families without the necessity of recourse to the Courts, but if the situation can be so regulated that the threatened dangers of deadlock or disagreement are removed insofar as it is possible to do so, then the need for the ruling of one authoritarian person recedes considerably. In my view, the fact that a child should know 'where it stands' is not the only consideration of importance. It is part of the pattern for a child's future which a Court attempts to construct which has to be balanced against the great benefits to be obtained when both parents contribute on a regular and reasonably equal basis to the upbringing of the child. I have no doubt that most children who love their parents as deeply as the children in this case appear to, would always choose to have the kind of contact with both parents which they have enjoyed before divorce. If that contact will inevitably lead to further instability in the lives of the children, then it should not be permitted. No one can predict the future, or say that deadlock between plaintiff and defendant will inevitably arise. They have both retained a measure of respect for each other, which was evident during the proceedings before me, and I am hopeful that when the traumatic events of the past two years have faded a little, they will be able to resume their lives for the benefit of their children. I feel reasonably certain that both parents will get on with their own lives. There is no evidence that they have ever used the children as weapons of war to get at each

other. Joint custody in such a situation would be unthinkable. In the present case, the children seem to want to protect their parents for whom they have sympathy. There is no evidence of antipathy against either parent, as was the case in *McCall v McCall*.

Plaintiff is a man who feels deeply wronged by the awful experience of attempting to analyse the cause of his wife's bleeding disorder. The shock of discovery of his wife's past must have been traumatic. His need to protect his children is obviously very strong. His belief that he is a more suitable parent is probably equally strong.

What really struck me during the trial was that a person with the history which the defendant has was able to cope as well as she did. She was quite able to withstand vigorous cross-examination from her husband and to conduct her case in a perfectly competent manner. I have no doubt that she is a good and suitable mother, and I think that it would be most unjust to compel her to exercise access rights to her children in the position of a visitor to the father's home. That image of a mother only being permitted to come to visit them because of her lifestyle would be unfair to her and also to her children. They would grow up with the feeling that their mother was being punished, not for anything which she had done to them, but because of the risk that her lifestyle might influence them in the wrong direction. What better protection against that can there be than continuing to live with both parents and judging for themselves eventually whether the lifestyle of the father or the mother was more or less harmful than the other?

The plaintiff continued to assert that he was not what he called a 'control freak'. He acknowledged that he was a person used to exercising authority and that he would not be able to command an aircraft if this were not so. While a good deal of defendant's feeling that plaintiff is overbearing and oppressive may simply be caused by his personality, his determination to control is demonstrated by the fact that he will only allow access between mother and children on his terms and primarily on his property. This relentless quest was, in all probability, generated after the separation agreement was broken by defendant when she consorted with her partner while the children were present. There was evidence that that was probably what really angered plaintiff, and made his position non-negotiable. While he had every right to feel affronted by this breach of faith, I cannot allow his anger against defendant to be visited upon his children. They broke no agreement and should not be deprived of real mothering.

It is for these reasons that I have decided that joint custody is in the best interests of the two children of the parties. In order to prevent further disputes, I shall attempt to include such directions in the order which I propose to make, which will, I hope, iron out many difficulties. As far as the proprietary consequences of the marriage are concerned, I am unpersuaded that there should be a forfeiture. The parties are married in community of property and plaintiff's case is that defendant, through no fault of her own, fell ill and caused a great deal of unnecessary expense. His accusation of gross misconduct on the part of defendant is that she lied to him about her condition and was only eventually prevailed upon to tell him what had happened to her in her childhood and thereafter after being admitted to hospital.

There can be no doubt that defendant's reluctance to reveal these details came from a deep sense of guilt and shame, and that it was only when her process of healing commenced that she was able to start to reveal these details to her family.

Plaintiff's case is that she is still ill and still suffering from the condition of borderline personality disorder. There can therefore, on his case, be no misconduct on her part worthy of an order of

forfeiture of the benefits. I see no reason to depart from the usual order where no gross misconduct is shown, and I will order a division of the joint estate.

As far as maintenance is concerned, I am going to reduce the amounts which were claimed, bearing in mind that the children will be residing for half of the time, whatever the time may be, with their mother and for half with their father. Some expenses are always there, even if children are not present, but I have made an adjustment. I have also decided to give maintenance for the defendant only for one year, which will enable her to get herself established in her career and by which time the division of the joint estate should have been effected. In my view, this is not a case where the plaintiff should continue to pay maintenance for his wife who, in my view, is clearly capable of earning her own living, and will have what remains of the joint estate after it has been divided.

As far as costs are concerned, plaintiff has failed to show that he should be awarded sole custody. That was the major issue in this trial action, and costs should follow the event. Defendant sought custody, but was at all times prepared to consent to an order for joint custody, believing that that is what the children wanted. In the circumstances she should not have to bear the costs of defending this action.

The order is therefore as follows:

1. There will be a decree of divorce.
2. Plaintiff and defendant are appointed as the joint custodians of their two minor children, D and D.
 - 2.1 The said children shall spend equal time with plaintiff and defendant as arranged between the parties.
 - 2.2 All decisions regarding and relating to education, schooling, religious upbringing and extra-curricular activities shall be taken by the parties jointly. Each party individually shall have the power to sign any necessary documentation required by the relevant authorities.
 - 2.3 The parties shall be entitled to use different medical and dental practitioners in regard to the minor children and shall keep each other informed of the names of such practitioners and the nature of the treatment administered.
 - 2.4 In regard to psychiatric or psychological treatment, defendant shall be permitted to retain the services of the clinical psychologist, Mrs Monica Spiro (D, the daughter) and the clinical social worker, Ms Melanie Horwitz (D, the son) if the children wish to continue in therapy with these persons for a period of one year. Defendant shall decide whether the children wish to continue, which decision shall be taken by her in consultation with the said professionals. After one year, the parties shall jointly decide on the need for any further treatment of this kind for the children, and any such future treatment.
 - 2.5 Long and short school holidays will be alternated between the parties. The December-January holiday shall be divided into two equal portions and the parties shall alternate these periods so that the children spend alternate Christmases with each party.
 - 2.6 If the parties are unable to reach agreement on any issue where a joint decision is required, the dispute shall be referred for mediation to two mediators, who shall take such steps as they deem appropriate to resolve the dispute as speedily as possible and without recourse to litigation. Each party shall be entitled to nominate a mediator to act on such party's behalf when the need for such mediation, if any, arises. If the mediators

are unable to agree on a resolution of the dispute, they shall jointly refer the dispute to an arbitrator, who will decide the issue, and whose decision will be final.

3. Maintenance for the children

Plaintiff shall pay maintenance in respect of the two minor children, D and D, until each such child reaches the age of 21 years or becomes self-supporting, whichever event last occurs, as follows:

3.1 An amount of R1 750 per month per child, payable monthly in advance on or before the first day of each and every month into defendant's bank account or at such other place specified by defendant. This sum shall be increased annually in accordance with any rise in the Consumer Price Index, the first such increase to occur on 1 October 1998.

3.2 All medical, surgical, hospital, prescribed pharmaceutical, orthodontic and ophthalmological treatment.

3.3 All school fees, including private school fees, and the cost of extramural activities, afterschool care and additional tuition, school uniforms, books and other requirements, as also all clothes, equipment and attire relating to agreed extramural and sporting activities engaged in by the children.

3.4 The cost of tertiary education in respect of the children if the parties decide that tertiary education is appropriate.

4. Maintenance for defendant

Plaintiff shall pay personal maintenance to defendant at the rate of R2 500 per month for a period of one year only. Thereafter such payments shall cease.

5. Proprietary rights

5.1 It is ordered that the joint estate of the parties be divided.

5.2 It is further ordered that plaintiff's pension benefits and pilot's fund benefits shall form part of the joint estate. An endorsement is to be made in the records of the relevant pension fund or funds and pilot's fund (as defined in s 1(1) of the Divorce Act 70 of 1979 as amended), entitling defendant to payment of a one-half share therein as calculated at date of divorce (10 September 1997) and which payment shall be effected to defendant when any benefits shall accrue to plaintiff.

5.3 The parties shall be given a period of three months in which to reach agreement in regard to the manner of division of the joint estate. Failing such agreement, a receiver shall be appointed by agreement or, failing such agreement, by the chairman of the Accountants Board, to realise and distribute a one-half share of the joint estate to each party. Such receiver shall exercise the powers set out in prayer C(iv) of defendant's amended counterclaim dated 27 June 1997 and shall act in accordance with prayers (C)(v) and (vi) of that amended counterclaim.

6. Plaintiff shall pay the costs of these proceedings on a party and party scale. Plaintiff's Attorneys: *De Klerk & Van Gend*, Claremont, Cape. Defendant's Attorneys: *Miller, Gruss, Katz & Traub Inc.*

KELLY AND ANOTHER V LANE

– original judgment could not be found but a note on the case by Alastair Hay is included in File 2 the arbitration notes. See page 52 of File 2

**PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND
OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION AND
OTHERS
1999 (4) SA 147 (CC)**

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 16/98

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Appellant
THE MINISTER OF SPORT AND RECREATION	Second Appellant
THE DIRECTOR-GENERAL: DEPARTMENT OF SPORT AND RECREATION	Third Appellant

versus

SOUTH AFRICAN RUGBY FOOTBALL UNION	First Respondent
GAUTENG LIONS RUGBY UNION	Second Respondent
MPUMALANGA RUGBY UNION	Third Respondent
LOUIS LUYT	Fourth Respondent

Heard on : 7,10-13 May 1999

Decided on : 10 September 1999

JUDGMENT

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THE COURT:

A. OVERVIEW AND SUMMARY

(a) Introduction

[1] This case raises important questions of legal principle concerning the basis on which the courts may review the exercise of presidential powers. It also touches on the circumstances in which the President can be called upon to testify in a court of law. Since its commencement in the Transvaal High Court, the case has generated considerable controversy and, at times, acrimony, not only amongst the litigants but also amongst members of the public. In disposing of the constitutional questions raised, this Court must focus not on the controversies that have arisen, but on the relevant legal and constitutional principles.

[2] At issue is the constitutional validity of two presidential notices that appeared in the *Government Gazette* on 26 September 1997. One announced the appointment of a commission of inquiry, under the chairmanship of Mr Acting Justice Browde, into the administration of rugby in the country.¹ The other declared the provisions of the Commissions Act 8 of 1947 applicable to the commission and promulgated regulations for its operation.² The South African Rugby Football Union (SARFU), two of its constituent unions and Dr Luyt, at that time the president of both SARFU and one of the unions, applied on notice of motion to the Transvaal High Court for an order against the President³ setting aside the two notices. The Minister of Sport and Recreation (the Minister) and the Director-General of the Department of Sport and Recreation (the DG) were also cited, although no relief was sought against them. The matter was heard by De Villiers J who set the two notices aside with costs and in his reasons, subsequently furnished, made adverse credibility findings against the President, the Minister and the DG. They appealed against that order and a number of ancillary orders. By the time the appeal came to be argued, Dr Luyt and the Gauteng Lions Rugby Union were the only remaining respondents and we shall refer to them as “the respondents” in the course of this judgment.

[3] The appeal was preceded by two preliminary hearings in this Court. The first raised the jurisdictional question whether the case should be heard by the Supreme Court of Appeal or by this Court. We concluded that the central issue in the case was the constitutionality of presidential action and accordingly designated this Court as the appropriate forum to determine the appeal.⁴ The second preliminary hearing was necessitated when, shortly before the appeal was due to be argued, Dr Luyt lodged an application in which he contended that he had reason to believe that all the justices of this Court would be biased against him. He sought the recusal of five of the ten justices,⁵ stating that he left it to the conscience of each of the five remaining judges to decide what to do. The application was argued over three days. This Court dismissed the application for recusal on the

1 The President acted under powers conferred on him by s 84(2)(f) of the Constitution. Section 84(2) which, in so far as is relevant, provides:

“The President is responsible for—

(f) appointing commissions of inquiry”.

2 The President acted in terms of s 1(1)(a) of the Commissions Act, which provides:

“[w]henever [he] has . . . appointed a commission . . . for the purpose of investigating a matter of public concern, he may . . . declare the provisions of this Act . . . applicable with reference to such commission . . .”

In terms of s 3(1) of the Act the commission then has the same power as a High Court to compel the production of documentary and oral evidence.

3 President Mandela was President from 10 May 1994 until 16 June 1999 when President Mbeki was inaugurated as President.

4 The judgment is reported as *President of the RSA and Others v South African Rugby Football Union and Others* 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC).

5 The vacancy created by the death of Didcott J had not yet been filled.

day following the conclusion of argument indicating that it would give its reasons later.⁶ The hearing of the appeal commenced immediately.

[4] Several days later, while leading counsel for Dr Luyt and the Gauteng Lions Rugby Union was addressing the Court, he announced that his mandate and that of his colleagues had been terminated and they withdrew. No reasons were furnished for their withdrawal. In the result we were deprived of the benefit of their full oral argument and of constructive debate with them. We have however given careful consideration to their written argument⁷ and to their oral submissions prior to their withdrawal. We have also scrutinised the Judge's reasons. Our unanimous conclusion is that the judgment is wrong and that the orders should be set aside.

(b) The factual background

[5] The recent history of South African rugby appears from the record and particularly from undisputed aspects of the President's affidavits. Like many other sports in South Africa, it has been a history of racial exclusion. One of the results of this racism was that support for South African rugby teams was generally to be found only amongst white people and open hostility to racially exclusive South African teams was felt by many black people. This pattern of exclusion and hostility seemed to have diminished during the Rugby World Cup which was held in South Africa during 1995. President Mandela gave his wholehearted support to the South African side and illustrated this by attending the final game, which South Africa won, wearing the captain's jersey. This event was welcomed by many both as a symbol of the possibility for racial reconciliation in South Africa and as a harbinger of a new racially inclusive ethos in South African rugby.

[6] This auspicious event, however, was followed by an eruption of controversy concerning the management and administration of rugby in South Africa. The national body responsible for the management and administration of rugby is SARFU. It is a private voluntary association whose members are the rugby unions constituted in provinces and regions throughout South Africa. The second respondent, the Gauteng Lions Rugby Union, of which Dr Luyt was the president when this litigation commenced, is a member of SARFU. The controversy related to many issues. Amongst these were allegations that the rugby administrators were doing too little to enhance the inadequate sporting facilities in townships and rural areas and too little to foster the development of rugby players from disadvantaged communities. In October 1996 Mr Brian van Rooyen, a vice-president of the Gauteng Lions Rugby Union, unsuccessfully challenged Dr Luyt for the presidency of that union. Two months later he handed a dossier to the Department of Sport and Recreation enumerating a list of complaints concerning the administration of rugby in South Africa. The Minister handed the contents of the dossier to Mr Mervyn King, a prominent financier and former judge, for evaluation. Mr King reported that while the dossier contained no proof of misconduct, it contained allegations which warranted further investigation. The Minister, therefore, decided to appoint a task team to undertake that investigation.

[7] A meeting was convened with SARFU on 14 February 1997, at which the Minister's intention was conveyed to SARFU. SARFU's representatives at the meeting indicated that they were unhappy about the appointment of the task team. After an exchange of correspondence between SARFU and the Department, a further meeting was convened for 21 February 1997. Present at that meeting were the Minister, the DG and several departmental officials, as well as Dr Luyt and several SARFU officials. A tape recording of the meeting was made and a transcript of that recording formed part of the record on appeal. At the end of the meeting a

6 Those reasons were handed down on 4 June 1999 and are reported as *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (7) BCLR 725 (CC).

7 Which runs to over 350 pages.

press statement was jointly prepared by those present. It stated, amongst other things, that SARFU would be given an opportunity to answer all allegations made against it and that a task team to be chaired by the DG would be appointed by the Minister.⁸

[8] The first meeting of the task team⁹ with representatives of SARFU was held on 3 April 1997. For several months thereafter the task team enjoyed helpful and extensive co-operation from SARFU and its constituent unions and their office-bearers. However, on 29 July 1997, shortly after auditors assisting in the investigation had called for disclosure of detailed financial and related records of SARFU, Ellis Park Stadium (Pty) Ltd and the Transvaal Rugby Sports Trust, SARFU's attorneys delivered a letter to the DG summarily suspending further co-operation.

[9] This led the Minister to comment to journalists that if SARFU continued to refuse co-operation, he would ask the President to appoint a commission of inquiry. SARFU's executive held a meeting and issued a press statement putting their side of the dispute. The Minister met with the President on 5 August 1997 and related the latter's attitude to the DG, who in turn issued a press statement. In that statement the President was said to have "happily responded" to the Minister that "[a] commission is yours if, in your best judgement, it is opportune". That press statement, dated 7 August 1997, was later to assume decisive importance in the judgment of De Villiers J. The following week the task team met and concluded that the continuation of their investigation was impossible and recommended to the Minister that he apply to the President for the appointment of a commission. On 17 August 1997, the *Sunday Times* reported that the Minister had indicated that he had decided that a commission of inquiry would be appointed and that, although he had to obtain the President's consent, that would merely be a "formality". On the same day, *Rapport* reported that the Minister had stated that a commission had already been appointed. These reports arose out of a brief encounter between the Minister and two journalists at a function on 15 August 1997.

[10] The tenor of the media reports gave rise to concern in the mind of one of the members of the task team, Professor Katz, the senior partner in the firm of attorneys advising the Department. He asked Mr Knowles, the member of his firm who was assisting the Department in the preparation of a memorandum to the President in support of the appointment of the commission, to ensure that everything be done properly.

[11] Accordingly, on 12 September 1997 the Minister, accompanied by Professor Katz, Mr Knowles and some departmental officials, met with the President regarding the appointment of the commission. They handed him a 26-page memorandum from the Minister and three supporting files containing a further 725 pages of documentation. This memorandum and its supporting documents was filed as part of the record and came to be called "the Tshwete file". Professor Katz outlined the application for the appointment of a commission and suggested that the President take his time and consult his own legal advisor. The execution by the President and the Deputy President of the formal instruments appointing the commission followed on 22 September 1997.

[12] The immediate response of SARFU and the Gauteng Lions Rugby Union to the appointment of the commission was a letter by their attorneys, dated 29 September 1997, calling for the President's reasons as well as all information and documents which led to the decision. The letter also intimated acceptance in principle of the commission, subject to their being satisfied with the reasons requested. The President answered in a five-

⁸ The full text of the press statement is to be found in para 190 below.

⁹ The members of the team were the DG and four persons from the private sector: Mr M King, two practising advocates, Messrs G Marcus SC and G Malindi, and Professor M Katz, a practising attorney.

page letter, dated 3 October 1997, which explained in great detail how the President viewed his powers, how he had deliberated on the matter and why he had decided to appoint the commission. The letter tendered sight of the Tshwete file and expressed the President's conclusion as follows:

- "10. My consideration of the Minister's memorandum and of the supporting documentation, has led me to conclude that:
- 10.1 the sport of rugby football, its welfare and its administration, especially at national level, is overwhelmingly a matter of national and public interest.
 - 10.2 the matters identified in the terms of reference of the commission of inquiry are matters in respect of which there is evident public concern and that concern has emanated from complaints and criticisms by, or controversies involving players, provincial rugby unions, administrators, sponsors, the public, sports writers and other media commentators.
 - 10.3 those public concerns have found expression both:
 - 10.3.1 in the print and electronic media, and
 - 10.3.2 by way of representations to the Minister of Sport and Recreation, or to his Department.
 - 10.4 there is a perception of a lack of transparency regarding decisions taken by SARFU in the conduct of its affairs and by some of its affiliate unions.
 - 10.5 there is a need to address the matters of public concern and to allow for a public process in which issues relating to the public interest, the best interests of the game and its administration can be engaged with in a proper and dignified manner. In particular, a forum is necessary to allow those who are critical of the current administration of rugby to ventilate their criticisms and, equally importantly, for those who have been the subject of such criticism to justify their decisions and practices.
 - 10.6 a commission of inquiry may usefully provide independent advice to SARFU and to government on how best to promote and manage the sport to the benefit of the public which supports the game, the players who actively participate in it, the members of the community who believe they are not provided with adequate access to it, and sponsors who help fund it.
 - 10.7 a commission of inquiry may help lift the cloud of distrust under which the organisation and administration of rugby is alleged to be operating.
 - 10.8 before any inquiry can perform a constructive function, the public must have confidence that it will be conducted thoroughly and impartially. My decision to appoint Acting Judge Browde as Chairperson of the commission will constitute a guarantee that the matter will be conducted independently and impartially.
11. I wish to emphasise that the complaints and criticism directed at the management of rugby in general and SARFU in particular, as contained in the documentation placed before me, were not accepted by me as proof of the existence of the alleged irregularities. They do, however, demonstrate the conflict-ridden environment within which rugby is being administered and emphasise the need for a proper, considered and dispassionate inquiry into whether the best interests of rugby and the public are being served. Although it is conceivable that the inquiry could uncover irregularities, it is not its purpose to pursue a vindictive inquiry into certain individuals. It is to promote a positive and constructive approach that the terms of reference have been framed so as to avoid any reference to specific individuals."

(c) The application

[13] On 20 October 1997 the respondents launched their application. No basis for the joinder of the Minister and the DG was laid in the founding affidavit. A consequent plea of misjoinder was raised in the court below but was dismissed. The point was raised afresh in this Court and is considered below.¹⁰ The founding affidavit, deposed to by Dr Luyt, is conveniently divided into a number of separately captioned chapters and sets out the factual averments considered relevant. Then, under the heading “Legal Grounds”, the affidavit identifies and seeks, over some 40 pages, to substantiate the factual and legal bases for the following seven named causes of action against the President:

(1) **Absence of Jurisdictional Prerequisite**

The subject matter of the commission does not constitute a “matter of public concern” as required by the Commissions Act.

(2) ***Infringement of Constitutional Rights***

If the Commissions Act sanctions an inquiry into the private affairs of autonomous private bodies such as the respondents, the Act infringes the constitutional rights to freedom, security, equality and privacy entrenched in the Constitution, and is therefore invalid.

(3) ***Agreement***

The appointment of the commission constituted a breach by the President, as head of the executive arm of government, of a legally binding agreement between the government and SARFU (and its constituent unions) concluded at the meeting on 21 February 1997.

(4) ***Audi Alteram Partem***

In terms of section 33 of the Constitution, SARFU, and its constituent unions, were entitled to procedural fairness and accordingly to make representations to the President before he appointed the commission; alternatively the respondents had a legitimate expectation that they would be afforded such a hearing arising from the agreement of 21 February 1997.

(5) ***Failure to Properly Consider The Matter***

The President’s decision to appoint the commission was so unreasonable as to be consistent only with a failure on his part properly to apply his mind to the matter. In support of this a number of circumstances were alleged, including bad faith on the part of the Minister, whose decision to appoint the commission the President “had simply rubber-stamped . . . without himself properly applying his mind . . .”. In this context the affidavit refers back to an earlier mention of press reports of the press statement of 7 August 1997 to the effect that the President had at that stage indicated to the Minister that a commission was his for the asking.

(6) ***Administrative Action Not Justified by Reasons***

The written reasons provided by the President do not justify the appointment, and accordingly fail to comply with section 33(1)(d) of the Constitution.

(7) ***Terms of Reference***

The terms of reference of the commission are so vague as to be devoid of meaningful content, and thus give an unrestricted licence to the commission.

¹⁰ See para 233 below.

[14] Each of the appellants deposed to an answering affidavit. Because of subsequent events, no useful purpose would be served by relating the details of the answering affidavits. Each of the seven causes of action relied upon in the founding affidavit was put in issue. We summarise how the deponents between them, singly and jointly, denied the foundational facts alleged in the founding affidavit. The main affidavit, that of the DG, sets out the government's reasons for wanting the inquiry, gives his version of the running debate between SARFU, the Department and the task team, deals with the various meetings held, denies the conclusion of a legally binding agreement on 21 February 1997 and comments on the correspondence exchanged.¹¹ The oblique suggestion in the founding affidavit that the media reports on the press statement implied that the appointment had been approved "well before the minister's application for its appointment" is rejected by the DG as "quite unfounded." He adds:

"Although the minister had from time to time discussed the possibility of such an appointment with the president, the latter did not make any final decision at the time."

The DG also describes as "untrue and not supported by the facts" the allegation in Dr Luyt's founding affidavit that "the President has simply rubber-stamped the Minister's decision." Although, on the face of it, these statements are hearsay in the mouth of the DG, his affidavit is confirmed by both the President and the Minister, in so far as it relates to them.

[15] The President's affidavit expressly confines itself to: (i) the question whether the subject matter of the envisaged inquiry is one of public concern; (ii) his decision to appoint the commission; and (iii) the allegations in the founding affidavit bearing on his conduct and state of mind when deciding on the appointment. The affidavit outlines the President's views regarding the national importance of rugby, making the point that rugby is a national asset and emphasising the role he and it had played in the reconciliation process. The affidavit then deals in some detail with the manner in which the President decided to appoint the commission, and affirms the contents of the letter giving the reasons for his decision.¹² The President's affidavit echoes the DG's description of the rubber-stamping suggestion as "unfounded and untrue".

[16] The Minister's affidavit concentrates on policy issues, including his reasons for asking for the appointment of the commission and, in three concluding pages responding to the alleged causes of action, expressly confines itself to traversing Dr Luyt's contention that personal animosity had motivated the Minister in applying to the President for the appointment of the commission.

[17] Dr Luyt's replying affidavit on behalf of the respondents is largely argumentative, and therefore impermissible.¹³ Dr Luyt accuses the Minister and the DG of having deviously orchestrated and generated media interest in order to create a basis for saying the administration of rugby was a matter of public concern. The Minister is also said to have pressed for the appointment of the commission in the furtherance of the ulterior motive of "getting at" Dr Luyt because he is an Afrikaner. More pertinently relevant to the course the case was thereafter to take, is the change in the thrust of the so-called rubber-stamping attack. Whereas the term "rubber-stamping" is used in the founding affidavit as evidence of the President's gross unreasonableness when he considered the Minister's application for the appointment of the commission, the replying affidavit introduces a subtle yet profound change. Now, for the first time, the verb "abdicate" is used; and it is used ambiguously. On the one hand it is used to characterise the President's mental attitude and conduct vis-à-vis

11 The first 40 pages of the DG's 47-page answering affidavit deals with this aspect of the case.

12 Quoted in para 12 above.

13 See, for example, *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 78 I – J.

the appointment of the commission, that is, as part of the complaint that the President, by relying too heavily on the Minister, had failed properly to bring his mind to bear on the question:

“I persist therefore with the allegation that the President had quite clearly abdicated his responsibility to decide himself and left the decision to the Minister, and I further persist that the President had merely rubber-stamped the Minister’s decision without properly considering the matter and without properly applying his mind.”

[18] At the same time, however, referring to the media reports of the press statement of 7 August 1997, the replying affidavit avers that the President thereby “abdicated his responsibility to decide himself and left the decision to the Minister.” In another paragraph Dr Luyt says:

“I also deny that the actual decision was taken by the President and I reiterate my denial that he had considered the matter either properly or at all.”

This version of the allegation which introduced the concept of abdication of responsibility was to serve as the springboard for a new emphasis, the one that was to have a pervasive influence on the Judge’s thinking. The President is no longer said to have come to a grossly unreasonable conclusion by applying too little – or misdirected – thought to the consideration of the Minister’s application; he is said not to have taken the decision at all; the decision, it is said, was taken by the Minister. The substitution of the Minister for the President as the person charged with having taken the offending decision was to have significant consequences.

(d) The course of events in the High Court

[19] The application was treated as one of urgency and was set down for hearing before the Judge during the court recess. The appellants applied to strike out the averments based on the press reports relied upon by the respondents, contending that they were hearsay and irrelevant. After the application to strike out had been launched, the respondents produced a copy of the press statement of 7 August 1997 which had not previously formed part of the record. The application was settled on the basis that: (a) the press statement of 7 August 1997 was admitted in evidence; (b) certain of the press reports were received in evidence in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988; and (c) the appellants were to file supplementary affidavits to deal with such statements. Supplementary affidavits by the President, the Minister and the DG, filed after the settlement of the striking-out application, specifically denied that there had been any abandonment of power by the President or that he had said, or that the Minister had reported him as having said, words that could be interpreted as an abdication. The President and the Minister also related how the Tshwete file had formed the basis of the President’s consideration of the matter in September 1997, while the Minister and the DG tried to explain how the press statement had come to be issued on 7 August 1997. In response to submissions made on behalf of the respondents at the hearing, another supplementary affidavit by the President was filed aimed at defeating a point raised by counsel to the effect that the decision to appoint the commission was invalid because the Deputy President had not been consulted.¹⁴

[20] After several days of argument, the Judge referred the application for the hearing of oral evidence in terms of Uniform Rule of Court 6(5)(g).¹⁵ The two main provisions of the order read as follows:

¹⁴ This argument is dealt with at paras 150 – 153 below.

¹⁵ Uniform Rule of Court 6(5)(g) provides:

“Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on

- “1. The application is referred for the hearing of oral evidence . . . on the following issues:
 - 1.1 Relating to the terms of the agreement of 21 February 1997 and in particular whether in terms thereof [SARFU] was first to be provided with the allegations against it before it was expected to cooperate.
 - 1.2 Relating to the questions whether or not –
 - 1.2.1 the [President] had made the remarks attributed to him in the press statement of 7 August 1997;
 - 1.2.2 the [Minister] had made the remarks attributed to him in the article in the Sunday Times of 17 August 1997;
 - 1.2.3 such remarks by the [Minister] correctly reflected discussions between him and the [President];
 - 1.2.4 the [President] had rubber stamped the [Minister’s] decision and had failed to properly consider the matter himself.
2. For the purpose of deciding the issues referred to above, [Dr Luyt], Mr Oberholzer,¹⁶ Mr Erasmus¹⁷ and Mr Gerber¹⁸ as well as the [President, the Minister and the DG] are ordered to appear personally to be examined and cross-examined as witnesses.”

[21] The correctness of that decision has been challenged on a number of legal grounds. Because of the conclusion we have come to on the totality of the evidence, it is not strictly necessary to consider its validity. However, as there are far-reaching implications in the order directing the President to subject himself to cross-examination on his reasons for exercising a constitutional power vested in him, we will deal briefly below with why we consider that decision to be wrong.¹⁹

[22] The hearing of oral evidence commenced on 16 February 1997 and lasted for eighteen court days. The following persons gave evidence: Dr Luyt, Mr Oberholzer, Mr Erasmus, Mr Gerber, the DG, Professor Katz, Mr Marcus, Mr Malindi, the Minister and the President. After SARFU and the other applicants closed their case, counsel for the appellants sought the withdrawal of the dispute relating to the terms of the agreement of 21 February 1997 from the referral to evidence, on the basis that no case had been made out by the applicants. This application was refused with costs by the Judge. On 8 March 1998, after the appellants’ other witnesses had completed their evidence, the appellants applied for a revocation of the order requiring the President to give evidence. This application was also refused with costs. The President gave evidence on 19 and 20 March

specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.”

¹⁶ The Chief Executive Officer of SARFU.

¹⁷ Member of the Executive Committee of SARFU.

¹⁸ Sports editor of Rapport newspaper who had written the article that had appeared on 17 August 1997 referred to in para 9 above.

¹⁹ See paras 240 – 245 below.

1998. His evidence-in-chief takes up half a page of the record and his cross-examination 150 pages. A considerable part of his cross-examination was devoted to the history of rugby in South Africa, the criteria for the appointment of presidential commissions of inquiry, the relative importance of rugby in comparison with corruption, the crime rate, farm murders and other matters. It was, however, never put to the President by the cross-examiner that his evidence concerning the process of deliberation, consideration and consultation, undertaken by him before he appointed the commission, and which he had described in his affidavits (and which had in material respects been confirmed by Professor Katz's evidence), was false. Indeed, during final argument on the application, counsel for SARFU and the other respondents expressly placed on record that they were not challenging the President's honesty and integrity. The failure to put to the President in cross-examination that his evidence relating to the events of 12 to 26 September 1997 was mendacious, has significant consequences as will be demonstrated later.

[23] On 3 April 1998, at the end of their closing submissions, the appellants applied to re-open their case to lead the evidence of a reporter, Mr Hannes de Wet. This application was refused with costs. On 17 April 1998, the court issued an order reviewing and setting aside the decision of the President to appoint the commission and his decision in terms of the Commissions Act. The President, the Minister and the DG were ordered to pay the respondents' costs including the costs of three counsel. The Judge did not at the time provide reasons for his order. Those reasons were provided later on 7 August 1998 and have been reported, albeit in truncated form.²⁰

(e) The judgment of the High Court

[24] The judgment of the High Court is prolix, running to 1159 typewritten pages. The Judge concluded that the appointment of the commission and the decision to afford it powers in terms of the Commissions Act were invalid. He based this conclusion on three grounds: first, that the President had irrevocably abdicated his responsibility to exercise these powers to the Minister; secondly, that if he was wrong in his decision regarding abdication, that the President's exercise of the powers was invalid because the respondents were not afforded a hearing by the President prior to his decision to appoint the commission; and thirdly, that in exercising his powers, the President had failed to apply his mind to the relevant issues. The Judge did not find it necessary to consider the other arguments raised by SARFU and the other applicants.

[25] In this judgment, it is neither necessary nor desirable to traverse in detail each of the many points the Judge made in his judgment; rather we identify and analyse particular instances of flawed reasoning and wrong findings of law that are crucial to his conclusion. Nevertheless, the length of the High Court's judgment, the multiplicity and complexity of the factual and legal conclusions it contains, the sweep and gravity of counsel's submissions in this Court and the inherent importance of the case, necessitate our giving more extensive reasons than might otherwise have been the case.

(f) The central fallacies in the judgment

[26] The Judge's reasoning in support of all three grounds referred to in paragraph 24 above is flawed both in law and fact, evidencing a mistaken approach that dictated the manner in which he handled the case and which predestined its outcome. These fallacies will be discussed in greater detail later in this judgment. It is appropriate now merely to identify them and describe their effect on the judgment in the High Court.

²⁰ SARFU and Others v President of the RSA and Others 1998 (10) BCLR 1256 (T).

[27] At an early stage of the proceedings, the Judge fixed on the press statement of 7 August 1997 and formed the view that, on 5 August 1997, the President may have abdicated his power to appoint a commission in favour of the Minister. This had a material influence on the Judge's reasoning. He took the view, quite wrongly, as will be shown later, that in law an abdication of the kind he thought had taken place was irrevocable. These errors of law and fact were foundational to the order made by him for the President to be subjected to cross-examination, and to his credibility findings against the President.²¹

[28] This "abdication fallacy" pervades the Judge's reasoning. Without it some of the interlocutory rulings are inexplicable and, because of it, the Judge's approach to the evidence of crucial events leading up to the publication of the presidential notices is skewed. Instead of looking at cogent and uncontested evidence as to the conduct of the President and his advisors during September 1997 and gauging its legality in the light of the Constitution, the Judge concentrated on side issues relating to press interviews by persons other than the President at the beginning of the preceding month, deriving from them the hypothesis that the President had irrevocably abdicated his responsibility.

[29] The second basis for the Judge's conclusion that the exercise of the President's powers was invalid in this case was his finding that the President had failed to afford the respondents a hearing prior to exercising his powers. It is correct that no hearing was afforded to the respondents, but the Judge erred in concluding that such a hearing was necessary as a matter of law. This error was based, first, on a misconception of the nature of the relevant presidential powers and the constraints upon their exercise; and secondly, on his misconstruction of the events of 21 February 1997. The Judge wrongly concluded that at that meeting a contract had been concluded between the government and SARFU in terms of which the government undertook to provide SARFU with all the allegations against it, prior to requiring any co-operation from SARFU and that such a contract was legally binding on the President in the exercise of his powers. That contract, the Judge held, regardless of events which followed, required the President in September 1997 to afford SARFU an opportunity to be heard prior to his appointing the commission of inquiry. He found, in the alternative, that the events of 21 February 1997 had given rise to a legitimate expectation which would also found a right to a hearing. His finding, in relation to legitimate expectation, however, once again focussed on the events of 21 February 1997, not on the events in the period immediately preceding the appointment of the commission in September 1997. By the time the commission was appointed in September, the events of February 1997 were quite peripheral to determining whether a legitimate expectation had arisen or not. The mistaken focus on the events of 21 February 1997 was a fundamental flaw in the Judge's reasoning in relation to his finding that the President erred in failing to afford SARFU and the other respondents a hearing prior to the appointment of the commission of inquiry. This misdirection had a major bearing on the referral to evidence, as will be described later.²² The third basis upon which the Judge held the President's actions to be invalid, namely that he had not properly applied his mind to the matter, was also flawed by the Judge's failure to appreciate the proper character of the discretion conferred upon the President as well as by the "abdication fallacy".

(g) The structure of this judgment

[30] The appellants appealed against the whole of the judgment and order made in the court below. They argued that each of the three bases upon which the Judge had concluded that the appointment of the commission was invalid was flawed, that the President's exercise of his powers was quite proper in the

21 The importance that the abdication theory came to have in his mind is indicated by the fact that some 500 pages of his judgment are devoted to it.

22 At paras 234 – 239 below.

circumstances and that the order made by the Judge should therefore be set aside. The respondents, however, argued that all three bases (outlined in paragraph 24 above) upon which the Judge held the exercise of the Presidential powers to be invalid were correct, save that they did not support the conclusion in respect of the first basis, that the abdication of responsibility was irrevocable. They argued, in addition, that the exercise of the President's powers was invalid on three further grounds: first, that the President had failed to consult the Deputy President as he was required to do prior to exercising the constitutional power to appoint a commission of inquiry; secondly, that the issues to be investigated by the commission did not constitute a matter of public concern and therefore both the appointment of the commission and the decision to make the provisions of the Commissions Act applicable were invalid; and thirdly, that the terms of reference of the commission are so vague as to render the appointment of the commission invalid.

[31] Each of the arguments raised by the respondents is considered in this judgment. In the next part of the judgment, we consider the abdication fallacy, both as a matter of law and of fact. In order to do so, it is necessary to evaluate the testimony of the President and the adverse credibility finding made by the Judge against the President. Thereafter, in the third major section, we analyse the powers conferred upon the President by section 84(2)(f) of the Constitution, and section 1 of the Commissions Act and the constraints upon those powers. In so doing, we deal with the respondents' arguments as to whether the President was obliged to afford SARFU and the other respondents a hearing prior to appointing the commission; the question whether the area of investigation entrusted to the commission was a matter of public concern; and the question whether the President consulted with the Deputy President in relation to the appointment of the commission. In the fourth major section, we deal with the argument concerning whether the President properly applied his mind to the appointment of the commission and the argument concerning the vagueness of the terms of reference. Finally, there is a section dealing with costs and certain interlocutory and procedural matters: the question of the referral to evidence, including the important constitutional question whether the President should have been required to give evidence; the question of misjoinder; the appeal against certain interlocutory costs orders; the reserved costs of the recusal application; and the costs upon appeal. All the matters dealt with are constitutional matters or matters which are connected with the principal constitutional matter which has to be decided in this case, namely the validity of the President's actions, and for that reason are within the jurisdiction of the Court.²³

(h) Appellants' arguments concerning bias on the part of the Judge in the High Court

[32] It remains only to mention that in their argument counsel for the appellants contended that the errors of fact and law in the rulings and judgment given by the Judge, and the manner in which he conducted the hearing, created the impression of partisanship which tainted his entire judgment. As we have come to the conclusion that the appeal should be upheld on the record as it stands, we need give no consideration to this issue and have refrained from doing so. No allegation of actual bias was made by the appellants. They asserted only that a reasonable apprehension of bias existed. In the circumstances, we are not obliged to consider the question, once we have decided that we can decide the case on the record.²⁴

(i) Summary of findings in this judgment

[33] The appeal is upheld. In part B of the judgment, in paras 37 – 125 below, we deal with the question of abdication of responsibility.

²³ Section 167(3)(b) of the Constitution.

²⁴ See *S v Rall* 1982 (1) SA 828 (A) at 834B – F; *S v Tyebela* 1989 (2) SA 22 (A) at 29H – 30E and our judgment in the jurisdiction hearing, above n 4 paras 41 – 2.

(a) We hold that the Judge erred in concluding that at the meeting between the President and the Minister of 5 August 1997, the President irrevocably abdicated his responsibility to appoint a commission to the Minister. In our view, the words of the press statement of 7 August 1997 are not sufficient, in themselves, to establish that an abdication took place.

(b) More importantly, even if the words of the press statement warrant such a conclusion, the purported abdication would, as a matter of law, have been invalid and therefore void. It could never, therefore, have been irrevocable.

(c) Accordingly, the Judge's finding that the subsequent evidence relating to the President's consideration of the matter between 12 and 26 September 1997 was irrelevant and could have no effect on the determination of the issue was a material misdirection.

(d) We consider all the oral and written evidence relating to the President's consideration of the appointment of a commission of inquiry and conclude that there is no basis for finding that the President abdicated his responsibility. The President's and the Minister's evidence in this regard is corroborated in material respects by the evidence of Professor Katz which was accepted by the High Court.

(e) We consider the grounds upon which the Judge made adverse credibility findings against the President and find them to be wrong and that such findings constitute a material misdirection by him. The respondents argued that the President's testimony concerning his consideration, in the period between 12 and 26 September 1997, of whether a commission should be appointed was false and should be rejected. They argued that the evidence was false on the ground that the consideration of the matter by the President was merely a charade, and alternatively that, despite his evidence to the contrary, he gave no consideration to the matter whatsoever. In our view, there was no basis in the evidence for the imputation of such dishonesty to the President.

(f) In addition, we find that the imputation of perjury in relation to the events of 12 to 26 September 1997 was never put to the President in cross-examination. This failure contravened the principles governing the practice of cross-examination. A witness is entitled to an opportunity to defend himself or herself against an allegation of mendacity. Such an opportunity was never afforded to the President.

[34] In part C of this judgment, at paras 126 – 222 below, we consider whether SARFU and the other respondents were entitled to a hearing prior to the President deciding to appoint a commission of inquiry.

(a) We conclude that there are two distinct legal decisions under challenge: the decision to appoint a commission of inquiry in terms of the Constitution; and the decision to make the powers of subpoena afforded by the Commissions Act applicable to that commission. We consider whether each of these decisions constitute "administrative action" as contemplated by section 33 of the Constitution.²⁵

(b) We hold that in order to determine whether an act or decision constitutes administrative action, it is necessary to consider the function being performed. After a consideration of the nature of the President's power to appoint a commission of inquiry, we conclude that it does not constitute administrative action and that, therefore, the procedural fairness requirement for just administrative action demanded by section 33 of the Constitution is not necessary for the decision to appoint a commission of inquiry.

²⁵ Section 33, as it currently reads, is cited in full in para 135 below.

(c) There are, however, other constraints on the exercise of that power. The doctrine of legality applies, as it does to all power exercised in terms of the Constitution. The President must also act in good faith and must not misconstrue the nature of his or her powers. In this case, we conclude that the President acted in accordance with those constraints when he appointed the commission of inquiry in terms of his constitutional powers. We also point out that the commission, upon appointment, must discharge its duties in accordance with the duty to act fairly.

(d) We find that the subject matter to be investigated by the commission constitutes a matter of public concern as required by the Commissions Act. We find that the demands of procedural fairness did not require the respondents to be afforded a hearing prior to the President's decision to confer the Commissions Act powers upon the commission. Accordingly, we do not find it necessary to decide whether the decision to make the provisions of the Commissions Act applicable to the commission constituted administrative action or not.

[35] In part D of the judgment, at paras 223 – 232 below, we reject the respondents' argument that the President failed to apply his mind properly to the appointment of a commission and hold that the terms of reference of the commission were sufficiently certain to determine the ambit of the commission's investigation.

[36] In part E, at paras 233 – 259 below, we hold that:

(a) there was no basis for the joinder of the Minister and the DG;

(b) the Judge misdirected himself when he decided to refer the matter to evidence;

(c) the decision to require the President himself to give evidence was fundamentally flawed; courts should be aware that the President is not in the same position as any other witness; the doctrine of separation of powers requires a court to seek to protect the status, dignity and efficiency of the office of the President and the President should be required to give evidence orally in open court in civil matters relating to the performance of his official duties only in exceptional circumstances.

B. ABDICATION OF RESPONSIBILITY

(a) The approach of the High Court

[37] One of the central findings in the judgment is that concerning what the Judge referred to as "the abdication of responsibility issue". The Judge's line of reasoning is the following: (a) the press statement of 7 August 1997 shows that, on 5 August 1997, at his meeting with the Minister, the President abdicated his responsibility in regard to the appointment of a commission of inquiry to the Minister and the press reports of 17 August 1997 show that the Minister had purported to exercise the President's power by appointing a commission of inquiry; (b) as a matter of law, a decision to appoint a commission of inquiry is invalid if the President abdicates his responsibility relating to the making of the decision; (c) as a matter of law, the President's abdication was irrevocable; and (d) therefore the events subsequent to the abdication were irrelevant to determine whether the decisions taken by the President were valid.

[38] It is clear that under our new constitutional order the exercise of all public power, including the exercise of the President's powers under section 84(2), is subject to the provisions of the Constitution which is the

supreme law. If this is not done, the exercise of the power can be reviewed and set aside by the Court. That is what this Court held in *President of the Republic of South Africa and Another v Hugo*.²⁶ It is clear also that section 84(2)(f) of the Constitution confers the power to appoint commissions of inquiry upon the President alone. The Commissions Act also confers the power to declare its provisions applicable to a commission of inquiry upon the President alone. The Judge was, therefore, correct in law when he held that, if the President had indeed abdicated either of these powers to another person, that abdication would have been invalid.

[39] What would constitute an “abdication” of the presidential power to appoint a commission of inquiry need not be precisely determined in this judgment. The Judge relied on the discussion of “unlawful abdication of power” in Baxter’s *Administrative Law*. Baxter identifies the following three ways in which power can unlawfully be abdicated: when an office-bearer unlawfully delegates a power conferred upon him or her; when an office-bearer acts under dictation; and when an office-bearer “passes the buck”.²⁷ The Judge found it unnecessary to decide in which of these three ways the President had abdicated his responsibility. He held simply that if the President had uttered the words reported in the press statement of 7 August 1997, he had unlawfully abdicated his responsibility.²⁸

[40] The first category of “abdication” referred to by Baxter occurs where a functionary in whom a power has been vested delegates that power to someone else. Whether such delegation is valid depends upon whether the recipient of the power is lawfully entitled to delegate that power to someone else. There can be no doubt that when the Constitution vests the power to appoint commissions of inquiry in the President, the President may not delegate that authority to a third party. The President himself must exercise the power. Any delegation to a third party would be invalid. The second category referred to by Baxter deals with cases where a functionary vested with a power does not of his or her own accord decide to exercise the power, but does so on the instructions of another. The third category, “passing the buck”, contemplates a situation in which the functionary may refer the decision to someone else. However, as Baxter points out, if the final decision is taken by the properly empowered authority, there is no objection to taking the advice of other officials.²⁹

[41] When contemplating the exercise of presidential powers, there can be no doubt that it is appropriate and desirable for the President to consult with and take the advice of Ministers and advisors. Indeed, it is clear from the Constitution itself that the exercise of executive authority, in terms of section 85, is a collaborative venture in terms of which the President acts together with the other members of Cabinet. Similarly, where the President acts as head of state, it is not inappropriate for him or her to act upon the advice of the Cabinet and advisors. What is important is that the President should take the final decision.

(b) The “abdication” on 5 August 1997

[42] For the reasons that follow, it is not strictly necessary for purposes of this judgment to consider whether, at the meeting with the Minister on 5 August 1997, the President abdicated his power to appoint a commission to the Minister. The Judge based his conclusion that an abdication had occurred on the text of the press statement, a document which was double hearsay against the President. That document stated that the President had allegedly told the Minister that “[a] commission is yours if, in your best judgement, it is opportune”. In our view, it is not possible to construe the words attributed to the President as embodying an

26 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at para 13.

27 Baxter *Administrative Law* (Juta, 1984) at pp 434 – 444. See also *Hofmeyr v Minister of Justice and Another* 1992 (3) SA 108 (C) at 117 F – G.

28 At p 1042 of the typescript judgment.

29 Above n 27 at 444.

intention on the President's part to abdicate the powers conferred upon him by the Constitution, or for that matter, the Commissions Act. Even if it is assumed that the President uttered the words attributed to him in the press statement (and that is the high water mark of the respondents' case) this would not, on its own, evince an intention by the President to abdicate his powers and would not establish even a purported delegation to the Minister by the President of his constitutional power to appoint commissions of inquiry. It is clear from the oral and written evidence that the Minister and the President both knew that the President was the only person with the power to appoint a commission, and that if a commission were to be appointed, the appointment would have to be made by the President himself. The words "[a] commission is yours if, in your best judgement, it is opportune", whether construed linguistically, contextually or purposefully do not purport to transfer anything to the Minister. At best for the respondents, they may mean that when the President decides whether to appoint a commission he would be guided by the Minister's judgment. We cannot, therefore, accept that the text of the press statement, on its own, can establish that an abdication of responsibility occurred. This finding, however, is not central to our approach to the matter, as we have described before.

[43] In the light of the foregoing, it is clear that, were the President to purport to delegate his or her powers in terms of section 84(2) of the Constitution or section 1 of the Commissions Act to another, that delegation would be invalid. However, it will not constitute an abdication of power, where it is clear that the President, although acting upon advice from advisors or members of the Cabinet, exercised the presidential powers himself or herself. The President is entitled to seek and rely on advice, but must make the final decision.

(c) The key error of law relating to irrevocability

[44] In law, the appointment of a commission only takes place when the President's decision is translated into an overt act, through public notification. In addition, the Constitution requires decisions by the President which will have legal effect to be in writing.³⁰ Section 84(2)(f) does not prescribe the mode of public notification in the case of the appointment of a commission of inquiry, but the method usually employed, as in the present case, is by way of promulgation in the *Government Gazette*. The President would have been entitled to change his mind at any time prior to the promulgation of the notice and nothing which he might have said to the Minister could have deprived him of that power. Consequently, the question whether such appointment is valid, is to be adjudicated as at the time when the act takes place, namely at the time of promulgation.³¹ This the Judge failed to do. He erred, not only in treating the press statement as proof of an abdication of authority, but also in holding that the abdication, which he found as a matter of fact to have taken place, was irrevocable.

[45] In *Administrator, Cape v Associated Buildings Ltd*,³² the Appellate Division had to consider an argument that a power vested by a provincial ordinance in the administrator acting with the consent of the executive committee of the province, had been wrongly delegated to the provincial secretary, and could not thereafter be exercised by the administrator in accordance with the requirements of the Ordinance. It dealt with that argument as follows:

³⁰ Section 101(1) provides that:

"A decision by the President must be in writing if it –

(a) is taken in terms of legislation; or
(b) has legal consequences."

³¹ See, for example, *Rajee v Zeerust Town Council* 1938 TPD 283 at 290.

³² 1957 (2) SA 317 (A).

“In any event, whether there had been an effective delegation or not, there can be no question of the competency of the authority – the Administrator acting with the consent of the Executive Committee – that dealt with the matter on the 14th November, 1955. That was the occasion when the decision was taken which was communicated to the respondent’s attorneys by the letter of the 17th November. I do not agree with the statement in the judgment of the Court *a quo* that

‘having delegated his authority to the Provincial Secretary and the latter official or somebody to whom he had delegated his powers having completed the matter delegated to him, the Administrator could not thereafter handle the matter himself.’

The delegation was obviously not intended to be an irrevocable one or one that would divest the Administrator of the power of acting himself, nor can I conceive of any principle which could have given it that effect.”³³

In that case there had been a purported delegation of power to the provincial secretary prior to the exercise of the power by the administrator. Because the purported delegation was invalid, it could have no legal effect and could not preclude the administrator from subsequently exercising the power conferred upon him. The same holds true in this case. Even if, as a matter of fact, there had been an improper abdication by the President to the Minister on 5 August 1997, such abdication would have had no legal effect. It would have been a nullity, and as such, could never have been irrevocable. Like the administrator in the *Associated Buildings* case, the President would have retained the capacity to exercise the powers conferred upon him by the Constitution and the Commissions Act.

[46] Because the Judge mistakenly took the view that the discussions of 5 and 15 August 1997 constituted the crucial issue in this regard, he focussed his attention on those events and paid scant attention to what happened after that. The Judge accordingly took the view that the President had abdicated his responsibility to the Minister on 5 August 1997. He also found that the Minister had purported to appoint a commission on 15 August 1997. This finding was based on the press reports in the Sunday newspapers of 17 August 1997 and the testimony of Mr Gerber, the journalist who had written one of the reports. These reports were based on an encounter between the Minister and the two journalists on 15 August 1997. This finding is questionable for several reasons: there was a material conflict between the two newspaper reports as to what the Minister had said;³⁴ the Minister also denied in oral evidence that he had taken a decision to appoint the commission; and it is improbable that the Minister would have purported to appoint a commission, when he knew that it was a power only the President could exercise. However, it is not necessary to deal with this question at all. Even if the Minister had purported to appoint a commission on 15 August 1997, such an act would have been invalid and a nullity.

[47] The factual issue to which the Judge ought to have directed his attention was whether the President gave consideration to the matter during the period 12 September to 26 September 1997, the latter date being the one on which the notice appointing the commission was published in the *Government Gazette*. However, because of his legal conclusion that the alleged abdication was irrevocable, the Judge considered all the evidence subsequent to the abdication to be irrelevant to his determination of the abdication issue. That conclusion of law was incorrect. The true evidential question is whether, in the period immediately before he appointed the commission, the President applied his mind to the appointment of the commission.

³³ Id at 323.

³⁴ See para 9 above.

(d) The respondents' arguments

[48] Indeed, the respondents correctly did not attempt to argue that the alleged abdication of 5 August 1997 was, in law, irrevocable and, in effect, abandoned the Judge's conclusion in this regard. They accepted that even if this Court could be persuaded that an abdication had taken place on 5 August 1997, they would need to show that the President had persisted in that abdication in the weeks that followed. In the light of the evidence relating to the President's consideration between 12 and 26 September 1997 of the appointment of the commission which will be considered below, the respondents had the task of persuading the Court not only that an abdication had taken place on 5 August 1997 but also that they had proved one of the following factual alternatives. First, the President gave no consideration to the question whether to appoint a commission during September 1997. Secondly, such consideration as he gave was merely a charade because the President and his advisors thought that an irrevocable abdication had taken place in August. Thirdly, the President wished to persist in the earlier abdication and therefore gave no genuine consideration to the question whether a commission should be appointed or not.

[49] In the light of the foregoing, the question of what exactly happened on 5 August 1997 is, at best, peripheral to the issues that need to be determined in this case. Whether or not there had been a purported abdication of responsibility by the President on that day, the question remains whether in the subsequent weeks the President in fact exercised his powers under the Constitution and the Commissions Act correctly. It is, therefore, unnecessary for this Court to consider the former question in any detail. It is the President's evidence of what happened between 12 and 26 September 1997 that is crucially relevant. None of the other witnesses was able to shed light on those events, save for Professor Katz, the Minister and the DG in relation to the delivery of the Tshwete file on 12 September 1997. For this reason it is necessary, later in this judgment, to consider carefully the Judge's adverse findings relating to the demeanour and credibility of the President. The evidence provided by the DG and the Minister related primarily to the events between February and August 1997. Although adverse credibility findings were made against them by the Judge, it is not necessary for the purposes of this judgment to consider those findings. Nor is it necessary to consider the challenge made by appellants' counsel to the veracity of the testimony of the respondents' witnesses whom the Judge had found to be truthful and reliable. For the purposes of this judgment, we shall assume in favour of the respondents that these findings made in respect of the Minister, the DG and the respondents' witnesses are correct.

(e) The evidence relating to the events of 12 – 26 September 1997

[50] In his initial answering affidavit, the President states that the decision to appoint the inquiry was his alone. He states that the Tshwete file had been placed before him on 12 September 1997 and that he gave it careful consideration before he decided to appoint the commission. He also states that he took into account his own knowledge of the history and nature of the controversy concerning rugby in making the decision. He states that:

“It was not a decision lightly taken and I did so only after taking into account all the considerations for and against such an appointment.”

In their reply, the respondents deny these averments and assert that the President merely rubber-stamped the decision of the Minister. In a supplementary affidavit filed by the Minister, and confirmed in so far as it related to him by the President, the Minister states that in order to assist the President in determining whether a commission should be appointed or not, he arranged the preparation of the Tshwete file and that he, together with Professor Katz and Mr King, presented that file to the President on 12 September 1997. In his evidence,

which will be discussed below, Professor Katz stated that he had advised the President to consider the matter and seek advice from his legal advisor.

[51] During cross-examination, the President stated that he followed this advice and indeed discussed the Minister's motivation with both Professors Haysom (his legal advisor) and Gerwel (the Director-General in his Office) and that they had come to the conclusion that the Minister had made out a case for the appointment of a commission. That evidence was not challenged during cross-examination and the Judge also accepted that there was consideration of the matter by the President from 12 September 1997 onwards after the Minister's memorandum and the Tshwete file had been handed to him. As indicated above, however, the Judge regarded this as being of no relevance because once the President had "abdicated his responsibility" such consideration "did not and could not cure the impropriety". The Judge further held that:

"... in any event, even if he had from 12 September onwards read the memorandum and skimmed through the newspaper clippings, it would again be a neutral consideration equally consistent with the applicants' version. Had he earlier abdicated his responsibility and had the Minister taken the effective decision, and had he been warned to go through the motions of looking at it and reading it, it could never have amounted in law to a proper consideration of the matter.

Respondents' counsel point out . . . that the President discussed the matter with his director-general, Gerwel, and his legal advisor, Haysom, and concluded that the Minister had made a case for the appointment of a commission of inquiry

The same consideration . . . apply. Had the President earlier abdicated his responsibility, it could never have amounted in law to a proper consideration of the matter."³⁵

[52] There is no basis in the evidence for the comment that the President might have been "warned to go through the motions" of reading the Tshwete report. No such suggestion was put to the President in cross-examination. Moreover, the evidence of the President and the Minister was corroborated in material respects by the testimony of Professor Katz and his evidence is of definitive significance in this regard. It was never challenged or questioned and must be accepted as correct. He said that on 12 September 1997 he attended a meeting with the President, in the company of his partner, Mr Knowles, the Minister and the DG. At this meeting the written motivation, embodied in the Tshwete file, was handed to the President. Professor Katz, at the invitation of the Minister, outlined very briefly its general contents. Thereafter he:

". . . suggested to the President that he should take time to consider the matter, that he should seek his own legal advice. I mentioned the name of the Presidential legal adviser, Professor Hasem [sic], and I suggested to the President that it was important that the appropriate procedures should be complied with."

35 At p 948 – 949 of the typescript judgment.

According to Professor Katz, “the President said that he would do so, that he would be contacting Professor [Haysom] and that he would take his time to evaluate the documentation.”

[53] In cross-examination, Professor Katz said that although he had not personally seen any of the newspaper or other media reports concerning what had passed between the President and the Minister on 5 August 1997, he was informed of the contents of the press statement by Mr King and by Mr Knowles. From this he had understood that “the Minister [had] agreed with the President to appoint a commission.” Professor Katz testified that he was “concerned” about this intimation on the ground that “if it was accurate, that without full submission, the decision had been taken.” It is clear from his evidence that Professor Katz did not know what had happened between the President and the Minister. His concern was that if the reports were correct and carte blanche to appoint a commission had been given to the Minister, a decision might be taken without a proper submission being made to the President. This was the very reason why he attended on the President on 12 September 1997; he wanted to ensure that the matter be dealt with correctly. Professor Katz made it clear during cross-examination that his concern that the matter be dealt with on a procedurally correct basis was a broad concern and not a narrow one limited to the possibility of a review application. Despite several interruptions from the cross-examiner and attempts to limit artificially the import of his evidence to some narrower procedural concern, Professor Katz made it clear that his concerns were of a broader nature:

“ With respect, Mr Maritz, I was not only concerned about a review. I wanted what was happening in SARFU to be fair and procedurally correct . . . It was my idea to have the task-force in the first place. I was concerned for South African rugby and I wanted the right thing to take place . . . But I am saying , with respect, my lord, [my concern] was not limited [to the possibility of a review]. I wanted it to be fair . . . What must be done, must be fair. It must be fair to SARFU, it must be fair to Dr Luyt, it must be fair to the administration. So it was not simply a question of review – it was a question of fairness.”

[54] Professor Katz made it clear that, based on what had been conveyed to him about the media reports, it never entered his mind that this had amounted to an abdication of the President’s responsibility in terms of the Constitution and that this had not been suggested to him by anyone. He said that he had spoken to Mr Knowles and said to him that “if the President had, without bringing his mind to bear on the matter . . . agreed to the appointment of a commission, it would have been procedurally a breach” and that it was his function and that of Mr Knowles to ensure that a proper submission would be prepared which would comply with the requirements of legal procedure.

[55] No proper reading of Professor Katz’s evidence can warrant the inference that either he or Mr Knowles was of the view that the President had, prior to the meeting of 12 September 1997, “abdicated his responsibility under the Constitution”; least of all that what the President had been reported to have said or done constituted some irrevocable legal act which thereafter precluded the constitutionally proper appointment of the commission in question. It is clear that the advice given by Professor Katz to the President was quite to the contrary, namely, that the President should consider the matter carefully, that he should take his time about doing this and that he should consult his own legal advisor, Professor Haysom. Implicit in all of this is the opinion that, provided that the correct procedure is followed and that the President considers the matter properly, a commission can properly and lawfully be appointed. Mr Knowles clearly held the same view. He forwarded the draft of the Tshwete file which he had prepared to the Department of Sport and Recreation under cover of a letter dated 10 September 1997, saying it should be finalised and submitted to the President. The letter continues:

“The President will appreciate, as a consequence of his office and as a man of legal training, that he should consider the documentation and make a deliberated decision as to the appointment and its consequences. We must anticipate that SARFU and its associates will keep more than a watchful eye on the proceedings.”

What is more, the President on his own evidence, completely unchallenged in this regard, heeded this advice and consulted both Professor Haysom and his Director-General, Professor Gerwel.

[56] Despite this wholly unchallenged evidence of Professor Katz, which could not properly have been rejected and indeed was not rejected by the High Court, the following conclusion is reached in the judgment:

“Katz did not, in my view, corroborate the President’s version at all. The meeting of 12 September 1997 is completely neutral and as consistent with the applicants’ version as with that of the respondents’.”³⁶

In our view this is a material misdirection which flows directly from the mistaken legal conclusion concerning the abdication issue, to which reference has already been made. Not only was the legal conclusion in this regard wrong, but there is no evidence, whether direct or inferential, that either Professor Katz or the President, or for that matter anybody in the President’s office concerned with the matter, thought that there had been an abdication, irrevocable or otherwise. In these circumstances the evidence of Professor Katz provides material corroboration for the President’s evidence. Professor Katz warned the President of the likelihood of a review application and no reason suggests itself why the President would not have followed the advice to take his time, consider the matter carefully and to consult his own legal advisor.

[57] The evidence of Professor Katz and the President that the advice was given and accepted and acted on by the President, who consulted Professors Gerwel and Haysom before taking the final decision to appoint a commission, was a complete answer to the rubber-stamping argument. Respondents’ leading counsel, Mr Maritz, appreciated this, and before his brief was terminated he correctly acknowledged this saying that if this evidence were correct it would refute the rubber-stamping argument, though it would not necessarily be destructive of the broader contention that the President had failed to give proper consideration to the matter. That, so he contended, was a separate enquiry which depended on other considerations.

(f) The failure to cross-examine the President on key issues

[58] Mr Maritz persisted, however, in the rubber-stamping argument contending that the President’s evidence that he had consulted Professors Gerwel and Haysom, and had considered the Minister’s memorandum and the Tshwete file should be rejected. There was no evidence to support Mr Maritz’s contention on this issue, nor any apparent reason why the President should have ignored the advice given to him by Professor Katz. Mr Maritz suggested that the President might have been too busy to give consideration to the Tshwete file and to consult with Professors Gerwel and Haysom on it, or he might have thought that there was no purpose in doing so because the abdication was irrevocable, or because he did not wish to undo such abdication.

[59] None of these possibilities was however raised with the President during cross-examination. The

³⁶ At p 953 of the typescript judgment.

suggestions that the President might wrongly have thought that what had occurred on 5 August 1997 was irrevocable, or that he might have been too busy to meet his advisors and consider the Tshwete file, or that he may have decided to persist with an earlier abdication, were not put to the President in cross-examination. Nor was it put to the President that he had not consulted Professors Gerwel and Haysom before taking the final decision to appoint a commission. Mr Maritz contended that there was no need to do so because it was implicit in the rubber-stamping contention that this did not happen.

[60] The implication of this argument was that the President had ignored the advice given by Professor Katz, had deliberately perjured himself in giving evidence that he accepted and acted on such advice, that the reasons given by him in his letter of 3 October 1997 for his decision to appoint the commission were false, and that he had in fact misled his legal representatives and the court in this regard. That is a grave allegation to make against any witness. It is particularly serious if made against the President of the country.

[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn*³⁷ and has been adopted and consistently followed by our courts.³⁸

[62] The rule in *Browne v Dunn* is not merely one of professional practice but "is essential to fair play and fair dealing with witnesses".³⁹ It is still current in England⁴⁰ and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.⁴¹

[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed,⁴² particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings.⁴³ It should be made clear not only that the evidence *is* to be challenged but also *how* it is to be challenged.⁴⁴ This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.⁴⁵

37 (1893) 6 The Reports 67 (HL).

38 See, for example, *R v M* 1946 AD 1023 at 1028 per Davis AJA, Watermeyer CJ, Greenberg JA and Schreiner JA concurring; *Small v Smith* 1954 (3) SA 434 (SWA) at 438 E – H; *S v Govazela* 1987 (4) SA 297 (O) at 298J – 300B; *S v Van As* 1991 (2) SACR 74 (W) at 109 b – g; *Van Tonder v Killian NO en 'n Ander* 1992 (1) SA 67 (T) at 72I – 73A and, generally, Pretorius *Cross-examination in South African Law* (Butterworths, Durban 1997) and the authorities referred to there.

39 See the speech of Lord Herschell in *Browne v Dunn*, above, at n 37.

40 See *Cross and Tapper on Evidence* 8 ed (Butterworths, London 1995) at 318 – 20 and *R v Fenlan and Neal* (1980) 71 Cr App Rep 307 at 313 – 4.

41 For example, in Canada, see Sopinka, Lederman and Bryant *The Law of Evidence in Canada*, (Butterworths, Toronto and Vancouver 1992) at 876 – 9; *R v Dyck* [1970] 2 CCC 283 (BCCA) at 290 – 2; *Palmer and Palmer v R* [1980] 50 CCC 193 (SCC) at 209 – 10; and *Machado v Berlet* (1987) 32 DLR (4th) 634 (Ontario High Court of Justice) at 637 – 8; and Australia, see *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* 44 ALR 607 (SC (NSW))(1983) at 623 – 34, where there is an extensive and illuminating discussion of the rule.

42 *Allied Pastoral Holdings*, above n 41, at 628.

43 *Id* at 634.

44 *Id* at 630.

45 *Id*.

[64] The rule is of course not an inflexible one. Where it is quite clear that prior notice has been given to the witness that his or her honesty is being impeached or such intention is otherwise manifest, it is not necessary to cross-examine on the point,⁴⁶ or where “a story told by a witness may have been of so incredible and romancing a nature that the most effective cross-examination would be to ask him to leave the box.”⁴⁷

[65] These rules relating to the duty to cross-examine must obviously not be applied in a mechanical way, but always with due regard to all the facts and circumstances of each case. But their object must not be lost sight of. Its proper observance is owed to pauper and prince alike. In the case of the President of this country there is an added dimension. Not only are his personal honour and dignity at stake. He, as head of state, is representative of all the people. That being so, the rule needs to be observed scrupulously.

[66] In the instant case, however, none of the exceptions apply; that is to say they do not apply to the most crucial factual issue in the case, namely, whether the evidence of the President (on affidavit and under oath in the witness box) regarding the events which occurred between 12 and 26 September 1997 was a contrived and dishonest concoction. It is clear beyond doubt that the President could not be honestly mistaken in this account. Either it is true or it is a meretricious deceit. On the respondents’ argument and implicit in the reasoning of the High Court, it could be a dishonest sham in one of three ways. First, the events described never took place and have simply been invented by the President. Secondly, the President and those advising him thought that the President had, on 5 August 1997, irrevocably in law abdicated his power to appoint a commission, thought that nothing could be done to rectify this lawfully and staged a charade. Thirdly, the President and those advising him not only thought that an abdication had taken place but intended to persist with it and therefore staged the charade. The charade was one of going through the motions of drawing up a ministerial motivation, consulting on the issue and the President reading the prepared motivation, believing that this would have no legal consequence, but nevertheless physically going through the set piece with some hope of it saving the day. The only other possibility is the one contended for by the appellants, namely, that whatever was said by the President to the Minister on 5 August 1997 had no legal consequence in relation to the exercise by the President of his section 84(2)(f) power, which power he could still validly exercise at any time thereafter, provided he did so constitutionally, and which power he did properly exercise thereafter. The onus was of course on the respondents to prove that the President’s evidence on this decisive issue was dishonest in one of the above ways.

[67] In his judgment, the Judge came to the conclusion that:

“the case of the applicants was fully and fairly put to the President in cross-examination. However, to the extent that any aspect of the applicants’ case had not been expressly put to the President, he, to my mind, probably had notice beforehand of any such point.”⁴⁸

This must be understood in the light of his finding that the impropriety of the abdication of responsibility on 5 August 1997 could not be cured by a subsequent consideration of the matter, his finding that it could be accepted that the President gave consideration to the matter from 12 September 1997 onwards, and his

46 Above n 37.

47 See the speech of Lord Morris in *Browne v Dunn*, above, n 37.

48 At p 925 of the typescript judgment.

apparent acceptance of the President's evidence concerning the discussions with Professors Gerwel and Haysom.

[68] It is convenient to deal first with the finding that the President "probably" had prior notice of every point in the respondents' case which had not been expressly put to him. This was based on two grounds only. The first was a single passage in the replying affidavit attested to by Dr Luyt and the second a submission in the present respondents' written argument, in support of the application to the High Court for the issues to be referred to oral evidence. These grounds will be dealt with in turn, and must be considered in the light of the way the case was pleaded.

[69] The legal grounds set out in Dr Luyt's founding affidavit on which the respondents relied in challenging the appointment of the commission, have been identified above.⁴⁹ Nowhere was it suggested that the President had not appointed the commission himself.

The complaint was that, in appointing the commission, he had not applied his mind properly. In his answering affidavit the President denied the averment that he had not applied his mind properly to the matter, and said that he had given proper consideration to the matter, referring in that context to the information which had been placed before him in the Tshwete file. In the replying affidavit it was asserted in response to this averment that the President had "abdicated his responsibility to decide himself and left the decision to the Minister", and that:

"The President's insistence that he carefully considered the material placed before him (from 12 September onwards) and that he alone took the decision and his denials that he had merely rubber-stamped the Minister's decision, therefore simply cannot be true."

That assertion was formulated as a conclusion drawn from the allegation that there had earlier been an abdication of responsibility. The allegation that responsibility had been abdicated was in turn based on double hearsay – the press statement that the President had said to the Minister "[a] commission is yours if, in your best judgement, it is opportune," followed by the bald legal conclusion that "[t]he foregoing statement makes it perfectly clear that the President abdicated his responsibility to decide himself and left the decision to the Minister."

[70] The submission in the written argument referred to above was to the effect that the President's denial of the rubber-stamping charge and his own version of having taken the decision properly "should be rejected on the papers alone as demonstrably false". What has been said in the preceding paragraphs in regard to the respondents' cause of action at that stage, applies with equal force to this submission. This submission must moreover be read in the context of what respondents' counsel himself understood, and must have intended, it to mean. In final argument before the Judge on the rubber-stamping issue the following is stated by respondents' counsel:

"it is important at the outset to *clearly state that we do not question the President's integrity or honesty*. The issue of reliability, is however, a different matter . . . [A]t the same time I want to make use of this opportunity to *state quite clearly that we have been accused of having called the President a liar*. We

⁴⁹ See para 13 above.

have not done that. We have said, certainly that his evidence is not to be accepted and that we still submit.” (emphasis supplied).

[71] Such a submission could never have been made if the respondents’ case had been that the President had engaged in a dishonest charade. The Judge correctly held that the above statement did not amount to a formal admission. But this in no way detracts from the fact that this passage is a description, by respondents’ leading counsel himself, of what meaning should be attached to any imputation which up to that stage might have been made against the President. It is also the only reasonable explanation for the failure to dispute the President’s evidence relating to his meeting with Professor Katz and the fact that he acted on the advice given to him. That could only have been disputed by a direct challenge to his integrity and honesty. In the light hereof there is simply no factual basis for the conclusion reached by the Judge that the President had prior warning that his honesty and integrity were going to be impugned.

[72] It is finally necessary, on this issue, to deal with the High Court’s finding that “the case of the applicants was fully and fairly put to the President in cross-examination.” A close reading of the President’s cross-examination does not reveal that it was ever suggested or even implied, either that the evidence of the President as to the way in which he considered the appointment of the commission on and after 12 September 1997 was a perjured concoction or, if he had done what he said he did, this was no more than a fraudulent charade. Such a conclusion simply cannot be reached when regard is had to the description given by leading counsel himself as to what the respondents’ case was throughout.

[73] Never was it suggested or implied, least of all put in cross-examination, that the President was being untruthful or dishonest. His evidence on affidavit, that the Minister, in the company of two members of the task team, had presented a written memorandum to him, was accepted as was his oral amplification thereof that the two members were Professor Katz and Mr Knowles. The President was asked by respondents’ counsel:

“Mr President, did Prof. Katz at that time caution you that or express a warning that there would possibly or likely be a court case ?”

The President’s affirmative answer was left unchallenged. Under cross-examination the President testified as follows:

“When I started [read “studied”] that motivation and when I discussed the matter with my own advisors, the director-general, Prof. Jakes Grabe [read “Gerwel”], Prof. Hayson [read “Haysom”], my legal advisor, we decided that the minister had made a case for the appointment of a commission and I, and I alone, supported that commission.”

This was also never challenged in any way. Least of all was it suggested that this discussion with his advisors was a concoction. Many aspects of the case raised in the respondents’ affidavits were canvassed with the President. What was not canvassed, however, was the case argued before this Court, namely, that the President’s evidence as to how he considered the written motivation, discussed it with his advisors and came to the decision to appoint the commission, was a dishonest sham. There is a reason why this case was not put to the President. It simply did not, even at that late stage of the oral evidence, constitute or form any part of the respondents’ case. This is clear from the following statement by Mr Maritz during the cross-examination of the President:

“The question of rubber stamping is not in itself a separate legal cause of action, it is but a facet of the cause of action or the review ground of a failure to properly consider the matter.”

[74] A further basis for the Judge’s conclusion that the President’s honesty had been sufficiently placed in dispute was his acceptance of Mr Maritz’s submission that the President during cross-examination complained on a number of occasions that the cross-examiner was improperly or unfairly impugning his honesty and integrity. Those comments were made in relation to the cross-examination of the President on the DG’s press statement dealing with the events of 5 August 1997. But one simply cannot conclude, as the Judge did, that because the President (rightly or wrongly) thought his credibility was under attack on this issue, this establishes that it was properly put to the President that he had engaged in a dishonest charade in pretending to consider the Tshwete file. Either the President’s honesty in respect of the crucial issue referred to above was challenged by the cross-examiner or it was not. The record shows that it was not. The fact that the President thought, wrongly as it transpired, that his honesty was under attack on quite another issue, cannot as a matter of logic remedy the failure properly to challenge on the crucial issue.

[75] The Judge accordingly misdirected himself in a material respect when he concluded that it was clear to the President when giving evidence that the respondents were impugning his evidence concerning what had been said to him at the meeting of 12 September 1997, and his evidence that he had considered the Tshwete file and consulted with his advisors thereupon. The Judge also misdirected himself when he held that the President had been given prior notice that his credibility in this regard was to be impugned. This misdirection seriously affects the weight to be attached to the Judge’s findings on credibility and demeanour.

[76] It cannot be suggested, nor was it suggested in argument, that the content of the President’s evidence on the issue was of “so incredible or romancing a nature” that it rendered specific cross-examination as to dishonesty unnecessary. Under these circumstances it would be manifestly unfair to disbelieve the President when, had it been suggested to him in cross-examination that the events in September 1997 were a dishonest sham, he could have called Professors Haysom and Gerwel to corroborate his version. It was under the circumstances not open to the High Court to disbelieve the President on this issue; particularly when the rejection was based, not on any evidence to the contrary, but on unwarranted inferences from hearsay evidence that the President abdicated his responsibility to the Minister and an unfounded legal conclusion as to the irrevocability of such abdication.

(g) The weight to be attached to the Judge’s findings based on demeanour

[77] The Judge made adverse findings concerning the President’s credibility as a witness and his demeanour in giving evidence. By demeanour is understood the subjective manner in which a witness testifies orally, as opposed to the objective content of the evidence so given. The trial court sees and hears the witness testifying and is thus able to evaluate how a witness responds to questions and produces answers. This immediate relationship between witness and trier of fact enables the latter to assess the evidence in the light of the behaviour and conduct of the witness while testifying, whereas the court of appeal is restricted to the written record of the witness’s oral testimony.⁵⁰

50 In *Wigmore on Evidence* 1A §24 note 5 (p 950 (Tillers rev. 1983)) the following is stated:

“Just as real evidence is a physical fact, demeanor evidence is a physical event, the conduct of the witness in testifying. Both are directly perceived by the trier, and both are accompanied by probative propositions presented by the witness in the form of testimony . . .”

[78] The deference which a court of appeal ought properly to accord credibility findings made by a trial court based directly or indirectly on the demeanour of witnesses who have testified orally before it, is not a matter of easy or simple formulation. The correct approach to this matter, as well as to appeals on fact generally, was enunciated in *R v Dhlumayo and Another*.⁵¹ These prescripts are not rules of law but guidelines.⁵² While the guidelines laid down in *Dhlumayo* have been consistently followed by our courts, caution has been expressed by the Supreme Court of Appeal concerning the reliability of demeanour findings, as, for example, in the following passage in *S v Kelly*:⁵³

“In any event, as counsel conceded in a homely metaphor, demeanour is, at best, a tricky horse to ride. There is no doubt that demeanour - ‘that vague and indefinable factor in estimating a witness’s credibility’ (*per* Horwitz AJ in *R v Lekaota* 1947 (4) SA 258 (O) at 263) - can be most misleading. The hallmark of a truthful witness is not always a confident and courteous manner or an appearance of frankness and candour. As was stated by Wessels JA in *Estate Kaluza v Braeuer* 1926 AD 243 at 266 more than half a century ago in this Court:

‘A crafty witness may simulate an honest demeanour and the Judge had often but little before him to enable him to penetrate the armour of a witness who tells a plausible story.’

On the other hand an honest witness may be shy or nervous by nature, and in the witness-box show such hesitation and discomfort as to lead the court into concluding, wrongly, that he is not a truthful person.”

[79] The advantages which the trial court enjoys should not, therefore, be over-emphasised “lest the appellant’s right of appeal becomes illusory.”⁵⁴ The truthfulness or untruthfulness of a witness can rarely be determined by demeanour alone without regard to other factors including, especially, the probabilities.⁵⁵ As indicated above, a finding based on demeanour involves interpreting the behaviour or conduct of the witness while testifying. The passage from *S v Kelly* above correctly highlights the dangers attendant on such interpretation.⁵⁶ A further and closely related danger is the implicit assumption, in deferring to the trier of fact’s findings on demeanour, that all triers of fact have the ability to interpret correctly the behaviour of a witness, notwithstanding that the witness may be of a different culture, class, race or gender and someone whose life

51 1948 (2) SA 677 (A).

52 *Attorney-General, Transvaal v Kader* 1991 (4) SA 727 (A) at 740B – C. This was explained as follows in *Dhlumayo*’s case, above n 51, at 695 – 6:

“It is particularly undesirable to tie the hands of appellate courts by rules which are not loose and flexible - see *Rex v Abel* (1948 (1), SALR 654) and cases therein cited. General lines of conduct may be laid down, but they must be such as will assist and not hamper an appellate court in dealing with the problems which may arise in any particular case in the manner most consistent with the attainment of justice. Any principles which may be laid down are in the main clearly only rules of common sense, and not rules of law. . . . The only legal principles involved are, so far as I know, the fundamental one that an appeal is a rehearing to which the appellant, who has been given leave to appeal or where no leave to appeal is necessary, is entitled as of right and that – in certain circumstances – the incidence of the *onus* may be all-important.

. . . .

The principle which has been adopted that an appellate court will not ordinarily interfere with a finding of fact by a trial judge . . . is no more than a common sense recognition of the essential advantages which the trial judge has had, as a consequence of which the right of the appellate court to come to its own conclusions on matters of fact, free and unrestricted on legal theory, is necessarily in practice limited.”

53 1980 (3) SA 301 (AD) at 308B – D, cited with approval in *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA) at 979C – F.

54 *Protea Assurance Co Ltd v Casey* 1970 (2) SA 643 (A) at 648E *per* Miller AJA. See also, *Germani v Herf and Another* 1975 (4) SA 887 (A) at 903D – E.

55 See, *S v Civa* 1974 (3) SA 844 (T) at 846D – 847A and the authorities there referred to; and the *Dumbarton Oaks* case above n 53 at 979G – I.

56 Para 78 above and n 53.

experience differs fundamentally from that of the trier of fact.⁵⁷

[80] As was said in *Dhlumayo*'s case:

"10. There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.

11. The appellate court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter."⁵⁸

[81] If these principles are applied to the present case, very little, if any, weight can be accorded to the findings by the Judge, whether express or implied, which impugned the honesty of the President on the basis of his demeanour. This is so for basically three reasons. First, as pointed out above, the irrevocable abdication finding by the Judge against the President was fundamentally and demonstrably wrong, even assuming that the President had used the words attributed to him in the press statement. It was wrong in law and on the facts; it was a fundamental misdirection that established a false basis for the Judge's inferential reasoning; and it clouded and skewed his assessment of the probabilities and the credibility of the President in relation to virtually all the events subsequent to 5 August 1997. How seriously this flawed the Judge's approach to the President's demeanour and credibility appears from the judgment itself. Immediately before considering the President's demeanour the following finding is recorded:

"As indicated, the overwhelming probabilities are that the President said to the Minister of [read "on"] 5 August 1997: 'A Commission is yours if, in your best judgement, it is opportune', or words to that effect, *and thereby abdicated his responsibility*."⁵⁹ (emphasis supplied).

Seven lines lower down the following is stated:

"In so far as the President's evidence *on other aspects of the matter is in conflict with the above finding on the probabilities*, I find that such evidence is also not credible".⁶⁰ (emphasis supplied).

[82] Secondly, the Judge failed to have any regard to the failure by respondents' counsel to cross-examine the President on vital aspects of his evidence relating to the events from 12 September 1997 onwards and accordingly erred in not having any regard to the consequences of such failure. As indicated above,⁶¹ the Judge

57 The recent radical revision of the so-called cautionary rule in sexual assault cases (see *S v J* 1998 (2) SA 984 (SCA)) is a reminder that today's received wisdom regarding human behaviour and the ability of the lay person to correctly interpret it, may tomorrow be discarded as irrational and out of date. It is unnecessary, however, for purposes of this case, to pursue this matter any further.

58 Above n 51 at 706.

59 At p 769 of the typescript judgment.

60 Id.

61 At paras 72 – 76 above.

misdirected himself in coming to the conclusion that the honesty of the President had been properly challenged. Such misdirection further substantially erodes the reliance which can be placed on any demeanour finding adverse to the President.

[83] Thirdly, the Judge avoided an express finding that the President was untruthful and, immediately after the second passage quoted in paragraph 81 above, said:

“That may again be due to lack of veracity, or unreliability, or a combination of both these factors. However, it is again unnecessary, to my mind, to attempt to determine its cause.

It is indeed unfortunate to have to come to these conclusions in regard to the credibility of the President.”⁶²

[84] Whatever the ordinary meaning of “unreliable” might be, there was no specific finding that the President had been deliberately dishonest and had engaged in the dishonest charade, pretending to consider the Tshwete file and to have regard to the advice given to him by Professors Gerwel and Haysom, then concocting reasons for his decision, and perjuring himself as a witness in order to mislead the court as to what had actually happened. No such finding would have been justified on the evidence and no such finding was made. Nothing short of such a finding would have justified the conclusion that the respondents had discharged the onus that was on them on this issue.

(h) The findings made concerning the President’s demeanour

[85] The President’s evidence and the findings made by the Judge concerning his demeanour must be seen in the context of the order that he give evidence and the manner of his cross-examination. We were referred to no case, and we know of none, in which a head of state has been required to give oral evidence in review proceedings to justify a decision taken as part of his or her official duties.⁶³ The President was ordered – over objections by his counsel – to give evidence in response to a double hearsay statement which was inadmissible against him. He honoured the order, came to court at considerable inconvenience to himself, and was cross-examined for more than a day.

[86] In evaluating the President’s evidence the Judge failed to appreciate the implications of the extraordinary order he made requiring the President to give evidence, the sensitivities it engendered and the political subtext it gave to the case which involved not only the litigants and their legal representatives, but also the Judge as the judicial officer in control of the proceedings. The political atmosphere was introduced by the averment that the President had rubber-stamped the Minister’s decision, the demand that he subject himself to cross-examination, a suggestion that the government was interfering in sport in much the same manner as had been the case under apartheid, and contentions in Dr Luyt’s founding affidavit that the Minister’s representations to the President were motivated by an ulterior purpose, including “resentment of the fact that rugby is controlled by whites and mostly Afrikaners and not by the government”; and resentment of the fact that he and SARFU had “not been prepared to meekly and tamely tolerate government interference with and intervention in the affairs of SARFU” and resentment of “SARFU’s refusal to effectively hand over control of rugby, its assets and management to the government.”

62 At pp 769 – 770 of the typescript judgment.

63 See the further discussion of this in paras 240 – 245 below.

[87] The Judge commented adversely on the President's evidence, finding that he had failed or refused to answer a number of questions, had used the court as a podium for political rhetoric, had suggested which of the witnesses should be believed, had queried rulings by the court, had insulted the cross-examiner, had been argumentative and had attempted to intimidate the cross-examiner into refraining from questioning him on matters relating to credibility, and had made defamatory remarks concerning Dr Luyt. The passages in the record cited in support of these findings are, however, not really findings as to demeanour, but more in the nature of general criticisms of the President's evidence.

[88] It is correct, however, that the President was at times argumentative, and that he also made disparaging comments concerning the cross-examiner. The President's attitude, however, needs to be understood in the context of the case described above and does not provide the basis for a finding that the President was a dishonest or untruthful witness. The Judge says that an impression was created that the President was attempting to deter the cross-examiner from cross-examining him on matters relating to credibility. The President was obviously deeply offended that his evidence concerning what he had said to the Minister was being disputed. It is clear from various passages in his evidence that he felt humiliated by the cross-examination and considered the attack upon his credibility in relation to the events of 5 August 1997 to be a personal affront which affected not only himself personally, but also the people of the country whose representative he was. He also clearly thought that his being summoned to court as a witness to be cross-examined on his affidavit, and his denial of the averment that he had rubber-stamped the Minister's decision, revealed a lack of respect for him as President, by the Judge, the respondents and their legal representatives. His feelings are revealed in a brief comment which he made to the cross-examiner:

"To question the statement made by the President of the country made under oath, is an experience that is new. I do not know and I say this again with respect, I do not know if under the previous order a thing of this nature would have happened."

[89] Examples given by the Judge of "unbridled defamation" of Dr Luyt were the following:

"Let me say, judge, I never imagined that Dr Luyt would be so insensitive, so disrespectful, so ungrateful as to say of the President of this country that when I gave my affidavit and signed it under oath, I was telling lies . . . I never imagined that he would do a thing like that. [As appears from para 74 above, the President was referring to the fact that the respondents were challenging his evidence in relation to the events of 5 August 1997.] There must be something why [Dr Luyt] is resisting an investigation to find out what is going on in Sarfu and people who know, they say he was alright, he was prepared to work with the task team, when they limited their investigation to Sarfu, but once they decided to probe into the financial affairs of the organisation, Dr Luyt saw red. It was like a red cloth in front of a bull and I think Dr Luyt in his founding affidavit is giving a message which he does not want us to know. He is saying I have something to hide and I might add just to round up this matter, that in December . . . he telephoned me to say he want[ed] to see me and because of my respect for him, notwithstanding the tight programme I have, I said he should come immediately. His request was that I should withdraw this commission. I spoke to him earnestly as my collaborator, I said Louis, do not ask for that because the message that you will be sending, you will be saying I have something to fear, I do not want . . . the transparency about the affairs of Sarfu, don't do that. He has done that notwithstanding the advice I gave to him. Dr Luyt projected in that founding affidavit is somebody totally different from the one I knew and I just wondered to myself what has gone wrong with Dr Luyt? What has he done to the affairs

of Sarfu? Only if he has got something which is irregular, which puts him on a lower moral ladder, could he challenge, could he refuse that there should be a probe because if he knows that he has done nothing wrong, he would welcome a commission . . . so that we can rescue rugby from this unhealthy environment.”

And

“I have told you that Dr Luyt had cooperated with the task team and until the team wanted to investigate his financial affairs, that was when he invented this theory [that there would be no investigation until the allegations had been put to him] which contradicts his own conduct . . .”

That there was a meeting between the President and Dr Luyt at which Dr Luyt asked the President to withdraw the commission and that the President responded in the manner described by him in his evidence was not disputed.

[90] The President’s attitude to Dr Luyt must be understood in the context of his evidence when he was asked at the beginning of his cross-examination about the role-players who participated in bringing about unification in rugby. He said:

“Then there is Dr Luyt . . . we were collaborators, we were partners. It was in the course of our trying to normalise rugby as a national sport, that I came to earn high regard for him. I still have that high regard for him. There are of course very serious allegations which have been made, but my approach towards him is determined by my experience when I worked closely with him and I will not give credence to the allegations that are being made. I hope that subject to what the judge will decide in this case, I hope that [a] commission will have the opportunity to sit down, to probe these allegations and if that commission decides that there is no substance in these allegations, I will be one of the happiest men in this country because that will then free rugby from the said [read “sad”] paralysing atmosphere environment [sic] in which it has been plunged today. I will be very happy, but at the same time, judge, if that commission decides that there is substance to this allegation, then I cannot allow personal relationships, however strong they are, to override the national interest. Those who are found to be responsible for doing things which have put rugby in disrepute, if those allegations are substantiated, they must pay the price, but until then all the officials with whom I have worked, I have the highest regard for them.

. . . .

I am aware that he did play [a] role which at that time could be played only by people who are independent, fearless and committed [to] the principle of non-racialism.

. . . .

[T]he question of promoting non-racialism rugby and of turning it to a national asset which we all now support, is the result of a [collective] effort as I have pointed out and in that context Dr Luyt has played a critical role.”

[91] There is no doubt that the President was concerned about Dr Luyt’s turnabout when the request was made for financial information and that, rightly or wrongly, he suspected that this might mean that credence

should be given to the allegations that were being made. He was also hurt and surprised that Dr Luyt had challenged the statement in his affidavit that he had not abrogated his responsibility to the Minister. The President's evidence reflects this suspicion and hurt, but does not justify the adverse comment made by the Judge nor is it justified on a reading of his evidence as a whole.

[92] On the rare occasion that the President was asked by the Judge to answer questions he did so. The only time he demurred was when he believed (wrongly as it turned out) that the ruling had been given as a result of a misrepresentation by counsel of what his evidence had been. This occurred towards the end of his evidence and at a time when he was obviously very angry at the way he had been cross-examined. The President's intervention may have been inappropriate and was shown to be incorrect. It does not, however, have any bearing on his integrity.

[93] In view of the material misdirections which taint the entire judgment, no purpose would be served by adding to an already long judgment by analysing the various passages from the record cited by the Judge. In our view these passages, read in the context of the President's evidence as a whole, do not reflect adversely on the President's integrity or credibility as a witness. The cross-examination addressed to him was repetitive, argumentative and at times speculative. The President was justifiably irritated and angered by the circumstances in which he had been ordered to court and by the manner in which he was cross-examined. The passages cited by the Judge reflect in the main such anger and irritation and have no bearing on credibility.

[94] The Judge said:

"The court is very conscious of the fact that the President is no longer a young man, that he has suffered much and that it must have been a particularly traumatic and humiliating experience to have been compelled to testify under circumstances where he perceived his veracity to be doubted."⁶⁴

He seems to have lost sight of these considerations, and to have made his findings without due regard to the circumstances personal to the President. In testing the President's powers of recollection, his familiarity with detail and the consistency of his testimony, insufficient regard seems to have been given to the demands of his office, the number of disparate matters he is called upon to deal with daily, the sheer mass of documentation that must pass through his hands every day, and the reliance he is inevitably forced to place, in the execution of all his duties, on his office staff in general, and on his Director-General and his personal legal advisor in particular – matters to which the President referred on more than one occasion during his evidence. The entire context in which the President is compelled to discharge his duties and in which he was compelled to testify was all but ignored by the court in its evaluation of the President's demeanour as a witness and his general credibility.

[95] The President's evidence under cross-examination certainly shows that he was, at times, impatient, imperious, hurt, angry and even insulting. None of these reactions, however, taken individually or cumulatively, warrants the inference that the President's testimony on the crucial issue, that is whether he himself had considered the question whether a commission should be appointed or not in the period between 12 and 26 September 1997, was untruthful or unreliable, particularly not when evaluated, as it ought to have been, in the

⁶⁴ At p 772 of the typescript judgment.

context to which we have referred.

(i) Reasons given for the credibility finding against the President

[96] The Judge devoted 25 pages of his judgment to considerations which in his view had a direct bearing on the credibility of the President's evidence.⁶⁵ He identified 13 grounds which, in his view, cumulatively suggested that the President's evidence was not to be believed. These grounds relate, in the main, to the following matters:

- (a) the meeting between the Minister and the President on 5 August 1997;
- (b) when he became aware of the press reports of 7 August 1997 and his failure to repudiate them immediately;
- (c) the question of how long it took the President to peruse the Tshwete file and how thoroughly he perused it; and
- (d) the question of when and by whom the terms of reference for the commission were prepared.

The contradictions identified are either not contradictions at all or are so insubstantial or unsubstantiated, as fairly to be categorised as make-weights. A significant number of the alleged contradictions relate to events in August 1997, rather than events during the period 12 – 26 September 1997 which, as we have explained above, is the crucial period. Neither alone nor cumulatively, do the contradictions identified by the Judge justify a conclusion that the President's evidence as to his role in the matter, and more specifically as to what happened between 12 and 26 September 1997, should be rejected.

[97] Before considering the period 12 – 26 September 1997, we shall examine two of the main criticisms in the judgment relating to the events of August 1997. The first of these relates to the way the President dealt with cross-examination on whether he instructed the Minister to provide a motivation if he sought the appointment of a commission, or whether he gave him a choice to do so. The conclusion reached by the Judge was:

"The different versions put forward both in the further supplementary affidavit and in the course of the evidence referred to above, are so contradictory that the credibility of the President's evidence in dealing with this meeting of 5 August 1997 must be subject to serious doubt".⁶⁶

This conclusion is unjustified. It is clear from a reading of the evidence that confusion arose as to whether there was a choice or an instruction in relation to two separate issues; the decision to apply for a commission, and the need to accompany such an application with a written motivation. The President's clear evidence is that the Minister retained a choice as to whether to apply to the President to seek the appointment of a commission. However if he chose to make such an application, the President instructed him to accompany such application

⁶⁵ At pp 791 – 816 of the typescript judgment.

⁶⁶ At p 794 of the typescript judgment.

with a written motivation. That this was the President's attitude was made clear when this issue was raised with him for the first time:

"Mr President, did you at that time when you had this discussion with the minister, did you instruct him to prepare a motivation or did you give him the choice? —

I will not put labels [into] what I said and Mr Maritz can conclude for himself. [A]ll that I said, give me a memorandum and what I was saying, without remembering the words, was that if you want a commission you must give me that memorandum, but I cannot remember the exact words I uttered.

The point that is of importance, as we see it, is whether you gave the minister a choice? — Well that is obvious. The minister always had a choice whether to apply for a commission or not. That is his right, but as far as I am concerned I am the only person who must take a decision whether a commission should be established and I took that decision, and I cannot say whether my statement to him was an instruction or a request. That was my instruction, prepare a motivation, concrete and formal."

During the repetitive cross-examination the two distinct issues (the choice to apply for a commission, and the instruction to accompany any such application with a written motivation) were intertwined and, as the next segment of the President's evidence demonstrates, the cross-examination became confusing.

"Yes, but the way you put it now sounds like an instruction. — You can conclude what you like, Mr Maritz, but that is what I said. The task of putting labels is yours not mine.

But if the President of the country tells me prepare a motivation then I would certainly view that as an instruction and I would do it. — Well that is what you say. I do not know what difference it would have made whether it was an instruction or request because the minister has the choice. I can give him an instruction and he can refuse because the choice is his whether to apply for the setting up of a commission and I indicated to him my thought when he approached me.

And if [he] did not apply then obviously there would not [have been] a commission? — Well, I do not think so. I do not think I would have taken a decision, although it is in my power, but my practice has been that I must be guided by the minister in that department whether I should set up a commission or not."

[98] This confusion persisted as the cross-examination continued. Later the cross-examiner put to the President a passage in the Minister's affidavit that the President "encouraged me to apply for the appointment of a commission of inquiry if I deemed it appropriate." The President was asked whether he had said this to the Minister. The President expressed his irritation at the continuation of this questioning saying that if the Minister dealt with this issue in his affidavit, that was his own affair, but:

"All that I remember, to my recollection, is that I said I understand your position, give me a motivation. You say this phrase 'if I deem it appropriate'. Now to me, it is unreasonable . . . It is unreasonable for me to have said it because when the man comes to me, a minister comes to me to say Mr President I want you to appoint a commission, it is because he deems it appropriate. Why would I say you apply for the appointment of a commission of enquiry if I deemed it appropriate. That is his own conception.

I think that phrase is completely redundant. I do not know how I could have said a think [read “thing”] like that, but that is his affair. This is not my statement, it is his statement and you have had an opportunity of cross-examining the minister on this question, I suppose.”

[99] The cross-examiner then put to the President that in his supplementary affidavit he had in fact confirmed the Minister’s affidavit as being correct “in so far as it describes the events to which I was a party.” The President answered that he agreed with the general purport of what the Minister had said, but “not necessarily with the exact words that he has [used].” When the question was repeated more than once the same answer was given with more than some irritation. The cross-examiner then said “[I]et me perhaps in all fairness, Mr President, explain to you the relevance.” He then explained to the President that both the Minister and the DG had expressed confidence that if a commission were applied for it would be granted and went on to say:

“Why I am putting all of that is it simply means that on the minister’s affidavit, which you confirmed in January of this year as being correct, the minister had the choice and he was given the discretion to decide whether there was going to be a commission by applying, or whether there was not going to be a commission by not applying. That is the relevance of it.”

[100] There was then an objection to this line of cross-examination and, after the objection had been overruled, the cross-examiner reverted to the issue and put to the President that in effect what was being confirmed was “you gave the minister the choice, therefore the discretion, to decide whether to apply or not to apply?” To that the answer was “that is not true”. The next question was:

“But if you say that is not true, this is what is written here in the affidavit. What do you mean if you say it is not true? — It is not true that I gave him a choice that if he wanted to establish a commission he can do so. That is not true.”

The cross-examination continued in this vein and the President objected. The Judge asked the President to bear with Mr Maritz and to bear with the court and said:

“Mr Maritz, please keep your questions as concise as possible and do please try and avoid any repetition where you are traversing things which the President has already dealt with, but Mr President . . .”.

The President then intervened to say “I respect what the court says.” The question was raised again and the President’s explanation was:

“There may be differences. Those who are concerned with minute details may see differences, but I looked at this matter from the point of view that I never gave him that discretion as far as the appointment of a commission. The appointment of a commission I have said right now, time without number, that is my task and my task alone, and I exercised that task. So I am not going to be caught out by him putting this question in this form now and then the same question in a different form.”

[101] The Judge further held that it could be inferred from Professor Katz’s evidence that the Tshwete file was prepared as a result of his advice, and not as a result of an instruction by the President to the Minister to

prepare a motivation. This, however, was not raised directly with the President in cross-examination. What the President was emphasising in his evidence was that it was he and not the Minister who would have to appoint the commission, and that he never surrendered that power to the Minister; that the Minister always had a choice as to whether he wished to ask the President to appoint a commission, but if he chose to approach the President to do so, the President required him to prepare a written motivation. Properly understood, this entire line of cross-examination amounted to no more than a confusing semantic quibble which can have no bearing on the credibility of the President. In our view, there is no material inconsistency in the President's version in this regard, there is merely an apparent confusion arising from the way in which questions were put. It cannot contribute in any material way to an adverse credibility finding against the President.

[102] The second major ground for criticism of the President's evidence in relation to the events of 5 August 1997 related to the President's failure in his answering affidavit to deal with the press reports of his meeting with the Minister on 5 August 1997, which had been mentioned in the founding affidavit. His explanation that he left it to his lawyers to decide what to do was described as an explanation which "cannot be regarded as satisfactory and credible". The appellants did not address the press reports in their affidavits but launched an application to strike them out as being hearsay and irrelevant. That application was subsequently settled on the following basis. First, the DG's press statement (a copy of which had been obtained by the respondents subsequent to the launching of their application) would be admitted in evidence. Secondly, it was agreed that the press reports of the discussion between the Minister and the *Sunday Times* reporter published in the *Sunday Times* of 17 August 1997, an interview with the Minister published in the *Mail & Guardian* of 31 October 1997, and a report of the statement by the Minister published in *The Star* of 7 November 1997, were admissible in terms of the Law of Evidence Amendment Act 45 of 1988. Thirdly, the appellants would be allowed to file affidavits dealing with such evidence. The various press reports had been annexed to the respondents' replying affidavit. Fourthly, "the remaining annexures subject to attack in the . . . application to strike out, may not be used as evidence of the truth of their contents". The appellants, including the President, then submitted affidavits denying that the President had made the comment attributed to him in the DG's press statement of 7 August 1997.

[103] Despite this, the judgment holds that the failure to deal with the comment in the answering affidavit constituted an implied admission that the President had made such a comment, and that the President's explanation for his failure to have entered such a denial in his answering affidavit was unsatisfactory. In an affidavit lodged by the President on 27 January 1998 opposing an application for further discovery, he said:

"The respondents' legal advisers consulted with me in the course of preparation of my answer in the main application. They raised with me at the time, the news reports referred to . . . I made it quite clear to them that those reports were inaccurate and that I had not made the statements attributed to me. They advised me however that it was not necessary for me specifically to deal with those reports as they constituted inadmissible fifth hand hearsay evidence."

The President repeated this in the supplementary affidavits lodged in the main application on 29 January 1998, after the striking out application had been settled. He repeated this in his oral evidence saying in cross-examination:

"I told my lawyers about what I am saying now, I left it to them to decide what they should put in the affidavit. They are experts. I did my duty to them by telling them my own side of the story in full, but I am not responsible for what they put in the pleadings."

[104] The Judge rejected this explanation holding “[h]e did not deny it, to my mind, because there was nothing to deny”,⁶⁷ and going on to say:

“It is inconceivable that a seemingly complete defence, such as ultimately put forward by respondents in this regard, would not have been raised in the answering affidavits, especially when regard is had to the fact that in motion proceedings applicants as a general rule can only succeed if a case is made out on the respondents’ version.”⁶⁸

[105] We are unable to agree with this reasoning which in our view is clearly fallacious. The averment, that the President had made the comment, was based on double hearsay which prima facie was inadmissible in evidence against him. If it was inadmissible, no regard could be had to it whether the President objected to the evidence or not.⁶⁹ The President’s explanation of the failure to deal with the averment in the answering affidavit is entirely consistent with the way his legal representatives conducted the case. This is what they contended in their argument in the High Court and what they repeated in their argument before this Court. There was substance in their argument. In terms of the settlement, the press statement could not be used as proof of the words attributed to the President. Although the DG’s press statement (which was not on the papers when the application to strike out was launched) was admitted as evidence, counsel for respondents conceded in argument in the High Court that it was not admissible in evidence against the President as proof of the words attributed to him. The Judge did not agree with this concession, but nonetheless accepted in favour of the President that the press statement was not admissible against him.⁷⁰ In the result, therefore, the position taken by the appellants’ legal advisors that the press cuttings were hearsay, and not admissible against the President as proof of the statements attributed to him, proved to be correct.

[106] Counsel for the respondents contended in their written argument that there is no provision in motion proceedings for averments in a founding affidavit to be struck out prior to the lodging of an answering affidavit, and that the practice is therefore to deal with such averments in the affidavits. The failure of the President to do so in the present case, therefore, justified the finding in the judgment. There is no substance in this contention. If litigants elect not to deal in their answering affidavits with evidence they consider to be inadmissible against them, they run the risk that such evidence will stand unanswered if their objection fails. But if their objection succeeds, their failure to deal in an answering affidavit with inadmissible evidence, cannot make such evidence admissible against them, nor can it form the basis of an adverse credibility finding against the litigant who so chooses.

[107] Despite this, in dealing with the attitude taken by the appellants to the press statement, the Judge says in another part of his judgment:

“The conduct of the respondents in this regard demonstrates, in my view, that they did not have a defence to the press statement. They did not deny it in their answering affidavit. They did not deal with it. They did not advance the explanation. They did not do so in the supplementary affidavits filed

⁶⁷ At p 717 of the typescript judgment.

⁶⁸ At p 720 of the typescript judgment.

⁶⁹ *Langham and Another, NNO v Milne, NO and Others* 1961 (1) SA 811 (N) at 817 A – F, and the cases there cited.

⁷⁰ At p 900 of the typescript judgment.

by the second and third respondents. They resorted to a striking-out application. They opposed the applicants' application in terms of section 32.

In my view, only after the respondents realised that their position was becoming intolerable and [indefensible], did they in the course of affidavits then filed for the first time on the second day of the hearing, deal with the press statement, admit that such press statement was issued and that it did contain the quotation relied upon by the applicants. For the very first time did the respondents raise the bizarre explanation that the DG, with the tacit approval of the Minister, went on a frolic of his own.”⁷¹

[108] It is implicit in these findings that the President's legal advisors had been told that the President admitted the comment and that they therefore did not enter a denial of the statement, but sought instead to strike out the averment. It is also implicit in the finding that when it was appreciated that the “position had become [indefensible]”, the President's legal advisors were subsequently party to the filing of perjured affidavits by him, well knowing that the affidavits were false and that the explanation given in them for not having dealt with the averment in the answering affidavit was not true.

[109] It was never suggested to the President that this is what happened. Although he was cross-examined as to why the statement had not been dealt with in his answering affidavit, the line of cross-examination was that, in the absence of such a denial it was reasonable for SARFU to assume that such a statement had been made, and that in the interest of openness and transparency the President ought to have insisted on the matter being dealt with in the first set of affidavits. The fact that he had received advice to the contrary and acted on it was never disputed. The finding made by the Judge in this regard imputes dishonesty, not only to the President, but also to his legal advisors. It is a startling finding, for which no basis is to be found in the evidence, nor on the probabilities. It must be rejected. In our view, the President's version is both probable and supported by the evidence. It provides no basis at all for an adverse credibility finding.

[110] We now turn to the credibility findings relating to the events of 12 – 26 September. As stated above, these fall into two categories; those relating to how long the President took to peruse the Tshwete file and how carefully he perused it; and those relating to the preparation of the terms of reference. Both these issues have a bearing on the crucial factual question as to whether the President considered the appointment of the commission himself prior to making his decision in September 1997.

[111] In paragraph 5 of the written reasons the President said:

“I took a period of over a week to peruse the materials placed before me and to consider whether the appointment was warranted. The decision to appoint the commission was a decision that I alone took.”

And in his affidavit:

⁷¹ At p 722 of the typescript judgment.

“I carefully considered the material placed before me and all the background information at my disposal before I took the decision to appoint a commission of inquiry.”

The Judge contrasted these statements with the President’s oral evidence in which he said:

“I read the memo but there was a large number of annexures and a large number of newspaper clippings, some in bold type, some in small print and some illegible and I just skimmed through them . . .”⁷²

It was not suggested to him during his cross-examination that his answer was inconsistent with the letter or with the affidavit which he had made. Despite this, the Judge found:

“Two completely different versions were thus put forward – the one version in the written reasons and in the answering affidavit – that he carefully and seriously considered all of the annexures and it took him an extensive period of time in doing that. The other version in the course of cross-examination that he only read the Minister’s memorandum and for the rest he skimmed through the annexures, which version is completely irreconcilable with the initial version put forward.”⁷³

[112] The conclusion that there was a contradiction in the President’s evidence in this regard is incorrect. Neither the letter nor the affidavit stated that the President had considered “all” the annexures, or that he had spent a considerable time in doing so. What he said was that he had carefully considered the material placed before him and had taken a period of over a week to consider whether the appointment was warranted. The Tshwete file contain more than 700 pages of annexed documents, a large number of which were newspaper clippings. It was not necessary for the President to have perused each and every annexure. The greatest criticism in this regard that can be levelled at the President’s evidence related to the fact that when he was cross-examined in March 1998 he could not recall in any detail the circumstances set out in the annexures to the memorandum relating to the events of February to August 1997 and SARFU’s version of the interaction between the Department and SARFU during this period. The reason for his inability to recall was not probed in cross-examination and it remains unclear whether the President was unfamiliar with those events at the time that he decided to appoint the commission, or whether he had forgotten the details when he came to be cross-examined, nearly six months later. In the absence of cross-examination in this regard, no conclusions of fact can be drawn on this issue and certainly no adverse credibility findings can be made.

[113] In their argument counsel for Dr Luyt suggested that there was also an inconsistency between the evidence and the statement in the written reasons that the President “took a period of over a week to peruse the materials placed before [him] and to consider whether the appointment was warranted”. A similar comment is made in the judgment, where it is said that the fact that the draft terms of reference were sent to Mr Browde on 18 September 1997, six days (as opposed to “more than a week”) after the President received the Tshwete file was a “manifest anomaly” that was not explained by the President.⁷⁴ It is clear that the discrepancy between the two versions does not amount to a “manifest anomaly”. Nor was the President asked to explain this “manifest anomaly”, which is really of no consequence and clearly cannot found an adverse credibility finding.

72 The President was being cross-examined at the time as to whether he had seen the press reports of the statement issued by the DG on 7 August 1997 and it was in this context that he was asked the question and gave the answer.

73 At pp 799 – 800 of the typescript judgment.

74 At p 801 of the typescript judgment.

[114] The Judge also saw several contradictions in the President's evidence relating to the preparation of the terms of reference. The first concerned who had been responsible for the preparation of the terms of reference. According to the judgment:

"The picture conveyed by the supplementary affidavit is that the terms of reference were prepared by [the] President's office in consultation with him and that the Minister or his department had no part in the formulation thereof."⁷⁵

while the evidence showed that:

"there was substantial involvement by others, such as attorney Knowles, the DG, the Department of Justice and Browde . . . [and that] the President himself was not involved in the process of affecting amendments or finalising the terms of reference and that it was therefore not done in consultation with him as conveyed in the supplementary affidavits aforesaid."⁷⁶

[115] Once again, the alleged contradiction was not put to the President. In any event, although drafts were apparently sent to the DG and Mr Browde, there was no evidence that they played any part in the actual formulation of the terms of reference. The statement in the President's affidavit that "[m]y office prepared the terms of reference of the commission in consultation with me", is not inconsistent with his evidence on this issue. The evidence shows that there was a discussion between the President and Professor Haysom concerning the terms of reference and that the final draft was settled by the latter in the light of this discussion.

[116] The documentary evidence is also not inconsistent with the President's affidavit. Included in the Tshwete file is a letter from the Department of Sport and Recreation to the Department of Justice dated 29 August 1997 enclosing what are described as "terms of reference for the Commission of Inquiry". The enclosed document does no more than identify four main areas of investigation and bears little relationship to the terms of reference promulgated by the President. Mr Knowles also prepared a draft for this purpose which was sent to the DG on 5 September 1997, acknowledged by the latter with approval on 8 September 1997 and on the same day sent to the Department of Justice for its consideration. The drafts were still under consideration by the Department of Justice when the Tshwete file was compiled and the Minister's memorandum in that file accordingly stated that "[t]he proposed terms of reference will be contained in a supplemented Schedule 1 hereto". That was not done, but at some stage (there is no evidence as to when this happened) Professor Haysom obtained a copy of the draft which had been submitted to the Department of Justice. A statement in the judgment that the President's office would probably have been involved shortly after 8 September 1997, and that Professor Haysom would have commenced work on the terms of reference substantially prior to 18 September 1997 is pure speculation. The President was not asked when Professor Haysom became involved for the first time, and no suggestion was made in cross-examination that Professor Haysom had been involved in drafting the terms of reference before the Tshwete file was submitted to the President. In the light of these facts, it is our view that there is no material inconsistency in the President's evidence in this regard. It is clear from the evidence that it was the President's legal advisor, Professor Haysom, who took responsibility for preparing the draft terms of reference. It cannot be said that there is a clear discrepancy in the evidence

⁷⁵ At p 804 of the typescript judgment.

⁷⁶ At p 805 of the typescript judgment.

sufficient to warrant an adverse credibility finding against the President.

[117] The second issue relating to the terms of reference concerns the question of when the terms of reference were prepared. The judgment refers to a statement in the President's written reasons for his decision in which it was said "[q]uite properly [the formal executive instruments establishing the commission] were only prepared once I had decided to appoint the commission", and finds that "[o]n the probabilities it would not have made sense to formulate the terms of reference before the principle of appointing the commission had been decided upon."⁷⁷ Later in the judgment the Judge returns to this issue, saying:

"The point of significance is, however, that Haysom was already involved with the terms of reference as early as the beginning of September 1997 and at a time well before the President had even received the Minister's submission. This is completely inconsistent with the President's version in his written reasons . . . This anomaly was not explained or cleared up by the respondents through evidence. It is, however, clear that both versions cannot be correct."⁷⁸ (emphasis in original).

[118] However, there was no evidence to show that Professor Haysom was involved before 12 September 1997 when the Tshwete file was given to the President. According to the President, Professor Haysom discussed the Department of Justice draft with him, indicating that he disapproved of portions of it. The President agreed with him and in the light of this discussion Professor Haysom made material changes to the draft. This was after the Tshwete file had been received. On 18 September 1997 Professor Haysom forwarded his draft to the Department of Justice, inviting proposed amendments. Only minor changes were subsequently made to the draft – there is no evidence as to who made these changes – and the formal notice appointing the commission was then prepared for signature by the President and the Deputy President. The formal instruments were signed by them on 22 September 1997. The President's affidavit is consistent with this evidence and provides no basis for an adverse credibility finding.

[119] The last major issue raised in the judgment relates to the President's failure to provide any documents to show when Mr Browde was approached for the first time. The judgment states that on the probabilities the names of the possible commissioners would have been sent to the President's office under cover of a letter "probably with some comment or some résumé dealing with each of the respective commissioners."⁷⁹ The judgment also states that "the alleged absence of any documentation relating to the approach to and appointment of Browde is questionable"⁸⁰ and suggests that Professor Haysom should have been called to clear up these uncertainties. An adverse inference is drawn against the appellants for their failure to have done this. The conclusion that is then reached is:

"[I]t is clear that Browde was approached and appointed after the decision had been taken to appoint the commission. On the evidence . . . this could not have been as a result of the President's decision. The approach to and the appointment of Browde must, therefore, have been as a result of an earlier decision, which on the evidence and on all the probabilities, could only have been that of the Minister.

77 At p 629 of the typescript judgment.

78 At pp 803 – 4 of the typescript judgment.

79 At p 704 of the typescript judgment.

80 At p 703 of the typescript judgment.

This conclusion is entirely consistent with the conclusion and inference flowing from the fact that the terms of reference were already in the process of finalisation by 18 September 1997.”⁸¹

[120] We are unable to agree with this reasoning. None of these propositions was put to the President during his evidence. It was not suggested to him that the Minister had appointed Mr Browde, it ignores the President’s own evidence that there had been a discussion between him and Professor Haysom as to who the commissioner should be, and that they had agreed that it should be Mr Browde. It was not suggested to the President that a decision to appoint Mr Browde was made prior to his discussion with Professor Haysom, or that such appointment was made by the Minister prior to the President having decided to appoint a commissioner. Nor was such a suggestion put to the Minister when he gave evidence.

[121] The President’s evidence on this issue in cross-examination was as follows:

“Can you tell his lordship at this stage who approached the commissioner? — I think it was Prof. Fink Haysom. He had discussed the matter with me and he suggested that between the two names that were placed before me, Mr Browde was preferable because the other person had previously been involved in rugby and it was necessary to have somebody independent and he then suggested the name of Acting Judge Browde. That is my recollection.

I understand that Prof. Haysom then approached Adv Browde. — I think that is right.

Do you know whether any letter was written to him to appoint him or to ask him whether he would be prepared to accept the appointment? — I am not sure what exactly was done but I know that he was contacted by Prof. Haysom.

Would that have been at the stage after you had decided to appoint the commissioner? — Oh yes. I mean it could not have been before.”

According to the President the final decision as to who the commissioner should be would have been taken by his office in consultation with the Department of Justice.

[122] Mr Browde was available to both parties, and if the respondents’ case was that he was approached by the Minister and appointed prior to a decision taken by the President, he could have been called by the respondents to provide the relevant documents and to say that this is what happened. Because of the assumption made by the Judge, it was put to counsel that a number of members of this Court have been approached in the past to act as commissioners, that such approaches have always been telephonic and that no résumé has ever been requested. In our view, therefore, the adverse credibility finding made by the Judge in relation to the failure by the appellants to produce documents relating to the selection of a commissioner had no basis.

[123] As stated in paragraph 66 above, the respondents could only succeed in their submissions relating to the abdication of responsibility on one of three alternative bases. First, the President did not consider the

81 At p 702 of the typescript judgment.

question of the appointment of the commission at all in the two weeks preceding the appointment of the commission on 26 September 1997 which would mean that all his evidence in this regard was a mendacious fabrication. Secondly, although he did consider the appointment of a commission, he did so merely as a charade either because he thought he had irrevocably abdicated his power to the Minister during August 1997. Thirdly, having abdicated his power to the Minister, he was determined not to consider the matter at all. Therefore, the question central to this part of the case was whether the President's evidence concerning what he did in September 1997 was deliberately dishonest, either on the basis that it was a complete fabrication, or on the basis that his conduct constituted a charade, and whether the letter written shortly after that in which detailed reasons were given for his decision, was false. The Judge failed to address these issues pertinently. We have already pointed to the fact that the President's evidence on crucial issues concerning the advice given to him by Professor Katz and how he responded to it, is consistent with the probabilities, and with Professor Katz's evidence; that there is no evidence to contradict it, and that it was never suggested to the President that such evidence was given dishonestly.

[124] An inference of dishonesty cannot be drawn from the statements referred to by the Judge as being contradictory, most of which were not canvassed with the President in his evidence, and in our view display, at best for the respondents, discrepancies of little moment and of no relevance to the crucial issues in this case. We agree with the well-known comment by Mr Justice Nicholas in an article in the *South African Law Journal*:⁸²

“Where [a witness] has made contradictory statements, since both cannot be correct, in one at least he must have spoken erroneously. Yet error does not in itself establish a lie. It merely shows that, in common with the rest of mankind, the witness is liable to make mistakes. A lie requires proof of conscious falsehood, proof that the witness has deliberately misstated something contrary to his own knowledge or belief.”

[125] All that need be added to what has already been said, is that the criticisms of the President's evidence provide no justification for rejecting his evidence concerning his discussion with Professor Katz, and what happened thereafter, as being false, or otherwise incorrect. In the circumstances, the finding that the President had abdicated his responsibility and merely “rubber-stamped” a decision by the Minister was clearly wrong.

C. CONSTRAINTS UPON THE PRESIDENT'S POWERS RELATING TO COMMISSIONS

[126] In this section of the judgment we consider the constraints upon the President's powers relating to commissions. This is necessitated by the respondents' argument that the President was obliged to afford them a hearing before appointing the commission. We first outline the approach of the High Court. Thereafter we identify the two distinct powers in question: the power to appoint a commission in terms of section 84(2)(f) of the Constitution, and the power to extend the Commissions Act to the commission in terms of section 1 of the Commissions Act. Each of these powers is considered separately.

[127] In order to examine the constraints upon the exercise of the section 84(2)(f) power we consider the manner in which the Constitution regulates public power, and, in particular, administrative action as

⁸² 102 (1985) at 32. See also his judgment in *S v Oosthuizen* 1982 (3) SA 571 (T) at 575E – 577C.

contemplated by section 33 of the Constitution as it currently reads. We conclude that an exercise of the section 84(2)(f) power does not constitute administrative action and that accordingly the requirements of procedural fairness demanded by section 33 are not applicable to the exercise of that power. We then identify the constraints upon the exercise of power under section 84(2)(f), including the requirement that the Deputy President be consulted prior to its exercise, and conclude that those constraints were complied with by the President in this case. We also consider two other arguments relating to the exercise of such power. The one suggested that the requirement that a commission be investigating a “matter of public concern” was a condition precedent to the appointment of the commission. The other was that the power could have been, and was, fettered by a contract entered into between the Minister and the respondents.

[128] We then turn to analyse the power conferred upon the President by section 1 of the Commissions Act. We consider, but find it unnecessary to decide, whether the exercise of that power constitutes administrative action or not. We then address the question whether the jurisdictional fact that is stipulated in the Commissions Act, requiring the subject matter of the commission’s investigation to constitute a “matter of public concern”, has been met in this case and we conclude that it has. We then consider respondents’ arguments that the President was required to afford the respondents a hearing prior to exercising his powers in terms of the Commissions Act and conclude that, once the commission is charged with the investigation of a “matter of public concern”, procedural fairness as contemplated by section 33 of the Constitution does not require a hearing prior to the exercise of those powers. We also conclude that the respondents have not established a legitimate expectation of a hearing and that the reasons given by the President justified his decision to exercise the Commissions Act powers.

(a) Approach of the Judge in the High Court

[129] The Judge held that the President was obliged to provide SARFU with an opportunity to make representations to him before deciding to appoint a commission of inquiry. As the President had failed to do this, he held that the President had acted procedurally unfairly. This conclusion was based on his primary finding that the appointment of the commission of inquiry in this case would prejudice those investigated and that therefore the President had a duty to afford them an opportunity to be heard prior to the appointment of the commission. The conclusion was also based on the secondary finding that SARFU had existing rights arising from the conclusion of a contract at the meeting of 21 February 1997 which would be impaired by the appointment of a commission of inquiry. He also held that even if SARFU had no existing rights which were affected by the appointment of the commission, it had a legitimate expectation of procedural fairness. The respondents relied upon the reasoning of the Judge in their written argument.

[130] Appellants’ leading counsel, Mr Trengove, argued in both courts that in considering the question of procedural fairness, it is necessary to separate the following events: the appointment of the commission in terms of section 84(2)(f) of the Constitution; the proclamation under the Commissions Act vesting the commission with powers listed in that Act, notably powers of subpoena; and the procedures followed by the commission in the execution of its task and the commission’s report. The Judge rejected this argument on the ground that once the first step has been taken, that is the appointment of a commission, the remaining steps follow as a matter of course.

[131] But that is wrong. It does not follow that, once a commission of inquiry has been appointed, the commission will automatically be vested with powers under the Commissions Act. Indeed, it is only competent

to vest such powers in a commission if the commission is investigating a matter of public concern.⁸³ There is no similar limitation on the power to appoint commissions in terms of section 84(2)(f). Accordingly a commission may be appointed to investigate a matter which is not of public concern, and to which the provisions of the Commissions Act do not apply. Equally, the President may decide not to make the provisions of the Commissions Act applicable even to a commission of inquiry investigating a matter of public concern. The question of procedural fairness needs to be considered in relation to three different acts, each of which involves the exercise of a specific power or powers: the President's decision to appoint a commission in terms of the power conferred upon him by section 84(2)(f); the President's decision to make the provisions of the Commissions Act applicable; and the exercise of the commission's powers by the commission itself. The third question does not arise in this case as the commission has not commenced its work. If it ever does, considerations of procedural fairness may well arise at that stage as the Supreme Court of Appeal has recently held.⁸⁴ The first two issues are relevant in the current proceedings. Although they are technically separate legal acts, they are, of course, closely related.

(b) The regulation of public power by the Constitution

[132] The exercise of public power is regulated by the Constitution in different ways. There is a separation of powers between the legislature, the executive and the judiciary which determines who may exercise power in particular spheres.⁸⁵ An overarching bill of rights regulates and controls the exercise of public power,⁸⁶ and specific provisions of the Constitution regulate and control the exercise of particular powers.

[133] Public administration, which is part of the executive arm of government, is subject to a variety of constitutional controls. The Constitution is committed to establishing and maintaining an efficient, equitable and ethical public administration which respects fundamental rights and is accountable to the broader public. The importance of ensuring that the administration observes fundamental rights and acts both ethically and accountably should not be understated. In the past, the lives of the majority of South Africans were almost entirely governed by labyrinthine administrative regulations which, amongst other things, prohibited freedom of movement, controlled access to housing, education and jobs and which were implemented by a bureaucracy hostile to fundamental rights or accountability. The new Constitution envisages the role and obligations of government quite differently.

[134] The constitutional goal is supported by a range of provisions in the Constitution. First, in the Bill of Rights there is the right of access to information⁸⁷ and the right to just administrative action.⁸⁸ Both these

83 Section 1(1) of the Commissions Act.

84 See *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A); 1997 (4) BCLR 531 (A).

85 *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (10) BCLR 1289 (CC); 1995 (4) SA 877(CC).

86 Section 8(2) of the Bill of Rights provides that its provisions also bind natural and juristic persons, if and to the extent that they are applicable, "taking into account the nature of the right and the nature of any duty imposed by the right". The Bill of Rights therefore bears on the exercise of "private power", an issue which does not arise in the present case.

87 Section 32(1) of the Constitution, which entrenches the right of access to information, provides that:

"Everyone has the right of access to

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights."

Item 23 of schedule 6 to the Constitution provides that the legislation must be enacted within three years of the date on which the Constitution came into force. The Constitution came into force on 4 February 1997.

88 Section 33 of the Constitution.

provisions require national legislation to be enacted by 3 February 2000 to give effect to these rights.⁸⁹ Pending the enactment of that legislation, the provisions of the interim Constitution apply.⁹⁰ Secondly, all the provisions of the Bill of Rights are binding upon the executive and all organs of state.⁹¹ The Bill of Rights, therefore, imposes considerable substantive obligations upon the administration. Thirdly, chapter 10 of the Constitution, entitled “Public Administration” sets out the values and principles that must govern public administration⁹² and states that these principles apply to administration in every sphere of government, organs of state and public enterprises.⁹³ This chapter also establishes a Public Service Commission to promote the values of public administration. Fourthly, chapter 9 of the Constitution establishes the office of the Public Protector whose primary task is to investigate and report on conduct in the public administration which is alleged to be improper.⁹⁴ Fifthly, the Constitution establishes the office of the Auditor-General whose responsibility it is to audit and report on the financial affairs of national and provincial state departments and administrations as well as municipalities.⁹⁵

89 See s 32(2) and s 33(3) of the Constitution respectively.

90 Constitution of the Republic of South Africa, Act 200 of 1993. See item 23 of schedule 6 to the 1996 Constitution which provides as follows:

“(1) National legislation envisaged in sections 9(4), 32(2) and 33(3) of the new Constitution must be enacted within three years of the date on which the new Constitution took effect.

(2) Until the legislation envisaged in sections 32(2) and 33(3) of the new Constitution is enacted —

(a) section 32(1) must be regarded to read as follows:

...;

(b) section 33(1) and (2) must be regarded to read as follows:

“Every person has the right to —

(a) lawful administrative action where any of their rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.”

The deemed provision is identical to s 24 of the interim Constitution.

91 Section 7(2) and 8(1) of the Constitution.

92 Section 195(1) provides that:

“Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be development-oriented.

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People’s needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness and the need to redress the imbalances of the past to achieve broad representation.”

93 Section 195(2). “[O]rgan of state” is defined in section 239 as:

“(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution —

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or judicial officer.”

94 Section 182(1)(a) and (b) of the Constitution.

95 Section 188(1)(a) and (c) of the Constitution.

(c) Section 33 of the Constitution

[135] Section 33 fits neatly into this constitutional framework. As it is currently deemed to read,⁹⁶ it provides:

“Every person has the right to —

- (a) lawful administrative action where any of their rights or interests is affected or threatened;
- (b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;
- (c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and
- (d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.”

Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles.⁹⁷ The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content.

[136] The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades. The question that arises in this case is what is included within the concept of “administrative action” as it is employed in section 33.

[137] Although the question, whether the appointment of the commission in terms of section 84(2)(f) of the Constitution is administrative action as contemplated in section 33, does not seem to have been expressly considered in his judgment, the Judge appears to have assumed that it was and that the President was accordingly constrained by its provisions. In our view that assumption cannot be made, and it is necessary to consider carefully whether or not the appointment of a commission in terms of section 84(2)(f) constitutes “administrative action” as contemplated by section 33. Once that question has been answered, it will then be possible to consider what constraints were imposed upon the exercise, by the President, of the power conferred on him by section 84(2)(f).

(d) Functions and duties of the executive

[138] The administration is that part of government which is primarily concerned with the implementation of legislation. In the national sphere, ensuring that the administration implements legislation is one of the

⁹⁶ See n 90 above.

⁹⁷ See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras 28 – 42.

responsibilities of the President and Cabinet. Their responsibilities are set out in section 85(2) of the Constitution, which provides that:

“The President exercises the executive authority, together with the other members of the Cabinet, by —

- (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
- (b) developing and implementing national policy;
- (c) co-ordinating the functions of state departments and administrations;
- (d) preparing and initiating legislation; and
- (e) performing any other executive function provided for in the Constitution or in national legislation.”

Provincial premiers and the members of their executive councils bear similar responsibilities in relation to provincial government. Section 125(2) of the Constitution provides that:

“The Premier exercises the executive authority, together with the other members of the Executive Council, by —

- (a) implementing provincial legislation in the province;
- (b) implementing all national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise;
- (c) administering in the province, national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;
- (d) developing and implementing provincial policy;
- (e) co-ordinating the functions of the provincial administration and its departments;
- (f) preparing and initiating provincial legislation; and
- (g) performing any other function assigned to the provincial executive in terms of the Constitution or an Act of Parliament.”

[139] It can be seen from these provisions that members of the executive in the national and provincial spheres have a range of responsibilities: for preparing and initiating legislation;⁹⁸ for developing policy;⁹⁹ for co-

98 See sections 85(2)(d) and 125(2)(f) of the Constitution.

99 See sections 85(2)(b) and 125(2)(d) of the Constitution.

ordination of government departments;¹⁰⁰ for implementing legislation¹⁰¹ and for implementing policy.¹⁰² A similar range of responsibilities is conferred upon the executive councils of municipalities.¹⁰³ One of the tasks of the national and provincial executives (and municipal executives) is therefore to ensure that legislation and policy are implemented. The process of implementation is generally carried out by the public service. Members of the executive, of course, have other functions as well, such as the development of policy and the initiation and preparation of legislation, which are not directly concerned with administration.

(e) The meaning of “administrative action”

[140][In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*,¹⁰⁴ this Court held that “administrative action” as contemplated in section 33 does not include within its ambit, legislative decisions taken by a deliberative and elected legislative body established by the Constitution. Such action, we held, was not action of the public administration, but action of a constitutionally empowered legislature. Similarly, in *Nel v Le Roux NO and Others*,¹⁰⁵ the Court held that a summary sentencing procedure was judicial, not administrative, action and therefore it did not fall within the ambit of the administrative justice clause. However, in the present case, we are concerned not with the acts of a legislature, nor with judicial acts, but with acts of the President in terms of section 84 of the Constitution. The question is whether the exercise of the power conferred upon the President by section 84(2)(f) constitutes “administrative action”.

[141] In section 33 the adjective “administrative” not “executive” is used to qualify “action”. This suggests that the test for determining whether conduct constitutes “administrative action” is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*,¹⁰⁶ that some acts of a legislature may constitute “administrative action”. Similarly, judicial officers may, from time to time, carry out administrative tasks.¹⁰⁷ The focus of the enquiry as to whether conduct is “administrative action” is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.

[142] As we have seen, one of the constitutional responsibilities of the President and cabinet members in the national sphere (and premiers and members of executive councils in the provincial sphere) is to ensure the implementation of legislation. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute “administrative action” within the meaning of section 33. Cabinet members have other constitutional responsibilities as well. In particular, they have constitutional responsibilities to develop policy and to initiate legislation. Action taken in carrying out these responsibilities cannot be construed as being administrative action for the purposes of section 33. It follows that some acts of members of the executive, in both the national and provincial spheres of government will constitute “administrative action” as contemplated by section 33,¹⁰⁸ but

100 See sections 85(2)(c) and 125(2)(e) of the Constitution.

101 See sections 85(2)(a) and 125(a),(b) and (c) of the Constitution.

102 See sections 85(2)(b) and 125(2)(d) of the Constitution.

103 See section 156 of the Constitution.

104 Above n 97.

105 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC) at para 24.

106 Above n 97 para 41.

107 There may be circumstances in which the performance of administrative functions by judicial officers infringes the doctrine of separation of powers. That, however, is not an issue we need consider here.

108 See, for example, *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC).

not all acts by such members will do so.

[143] Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor.¹⁰⁹ So too is the nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is.¹¹⁰ While the subject matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of section 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of section 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis.

(f) Section 84(2) of the Constitution

[144] Under our Constitution, the President is both head of state and head of the national executive. Section 84(2) of the Constitution provides that the President is responsible for:

- “(a) assenting to and signing Bills;
- (b) referring a Bill back to the National Assembly for reconsideration of the Bill’s constitutionality;
- (c) referring a Bill to the Constitutional Court for a decision on the Bill’s constitutionality;
- (d) summoning the National Assembly, the National Council of Provinces or Parliament to an extraordinary sitting to conduct special business;
- (e) making any appointments that the Constitution or legislation requires the President to make, other than as head of the national executive;
- (f) appointing commissions of inquiry;
- (g) calling a national referendum in terms of an Act of Parliament;
- (h) receiving and recognising foreign diplomatic and consular representatives;
- (i) appointing ambassadors, plenipotentiaries, and diplomatic and consular representatives;
- (j) pardoning or reprieving offenders and remitting any fines, penalties or forfeitures; and
- (k) conferring honours.”

In *President of the Republic of South Africa and Another v Hugo*,¹¹¹ this Court held that the powers conferred upon the President by section 82(1) of the interim Constitution, which are similar to those conferred by section 84(2) of the 1996 Constitution, were powers which historically originated from the royal prerogative and were

109 Panel on Take-overs and Mergers, *Ex parte Datafin PLC. and Another* [1987] QB 815 (CA) at 847; *Makhasa v Minister of Law & Order, Lebowa Government* 1988 (3) SA 701 (A) at 720-721; *Fedsure*, above n 97 paras 30 – 39.

110 See the discussion of review of “prerogative” decisions in *President of the Republic of South Africa and Another v Hugo*, above n 26 paras 16 – 28.

111 *Id* at paras 6 – 8.

enjoyed by the head of state. In neither the interim Constitution nor the 1996 Constitution, however, is there any reference to the prerogative. The powers conferred are limited to those expressly listed. They are conferred upon the President as head of state, rather than as head of the national executive. This conclusion is suggested not only by the historical antecedents of these powers, but also by the provision in section 84(2)(e) which empowers the President to make appointments required by the Constitution or legislation other than those appointments he must make as head of the national executive. The clear implication is that those appointments made under section 84(2) are made as head of state.

[145] All of the powers conferred by section 84(2) are original constitutional powers. They are concerned with matters entrusted to the head of state, subject in some cases and only for the initial transitional period, to an obligation to consult with the Deputy President.¹¹² None of them is concerned with the implementation of legislation in any sphere of government. The exercise of some of the powers is strictly controlled by the express provisions of the Constitution. For example, the responsibility conferred by subsections 84(2)(a) – (c) concerning the assenting to and signature of Bills is regulated by section 79 of the Constitution which provides as follows:

“(1) The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has any reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration.

(2) The joint rules and orders must provide for the procedure for the reconsideration of a Bill by the National Assembly and the participation of the National Council of Provinces in the process.

(3) The National Council of Provinces must participate in the reconsideration of a Bill that the President has referred back to the National Assembly if —

- (a) the President’s reservations about the constitutionality of the Bill relate to a procedural matter that involves the Council; or
- (b) section 74(1), (2) or (3)(b) or 76 was applicable in the passing of the Bill.

(4) If, after reconsideration, a Bill fully accommodates the President’s reservations, the President must assent to and sign the Bill; if not, the President must either —

- (a) assent to and sign the Bill; or
- (b) refer it to the Constitutional Court for a decision on its constitutionality.

112 Item 9(2) of schedule 6 to the Constitution provides that until 30 April 1999 s 84 is deemed to contain a further subclause, subsection (3) which reads as follows:

“The President must consult the Executive Deputy Presidents —

- (a) in the development and execution of the policies of the national government;
- (b) in all matters relating to the management of the Cabinet and the performance of Cabinet business;
- (c) in the assignment of functions to the Executive Deputy Presidents;
- (d) before making any appointment under the Constitution or any legislation, including the appointment of ambassadors or other diplomatic representatives;
- (e) before appointing commissions of inquiry;
- (f) before calling a referendum; and
- (g) before pardoning or reprieving offenders.”

See the equivalent provisions in s 82(2) of the interim Constitution. These provisions were included in the Constitution as part of the scheme of a government of national unity which the interim Constitution required to be established for five years after the first democratic elections had been held.

(5) If the Constitutional Court decides that the Bill is constitutional, the President must assent to and sign it.”

These are very specifically controlled constitutional responsibilities directly related to the legislative process and the constitutional relationship between the executive, the legislature and the courts. In exercising these responsibilities, the President is clearly not performing administrative acts within the meaning of section 33. Section 84(2)(d) and (e) which refer to the President’s power to summon extraordinary sittings of Parliament and his responsibility for making appointments required by the Constitution are similarly narrow constitutional responsibilities which are not related to the administration of legislation but to the execution of provisions of the Constitution.

[146] The remaining section 84(2) powers are discretionary powers conferred upon the President which are not constrained in any express manner by the provisions of the Constitution. Their scope is narrow: the conferral of honours; the appointment of ambassadors; the reception and recognition of foreign diplomatic representatives; the calling of referenda; the appointment of commissions of inquiry and the pardoning of offenders. They are closely related to policy; none of them is concerned with the implementation of legislation. Several of them are decisions which result in little or no further action by the government: the conferral of honours, the appointment of ambassadors or the reception of foreign diplomats, for example. It is readily apparent that these responsibilities could not suitably be subjected to section 33. In the case of the appointment of commissions of inquiry, it is well-established that the functions of a commission of inquiry are to determine facts and to advise the President through the making of recommendations.¹¹³ The President is bound neither to accept the commission’s factual findings nor is he or she bound to follow its recommendations.¹¹⁴

[147] A commission of inquiry is an adjunct to the policy formation responsibility of the President. It is a mechanism whereby he or she can obtain information and advice. When the President appointed the commission of inquiry into rugby he was not implementing legislation; he was exercising an original constitutional power vested in him alone. Neither the subject matter, nor the exercise of that power was administrative in character. The appointment of the commission did not, therefore, constitute administrative action within the meaning of section 33. It should, however, be emphasised again, that this conclusion relates to the appointment of the commission of inquiry only. The conduct of the commission, particularly one endowed with powers of compulsion, is a different matter.

[148] It does not follow, of course, that because the President’s conduct in exercising the power conferred upon him by section 84(2)(f) does not constitute administrative action, there are no constraints upon it. The constraints upon the President when exercising powers under section 84(2) are clear: the President is required to exercise the powers personally and any such exercise must be recorded in writing and signed;¹¹⁵ until 30 April 1999, the President was required to consult with the Deputy President; the exercise of the powers must not infringe any provision of the Bill of Rights; the exercise of the powers is also clearly constrained by the principle of legality¹¹⁶ and, as is implicit in the Constitution, the President must act in good faith and must not misconstrue the powers.¹¹⁷ These are significant constraints upon the exercise of the President’s power. They arise from

113 See *Bell v Van Rensburg NO 1971 (3) SA 693 (C)* at 705 F; *S v Mulder 1980 (1) SA 113 (T)* at 120 E.

114 *Minister of the Interior v Bechler and Others; Beier v Minister of the Interior and Others 1948 (3) SA 409 (A)* at 455; *S v Mulder*, above n 113 at 120 E – F.

115 Above n 30.

116 *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*, above n 97 paras 56 – 8.

117 See *Hugo’s case*, above n 26 paras 6 – 8.

provisions of the Constitution other than the administrative justice clause. In the past, under the doctrine of parliamentary supremacy, the major source of constraint upon the exercise of public power lay in administrative law, which was developed to embrace the exercise of public power in fields which, strictly speaking, might not have constituted administration. Now, under our new constitutional order, the constraints are to be found throughout the Constitution, including the right, and corresponding obligation, that there be just administrative action.

[149] In Part B of this judgment titled “Abdication of Responsibility”, the question whether the President exercised the section 84(2)(f) power in this case personally, is fully considered. It is clear from the reasons given there, that in appointing the commission, the President did act personally, in good faith and without misconstruing the nature of his powers.

(g) Consultation with the Deputy President

[150] The respondents argued, in relation to the exercise of the President’s section 84(2)(f) power, that the President had failed to consult with the Deputy President as the Constitution required him to do.¹¹⁸ This contention was not expressly pleaded by the respondents in their founding affidavit and was raised only in argument in the court below and the Judge held it was unnecessary to deal with it.¹¹⁹ The appellants contended that the respondents were not entitled to rely upon it. Although the ordinary rule in motion proceedings is that an applicant must stand or fall by its founding affidavit,¹²⁰ for the reasons that follow we do not intend to dismiss the argument on that basis, but on the basis that the absence of consultation has not been established by the respondents. Indeed the uncontradicted evidence shows that the Deputy President was consulted by the President.

[151] When, in argument, the respondents raised the question of the President’s failure to consult with the Deputy President, a supplementary affidavit was filed by the President in which he denied the absence of consultation and stated that the Deputy President was asked and did concur in the appointment of the commission. The President points out that the Deputy President’s signature appears on the written decision to appoint the commission. The President’s statement in his supplementary affidavit was not directly contradicted in either oral or written evidence.

[152] However, the respondents argued that the concurrence and signature of the Deputy President were not sufficient to meet the requirement of consultation imposed by the Constitution and that there should have been evidence that the Deputy President was consulted fully on the matter. That argument cannot be accepted. The requirement that there be consultation with the Deputy President is set out in section 84(3)(e). This section is included in Annexure B to schedule 6 of the Constitution, which contains special provisions pertaining to the “Government of National Unity in the national sphere” which were to remain in place until 30 April 1999.¹²¹ During that period, the Constitution entitled all political parties which achieved more than 10 per cent of the national vote to participate in Cabinet on a proportional basis and entitled those parties which achieved more than 20 per cent of the national vote to designate a Deputy President.

[153] Section 84(3) then gave the Deputy President the right to be consulted on various matters including the

118 This requirement was imposed by item 9(2) of schedule 6 read with Annexure B thereto.

119 At p 1151 of the typescript judgment.

120 See *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635 – 6; *Bowman NO v De Souza Roldao* 1988 (4) SA 326 (T) at 327.

121 Item 9(2) read with Annexure B of schedule 6.

President's proposal to appoint a commission of inquiry in terms of section 84(2)(f). As it happened, when the decision in this case was taken to appoint the commission of inquiry, the only minority party to have achieved 20 per cent of the national vote had, of its own volition, withdrawn from the government of national unity. The purpose of the section 84(3) consultation requirement was clearly to afford the Deputy President (and in particular a Deputy President from a minority political party) an opportunity to object or propose variations to the President's proposal. If, upon consultation, the Deputy President objected, a full discussion and consultation would be required. However, should the Deputy President, upon being consulted, not object, but concur with the proposed course of conduct, lengthier consultation would be futile. The details of the consultation between the President and the Deputy President, which in any event would be irrelevant, do not appear from the papers. If the Deputy President is consulted and concurs that a commission of inquiry should be appointed, as happened in this case, further consultation would have been pointless. To consult in general means to inquire as to someone's views in regard to a proposed course of action. A consultation in this sense can range from a protracted and deliberate exchange of views to obtaining a swift signification of consent. If the views of the person consulted concur with the action proposed, further consultation is obviously redundant. It is obvious that the present case is an instance of the latter. The constitutional purpose underlying the requirement of consultation was met.

(h) Applicability of the requirement of public concern to the appointment of commissions in terms of section 84(2)(f)

[154] Before leaving the question of the appointment of a commission in terms of section 84(2)(f), it is necessary to deal with a further argument raised by the respondents. They argued that, because the President, when he appointed the commission, intended to make the provisions of the Commissions Act applicable to it, the appointment of the commission itself was also subject to the requirements of the Commissions Act. In particular, it was argued that the matter for investigation by the commission had to be a "matter of public concern". The appellants correctly contended that the conditions for making the provisions of the Commissions Act applicable to a commission of inquiry are not applicable to the appointment of a commission by the President in terms of section 84(2)(f) of the Constitution.

[155] The appointment of a commission of inquiry in terms of the Constitution is a separate legal act distinct from that which vests the powers contained in the Commissions Act in a commission of inquiry. Moreover, the source of the President's power to appoint a commission is not the Commissions Act itself, it is a constitutional power. This was the case under previous constitutions as well.¹²² What is more, under our current Constitution, Parliament is not entitled to restrict the constitutional power of the President. The two acts, therefore, arise from different sources and are subject to different regulation. Section 84(2)(f) states merely that the "President is responsible for appointing commissions of inquiry". This provision does not limit that power to commissions of inquiry into matters of public concern. Whether or not the commission in this case is one which was mandated to investigate a matter of public or private interest is thus irrelevant to the question whether the appointment of the commission was valid.

[156] In summary, section 84(2)(f) is a special constitutional power conferred on the President as head of state. The exercise of this power does not constitute administrative action as contemplated in section 33 of the Constitution. The exercise of this responsibility is nevertheless constrained by the Constitution in a variety of ways. In this case, however, the respondents failed to establish that the President did not act in accordance

122 Bell v Van Rensburg, NO, above n 113, at 705 – 6. Minister of the Interior v Belcher and Others, above n 114; Garment Workers' Union v Schoeman, NO and others 1949 (2) SA 455 (A) at 463; S v Mulder, above n 113.

with those constraints when he appointed the commission of inquiry.

(i) Contractual constraints upon the exercise of the President's power to appoint a commission under section 84(2)(f) of the Constitution

[157] In their founding affidavit, the respondents averred that at the meeting between the Minister, the DG and Dr Luyt and others on 21 February 1997, a contract was concluded in which the respondents agreed to permit an investigation into the affairs of rugby by an independent task team on the condition that the Minister and the DG first provide the respondents with a list of the allegations made against the respondents which the Minister and the DG wished to have investigated. They went on to aver that one of the effects of this contract was to preclude the President from exercising the powers conferred upon him by the Constitution and the Commissions Act. The terms of the 21 February 1997 agreement were disputed by the appellants and will be dealt with later. For the moment it is sufficient to say that the Judge held that the President was not precluded by the 21 February 1997 agreement from appointing a commission of inquiry.

[158] His reason for that finding were as follows:

“The agreement between SARFU and the Government of 21 February was obviously not intended to fetter the President's power to appoint a commission. The parties clearly did not envisage that the agreement would in any way prevent the President from exercising his discretion to appoint a commission. It is obvious that the parties regarded the agreement as being compatible with the existence of the President's power to appoint a commission. If the public interest subsequently demanded the exercise of the President's power to appoint a commission, the parties obviously intended that the President would be entitled to override the agreement, thereby effectively terminating it.”¹²³

[159] In this Court the respondents did not suggest that the President was precluded by the agreement of 21 February 1997 from appointing the commission. We need say no more on this issue than that the Minister has no power to prevent the exercise of or to limit powers vested in the President personally. He could therefore not enter into an agreement which would have the effect of preventing the President from exercising powers vested in him personally, or indeed which would limit the President's powers in any way.¹²⁴ It is not, as the Judge suggested, that the President has the power to terminate such an agreement; such an agreement is not and cannot be binding on him. It follows from our conclusion that the act of the President in appointing a commission under section 84(2)(f) of the Constitution does not constitute administrative action, that the “audi principle”¹²⁵ has no application to such appointment, whatever the source may be from which the obligation to observe it might otherwise arise.

[160] The respondents' argument on the disputed 21 February 1997 agreement was confined in this Court to a contention that the agreement entitled them to a hearing before the President decided to make the powers

¹²³ At pp 1100 – 1101 of the typescript judgment.

¹²⁴ *Waterfalls Town Management Board v Minister of Housing* 1957 (1) SA 336 (SR) at 339B-340C.

¹²⁵ This is a shorthand phrase referring to the *audi alteram partem* principle (the right to be given a hearing before a decision is made) and it was first adopted by Corbett CJ in *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A) at 762F – 763J.

under the Commissions Act applicable to the commission. We deal with the dispute concerning the agreement of 21 February 1997 and the implications of the agreement later when we consider whether the “audi principle” relied upon by the respondents can be invoked in the circumstances of the present case. We will, however, do so only in relation to the President’s exercise of power in making the provisions of the Commissions Act applicable to a commission, because, as we have said, the principle can have no application to the President’s power to appoint a commission.

(j) Proclamation under the Commissions Act

[161] The next issue to be considered is the nature of the power conferred upon the President by the Commissions Act. Here again, the first question to be answered is whether the exercise of the power to proclaim the Commissions Act applicable to a commission of inquiry constitutes “administrative action” as contemplated by section 33 of the Constitution.

[162] The Commissions Act provides that once a commission has been appointed, the President may confer upon that commission the power to summon and examine witnesses, to administer oaths and affirmations and to call for the production of books, documents and objects.¹²⁶ Failure to comply with a subpoena issued by a commission is a punishable offence.¹²⁷ If these powers are not conferred, the commission will have no powers beyond those enjoyed by any individual or state agency conducting an investigation.¹²⁸ The Commissions Act may only be made applicable to a commission of inquiry if it is investigating a matter of public concern.¹²⁹ The respondents argued that the subject matter of the current commission was not a matter of public concern. This argument is considered later in this judgment.¹³⁰

[163] Making the Commissions Act applicable to a commission of inquiry therefore ensures that a commission can call witnesses and obtain the production of documents and objects on pain of punishment. Nevertheless, a commission remains an investigative body whose primary responsibility is to report to the President upon its findings.¹³¹ A commission is generally not entitled or empowered to take any action as a result of its findings.

[164] In the hearing before this Court, the respondents submitted that the President’s decision to make the Commissions Act applicable was an administrative act which attracted the constraints imposed by section 33. The appellants pointed out that this was not an issue raised in the founding affidavit and that the respondents were therefore not entitled to rely upon it. The founding affidavit does indeed not separate the issue of the appointment of the commission in terms of the Constitution from the issue of the decision to make the Commissions Act applicable to it. The affidavit merely states that the decision to appoint the commission was an administrative act which fell within the ambit of section 33. This argument conflated the question of the appointment of the commission with the decision to vest powers of subpoena in it. We propose nevertheless to deal with the argument on its merits.

¹²⁶ Section 3(1) of the Commissions Act, 1947 provides that:

“For the purpose of ascertaining any matter relating to the subject of its investigations, a commission shall in the Union have the powers which a Provincial Division of the Supreme Court of South Africa has within its province to summon witnesses, to cause an oath or affirmation to be administered to them, to examine them, and to call for the production of books, documents and objects.”

¹²⁷ Section 6 of the Commissions Act.

¹²⁸ See, for example, *S v Mulder*, above, at n 113, at 121 C.

¹²⁹ Section 1(1) of the Commissions Act, 1947.

¹³⁰ See below, paras 169-183.

¹³¹ *S v Mulder*, above n 113, at 120 F – G.

[165] The first question to be considered is whether the decision to make the Commissions Act applicable constitutes administrative action. The power to make the Commissions Act applicable to commissions is one conferred by legislation, not by the Constitution. It is not part of the constitutional power granted to the head of state to appoint commissions of inquiry. It may be exercised only when a commission of inquiry has been appointed to investigate a matter of public concern. The legislation permits the President to give important and, potentially invasive, powers to a commission in order to assist the commission to carry out its tasks effectively. The source of the power suggests that its exercise does constitute administrative action.

[166] There are indications to the contrary however. It is true that the power to give commissions powers of subpoena where the commissions are investigating matters of public concern is a power conferred by the legislature upon the President. Nonetheless, it is a power closely related to the exercise of the power of the head of state to appoint a commission, and to ensure that it is able to do its task effectively. There is substance in an argument that the power is so closely related to the constitutional power to appoint a commission that it should be characterised as part of the policy decision rather than administrative action.

[167] In their written argument, the respondents relied on the finding made in the judgment that the decision to appoint a commission and to vest it with powers under the Commissions Act infringed their rights under section 33(b) to “procedurally fair administrative action”. Because of the importance attached to this finding by the respondents we will assume in their favour that a decision vesting a commission with powers under the Commissions Act constitutes administrative action for the purposes of section 33. In doing so we will have regard to the fact that in the present case it was never contemplated that the commission would not be vested with such powers.

[168] Section 33 (as it is currently deemed to read) requires administrative action which affects or threatens *rights or interests* to be lawful; action which threatens or affects *rights or legitimate expectations* to be procedurally fair; reasons to be given where administrative action affects *rights or interests*; and administrative action to be justifiable in relation to the reasons given where *rights* are affected or threatened. The interests of the respondents are affected by the proclamation making the Commissions Act applicable. They may be obliged to give evidence and produce documents which they otherwise would not have been obliged to do. Section 33(1) therefore required that the vesting of powers under the Commissions Act should be lawful. The main challenge raised by the respondents in that regard was that the jurisdictional fact applicable to the exercise of the Commissions Act power was absent. They argued that the subject matter of the commission of inquiry was not a matter of public concern.¹³² Because the doctrine of legality requires the provisions of the Commissions Act to be complied with, this issue would have to be considered whether section 33 were applicable or not. We consider this question below,¹³³ and later we deal with the finding made by the Judge that the decision was unlawful because it was taken contrary to the dictates of natural justice.¹³⁴

(k) Matter of public concern

[169] The respondents argued that the subject matter of the commission of inquiry in this case, is not one of

132 The leading authority on “jurisdictional facts” in our law remains *South African Defence and Aid Fund and Another v Minister of Justice* 1967 (1) SA 31 (C).

133 See paras 169 – 183.

134 See paras 184 – 222.

public concern for two reasons. First, that the terms of reference¹³⁵ are so vague that it cannot be concluded that they refer to matters of public concern. The vagueness of the terms of reference is a separate cause of action and is dealt with in detail below.¹³⁶ Subject to that discussion, the terms of reference mandate an inquiry aimed at financial and related matters, and administrative and related matters, which concern the management and development of rugby by SARFU and its affiliate unions.

[170] Secondly, they submitted that the matters embraced by the terms of reference do not constitute matters of public concern, because the public at large and the rugby-viewing public in particular, have no legitimate interest in the internal management of financial, administrative and related matters by SARFU and its affiliates.

[171] In determining whether the subject matter of the commission's investigation is indeed a "matter of public concern", the test to be applied is an objective one.¹³⁷ The legally relevant question is not whether the President thought that the subject matter of the inquiry was a matter of public concern, but whether it was objectively so at the time the decision was taken. Whether or not the matter is one of public concern is a question for the courts to determine and not a matter to be decided by the President within his own discretion.¹³⁸ In this context, the Constitution requires that the notion of "public concern" be interpreted so as to promote the spirit, purport and objects of the Bill of Rights¹³⁹ and to underscore the democratic values of human dignity, equality and freedom. The purpose of the requirement that a matter be one of public concern is, on the one hand, to protect the interests of individuals by limiting the range of matters in respect of which the President may confer powers of compulsion upon a commission and, on the other, to protect the interests of the public by enabling effective investigation of matters that are of public concern.

[172] The respondents argue that SARFU and its affiliates are autonomous private associations, and that the Commissions Act should not be interpreted in a manner which would render them the subjects of an investigation by a commission of inquiry. Although it is true that very often the management and financial affairs of an autonomous private association will not be matters of public concern, it is not correct that they may never be. The use of the adjective "public" in the phrase "matter of public concern" does not mean that only public organisations or state institutions may be the subjects of a commission of inquiry vested with Commissions Act powers. "Public" in this context qualifies "concern". The question is whether the subject of investigation by the commission is a matter of concern to the public. It follows that the Commissions Act can apply to a commission inquiring into the internal management of private autonomous organisations, provided that those affairs are indeed matters of public concern. This was accepted by the Judge, "if the circumstances warrant it" for purposes of his judgment only.¹⁴⁰

[173] To hold otherwise would be to hold that the President could never appoint a commission of inquiry into the affairs and conduct of any private entity, even if such affairs were to constitute matters of grave public concern. There are many private institutions which, for historical or practical reasons, are privately controlled, although their activities manifestly affect members of the public and give rise to considerable public interest

135 The terms of reference are quoted in para 227.

136 See paras 227 – 232.

137 *Garment Workers' Union v Schoeman NO*, above n 122, at 463; *Erasmus and Others NNO v SA Associated Newspapers Ltd and Others 1979 (3) SA 447 (W)* at 449 – 450; *Bell v Van Rensburg NO*, above n 113; *S v Mulder*, above n 113 at 121.

138 *Garment Workers' Union v Schoeman, N.O. and others*, above n 122 at 464.

139 Section 39(2) of the Constitution. Such an approach would prevent the improper abuse of commissions to suppress dissent as happened in the past.

140 At p 1132 of typescript judgment.

and, at times, public concern.

[174] The Oxford English Dictionary defines the term “concern” as “anxiety or worry; or matter of interest or importance to one”. The first meaning given is the meaning of “worry or anxiety”. The second meaning is a matter of interest or importance. In our view, public concern as it is used in the Commissions Act should be interpreted in a way which involves both the notion of “anxiety” and “interest”. A matter of public concern is therefore not a matter in which the public merely has an interest, it is a matter about which the public is also concerned. “Public concern” in this context is therefore a more restricted notion than that of public interest.

[175] The term refers to *public* concern. The use of “public” to qualify concern makes it clear therefore that the concern must not be a private or undisclosed concern of the President. It must be a concern of members of the public and which is widely shared. The word “public” needs to be construed in its context and with common sense.¹⁴¹ It would be quite inappropriate to require the concern to be one shared by every single member of the South African public, for that would be to create a condition that could, arguably, never be met. However, the concern must be one shared by a significant segment or portion of the public.

[176] The requirement that a commission should be investigating a matter of “public concern” before the provisions of the Commissions Act may be vested in it is therefore a significant limitation on the President’s power to vest commissions with powers of coercion. It is an objective check, justiciable by the courts. Coercive powers of subpoena are generally reserved for courts. It is quite appropriate that, where the President is given the power to extend them to a commission investigating a matter, he or she may do so only where, viewed objectively, the matter to be investigated by the commission is one of public concern.

[177] In his judgment, the Judge did not directly address the question whether the investigation to be undertaken by the commission in this case was “a matter of public concern” or not. However, in that section of his judgment dealing with the question of procedural fairness, he referred, with approval, to the Royal Commission on Tribunals of Inquiry, 1966, chaired by Lord Salmon. In its report, the Commission stated that:

“The exceptional inquisitorial powers conferred upon a Tribunal of Inquiry under the Act of 1921 necessarily expose the ordinary citizen to the risk of having aspects of his private life uncovered which would otherwise remain private, and to the risk of having baseless allegations made against him. This may cause distress and injury to reputation. For these reasons, we are strongly of the opinion that the inquisitorial machinery set up under the Act of 1921 should never be used for matters of local or minor public importance but always be confined to matters of vital public importance concerning which there

141 *Argus Printing and Publishing Co. Ltd. v Darby’s Artware (Pty.) Ltd. And Others* 1952 (2) SA 1 (C) at 8H citing, with approval, *Jennings v Stephens* 1936 (1) All ER 409 (CA) in which Lord Wright said:

“‘The public’ is a term of uncertain import: it must be limited in every case by the context in which it is used. It does not generally mean the inhabitants of the world or even the inhabitants of [the] country.”

See also *Clinical Centre (Pty.) Ltd. v Holdgates Motor Co. (Pty.) Ltd.* 1948 (4) SA 480 (W) at 488 where Roper J held that:

“In my view a scheme is ‘in the public interest’ if it is to the general interest of the community that it should be carried out, even if it directly benefits only a section or class or portion of the community.”

is something . . . of a nation-wide crisis of confidence. In such cases we consider that no other method of investigation would be adequate.”¹⁴²

[178] This statement should be read in the light of the specific provisions of the relevant English legislation. Section 1(1) of the British Tribunals of Inquiry (Evidence) Act of 1921 (the Act of 1921) provides that commissions may be vested with powers of subpoena if the subject matter for investigation is a “specific matter of vital public importance.” The Royal Commission on Tribunals of Inquiry, instituted to investigate the proper functioning of the Act of 1921, suggested that the term “matter of vital public importance” be interpreted narrowly.

[179] It must be emphasised, however, that the statutory provision which governs the exercise of the power in South Africa is not the same as that applicable in England. It would be quite improper to adopt the English statutory standard as our law because it further restricts the field of inquiry to a matter of “vital” public importance. The test established by our statute remains that the commission be investigating a “matter of public concern”.

[180] We turn now to an application of the above principles to the facts. In their answering affidavits, the President and the Minister set out the history of the game of rugby in South Africa. They note that the game of rugby is a national sport and that, like other sports in South Africa, the playing of rugby was deeply affected by apartheid law and policy. Black South Africans were prevented from representing South Africa in the national team and few facilities were provided for the playing of rugby in those areas in which black people were required to live. The policy of apartheid attracted international condemnation and protest and resulted in many foreign teams refusing to play against the South African team. The conflict-ridden nature of sport in South Africa and, in particular, the racist manner in which national sports were managed and funded in the past, is a legacy which has direct implications for the conduct of sport today. The evidence shows that there was indeed concern expressed in both rugby circles and the media on various matters of importance which affected the image of rugby and its potential for promoting national reconciliation.

[181][The respondents did not dispute the fact that the game of rugby is a matter of great public interest. They disputed, however, that there was any legitimate interest in the internal affairs, financial and others, of SARFU and its affiliates on the ground that they were private institutions. There can be no doubt that the administration and management of the game of rugby may be a matter of great public concern. A New Zealand case, *Finnigan v New Zealand Rugby Football Union Inc*,¹⁴³ illustrates how intense such concern may become. It concerned a highly controversial proposed tour of South Africa by the New Zealand rugby team in 1985. Finnigan, a member of a rugby union club, sought to challenge the decision by the New Zealand Rugby Football Union to undertake the tour. The Court of Appeal held that he did have standing to do so on the basis that:

“While technically a private and voluntary sporting association, the Rugby Union is in relation to this decision in a position of major national importance, for the reasons already outlined. In this particular case, therefore, we are not willing to apply to the question of standing the narrowest of criteria that might be drawn from private law fields. In truth the case has some analogy with public law issues. This

¹⁴² At para 27 of the Report. The Report was also referred to by Baker AJ in *Bell v Van Rensburg NO*, above n 113 at 710 – 1.

¹⁴³ [1985] 2 NZLR 175 (CA).

is not to be pressed too far . . . We are saying simply that it falls into a special area where, in the New Zealand context, a sharp boundary between public and private law cannot realistically be drawn.”¹⁴⁴

The High Court subsequently granted an interim injunction restraining the departure of the team until the action had been determined.¹⁴⁵

[182] The respondents accept that SARFU and its affiliates are responsible for managing rugby in South Africa and are the formal structures through which rugby is controlled and administered, but seek to argue that their financial and administrative arrangements fall outside the sphere of public concern. We cannot accept that such a distinction should be drawn. SARFU and its constituent unions may be governed by private law and it may be that their funds are earned in activities governed by private law, but the determination of the appropriate branch of law under which such activities are governed does not mean that such activities and the funds which they generate cannot be matters of public concern. Much of SARFU’s income derives from ticket sales, broadcasting contracts, hiring fees for stadiums and sponsorship contracts, all of which directly concern the public. What is more, much of SARFU’s expenditure relates to the development of rugby in schools and elsewhere, and in providing facilities for the playing of rugby, again matters which directly engage the public, particularly in relation to steps taken to address past discrimination. It follows that the public at large has a legitimate concern in the manner in which SARFU and its constituent unions manage the financial aspects of the game of rugby, and make it accessible to those wishing to participate in the game as well as those wishing to watch games at stadiums or on television or to listen to them on the radio.

[183] Moreover, any inquiry into the management of rugby in this country necessarily entails an inquiry into the affairs of SARFU and its affiliates, since they are entrusted with every aspect of the game’s management. However, the terms of reference focus the commission’s inquiry on the financial, administrative and related matters concerning the management of rugby for the purpose of determining whether rugby is being administered in the best interests of the public and the rugby-supporting public; the best interests of the game of rugby, its development and promotion amongst all South Africans; and the principles of fair, open, honest and sound management. The investigation is therefore limited to these purposes. We have no doubt that those affairs of SARFU and its affiliates are a matter of public concern, within the meaning of the Commissions Act. The respondents’ arguments that this requirement of the Commissions Act was not met must therefore fail.

(I) Procedural fairness — section 33(b)

[184] The respondents contended that the proclamation should be set aside because the President failed to observe the audi principle. The applicability of the audi principle was asserted on two grounds, both of which were upheld by the Judge. First, it was contended that the decision to make the powers under the Commissions Act applicable to the commission interfered with the respondents’ constitutional rights to freedom and privacy, and with their rights under the agreement of 21 February 1997. Secondly, it was contended that the respondents had, if not a right, at least a legitimate expectation of such a hearing arising out of the terms of the agreement of 21 February 1997. Finally, they submitted that they would be prejudiced by the President’s decision to confer the Commissions Act powers upon the commission and that they were, accordingly, entitled to a hearing. We shall deal with each of these submissions in turn.

¹⁴⁴ Id at 179.

¹⁴⁵ *Finnigan v New Zealand Rugby Football Union Inc* (No 2) [1985] 2 NZLR 181 (High Court).

(m) Constitutional rights to privacy and freedom

[185][A person who is served with a subpoena is required to give evidence and to produce documents in relation to the terms of reference of the commission to the satisfaction of the commission. In this regard, such an individual or organisation is in the same position as any witness called before a criminal or civil court. In *Bernstein and Others v Bester and Others NNO*¹⁴⁶, Ackermann J said the following:

“The use of subpoenas to require witnesses to attend courts, to produce documents and where necessary to give evidence is essential to the functioning of the court system. It is no doubt possible for the rule governing the issuing of subpoenas to be misused. The courts have the power to set aside subpoenas which have been issued for an improper purpose, or which are vexatious in other respects, but in its practical application that power is limited, and the possibility of the process of the court being abused in particular cases cannot be excluded.

The fact that the power of subpoena may possibly be abused in a particular case to the prejudice of the person subjected to such abuse does not mean that the power should, for this reason, be characterised as infringing section 11(1) of the Constitution. The law does not sanction such abuse; it merely recognises that it is difficult to control it and that a clear case of abuse must be established in order to secure a discharge from a subpoena. Absent such proof it is the duty of persons who are subpoenaed to co-operate with the courts, and to attend court for the purpose of giving evidence or producing documents when required to do so. The fact that the present case is concerned with enquiries under ss 417 and 418 of the Companies Act, and not with a trial, does not affect the characterisation of the obligation to honour a subpoena to attend the enquiry. It is a civic obligation recognised in all open and democratic societies and not an invasion of freedom.”¹⁴⁷

[186] A more difficult question is raised by the issue of privacy. In *Bernstein's* case, Ackermann J held that the obligation to be physically present at an investigation itself did not constitute a breach of privacy.¹⁴⁸ The obligation to produce documents or answer questions, however, could, in certain circumstances, constitute an invasion of privacy. He held that even if on a proper construction of the challenged provisions they could be interpreted to require a witness to answer questions or produce books or documents in breach of that person's right to privacy, such breach would be justifiable as long as the answers to be given or documents to be produced were relevant to the objects of the enquiry and achievement of its purposes. He held:

“The public's interest in ascertaining the truth surrounding the collapse of the company, the liquidator's interest in a speedy and effective liquidation of the company and the creditors' and contributors' financial interests in the recovery of company assets must be weighed against this, peripheral, infringement of the right not to be subjected to seizure of private possessions. Seen in this light, I have

146 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC).

147 *Id* at paras 51 – 52. See also *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC); *Nel v Le Roux NO and Others*, above n 105.

148 Above n 146, para 58.

no doubt that ss 417(3) and 418 (2) constitute a legitimate limitation of the right to personal privacy in terms of s 33 of the [interim] Constitution.”¹⁴⁹

In our view, similar considerations apply to the provisions of the Commissions Act. It may be that a witness before the commission may be asked questions or required to produce documents which will limit his or her right to privacy. However, in any particular case, the questions put and the documents sought must be relevant to the scope of the commission’s investigation and that investigation must be a matter of public concern. If the questions asked or documents sought are relevant to such an investigation, then in all probability an invasion of privacy will be permissible. The requirement that the commission be investigating a matter of public concern coupled with the requirement that any questions be relevant to its terms of reference will ensure that witnesses’ privacy rights will not be improperly infringed. In so deciding, we assume, as we must, that the commission will act properly and lawfully in exercising its powers and that it will construe its powers in the light of the spirit, purport and objects of the Bill of Rights.¹⁵⁰ In our view, therefore, the respondents have not shown that they were entitled to invoke the audi principle in this case on the basis that their rights to privacy had been affected or threatened by the President making the provisions of the Commissions Act applicable to the commission he had appointed.

(n) The agreement of 21 February 1997

[187] In the High Court the Judge held that the contract relied upon by the respondents had indeed been concluded. It was, he held, a term of that contract that the respondents would co-operate with the task team only after the allegations had been provided to them. Further it was a tacit term of that contract that the Minister would not approach the President to request the appointment of a commission of inquiry while the contract was in force. The Judge also held that if he was incorrect in finding that a contract had been entered into between the Minister, the DG and the respondents, in any event the meeting of 21 February 1997 had given rise to a legitimate expectation that no commission of inquiry would be held without the respondents being afforded an opportunity to make representations to the President. Counsel for the respondents supported these findings. We shall, however, for the reasons mentioned in paragraphs 159 – 160 above, consider these arguments only in so far as they can bear on the President’s act in making the provisions under the Commissions Act applicable to the commission.

[188] The appellants counter this argument. First, they contend that the finding by the Judge that a contract was entered into on 21 February 1997 is mistaken. They argue that no such contract was entered into between the Minister and the respondents; that the product of the meeting of the 21 February 1997 was a working arrangement; that it was not a term of the working arrangement that allegations against the respondents would be put to them prior to their undertaking to co-operate with the investigation; and that no tacit term constraining the appointment of a commission of inquiry existed. They further contend that, even if there was such a term, the Minister was not competent to constrain the exercise of the President’s constitutional discretion in such a fashion.

[189] Two disputes exist, therefore, concerning the meeting of 21 February 1997: the first is whether those present at the meeting entered into an agreement which had the effect of a legally binding contract to regulate

¹⁴⁹ Id para 90.

¹⁵⁰ See *Bernstein and Others v Bester and Others NNO*, above n 146 paras 60 – 3; *Nel v Le Roux NO and Others*, above n 105 paras 7 – 9.

future conduct in such a way as to preclude the Minister from approaching the President and requesting him to appoint such an inquiry. The second question relates to the terms of the agreement (be it binding or non-binding) in relation to the procedure to be followed. The first dispute concerning the legal character of the arrangement of 21 February 1997 was not referred to oral evidence by the Judge,¹⁵¹ but the second dispute was.

[190] It was common cause between the parties that there was a meeting on 21 February 1997 attended by, amongst others, the Minister, the DG and Dr Luyt. At the conclusion of the meeting the following press statement was issued by the Minister:

“The Minister of Sport and Recreation, Min Tshwete, his Director General, Mr Tyamzashe and his delegation met with a SARFU delegation led by its President Dr Louis Luyt.

It was agreed that SARFU should be given the opportunity to answer to all allegations made against them by Van Rooyen and others.

The Minister will appoint a team under the leadership of Mr Tyamzashe.

Mr Tyamzashe will be able to make use of any expertise he may believe necessary in order to authenticate the answers given by SARFU. It was further agreed that no members of other sporting codes will form part of this team.

It is SARFU’s intention to apply to the Supreme Court on an urgent basis for the release of the Van Rooyen document. The Minister conceded that SARFU could proceed.”

It was initially the respondents’ case that this press statement recorded an agreement which was a legally binding contract between SARFU and its constituent unions on the one hand and the government represented by the Minister and the DG on the other. They averred that the contract bound the government, including the President. Later, however, they took up the attitude that nothing turned on this and that the right to a hearing existed whether the agreement was binding or not.

[191] The appellants denied that the product of the meeting of 21 February 1997 was a binding contract. The DG stated in his answering affidavit that a working arrangement had been adopted in terms of which SARFU had promised co-operation with a task team to be appointed by the Minister to investigate the administration of rugby, and said:

“Dr Luyt’s suggestion that a binding contract was made at the meeting, is quite incorrect. We did no more than to discuss and agree upon a broad working arrangement acceptable to both sides as a basis for co-operation. This arrangement was never intended to be a contract in law. Neither the minister nor the department considered the appointment of the task team, its mandate and its manner of

¹⁵¹ See para 20 above.

investigation, to be matters for negotiation and agreement and would not have entered into any contract fettering their executive discretion to act in the public interest.”

[192] The circumstances in which the agreement of 21 February 1997 was entered into were as follows. The Minister, whose executive responsibilities included matters relating to sport, was concerned with the way in which rugby was being administered. He was entitled to ask the President to appoint a commission to enquire into these concerns. Instead of doing that, he sought SARFU’s co-operation to resolve the problems by interaction between SARFU and a task team of independent persons of standing. He knew that the power to appoint a commission vested in the President. He could not limit that power or prevent the President from exercising it. In fact, if he attempted to do so, any agreement made by him would not be binding on the President. The probabilities strongly favour the Minister’s contention that when the agreement to appoint a task team was reached neither party intended to bring about a contractual relationship which would constrain either the President’s or the Minister’s responsibility to discharge their duties in a manner which they considered appropriate.¹⁵² What was of concern to them was to establish an acceptable procedure for the functioning of the task team, and this is what is reflected in the press statement. The subsequent conduct of the parties to which we refer in more detail later¹⁵³ is entirely consistent with this, and inconsistent with the existence of a legally binding agreement that the task team would investigate only SARFU’s responses to specific allegations made by Mr van Rooyen or others. At a meeting with SARFU on 3 April 1997, the task team identified areas of concern that would be the subject of their investigation. The team commenced its investigations immediately after this had been done and SARFU co-operated with it for more than four months without any specific allegations having been put to it other than the areas of concern identified at the meeting of 3 April 1997. It was only on 29 July 1997 when auditors appointed by the task team were attempting to secure access to certain financial books and records that SARFU withdrew its co-operation.

[193][As stated above, the question whether the agreement of 21 February 1997 constituted a legally binding contract was not referred to evidence. The fact that the respondents did not seek to have this issue referred to evidence, despite the clear denial on the papers by the appellants, is consistent with their attitude in argument in the High Court that it was not essential to their case that the agreement was legally binding. Accordingly, the ordinary principles established in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*¹⁵⁴ ought to apply so that the dispute between the parties should have been determined on the basis of the appellants’ evidence on this issue. However, in his judgment, despite the fact that the respondents never sought the referral of the issue to evidence, and the clear denial on the papers by the appellants, the Judge found the agreement of 21 February 1997 to have been a legally binding contract. In reaching this conclusion, he relied on inferences drawn from the oral evidence. He held that the ordinary rule established in *Plascon-Evans* did not apply, and that he was entitled to have regard to the oral evidence because the issue upon which the matter had been referred to evidence, relating as it did to the terms of the agreement as opposed to its status, was so closely related to the question of its status that it was permissible for him to do so. The second basis upon which the Judge held that he was not bound by the ordinary rule¹⁵⁵ was that the appellants’ evidence denying that they had acted with the intention of being contractually bound was so far-fetched as to justify the court rejecting it on the papers.¹⁵⁶ He gives no reason for this conclusion.

152 Compare *Dikolong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel en Nywerheid* 1992 (4) SA 1 (A).

153 Paras 205 – 210 below.

154 1984 (3) SA 623 (A) at 634-5.

155 At p 466 of the typescript judgment.

156 An exception recognised in *Plascon-Evans*, above n 154 at 635C.

[194] In our view, there is nothing far-fetched at all in the appellants' assertion that the agreement entered into on 21 February 1997 was not entered into with the intention of it being legally binding. The DG states in his answering affidavit that the Minister would not have fettered his executive discretion in this manner. There is no reason to doubt this statement. Indeed, the Judge himself held:

"The agreement in the instant case would, in my view, not have prevented the Minister from approaching the President to appoint a commission if the public interest subsequently demanded that a commission should be appointed. The agreement was, therefore, compatible with the President's power to appoint a commission of inquiry, and with the Minister's power to approach the president for the appointment of a commission."¹⁵⁷

In other parts of his judgment the Judge also accepted that it would not have been legally possible for the parties to the agreement to fetter the President's discretion to appoint a commission and he finds that they never intended to do so.¹⁵⁸

[195] The appellants' version is supported, in our view, by the text of the press statement which nowhere suggests that a legally binding contract had been entered into by the government and SARFU and by the absence of detailed provisions one would have expected to find if a legally binding contract had been contemplated. In our view, therefore, the status of the contract should have been resolved on the basis of accepting the correctness of the version in the appellants' affidavits as the *Plascon-Evans* rule requires. The result would have been a finding that there was no legally binding contract.

[196] In any event, it is our view that the Judge's finding on the oral and written evidence is also unjustified. This Court is in as good a position as the Judge to make a determination on this. The proceedings at the meeting of 21 February 1997 were transcribed and a copy of that transcript formed part of the appeal record. The Judge based his conclusion on an assessment of the probabilities based on the following key factual findings: (a) in the absence of SARFU's co-operation, the task team appointed by the Minister would not have been lawfully entitled to gain access to SARFU's records; (b) when the Minister announced the appointment of the task team on 14 February 1997 he was not aware of this; (c) he became aware of it only on 17 February 1997 when SARFU's attorneys wrote to the Minister stating that SARFU was not obliged to co-operate with the task team but that "as a gesture of goodwill . . . they will deal with the issues raised with you and your department provided that the dossier and other documents in your possession are made available to our clients together with a list of issues; (d) the DG replied on 18 February 1997 to propose a meeting between SARFU and the Department on 21 February 1997 at which "[t]he issue of the proposed task force shall also be addressed," also stating that "[i]n the interest of rugby as a whole and the national interest it projects, the Department feels strongly that your clients accept this offer of the Department to negotiate the issue at stake at the meeting referred to above"; (e) the events at the meeting of 21 February 1997; and (f) the press statement issued thereafter which is set out at paragraph 190 of this judgment. The Judge speculated that the Minister had obtained legal advice between 17 and 21 February 1997, knew of his error at the time of the later meeting and was accordingly under pressure to

¹⁵⁷ At p 473 of the typescript judgment.

¹⁵⁸ The contract would not, as indicated, have fettered "their executive discretion to act in the public interest"; see, for example, p 482 of the typescript judgment.

save the situation by securing SARFU's agreement at that meeting to the appointment of the task team. There was no evidence to support this supposition, which was not put to the Minister in cross-examination. The finding that on 14 February 1997 the Minister was not aware that a task team would have no legal powers of subpoena and would require co-operation from SARFU cannot be accepted. It was common cause that the Minister informed the SARFU representatives at the time that he expected SARFU to co-operate with the task team, and that if co-operation was not forthcoming he would be obliged to ask the President to appoint a commission of inquiry. He repeated this to the press at an interview held immediately after the meeting of 17 February 1997, identifying the areas of concern to him, namely, "the administration of rugby, the development programme, the status of professionalism, the ownership of stadiums and the television rights relating to rugby". This threat would have been unnecessary if the Minister was under the mistaken impression that the task team had powers of coercion. Moreover, according to the answering affidavits, the DG and the Minister both knew at the time of these discussions that the task team would have no powers of compulsion and this was not disputed in cross-examination or in the oral evidence. In reaching this finding, the Judge therefore erred.

[197] In the judgment, it is repeatedly stated that the parties must have intended to enter into a binding contract because without such a contract the proposed task team would not have been able to function. This was summed up as follows:

"Seen from the side of the Minister and the DG, it was, therefore, imperative for them to obtain SARFU's consent in order to legally appoint a task team that had authority in law to conduct the investigation."¹⁵⁹ (emphasis in the original)

This misses the point. The fact that SARFU's consent was necessary did not mean that the Minister had to agree to fetter his discretion to ask for a commission if that turned out to be the appropriate course to follow. This the Judge seems to accept for he held specifically that the contract "would not . . . have fettered their executive discretion to act in the public interest". The finding made by the Judge amounts, however, to a finding that the Minister agreed to forego the right to ask for a commission of inquiry in exchange for an undertaking that there would be a limited investigation into specific allegations only, well knowing that he was not in a position to make such agreement, and could do no more than identify the areas of concern which had in fact largely been spelt out by him already at the press conference. There is no apparent reason why the Minister should have intended to do this. Both parties knew that the choice was between a private investigation by a task team or, failing that, a request to the President to appoint a commission. The Minister made this perfectly clear both at the meeting of 17 February 1997 and at the press conference that followed.

[198] Although there is some uncertainty as to the precise ambit of the principle that a public authority cannot, by contract, fetter the exercise of its own discretion,¹⁶⁰ there is little doubt that a public authority cannot enter into a contract which is wholly incompatible with the discretion conferred upon it. More conclusively, one member of the Cabinet cannot of his or her own accord enter into a contract with a third party which would

¹⁵⁹ At p 480 of the typescript judgment.

¹⁶⁰ The Appellate Division has held estoppel may not be used, in public law, to give legal effect to ultra vires conduct of an official that would otherwise be a nullity. See *Strydom v Die Land- en Landboubank van Suid- Afrika* 1972 (1) SA 801 (A) at 815G – 816 B, 817 D. See for academic commentary on the place of estoppel in public law: Baxter *Administrative Law*, above n 27, at 419 – 424; Cockrell "Can you Paradigm? — Another Perspective on the Public Law/Private Law Divide" 1993 *Acta Juridica* 227 at 236 – 8; and S Arrowsmith "Judicial Review and the contractual powers of public authorities" (1990) 106 *Law Quarterly Review* 277.

preclude or constrain the President from exercising powers conferred upon him or her directly by the Constitution. For example, a contract between the Minister of Foreign Affairs and an individual in terms of which the Minister undertook to ensure that such person would be appointed ambassador to a particular country could not fetter, in any way, the discretion conferred upon by the President in terms of section 84(2)(i) of the Constitution, or indeed the discretion of the Minister to recommend somebody else for that post. Nor could it give rise to a demand that the appointment be set aside because the person concerned had not been afforded a hearing by the President before the appointment was made.

[199] Any arrangement made by the Minister with SARFU concerning the task team's investigation could, as a matter of law, have been no more than an undertaking by the Minister to discharge his executive powers in a particular way. If that proved not to be a satisfactory arrangement, the undertaking could not fetter the Minister's power to pursue a different course and request the President to appoint a commission and certainly not that of the President to appoint a commission whether requested to do so by the Minister or not.¹⁶¹ The arrangement broke down when SARFU withdrew its co-operation because certain conditions were not met, and the task team felt they could not continue their work in the absence of such co-operation.

[200] There is accordingly no merit in the respondents' submission that because their rights were infringed by the President's decision to appoint the commission of inquiry and vest it with powers under the Commissions Act, the audi principle was applicable.

(o) Legitimate expectation

[201] The respondents argued that even if a binding contract had not been entered into on 21 February 1997, they, nevertheless, had a legitimate expectation that gave rise to an obligation of procedural fairness in relation to the vesting of the powers of the Commissions Act in the commission. Their legitimate expectation, they argued, arose from the terms of the agreement of 21 February 1997. The respondents argued that the terms of the agreement were that SARFU would co-operate with the task team on condition that the allegations against SARFU would first be provided to SARFU by the Department, that SARFU would then be given an opportunity to respond to those allegations, and that the task team would then verify SARFU's responses. The respondents argued further that this procedure had not been followed; that they had never been given a clear list of allegations against SARFU; and that although they withdrew from co-operation with the task team because of the failure to follow this agreement, they were willing to resume co-operation if and when such allegations were communicated to them. The agreement, they contended, gave rise to a legitimate expectation that the undertaking to furnish those allegations would not be terminated, and powers of coercion would not be vested in a commission, before the President had afforded them a hearing.

[202] According to the appellants, this was not the agreed procedure. They stated that the agreement of 21

¹⁶¹ "This promise had it been given by an individual, might well have been binding and enforceable. Given by the Minister it was no more than an undertaking to discharge his administrative duties in regard to building in a way which would remove their grievances. I cannot regard the Minister's 'agreement' as anything more than a promise to meet their objection by exercising his discretionary administrative powers in a particular way. This promise cannot fetter his right, if circumstances connected with his administration require it, to exercise his discretion in some other way. If aggrieved the Board has a political, not a judicial remedy."

Per Murray C.J. in *Waterfalls Town Management Board v Minister of Housing*, above n 124, at 342E-F. See also *Dikolong Chrome Mines (Edms) Bpk v Direkteur-Generaal, Departement van Handel en Nywerheid*, above n 152, at 21G-J; *Rapholo v State President and Others* 1993 (1) SA 680 (T); *Findlay v Secretary for State for the Home Dept.* [1985] AC 318 at 337 – 338; *Hughes v Dept of Health and Social Security* [1985] AC 776 at 778; *R v Secretary of State, ex parte Hargreaves* [1997] 1 All ER 397(CA) at 408 – 411.

February 1997 was that a task team would be appointed to investigate the administration of rugby; that SARFU would co-operate with that task team by providing them with the necessary documents and information; and that SARFU would be given an opportunity to respond to any allegations that emerged from the task team's investigation. They contended that when SARFU withdrew its co-operation in July 1997, and the task team decided that it was unable to continue its enquiries, the Minister had no option but to request the President to appoint a commission of inquiry.

[203] In the alternative to his finding that there had been a contract entered into on 21 February 1997, the Judge held that if only a working arrangement had been established, it nonetheless gave rise to a legitimate expectation in terms of which the President was obliged to give SARFU a hearing prior to his decision to appoint a commission and vest it with powers in terms of the Commissions Act. This conclusion was based on the finding that the terms of the working arrangement of 21 February 1997 included a provision that SARFU would first be provided with allegations before it would be required to co-operate with the task team.

[204] The terms of the agreement constituted one of the two issues referred to oral evidence. Extensive and contradictory evidence was given by five witnesses on this matter. It seems to us, however, that the question whether SARFU had a legitimate expectation which gave rise to a duty on the President to afford them an opportunity to be heard, is a factual question in respect of which the agreement of 21 February 1997 is, at best, only peripherally relevant. Although the conduct of the parties subsequent to 21 February 1997 provides strong support for the appellants' version of the agreement, it is not necessary for us to decide what the terms of the working arrangement of 21 February 1997 were. Seven months elapsed from that date till the appointment of the commission. To determine whether a legitimate expectation existed in September 1997, it is the events of those seven months and particularly the period immediately preceding the vesting of the Commissions Act powers in the commission which is crucial, not the events of the meeting of 21 February 1997. It is our view that the Judge erred in focussing solely on the meeting of 21 February 1997.

[205] Those events, as the affidavits reveal, were generally not in dispute and they were not referred to oral evidence. After the meeting of 21 February 1997, SARFU launched the application contemplated by the press statement to obtain a copy of the Van Rooyen dossier. This it obtained on 4 March 1997. In early March 1997, the task team was established and SARFU was notified of this. After an exchange of correspondence between SARFU and the DG, a meeting of the members of the task team and SARFU representatives, including Dr Luyt and Mr Oberholzer, was held on 3 April 1997. At that meeting, the SARFU representatives were told of the various areas of investigation to be undertaken by the task team. These included the following: administration; development programmes; representivity; media; and ownership of stadiums. This was accepted. Following that meeting, an agreed press statement was issued which read as follows:

"The Task Team, which has been appointed by the Minister of Sport and Recreation to inquire into Rugby in South Africa has commenced its work. It wishes to emphasize [sic] that in the course of its work it will be inter-acting with as many as possible of the role players in Rugby including SARFU. A meeting took place yesterday afternoon between members of the Task Team and representatives of SARFU for the purpose of enabling the Task Team to outline to SARFU the objectives of the Task Team and the procedures which it proposes to follow. The Task Team will also employ consultants to assist it in its work.

The scope of the inquiry can be summarised in the broad areas of administration; development programmes; representivity as well as media and ownership of stadia. The Task Team assured SARFU

that they would be objective and fair in their assessment and that SARFU would be offered every opportunity to respond to all issues raised. The Task Team adds that no sinister inference is to be drawn or any presumption made and that witch-hunting was not amongst its objectives.

SARFU assured the Task Team that they should count on SARFU's cooperation and support as well as that of its affiliates, in a gesture of goodwill with a view to advancing the well-being of and resolving any concern that may exist in rugby."

On 4 May 1997 the task team published a notice inviting public comments to be forwarded to it before 31 May 1997. On 13 May 1997, Mr Oberholzer forwarded a copy of this notice to all provincial unions with the following letter:

"Recently the Department of Sport & Recreation placed an advertisement nationally, inviting all persons who wished to make representations on the well-being of rugby in South Africa, whether written or oral, to submit these to the address mentioned [in] their advertisement (*see attached copy*), on or before 31 May 1997.

Please be aware, that as Provincial Unions you are entitled to submit any representations you might wish to the Task Team in respect of any problems you might be experiencing which do not involve SARFU.

I trust that . . . you will avail yourselves of the opportunity offered to you by the Sports Ministry."

[206] Between 3 April 1997 and the end of July 1997, the task team undertook its investigations. Meetings were held between one or more members of the task team and Mr Oberholzer, various development officers of SARFU, as well as provincial union officials. Copies of the constitutions of SARFU and its affiliates were provided to the task team. The task team sought access to copies of contracts between SARFU and players, and between SARFU and Newscorp concerning television rights for the Super-12 rugby series. Dr Luyt responded to this request in the following manner:

"Thank you for your letter dated 4 July 1997.

We have co-operated with your Task Team and reiterate that we will do so in future.

However,

2.1 We cannot comply with this request [for contracts between players and SARFU] because of the confidentiality of the agreements save to state that a blank copy of an agreement can be made available.

2.2 I will have to seek the acquiescence of Newscorp, the New Zealand and Australian Rugby Unions to allow you to have sight of the Newscorp contract. That I undertake to request immediately and on an urgent basis.

. . . .

If the parties to the other SARFU sponsorships agree to your having sight of their agreements, the agreements will be available at my office for your perusal. We will let you know telephonically once we have the sponsors' permission in order to arrange a suitable date for us to meet at Ellis Park to conclude this matter. We assure you we will seek their permission on an urgent basis.

Please be assured of our co-operation at all times."

On 17 July 1997, Dr Luyt wrote to the task team informing them that permission had been obtained for the task team to have sight of the relevant contracts.

[207] On the same day, auditors who were assisting the task team wrote to Mr Oberholzer requesting access to a list of documents relating to SARFU, Ellis Park Stadium (Pty) Ltd and the Transvaal Rugby Sports Trust, including financial statements for 1989 – 1996; management accounts for the same period; minutes of meetings and annual general meetings for the period; and copies of sponsorship agreements. SARFU's general manager for administration and finances, Mr Bloom, responded on behalf of SARFU, observing that Dr Luyt would need to be approached in respect of the Transvaal Rugby Sports Trust and Ellis Park Stadium (Pty) Ltd. Mr Bloom confirmed that the documents sought by the auditors were available for inspection, although he reasserted that confidentiality must be maintained by the auditors in relation to the sponsorship agreements, the Newscorp agreement and players' agreements as had been requested by Dr Luyt on 17 July 1997. Mr Bloom also suggested that a meeting should be held between members of the task team and SARFU to facilitate disclosure of the documents. The auditors responded to this letter and a meeting was arranged for the week of 4 to 8 August 1997.

[208] The auditors also wrote to the provincial unions requesting access to similar documentation and arranged meetings with thirteen of the fourteen unions, all of whom promised co-operation. However on 24 July 1997, a letter was sent to the DG by a Mr Kruger on behalf of SARFU objecting to the firm of auditors that had been appointed to assist the task team on the ground that one of the partners of this firm had previously supported Mr Brian van Rooyen. The letter stated:

"... we do not believe that the firm is objective, we are suspicious that the firm is not impartial or that there is bias, or the likelihood of bias in the exercise by the firm of its functions. We accordingly submit that it is not competent or proper for the firm to act as your consultant in the investigation ...".

This letter was followed on 29 July 1997 by a letter from Rooth and Wessels, a firm of attorneys acting on behalf of SARFU, Gauteng Lions Rugby Union, Ellis Park Stadium (Pty) Ltd and the Transvaal Rugby Sports Trust. The letter withdrew all co-operation from the task team in the following terms:

"Until our client has been advised of every allegation and by whom and when so made, which the Task Team wishes to investigate, and until our client has had an opportunity of considering these and of deciding on the extent of its co-operation given the particular allegations, our client will not afford the Task Team any further access to any further information."

At a meeting of SARFU's executive committee on 5 August 1997, Mr Oberholzer and Dr Luyt, somewhat inexplicably on their present version, explained the withdrawal of co-operation on the basis that the task team was not observing the agreement of 3 April 1997.

[209] At its meeting on 15 August 1997, the task team concluded that it could not proceed with its investigation in the light of the suspension of co-operation by SARFU. They recommended to the Minister that he apply to the President for the appointment of a commission of inquiry to be vested with powers in terms of the Commissions Act. SARFU was notified of the task team's attitude by a letter sent on the same day which informed them that the processes for the appointment of a commission of inquiry, to be vested with Commissions Act powers, were to be set in motion. Thereafter, a submission was prepared for the President making out a case for the appointment of a commission of inquiry. SARFU's attorneys responded to the Department's letter of 15 August 1997 on 26 August 1997. The 13-page letter does not allege that SARFU had any expectation, legitimate or otherwise, of being heard by the President before he made his decision to appoint the commission.

[210] Although they had been informed on 15 August 1997 that the task team and the Department intended to approach the President and request the appointment of a commission, the respondents took no steps to approach the President to seek an opportunity to be heard or to place information before him. They would have had ample time to do this as more than a month elapsed before the appointment of the commission was announced on 26 September 1997. Once the commission had been appointed, SARFU wrote to the President requesting his reasons for the appointment of the commission. In that letter they did not assert that they had enjoyed an expectation, which had been breached, that they would be given an opportunity to be heard prior to the President's decision. Indeed, the letter stated that:

"We wish to record that our clients have in principle accepted the appointment of the Commission subject to them being satisfied with the reasons and information furnished to them as requested above. Furthermore, it is to be appreciated that the terms of reference of the Commission must be sufficiently explicit so as to enable our clients to understand the extent and ambit of the allegations to be investigated. It also goes without saying that the terms of reference must be Constitutional."

[211] The question then is whether, on the facts outlined above, which were not in material dispute between the parties, the respondents have established any legitimate expectation, that the President would not, in conflict with any undertaking which might have been given by the Minister, make the provisions of the Commissions Act applicable to the commission, without first affording the respondents an opportunity of being heard. They did not assert such an expectation in the correspondence addressed to the Department on 26 August 1997, after they had been informed that the Department considered the appointment of a commission to be its only option. Nor did they assert such an expectation in their letter to the President on 29 September 1997 when they sought his reasons.

[212] In *Administrator, Transvaal and Others v Traub and Others*,¹⁶² Corbett CJ considered the concept of "legitimate expectation" and its development in English law. In considering what conduct would give rise to a

¹⁶² Above n 125 at 756l.

legitimate expectation, he cited the speech of Lord Fraser of Tullybelton in *Council of Civil Service Unions and Others v Minister for the Civil Service*:

“Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from *the existence of a regular practice which the claimant can reasonably expect to continue.*” (emphasis supplied by Corbett CJ)¹⁶³

In the present case, there is no suggestion that the legitimate expectation arose from a regular practice of the President. The respondents’ case is that *an express promise* was given by a public authority. They seek to prove that such a promise was given on 21 February 1997 and that it was binding on the President. There was no evidence that such a promise was made expressly. The respondents were driven to place reliance on inferences sought to be drawn from what took place at the meeting of 21 February 1997 which imply that the Minister intended to fetter his own discretion to apply for a commission and also to commit the President to hearing SARFU before taking a decision to appoint a commission. Such inferences are at variance with the probabilities. Moreover, whatever may have been the understanding at the meeting of 21 February 1997, it was overtaken by subsequent events as we have described. It is noteworthy that SARFU and its affiliates did not seek to rely on any promise when tendering co-operation between April and July 1997, nor did their lawyers suggest in their letters of 26 August and 29 September 1997 that a legitimate expectation of a hearing existed.

[213] It is clear that the meeting of 21 February 1997 was to establish a working arrangement for the investigation of rugby which would avoid the necessity for the appointment of a commission of inquiry. This was a preliminary meeting. Subsequent to it, a task team was set up and commenced an investigation. It identified areas of concern to be investigated. Between April and July 1997, SARFU and its affiliates willingly and unconditionally co-operated with and assisted the task team’s investigations. No condition was apparently placed on that co-operation which was unstintingly provided by officials of SARFU (including Mr Oberholzer and Dr Luyt, as has been described above) and its affiliates in relation to the wide-ranging investigation initiated by the task team. It had always been clear to SARFU and its affiliates that if co-operation was not forthcoming, the task team could not function, and the only alternative for the sports ministry would be to apply to the President for a commission of inquiry. This was stated expressly on more than one occasion in the correspondence. It appears to us that whatever the working arrangement might have been in February 1997, it evolved during the following seven months into one in which it was accepted that the task team would investigate the areas of concern identified by it at its meeting with SARFU on 3 April 1997. The press statement issued after the meeting of 3 April 1997 stated that SARFU undertook to co-operate with the task team “in a gesture of goodwill with a view to advancing the well-being of and resolving any concern that may exist in rugby”. That goodwill was demonstrated by Mr Oberholzer’s letter to affiliates on 13 May 1997 and by the subsequent co-operation by the affiliates and SARFU with the task team’s investigations. No conditions arising from the agreement at the meeting of 21 February 1997 were referred to during this period at all. SARFU appears to have decided that co-operation in the interests of rugby was the wise and expedient course.

[214] The Judge held that the President terminated the agreement when he appointed the commission, and although he had the right to do so, it was a right which in fairness ought only to have been exercised by him after hearing SARFU. The agreement, however, was never binding on the President, and it was never put to the President in evidence that he had terminated it. It had in fact been terminated more than a month before the

163 [1985] AC 374 (HL) at 401 B-C.

President took his decision, when SARFU withdrew its co-operation and the decision was taken by the Minister to apply for a commission. Whether that is seen as the termination of the working arrangement or as the exercise by the Minister of his right to withdraw from the agreement, and to apply for a commission, is of no moment. The Minister clearly did not have to give SARFU a hearing before taking that decision. At most, SARFU was entitled to notice of the decision and that was given to them approximately four weeks before the application for the commission was lodged with the President.

[215] The withdrawal of co-operation on 29 July 1997 was sudden and complete. The withdrawal was in conflict with the spirit of co-operation which had been demonstrated between April and July 1997. It coincided with requests by auditors for detailed financial and management information from SARFU, as well as Ellis Park Stadium (Pty) Ltd and the Transvaal Rugby Sports Trust. The reason given was the breach of an agreement in April 1997 that allegations would first be given to SARFU. If this were the real reason, it is not clear why co-operation and disclosure of documentation without the allegations having been given had previously been unstintingly provided. In fact, the appellants sought to cross-examine the respondents' witnesses and to lead the evidence of members of the task team to establish that the task team had specifically indicated that it would undertake the investigations only if no conditions were attached to its doing so. The Judge excluded this evidence holding that this was not an issue referred to evidence, that the appellants had denied that there was a binding agreement in February 1997 and had not contended that the agreement was varied in April 1997. We need not consider the correctness of that ruling, as the conduct of the parties between 3 April and 29 July 1997 is sufficient to refute the existence of a legitimate expectation as relied on by the respondents. It must have been overwhelmingly clear to SARFU when it chose to withdraw its co-operation that it would leave the ministry with no alternative but to seek the appointment of a commission of inquiry. In our view, in the light of the events between April and July 1997, SARFU had no legitimate expectation to a hearing by the President before he decided to confer powers under the Commissions Act upon the commission he had appointed to investigate rugby.

[216][Indeed, any such expectation could not in the circumstances of this case have been considered to be legitimate, giving rise to a right to be heard by the President. The question whether an expectation is legitimate and will give rise to the right to a hearing in any particular case depends on whether in the context of that case, procedural fairness requires a decision-making authority to afford a hearing to a particular individual before taking the decision. To ask the question whether there is a legitimate expectation to be heard in any particular case is, in effect, to ask whether the duty to act fairly requires a hearing in that case. The question whether a "legitimate expectation of a hearing" exists is therefore more than a factual question. It is not whether an expectation exists in the mind of a litigant but whether, viewed objectively, such expectation is, in a legal sense, legitimate; that is, whether the duty to act fairly would require a hearing in those circumstances. It is for this reason that the English courts have preferred the concept of "legitimate expectation" to that of "reasonable expectation". In *Council of Civil Service Unions and Others v Minister for the Civil Service*,¹⁶⁴ Lord Diplock explained that "legitimate" should be used rather than "reasonable":

"... in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed,

164 Above n 163 at 408 – 9.

although it might well be entertained by a 'reasonable' man, would not necessarily have such consequences."¹⁶⁵

We therefore conclude that the respondents had no legitimate expectation that the President would afford them a hearing prior to his deciding to confer the Commissions Act powers upon the commission he had appointed.

(p) Prejudice and the duty to act fairly

[217] One last question needs to be considered in relation to the respondents' submission that they had a right to be heard. The Judge placed considerable reliance on the decision of the Supreme Court of Appeal in the *Du Preez* case,¹⁶⁶ holding that the requirements of natural justice oblige a functionary to act fairly whenever a decision which is likely to prejudice another is taken by such a person. Purporting to apply that principle, the Judge held that in the circumstances of the present case, where the decision would cause prejudice to SARFU, fairness demanded that SARFU be heard by the President before he took the decision.

[218] *Du Preez's* case was entirely different from the present one. There the issue was whether persons who were to be implicated as persons who had committed gross human rights violations by the evidence given at the Truth and Reconciliation Commission should be given adequate notice thereof so that they could appear before the commission in order to dispute the evidence and, if necessary, to rebut it immediately.

[219] The requirement of procedural fairness, which is an incident of natural justice, though relevant to hearings before tribunals, is not necessarily relevant to every exercise of public power. *Du Preez's* case is no authority for such a proposition, nor is it authority for the proposition that whenever prejudice may be anticipated, a functionary exercising public power must give a hearing to the person or persons likely to be affected by the decision. What procedural fairness requires depends on the circumstances of each particular case.¹⁶⁷ For instance, in *Du Preez's* case, the calling of the evidence was likely to cause severe prejudice to the persons implicated thereby. It was precisely for that reason that the commission was required to give notice to them. Yet, it could hardly have been suggested that the commission would not have been entitled to take the decision to call the witnesses without first hearing such persons.

[220] The power to appoint a commission of inquiry is a tool to assist the executive in the task of government. The executive is not obliged to accept either the factual findings or the recommendations of a commission. The commission's report may be acted upon or not, as the President and his executive considers fit. Once a decision has been taken to appoint a commission and the subject matter of the commission's investigation constitutes a matter of public concern, it is difficult to contemplate a situation in which any person could say that though the commission has been lawfully appointed, and though it is to deal with matters of public concern, the decision

165 Id. See also the speeches of Lord Fraser of Tullybelton at 401 and Lord Roskill at 415 both preferring the phrase "legitimate expectation" to "reasonable expectation". See also the judgment of Sopinka J in the Canadian Supreme Court, *Old St Boniface Residents Association v Winnipeg (City)* (1990) 75 DLR (4th) 385 at 414d in which he held that "[t]he principle developed in these cases [interpreting the term 'legitimate expectation'] is simply an extension of the rules of natural justice and procedural fairness." See also *Reference re Canada Assistance Plan (BC)* (1991) 83 DLR (4th) 297 at 319 – 320.

166 Above n 84.

167 See, for example, *Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal*, above n 108 para 39 and cases cited there.

to extend the Commissions Act powers to it must be subject to an opportunity to be heard. To impose an obligation to hear affected parties prior to conferring powers under the Commissions Act upon a commission may well unnecessarily hamper the executive in performing the tasks of government. What is more, the vesting of such powers in a commission does not, in itself, infringe rights. Subsequent conduct by the commission is constrained by the duty to act fairly.¹⁶⁸ The rights of witnesses before a commission are therefore protected. A commission can only be vested with powers of subpoena if it is investigating a matter of public concern. Whether it is such an investigation or not is an objective question justiciable before the courts.

[221] In the circumstances of the present case, which have been sufficiently described above, SARFU could have had no legitimate expectation which could have given rise to a right to be heard by the President before he decided to confer the Commissions Act powers upon the commission.

(q) Reasons for the President's decision

[222] The respondents also argued that the reasons given by the President did not justify his decision to make the provisions of the Commissions Act applicable to the commission in breach of section 33 of the Constitution. It is not necessary to decide whether the Constitution obliges the President to give reasons when he exercises the Commissions Act power or whether the Constitution empowers a judge to determine whether the exercise of the power is justifiable in terms of the reasons given. The President chose to give reasons in his letter of 3 October 1997, a significant portion of which is set out in paragraph 12 above. It is clear from the President's reasons that they justify his decision to exercise the powers conferred upon by the Commissions Act. Nothing further need be said, therefore, in relation to this challenge.

D.REMAINING CHALLENGES TO THE VALIDITY OF THE PRESIDENTIAL ACTS

[223] Two challenges raised by the respondents remain to be dealt with: the challenge relating to the question whether the President failed to apply his mind properly to the question whether a commission should be appointed and the challenge relating to the terms of reference. Both will be dealt with in this section of the judgment.

(a) Failure to apply his mind — irrelevant considerations and gross unreasonableness

[224] The respondents argued in the alternative that, if the President had not abdicated his responsibility, he had in any event failed to apply his mind properly to the exercise of his discretion in terms of section 84(2)(f). In this regard, they relied on the well-known dictum of Corbett JA in *Johannesburg Stock Exchange and another v Witwatersrand Nigel Ltd and another*:¹⁶⁹

“Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the ‘behests of the statute and the tenets of natural justice’ (see *National Transport Commission and another v Chetty's Motor Transport (Pty) Ltd* 1972 (3) SA 726 (A) at 735 F – G; *Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd* 1976 (1) SA 887 (A) at 895 B – C; *Theron en andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A) at 14 F – G). Such failure may be shown by

¹⁶⁸ See *Du Preez and Another v Truth and Reconciliation Commission*, above n 84 at 233B–C.

¹⁶⁹ 1988 (3) SA 132 (A) at 152 A – E.

proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated.”

In their written argument, the respondents argued that the President’s oral evidence disclosed that he had failed to apply his mind to the matter and, in particular, that he had taken into account irrelevant considerations and ignored relevant ones. There are two reasons why this contention cannot be accepted. First, the exercise of the President’s constitutional power to appoint a commission of inquiry is not directly governed by the principle in the *Johannesburg Stock Exchange* case. The constraints on that power are determined by the Constitution and have been fully considered in paragraph 148 above. We have held that those constraints were not breached by the President when he appointed the commission in this case.

[225] Secondly, even if the principle in *Johannesburg Stock Exchange* were applicable, it has not been established by the respondents that the President acted arbitrarily, capriciously, in bad faith, in furtherance of an ulterior or improper purpose or that he misconceived the nature of his discretion when he appointed the commission or when he conferred the Commissions Act powers upon it. The requirement of the Commissions Act, that the matter be one of public concern, has been objectively met.

[226] The Judge upheld the respondents’ argument finding that the President’s evidence showed that he had failed to apply his mind to the matter properly, in that he had taken irrelevant factors into account and had failed to consider relevant factors. He also held that the President had acted grossly unreasonably. The basis for the conclusion that the President had not applied his mind properly was the Judge’s finding that the Minister had entered into a contract, alternatively a working arrangement, with SARFU in terms of which SARFU was to be given the complaints against it before it was under any obligation to co-operate; that the President did not take this into account, and that if he had done so, he would not have appointed the commission. The Judge concluded, therefore, that the President’s decision was therefore both wrong and grossly unreasonable. This finding was, as a matter of fact, fundamentally flawed. It was also flawed as a matter of law. The Judge erred in applying these principles to the exercise of the power conferred by section 84(2)(f) of the Constitution. In the latter case, there are no jurisdictional facts on which the exercise of power is dependent. In relation to the Commissions Act powers, we have made it clear that the jurisdictional fact, namely, that the subject matter of the commission’s area of investigation constitutes a matter of public concern, was established. The evidence also makes it clear that the President had specifically considered those jurisdictional facts before exercising the power conferred upon him by the Commissions Act. The respondents’ contention in this regard must accordingly be rejected.

(b) Terms of reference

[227] The commission’s terms of reference, as promulgated, read as follows:

“To inquire into and report upon the financial, administrative and related matters concerning the management of Rugby Union Football in South Africa by the South African Rugby Football Union

(SARFU) and its affiliate unions with a view to establishing whether such matters are being handled in a way that is consonant with –

- (a) the best interests of the public and the rugby supporting public in particular;
- (b) the best interests of the game of rugby football, its development and its promotion amongst all South Africans including those in underprivileged areas; and
- (c) the principles of fair, open, honest and sound management;

and more in particular –

- (i) the governance and functioning of SARFU including SARFU's relationship with the provincial unions; and
- (ii) the handling of or present practices in regard to the development programs in rugby, professionalism in rugby, intervention by administrators in team management and team selection, the adequacy of the process of integration in rugby and its administrative structures, the employment and promotion of personnel, the awarding of contracts especially those contracts relating to media coverage of rugby, payment of commissions and the award of any other benefits or privileges, sponsorships and the ownership and management of stadia or other facilities."

The respondents argued that the terms of reference were so vague that the ambit of the inquiry could not be determined with reasonable certainty. This was a cause of action set out in their founding affidavit and argued in the court below. However, the Judge found it unnecessary to deal specifically with the question of the vagueness of the terms of reference in the light of his other findings.

[228] In this Court, the respondents argued that the impermissible vagueness of the terms of reference had two results: first, that it was impossible to determine whether the commission was charged with the investigation of a matter of public concern and that therefore the vesting of the subpoena powers in terms of the Commissions Act could not be valid; and secondly, that the appointment of the commission itself was null and void. The appellants argued that the terms of reference define the scope of the inquiry with reasonable certainty and that it is clear from them that the commission is engaged upon an investigation of a matter of public concern.

[229] Terms of reference constitute a mandate for the commissioner which he or she uses as a guide to determine the scope of his or her investigation. Consequently, the question to be answered is whether objectively the terms of reference are reasonably comprehensible to the commissioner and affected parties so as to determine the nature and ambit of the commission's mandate with reasonable certainty. If a witness is required to answer a question which is not related to the terms of reference, he or she will not be obliged to

answer such question.¹⁷⁰ In determining, in a criminal case, whether a witness may be convicted of refusing to answer questions in terms of the criminal offence created by sections 3 and 6 of the Commissions Act, courts will take a narrow view of the terms of reference.¹⁷¹

[230] There can be no doubt in this case that the terms of reference do determine the ambit of the commission's task sufficiently. The terms of reference first identify the overall subject matter to be investigated by the commission. That subject matter is stated to be "the financial, administrative and related matters concerning the management of Rugby Union Football in South Africa" by SARFU and its affiliates. Thereafter, paragraphs (i) and (ii) of the terms of reference identify certain issues specifically for investigation. Those issues are: (a) the governance and functioning of SARFU including its relationship with the provincial unions; (b) development programmes in rugby; (c) professionalism in rugby; (d) intervention by administrators in team management and team selection; (e) the adequacy of the process of integration in rugby; (f) the employment and promotion of personnel; (g) the awarding of contracts, especially those contracts relating to media coverage of rugby; (h) the payment of commissions and the award of any other benefits, privileges or sponsorships; and (i) the ownership and management of stadiums or other facilities. The scope of the inquiry is clearly broad, but it is not indeterminate.

[231] Moreover, the terms of reference require that the investigation generally, and the specific issues in particular, are to be investigated for the purpose of establishing whether such matters are being handled in a way that is consonant with: (a) the best interests of the public and the rugby-supporting public in particular; (b) the best interests of the game of rugby football, its development and its promotion among all South Africans including those in under-privileged areas; and (c) the principles of fair, open, honest and sound management. No investigation of the subject areas identified in the terms of reference may take place unless related to one of these three purposes. These purposes are clearly matters of public concern. It is clear therefore that the terms of reference permit investigation into the affairs of SARFU and its affiliates only to the extent that the investigation is connected with a matter of public concern and we cannot accept the respondents' contention to the contrary. Nor can we accept that the terms of reference are vague and incapable of determining the proper ambit of the commission's investigation.

[232] The ultimate conclusion which we unanimously reach is that there is no basis in fact or in law on which the judgment and the order of the High Court can be sustained. It remains to deal only with certain interlocutory and procedural issues, as well as the question of costs.

E. REMAINING PROCEDURAL AND INTERLOCUTORY MATTERS AND COSTS

(a) Misjoinder

[233] As explained above, the appellants argued that the joinder of the Minister and the DG was incorrect. Because of the introduction of the Minister and the DG to the ranks of the parties, the real issues between the correct parties (as crystallised by the founding and answering affidavits) became blurred. On the face of it, there was no basis in any of the seven causes of action advanced to join the Minister and the DG as parties to the

¹⁷⁰ See *S v Mulder*, above n 113 at 122 C – D.

¹⁷¹ *Id* at 122D.

application. No substantive relief was sought against them. However involved they may have been in the proceedings and however much was at stake for them politically or administratively, they did not have an interest that in law could justify their joinder. The case cited by the Judge,¹⁷² *Amalgamated Engineering Union v Minister of Labour*,¹⁷³ as authority for the joinder of the additional two parties, does not support his conclusion. That case requires joinder where the outcome of a case may affect any direct and substantial interest of that person. In this case, no direct and substantial interest of the Minister or the DG could have been affected by its outcome. The case for setting aside the decision to appoint the commission (and to give it the powers afforded by the Commissions Act) was rightly directed at the President alone; and it matters not whether he had acted as head of state or as the head of the executive branch of government in making the impugned decision. In either instance he was the sole repository of the power alleged to have been unlawfully exercised and any order made in relation to his exercise of such power would affect him alone. Neither the Minister nor the DG had any “legal interest in the subject-matter of the action . . . which could be prejudicially affected by the judgment”.¹⁷⁴ Such interest as they might have had was indirect and of a political, and not legal, nature. The issues became blurred, however, with the addition of parties who did not belong there. The result was that extra-curial statements by the DG and the Minister were introduced without a proper foundation having been laid for their admissibility against the President. These statements were relied on, first, in casting doubt on the President’s evidence on affidavit, and then in cross-examining him. They were inadmissible against him and, were it not for the misjoinder, would probably not have formed part of the papers. Those statements appear to have been an important part of the Judge’s reasoning in deciding to refer the matter to evidence. In our view, therefore, the appellants were correct in arguing that there had been a misjoinder and the Judge was incorrect in dismissing that argument. However, in the light of the decision to which we have come in relation to the appeal, nothing now turns on this misdirection.

(b) Referral to oral evidence

[234] We have held, with due regard to all the evidence adduced pursuant to the order referring the matter to oral evidence, that the respondents have not made out a case for any of the relief which they seek.¹⁷⁵ It is therefore not strictly necessary to consider whether the Judge was correct in making the referral order.¹⁷⁶ The appellants, however, specifically challenged the correctness of that order and that of certain interlocutory orders carrying awards of costs in favour of the respondents. We are of the view that determining whether the order referring the matter to oral evidence was correctly made would assist in deciding whether the disputed interlocutory costs orders should stand. There is another aspect of the order of the Judge that merits careful consideration at this stage, namely, the order compelling the President to subject himself to cross-examination at the hearing of the oral evidence. Such an order is, to say the least, unusual and has far-reaching implications, particularly because of its impact on the question of separation of powers and the comity between different arms of the state. The circumstances which must be taken into account before an order of this kind can be made will therefore be briefly considered later.

[235] It is trite that an application will be referred for oral evidence only if there is a genuine dispute of fact, the resolution of which is material to the determination of the case. The terms of the referral order in this case required evidence on two issues. The first related to a term of the alleged agreement of 21 February 1997; the second to the “abdication of responsibility” issue. Each of these will be dealt with in turn.

¹⁷² At p 1155 of the typescript judgment.

¹⁷³ 1949 (3) SA 637 (A) at 659.

¹⁷⁴ See *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 167 H.

¹⁷⁵ At para 232 above.

¹⁷⁶ The relevant terms of that order are set out in para 20 above.

[236] The first part of the order related in particular to whether the terms of the agreement of 21 February 1997 required SARFU to be provided with the allegations against it before it was expected to co-operate. As stated above, the question of the legal status of the agreement of 21 February 1997 was not referred to oral evidence.¹⁷⁷ There was a dispute on the papers as to precisely what the terms of the arrangement reached on 21 February 1997 were. The respondents averred that it was agreed that all the allegations against SARFU were to be furnished to it before it would be obliged to co-operate; the affidavits of the appellants were to the effect that co-operation by SARFU was not conditional upon the allegations being provided beforehand, but that the allegations were to be furnished “in due course”. The respondents sought to establish that all the allegations against SARFU were to be furnished before SARFU was obliged to co-operate, that all the allegations were not provided, that SARFU withheld its co-operation on this account and that the existence of the arrangement or agreement gave rise to a legitimate expectation on the part of SARFU that it would be given a hearing by the President before the latter appointed any commission of inquiry to investigate the affairs of SARFU.¹⁷⁸ As the Judge saw it :

“ . . . the dispute concerning the terms of agreement of 21 February 1997 was central to the dispute between the parties and the matter could not with justice and fairness to the parties be properly decided without the court having the benefit of hearing and seeing the deponents to the affidavits in the witness-box.”¹⁷⁹

[237] We have held that: (a) the agreement of 21 February 1997 is, at best, only peripherally relevant to the material factual question as to whether SARFU had a legitimate expectation of procedural fairness which gave rise to a presidential duty to afford it an opportunity to be heard; (b) a decision on the precise terms of the working arrangement of 21 February 1997 is unnecessary; and (c) it is the events of the seven months between February and September 1997 and particularly those immediately preceding the appointment of the commission which are crucial.¹⁸⁰ We have furthermore concluded that, in the light of the events between April and July 1997, SARFU did not have any legitimate expectation which, under the circumstances, would oblige the President, as a matter of procedural fairness, to afford it a hearing before he decided to make the provisions of the Commissions Act applicable to the commission he had appointed.¹⁸¹ It follows that the Judge erred in focusing solely on the meeting of 21 February 1997, and that it was this incorrect focus which resulted in this issue being referred to oral evidence. In our view, there was no basis for referring this issue to evidence as the events of the period April to September 1997 were set out in considerable detail in the affidavits and were not materially in dispute.

[238] As far as the “abdication of responsibility” issue is concerned, the matter was referred to oral evidence on the issues “relating to whether or not” the President had made the remarks to the Minister attributed to him in the press statement of 7 August 1997 that “[a] Commission is yours if, in your best judgement it is opportune”; whether or not the Minister had made the remarks attributed to him in an article in the *Sunday Times* of 17 August 1997; whether or not such remarks by the Minister correctly reflected the discussions between himself and the President; and whether or not the President had rubber-stamped the Minister’s decision and had failed

177 See para 189 above.

178 The contentions of the parties are summarized in paras 201 – 202 above.

179 At p 42 of the typescript judgment.

180 See para 204 above.

181 See paras 215 – 216 above.

to properly consider the matter himself. Before the matter was referred to oral evidence, the statement attributed to the President in the press statement of 7 August 1997, together with certain alleged statements of the Minister reported in the *Sunday Times* and *Rapport* of 17 August 1997, were the only foundation for the respondents' contention that the President had not taken the decision to appoint the commission but that it had been taken by the Minister. In their affidavits, the President and the Minister denied that the President had made the statement attributed to him in the press statement of 7 August 1997, and the Minister denied that he had appointed the commission (and emphasised that he had no power to do so). The President stated that it was he who had taken the decision to appoint the commission for the reasons contained in his letter to the respondents dated 3 October 1997.¹⁸² It was in these circumstances that the Judge, relying on cases such as *Moosa Brothers and Sons (Pty) Ltd v Rajah*¹⁸³ and *Khumalo v Director-General of Co-operation and Development and Others*¹⁸⁴, said:

“It appeared to me that on a conspectus of all the papers before me at that stage [at which the matter was referred for the hearing of oral evidence] there were reasonable grounds for doubting the correctness of the respondents' averments in their further supplementary affidavits.”¹⁸⁵

[239] It is difficult to see how the accuracy or veracity of the press statement issued by the department press officer on 7 August 1997 could have formed the basis for a referral to oral evidence. On the application papers, the only issue between the President and the respondents in relation to the abdication of responsibility issue was whether the President himself had decided to appoint the commission on 22 September 1997. The judgment was built on the hypothesis that the statement in question was made by the President to the Minister on 5 August 1997, and on the finding that if this was said, it amounted to an abdication of responsibility which was irrevocable and rendered everything that happened thereafter unlawful. We have held that even if it is assumed that the press statement correctly reflected what was said by the President to the Minister on 5 August 1997, this would not constitute an abdication by the President of his constitutional power to appoint a commission of inquiry¹⁸⁶ nor would it constitute an irrevocable abdication of his responsibility.¹⁸⁷ It follows that the statement attributed to the President in the departmental press statement, even if correct, could cast no doubt on the President's statements in his affidavits to the effect that he alone had taken the decision to appoint the commission after a careful and thorough consideration of the matter during September 1997. It seems clear that the decision to refer the matter for the hearing of oral evidence on this issue was profoundly affected by the Judge's incorrect conclusion that the contested statement by the President to the Minister amounted to an irrevocable abdication of responsibility by the President. The order for referral in this regard, based as it was on this incorrect conclusion, was itself clearly wrong.

(c) Order compelling the President to give evidence

[240] This conclusion does not, however, end the enquiry in relation to the correctness of the order of referral made by the Judge. It was a term of the Judge's order that the President himself give oral evidence. There was no special order concerning the circumstances in, and the place at which, the President was to testify. The effect of the order of the Judge was therefore that the President was ordered to (and did) testify in open court. We

¹⁸² An excerpt from this letter is contained in para 12 above.

¹⁸³ 1975 (4) SA 87 (D) at 93 E - H.

¹⁸⁴ 1991 (1) SA 158 (A) at 167 G - J.

¹⁸⁵ At p 122 of the typescript judgment.

¹⁸⁶ See paras 42 - 43 above.

¹⁸⁷ See paras 44 - 45 above.

have already held that the circumstances of this case did not warrant any issue being referred to evidence. The question that remains to be considered is whether the order was correct in so far as it required the President to give evidence in a civil matter in relation to the performance of his official duties. This is a question of considerable constitutional significance going to the heart of the separation of powers under our Constitution. It is also relevant to another aspect of this appeal concerning the correctness of the Judge's dismissal of appellants' application for an order revoking the order in terms of which the President was compelled to testify.

[241] The appellants, relying on the law of several foreign jurisdictions, submitted that the order requiring the President to testify was wrong in law. They submitted that the doctrine of the separation of powers requires that the President not be treated as if he or she were any other witness. They pointed to the important constitutional role of the President as head of state and head of the national executive and submitted that the separation of powers required the courts to be astute to protect the dignity and status of the office of the President under the Constitution as well as the efficiency of that office.

[242] A review of the law of foreign jurisdictions fails to reveal a case in which a head of state has been compelled to give oral evidence before a court in relation to the performance of official duties.¹⁸⁸ Even where a head of state may be called as a witness, special arrangements are often provided for the way in which the evidence is given.¹⁸⁹ There is no doubt that courts are obliged to ensure that the status, dignity and efficiency of the office of the President is protected. At the same time, however, the administration of justice cannot and should not be impeded by a court's desire to ensure that the dignity of the President is safeguarded.

[243] We are of the view that there are two aspects of the public interest which might conflict in cases where a decision must be made as to whether the President ought to be ordered to give evidence. On the one hand, there is the public interest in ensuring that the dignity and status of the President is preserved and protected, that the efficiency of the executive is not impeded and that a robust and open discussion take place unhindered at meetings of the Cabinet when sensitive and important matters of policy are discussed. Careful consideration must therefore be given to a decision compelling the President to give evidence and such an order should not be made unless the interests of justice clearly demand that this be done. The judiciary must exercise appropriate restraint in such cases, sensitive to the status of the head of state and the integrity of the executive arm of government. On the other hand, there is the equally important need to ensure that courts are not impeded in the administration of justice.

[244] The Judge says that he earnestly considered whether the President ought to be ordered to subject himself to cross-examination in the light of his constitutional status. But nowhere in the judgment is there any

188 For jurisprudence, see *US v Burr* 25 Fed Cas 30 (1807); *US v Nixon* 418 US 683 (1974); *Clinton v Jones* 137 L Ed 2d 945 (US SC); *Sankey v Whitlam and Others* (1979) 142 CLR 1 (HCA). For academic consideration, see for example, the following: de Smith, Woolf and Jowell *Judicial Review of Administrative Action* 5 ed (Sweet & Maxwell, London 1995) at 205; Rotunda and Nowak *Treatise on Constitutional Law* 2 ed Vol 1 (West Publishing Co, St. Paul 1992) at 571 – 582; Tribe *American Constitutional Law* 2 ed (Foundation Press Inc., New York 1988) at 275 – 285; Freund "The Supreme Court 1973 Term Foreword: On Presidential Privilege" 88 (1974) *Harvard Law Review* 13 at 31. See also the following note.

189 In Germany, for example, in terms of the Codes regulating Civil Procedure and Criminal Procedure the state president need not attend court in person; instead he gives his testimony in his residence (*Zivilprozeßordnung* sections 219(2) and 375(2); *Strafprozeßordnung* section 49). He may also refuse to give evidence if it would be detrimental to the well-being of the Federal Republic or a German state (*Zivilprozeßordnung* section 376(4); *Strafprozeßordnung* section 54(3)). Some academic writers say this discretion is not justiciable (see, for example, Hartmann in Baumbach, Lauterbach, Albers and Hartmann *Zivilprozeßordnung* (Beck, München 1997) 55 Aufl section 376 at para 11; Kleinknecht, Meyer-Goßner *Strafprozeßordnung* (Beck, München, 1995) 42 Aufl section 54 at para 31).

indication of the factors which were taken into account by him in giving the matter that consideration. Moreover, there is nothing on the papers or in the evidence from which we can conclude that the administration of justice would have been injured in any way if the President had not been ordered to submit himself to cross-examination but, instead, the decision to do so or not had been left to him. In the circumstances, we conclude that the Judge erred in making that order.

[245] Even when exceptional circumstances require the President to give evidence, the special dignity and status of the President together with his busy schedule and the importance of his work must be taken into account. In a private suit involving the President of the United States of America, the Supreme Court held in *Clinton v Jones*:¹⁹⁰

“We assume that the testimony of the President, both for discovery and for use at trial, may be taken at the White House at a time that will accommodate his busy schedule, and that, if a trial is held, there would be no necessity for the President to attend in person, though he could elect to do so.”

Later, Stevens J said :

“Although we have rejected the argument that the potential burdens on the President violate separation of powers principles, those burdens are appropriate matters for the District Court to evaluate in its management of the case. The high respect that is owed to the office of the Chief Executive, though not justifying a rule of categorical immunity, is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery.”¹⁹¹

We are of the view that in all cases in which a President is called upon to testify, respect for the office, the need to preserve the dignity and status of that office and an understanding of the implications of his busy schedule must be sensitively and carefully considered.

(d) Miscellaneous interlocutory orders

[246] The appellants appeal against orders of costs made against them consequent upon their lack of success at the end of each of four interlocutory applications which were made during the hearing of oral evidence. The first was an application for the withdrawal of the dispute relating to the terms of the agreement of 21 February 1997 from the referral to evidence; the second was an application for revocation of the order that the President appear personally to be examined and cross-examined; the third was an application for production of certain documents in respect of which the applicants had claimed privilege;¹⁹² and the fourth was an application, after all the oral evidence had been led, seeking leave to lead the evidence of an additional witness, a journalist, Mr de Wet. The first three applications were inextricably linked to the order of referral which we have held was wrongly made. In the absence of the incorrect referral order, none of the applications would have been made and none of the costs orders would have arisen. The fact that the orders arose from the incorrect referral order may be sufficient on its own to justify setting aside the orders. Further consideration of the three interlocutory

¹⁹⁰ Above n 188 at 959.

¹⁹¹ *Id* at 968-969.

¹⁹² The judgment on this application is reported as *South African Rugby Football Union and Others v President of the Republic of South Africa and Others* 1998 (4) SA 296 (T).

applications, however, provides additional reasons for setting aside the orders in the first three interlocutory applications. We will, therefore, deal briefly with each of the interlocutory applications.

[247][In order to determine which party should bear the costs for these applications, the approach in *Fripp v Gibbon and Co*¹⁹³ is helpful. In that case, De Villiers JP held the following:

“ I agree that as a rule it is fair and just that the costs should follow the event, whether of claim or counterclaim. But I cannot agree with the view that the unsuccessful party should bear the burden of all the costs simply on the ground that in the final result he is the unsuccessful party. To me it seems more in accordance with the principles of equity and justice that costs incurred in the course of litigation which judged by the event or events, prove to have been unnecessarily or ineffectively incurred should, as a rule, be borne by the party responsible for such costs.”

The question to be considered in relation to each interlocutory costs order, therefore, is whether the interlocutory application which gave rise to the costs order had been successful or effective.

[248] The first two costs orders are concerned with interlocutory applications concerning the referral to evidence. It is a well-established principle in our law that a referral to evidence constitutes a ruling, not an order, by a judge.¹⁹⁴ As such, it is open to the court to withdraw that ruling and order that it is unnecessary to hear the oral evidence.¹⁹⁵ We have held that the referral to evidence was clearly wrong and constituted a misdirection by the Judge. The appellants were, therefore, entitled to make an interlocutory application to the Judge seeking a reconsideration of the referral to evidence. Moreover, they were entitled to seek the revocation of the order requiring the President to give evidence, particularly given the extraordinary and sensitive character of such an order.¹⁹⁶ Such interlocutory applications, therefore, though unsuccessful in the court below should in fact have succeeded for the reasons we have given earlier in this judgment. In the circumstances, therefore, the applications were in fact successful and effective. They were properly launched and should have succeeded. In the circumstances, it is just and equitable that the costs orders made against the appellant should be set aside and that the respondents, who should not have opposed these applications in the High Court, be ordered to pay the costs.

[249] The third application relates to the production of certain documents in respect of which the appellants claimed attorney and client privilege. The respondents placed the claim in issue and brought an application for the Judge himself to inspect them in order to rule on it. The application was opposed by the applicants. The Judge ruled in favour of the respondents and the documents were produced for his inspection. Having read them, the Judge ruled that the privilege had indeed been properly claimed. However, he nevertheless ordered the appellants to pay the costs of the interlocutory application. The appellants challenged the costs order made against them for opposing the application for the production of documents. In our view, they should succeed. The inspection of the documents by the Judge formed part of the application in which the appellants' claim of privilege was challenged. It was pursuant thereto that the Judge decided himself to inspect the documents.¹⁹⁷

193 1913 AD 354 at 361.

194 *Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (A) at 262 J – 263 D and cases therein cited.

195 *Id* at 263 G – H.

196 See paras 240 – 245 above.

197 That the Judge had such power appears from the decision of the Full Bench of the Transvaal Provincial Division in *Lenz Township (Pty) Ltd v Munnick and Others* 1959 (4) SA 567 (T).

His decision that the documents were privileged justified the appellants' opposition to the respondents' claim for their production. The Judge erred in separating the appellants' objection to produce the documents for his inspection from the application in respect of which it formed a part. It is just and equitable that a litigant who has opposed an application to produce documents for inspection on a ground that subsequently turns out to be correct should not be required to pay the costs of the interlocutory application which, in the final result, has been successfully opposed.¹⁹⁸ For the above reasons, all three of these costs orders must be set aside and replaced with an order requiring the respondents to pay those costs.

[250] The fourth interlocutory application was made after all the oral evidence had been led and sought leave to call an additional witness, a journalist, Mr de Wet. It falls to be dealt with on a different footing. The appellants sought to call Mr de Wet in order to elicit evidence that Dr Luyt had told Mr de Wet that he (Dr Luyt) did not wish to impugn the integrity of the President and had not wanted him to be cross-examined. The argument was that the statement made by Dr Luyt to Mr de Wet would found a special order of costs against Dr Luyt. We fail to see how this could have been so. The cross-examination of the President had been completed by the time that the application was made. The order that the President submit himself for cross-examination had been made at the instance of the respondents' counsel and Dr Luyt must have been aware of this. As we see it, the most favourable inference for the appellants that could properly be drawn from the circumstance that the statement was made by Dr Luyt to Mr de Wet (if indeed such a statement was made) would be that Dr Luyt had acquiesced in the cross-examination of the President, but had said to a courtroom newspaper reporter that he did not wish the President to be cross-examined. This could not have been the basis for any special costs award. In the circumstances, the refusal of this application and the consequent order for costs were correct and should stand.

(e) Costs of appeal

[251] Mr Trengove asked for the costs of the appeal to be awarded to the appellants on the attorney and client scale. Three grounds were relied upon for such an order. He referred first to the recusal application launched by Dr Luyt shortly before the appeal was due to be heard. That application was unprecedented. It attacked the integrity of every member of this Court, contrasting their integrity and courage (perceived to be flawed) with that of the Judge (who was said to have shown remarkable courage in giving the judgment that he did). The implication of these allegations is referred to by this Court in its judgment on the recusal application. It was:

“... that the ten members of this Court had created the impression that they had already decided to uphold the appeal of the President at a time when the record had not been filed and before argument on behalf of any of the parties had been heard. Having so decided, the further consequence of this impression was that they made interlocutory rulings aimed at upholding the President's appeal. The suggestion that a court, without having seen the record or heard argument, would engineer its interlocutory rulings to favour a decision it had already taken, is extraordinary and contemptuous.”¹⁹⁹

[252] Secondly, counsel for the respondents during their argument on appeal contended, notwithstanding their attitude in the High Court that the honesty of the President was not being challenged, that the evidence of the President in relation to the events of 12 to 26 September 1997 was a fabrication. We have dealt with this

¹⁹⁸ A similar order was upheld on appeal in the *Lenz Township* case, above n 197.

¹⁹⁹ Above n 6 para 54.

fully in our judgment.²⁰⁰ The implication of this argument is that the President deliberately attempted to mislead the Court in two respects: first, by pretending to have applied his mind to the question whether to appoint the commission when in fact he had not done so; and secondly, by affirming in his evidence the reasons for the decision in the letter of 3 October 1997, when in fact he had not given consideration to the matter himself.

[253] Thirdly, on the fourth day of the appeal, when senior counsel for the respondents was being questioned about the propriety of raising such a contention for which there was no foundation in the evidence, his brief was terminated, and he and the respondents' other legal representatives withdrew from the appeal. No explanation was offered for this.

[254] As could be expected, the attack on the integrity of this Court and the abrupt termination of counsel's mandate attracted considerable media attention. Mr Trengove contended that these factors, taken together, suggest that there was a calculated attempt on the part of Dr Luyt to question the independence and integrity of this Court, and to create an impression that the judgment of the High Court was indeed correct, so that if this appeal succeeded, the implied reason for that success would not be that the judgment of the High Court was wrong, but that this Court was biased against the respondents.

[255] There is much to be said in favour of this contention. The tactics adopted by Dr Luyt bear the hallmark of spin-doctoring by a respondent who, knowing that the appeal might succeed, lays the ground to discredit the Court with the object of undermining a decision which might go against him. The appellants might succeed, but it would be a pyrrhic victory, secured by a dishonest President from a compliant Court.

[256] Although there is substance in Mr Trengove's argument, we have come to the conclusion that an order for attorney and client costs is not warranted in the particular circumstances of this case. The respondents were defending a judgment they obtained in the High Court which included adverse findings of credibility made against the President. Although we have held that the judgment was wrong, a litigant ought not to be penalised for seeking to defend a judgment. It is true that scandalous allegations were made in the recusal application. But those allegations were made against the members of this Court, and the injury done was to the Court and not to the appellants. If we were satisfied that there was indeed a calculated policy to prosecute the appeal in a manner designed to discredit the judgment of this Court and to undermine a decision it might give in favour of the appellants, we would have ordered costs to be paid on the attorney and client scale. We have concluded, however, though not without some hesitation, that there is insufficient evidence to permit us to draw such an inference with the certainty required for the making of such an order.

[257] The appellants, having lost the case in the High Court, were obliged to note and prosecute an appeal. To do that they had to prepare the record and written argument and address oral argument to this Court in support of their submissions that the judgment was wrong. These costs had to be incurred irrespective of the manner in which the appeal was conducted by the respondents. In the circumstances we have come to the conclusion that this is not a case in which an order for attorney and client costs should be made.

[258] In our judgment on the recusal application we referred to an application made by the respondents for a postponement of the hearing of the appeal which had originally been set down for hearing in March 1999.

200 At paras 48 – 125 above.

When the postponement was granted we reserved the question of the wasted costs and made an order that the respondents' attorneys would be required to show cause why the wasted costs should not be paid by them *de bonis propriis*. We have heard no argument on this issue. We were told by Mr Trengove that the wasted costs are minimal. In the circumstances no good purpose would be served by calling for argument on the question of the reserved costs. The wasted costs of the postponement (if any) should be treated as part of the costs of the appeal to which the appellants, as the successful litigants, are entitled.

(f) Costs of the recusal application

[259] When we made the order dismissing the application for recusal we reserved the question of costs. Although scandalous allegations were made in that application, we have decided, for the reasons given in paragraphs 256 and 257 above, not to order that the costs of the application be paid on the scale as between attorney and client. Dr Luyt must, however, pay all the costs occasioned by that application, including the costs of counsel for the appellants who were obliged to be in court whilst the application was being heard.

F. ORDER

[260] The following order is made:

1. The appeal is upheld.
2. The order of the High Court made on 17 April 1998 as well as the costs orders made in the interlocutory applications, other than the costs order made in respect of the application to call Mr de Wet as a witness, are set aside and for the orders so set aside the following order is substituted:
 - (a) The application is dismissed with costs, such costs to include the costs of two counsel;
 - (b) The costs order referred to in (a) above is to include the costs orders of the interlocutory applications, other than the application to call Mr de Wet as a witness.
3. The costs of the application for recusal are to be paid by the fourth respondent, such costs to include the costs of three counsel.
4. The costs of the appeal are to be paid by the second and fourth respondents jointly and severally and are to include the costs of three counsel.

Chaskalson P, Langa DP, Ackermann J, Goldstone J, Kriegler J, Madala J, Mokgoro J, O'Regan J, Sachs J and Yacoob J.

For the appellants:	W Trengove SC, A Bham and M Chaskalson instructed by the State Attorney, Pretoria.

For the respondents:	MC Maritz SC, M Helberg SC and JG Cilliers instructed by Rooth and Wessels.

For the appellants:	W Trengove SC, A Bham and M Chaskalson instructed by the State Attorney, Pretoria.

For the respondents:	MC Maritz SC, M Helberg SC and JG Cilliers instructed by Rooth and Wessels.

ARBITRATION ACT NO 42 of 1965

Last checked: 28 March 2025. *]

*The last time this Act was reviewed for updates.

ARBITRATION ACT 42 OF 1965

[Updated to 11 October 2024. **]

**Date of last changes incorporated into this Act.

*(English text signed by the State President.)
(Assented to 5th April, 1965.)*

Published: G. 1084

Commencement: 14 April 1965

Amended

Act 49 of 1996 (GoN 1601, G. 17477, with effect from 4 October 1996),

Act 18 of 1996 (GoN 632, G. 17123, with effect from 1 April 1997 [Proc. R23, G. 17849]),

Act 12 of 2004 (GoN 559, G. 26311, with effect from 27 April 2004).

[NOTE: The administration, powers and functions of this Act are transferred to the **Minister of Justice and Constitutional Development**, effective immediately before the President assumed office on 19 June 2024 – Proc 199 / G. 51368 / 11 October 2024.]

ACT

To provide for the settlement of disputes by arbitration tribunals in terms of written arbitration agreements and for the enforcement of the awards of such arbitration tribunals.

BE IT ENACTED by the State President, the Senate and the House of Assembly of the Republic of South Africa, as follows.

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DEFINITIONS

1. Definitions

In this Act, unless the context otherwise indicates—

“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;

“arbitration proceedings” means 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;

“arbitration tribunal” means the arbitrator, arbitrators or umpire acting as such under an arbitration agreement;

“award” includes an interim award;

“court” means any court of a provincial or local division of the Supreme Court of South Africa having jurisdiction;

“party”, in relation to an arbitration agreement or a reference, means a party to the agreement or reference, a successor in title or assign of such a party and a representative recognised by law of such a party, successor in title or assign;

“territory” ...

[“territory” rep by s 1 (Sch item 1) of Act 49 of 1996.]

MATTERS NOT SUBJECT TO ARBITRATION

2. Matters not subject to arbitration

A reference to arbitration shall not be permissible in respect of—

- (a) any matrimonial cause or any matter incidental to any such cause; or
- (b) any matter relating to status.

EFFECT OF ARBITRATION AGREEMENTS

3. Binding effect on arbitration agreement and power of court in relation thereto

- (1) Unless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto.
- (2) The court may at any time on the application of any party to an arbitration agreement, on good cause shown—
 - (a) set aside the arbitration agreement; or
 - (b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or
 - (c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred.

4. Death or removal from office of party to an arbitration agreement

- (1) Unless the agreement otherwise provides, an arbitration agreement or any appointment of an arbitrator or umpire thereunder shall not be terminated by the death of any party thereto.
- (2) If any party to a reference under an arbitration agreement dies or vacates or is removed from his office after any dispute has been referred to arbitration, all steps and proceedings in connection with the reference shall be stayed, subject to any order that the court may make, until an executor or other proper representative has been appointed in the estate of the party who has died or, as the case may be, until an executor, administrator, curator, trustee, liquidator or judicial manager has, where necessary, been appointed in the place of an executor, administrator, curator, trustee, liquidator or judicial manager who in his capacity as such was a party to the reference and who has died or has vacated or has been removed from his office.
- (3) For the purposes of subsection (2) a dispute shall be deemed to have been referred to arbitration if any party to the dispute has served on the other party or parties thereto a written notice requiring him or them to appoint or to agree to the appointment of an arbitrator or, where the arbitrator is named or designated in the arbitration agreement, requiring the dispute to be referred to the arbitrator so named or designated.
- (4) Any period of time fixed by or under this Act which is interrupted by any stay resulting from the operation of subsection (2), shall be extended by a period equal to the period of such interruption.
- (5) Nothing in this section contained shall affect the operation of any law or rule of law by virtue of which any right of action is extinguished by the death of any person.

5. Insolvency or winding-up of a party to an arbitration agreement

- (1) Unless the agreement otherwise provides, an arbitration agreement or any appointment of an arbitrator or umpire thereunder shall not be terminated by the sequestration of the estate of any party thereto or, if such party be a corporate body, by the winding-up of the corporate body or the placing of the corporate body under judicial management.
- (2) If the estate of any party to an arbitration agreement is sequestrated or if, in the case of a corporate body which is a party to such an agreement, a petition for the winding-up of the corporate body or for placing the corporate body under judicial management is presented or an order for winding-up the corporate body or for placing the corporate body under judicial management is made, the provisions of any law

relating to the sequestration of insolvent estates or, as the case may be, any law relating to the winding-up or judicial management of the corporate body concerned, shall apply in the same manner as if a reference of a dispute to arbitration under the arbitration agreement were an action or proceeding or civil proceedings or legal proceedings or civil legal proceedings within the meaning of any such law.

- (3) For the purposes of the application of the laws referred to in subsection (2)—
- (a) a reference of a dispute to arbitration shall be deemed to be an action or proceeding or civil proceedings or legal proceedings or civil legal proceedings by or against any person or corporate body instituted or pending in any court of law having jurisdiction if any party to the dispute has served on the other party or parties thereto a written notice requiring him or them to appoint or to agree to the appointment of an arbitrator, or, where the arbitrator is named or designated in the arbitration agreement, requiring the dispute to be referred to the arbitrator so named or designated; and.
 - (b) a reference of a dispute to arbitration shall be deemed to be an action or proceeding which is being or is about to be instituted against a corporate body, if any party to the dispute is taking steps to serve or is about to serve on the corporate body a written notice such as is referred to in paragraph (a).
- (4) Any period of time fixed by or under this Act which is interrupted by any stay, suspension or restraint resulting from the application of any law referred to in subsection (2), shall be extended by a period equal to the period of such interruption.

6. Stay of legal proceedings where there is an arbitration agreement

- (1) If any party to an arbitration agreement commences any legal proceedings in any court (including any inferior court) against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings.
- (2) If on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings subject to such terms and conditions as it may consider just.

7. Power of court to order that dispute be determined by interpleader proceedings or that interpleader issues be determined by arbitration

- (1) The court may order that the dispute between parties to an arbitration agreement be determined by way of interpleader proceedings for the relief of any person desiring so to interplead.
- (2) Where in any interpleader proceedings it is proved that the claims in question are matters to which an arbitration agreement, to which the claimants are parties, relates, the court may order that the issues between the claimants be determined in accordance with the arbitration agreement.

8. 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.

ARBITRATORS AND UMPIRES

9. Reference to a single arbitrator

Unless a contrary intention is expressed in the arbitration agreement, the reference shall be to a single arbitrator.

10. Power of parties to appoint arbitrators to fill vacancies

- (1) Where an appointed arbitrator refuses to act or is or becomes incapable of acting or dies or is removed from office or his appointment is terminated, or is set aside, and a contrary intention is not expressed in the arbitration agreement, the party or parties who appointed him may appoint another arbitrator in his place.
- (2) Where an arbitration agreement provides that the reference shall be to two or more arbitrators, one to be appointed by each party, and any party fails to appoint an arbitrator in terms of the agreement, or by way of substitution in the circumstances described in subsection (1), then, unless the arbitration agreement expresses a contrary intention, the other party, having appointed an arbitrator, or the other parties each having appointed an arbitrator, may serve the party in default with a written notice requiring him to appoint an arbitrator within seven days after receipt of the notice.
- (3) If the party in default does not appoint an arbitrator within the period referred to in the notice served upon him in terms of subsection (2), the other party who has appointed an arbitrator or the other parties who have each appointed an arbitrator may appoint that arbitrator or those arbitrators, as the case may be, to act as sole arbitrator or arbitrators in the reference, and his or their award shall be binding on all parties as if he or they had been appointed by consent of all parties: Provided that the court may, on the application of the party in default, on good cause shown, set aside such appointment and grant the party in default an extension of time to appoint an arbitrator.

11. Power of parties or arbitrators to appoint umpire and to fill vacancy

- (1) If an arbitration agreement provides for a reference—
 - (a) to an even number of arbitrators, then, unless a contrary intention is expressed therein, the arbitrators may at any time appoint an umpire; or
 - (b) to three arbitrators, of whom one is to be appointed by the other two, such agreement shall, unless a contrary intention is expressed therein, be construed as providing for the appointment of an umpire by the other two arbitrators immediately after they are themselves appointed.
- (2) Where an appointed umpire refuses to act or is or becomes incapable of acting or dies or is removed from office or his appointment is terminated, or is set aside, and a contrary intention is not expressed in the arbitration agreement, the parties or arbitrators who appointed him may appoint another umpire in his place.

12. Power of court to appoint an arbitrator or umpire

(1) Where—

- (a) in terms of an arbitration agreement or this Act the reference shall be to a single arbitrator and all the parties to the reference do not, after a dispute has arisen, agree in the appointment of an arbitrator; or
- (b) an arbitration agreement provides that the reference shall be to an even number of arbitrators and the parties to the reference or the arbitrators are at liberty to appoint an umpire and do not appoint him in any case where such appointment is necessary for the decision of the matters in dispute or the due conduct of the arbitration, or where the parties or such arbitrators are required to appoint an umpire and do not appoint him; or
- (c) where an arbitration agreement provides that the reference shall be to two or more arbitrators one to be appointed by each party, and any party fails to appoint an arbitrator in terms of the agreement or by way of substitution in the circumstances described in subsection (1) of section 10; or
- (d) an arbitration agreement provides that the reference shall be to three arbitrators one of whom is to be appointed (whether as arbitrator or as umpire) by the parties to the reference or by the other two arbitrators and such arbitrator or umpire has not been appointed; or
- (e) an appointed arbitrator or umpire refuses to act or is or becomes incapable of acting or dies, or is removed from office or his appointment is terminated or is set aside and the party or parties to the reference or arbitrators who made the appointment are at liberty to appoint another arbitrator or umpire to fill the vacancy and do not appoint him in any case where such appointment is necessary for the decision of the matters in dispute or the due conduct of the arbitration, or where the party or parties or arbitrators who made the appointment is or are required to appoint another arbitrator or umpire to fill such vacancy and does or do not appoint him; or
- (f) more than one arbitrator has to be appointed and the parties to the reference do not, after a dispute has arisen, agree in the appointment of arbitrators so far as the arbitration agreement may require such agreement,

any party to the reference may serve the other party or parties or the arbitrators, as the case may be, with a written notice requiring him or them to appoint or if agreement be necessary, to agree in the appointment of an arbitrator or arbitrators or umpire.

- (2) If the appointment referred to in the notice served under subsection (1) is not made or agreed to, as the case may be, within seven days after the service of the notice, the party who gave the notice, may upon notice to the other party or parties or the arbitrators, as the case may be, apply to the court to make the necessary appointment, and thereupon the court may appoint an arbitrator or arbitrators or umpire.
- (3) Where an arbitrator (not being a sole arbitrator) or two or more arbitrators (not being all the arbitrators) or an umpire who has or have not entered on the reference is or are removed by the court or his or their appointment or appointments is or are set aside by the court, and the arbitration agreement does not provide otherwise, the court may, on the application of any party to the reference, appoint an arbitrator or arbitrators or umpire to act in the place of the arbitrator, arbitrators or umpire so removed or whose appointment or appointments has or have been so set aside.
- (4) Where a sole arbitrator or all the arbitrators or an umpire who has or have entered on the reference is or are removed by the court, or his or their appointment or appointments is or are set aside by the court

and the arbitration agreement does not provide otherwise, the court may, on the application of any party to the reference, either—

- (a) appoint an arbitrator or arbitrators or an umpire to act in the place of the arbitrator, arbitrators or umpire so removed or whose appointment or appointments has or have been so set aside; or
 - (b) appoint a sole arbitrator to act in the place of the sole arbitrator or all the arbitrators or umpire so removed or whose appointment or appointments has or have been so set aside; or
 - (c) order that the arbitration agreement shall cease to have effect with respect to the dispute referred.
- (5) An arbitrator or umpire appointed by the court shall have the like power to act in the reference and make an award as if he had been appointed in accordance with the terms of the arbitration agreement.
- (6) An arbitrator or umpire appointed in the circumstances described in subsection (1) of section 10 or subsection (2) of section 11 or subsection (2), (3) or (4) of this section or an arbitrator appointed after the court has granted an extension of time to do so in the circumstances described in subsection (3) of section 10, may avail himself of the evidence recorded in the arbitration proceedings before his appointment and may, if he think fit, recall for further examination any person who has given such evidence.

13. Termination or setting aside of appointment of arbitrator or umpire

- (1) Subject to the provisions of subsection (2), the appointment of an arbitrator or umpire, unless a contrary intention is expressed in the arbitration agreement, shall not be capable of being terminated except by consent of all the parties to the reference.
- (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.
 - (b) For the purposes of this subsection, 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, in giving notice of that fact to the parties or to the umpire.
- (3) Where the appointment of an arbitrator or umpire is so set aside, or where an arbitrator or umpire is so removed from office, the court may, apart from any order for costs which may be awarded against such arbitrator or umpire personally, order that such arbitrator or umpire shall not be entitled to any remuneration for his services.

PROVISIONS AS TO ARBITRATION PROCEEDINGS

14. Powers of arbitration tribunal and manner of arriving at decisions where the arbitration tribunal consists of two or more arbitrators

- (1) An arbitration tribunal may—
- (a) on the application of any party to a reference, unless the arbitration agreement otherwise provides—

- (i) require any party to the reference, subject to any legal objection, to make discovery of documents by way of affidavit or by answering interrogatories on oath and to produce such documents for inspection;
- (ii) require the parties to the reference to deliver pleadings or statements of claim and defence or require any party to give particulars of his claim or counterclaim, and allow any party to amend his pleadings or statements of claim or defence;
- (iii) require any party to the reference to allow inspection of any goods or property involved in the reference, which is in his possession or under his control; and
- (iv) appoint a commissioner to take the evidence of any person in the Republic or abroad and to forward such evidence to the tribunal in the same way as if he were a commissioner appointed by the court;

[S 14(1)(iv) am by s 1 (Sch item 2) of Act 49 of 1996.]

- (b) unless the arbitration agreement otherwise provides—
 - (i) from time to time determine the time when and the place where the arbitration proceedings shall be held or be proceeded with;
 - (ii) administer oaths to, or take the affirmations of, the parties and witnesses appearing to give evidence;
 - (iii) subject to any legal objection, examine the parties appearing to give evidence in relation to the matters in dispute and require them to produce before the tribunal all books, documents or things within their possession or power which may be required or called for and the production of which could be compelled on the trial of an action;
 - (iv) subject to any legal objection, examine any person who has been summoned to give evidence and require the production of any book, document or thing which such person has been summoned to produce;
 - (v) with the consent of the parties or on an order of court, receive evidence given by affidavit; and
 - (vi) inspect any goods or property involved in the reference.
- (2) Where an arbitration tribunal consists of two or more arbitrators, any oath or affirmation may be administered by any member of the tribunal designated by it for the purpose.
- (3) Where an arbitration tribunal consists of two arbitrators, their unanimous decision, and where it consists of more than two arbitrators, the decision of the majority of the arbitrators, shall be the decision of the arbitration tribunal.
- (4) Where the arbitrators, or a majority of them, do not agree in their award, their decision shall not be taken to be either the least amount or least right of relief awarded by them, or the average of what has been awarded by them, but the matter shall thereupon become referable to the umpire, unless the arbitration agreement otherwise provides.

15. Notice of proceedings to parties

- (1) An arbitration tribunal shall give to every party to the reference, written notice of the time when and place where the arbitration proceedings will be held, and every such party shall be entitled to be present personally or by representative and to be heard at such proceedings.

- (2) If any party to the reference at any time fails, after having received reasonable notice of the time when and place where the arbitration proceedings will be held, to attend such proceedings without having shown previously to the arbitration tribunal good and sufficient cause for such failure, the arbitration tribunal may proceed in the absence of such party.

16. Summoning of witnesses

- (1) The issue of a summons to compel any person to attend before an arbitration tribunal to give evidence and to produce books, documents or things to an arbitration tribunal, may be procured by any party to a reference in the same manner and subject to the same conditions as if the reference were a civil action pending in the court having jurisdiction in the area in which the arbitration proceedings are being or are about to be held: Provided that—
- (a) no person shall be compelled by such a summons to produce any book, document or thing the production of which would not be compellable on trial of an action; and
 - (b) the clerk of the magistrate's court having jurisdiction in the said area, may issue such summons upon payment of the same fees as are chargeable for the issue of a subpoena in a civil case pending in the magistrate's court.
- (2) Any summons issued out of any court in terms of subsection (1) shall be served in the same manner as a subpoena issued out of that court in a civil action pending in that court.
- (3) The provisions of subsections (3) and (4) of section 87 of the Correctional Services Act, 1959, (Act 8 of 1959), relating to the service of a subpoena upon any prisoner to give evidence in civil proceedings in any court, shall *mutatis mutandis* apply with reference to the service of a summons upon any prisoner required to give evidence before an arbitration tribunal as if the proceedings before such tribunal were civil proceedings pending in a court.

[S 16(3) am by s 4 (Sch III) of Act 18 of 1996.]

- (4) On the application of any party to a reference, the court may order the process of the court to issue to compel the attendance of a witness before the arbitration tribunal or may order any prisoner to be brought before such arbitration tribunal for examination.

17. Recording of evidence

If not recorded by the arbitration tribunal itself, the oral evidence of witnesses shall be recorded in such manner and to such extent as the parties to the reference may agree or, failing such agreement, as the arbitration tribunal may from time to time direct after consultation with the parties.

18. Reference of particular points to umpire

Where the arbitrators or a majority of them are unable to agree as to any matter of procedure, or any interlocutory question, they may refer that matter or question forthwith to the umpire for decision.

19. Powers of umpire

Unless the arbitration agreement otherwise provides—

- (a) the umpire may sit together with the arbitrators and hear the evidence given from time to time and may then and there decide any matter of procedure or any interlocutory question upon which the arbitrators disagree and which is referred by them to him for decision;
- (b) an umpire shall not be entitled to any remuneration from the parties in respect of his attendance at any arbitration proceedings conducted by the arbitrators unless the parties have requested him

so to attend or unless he is called upon to decide any matter of procedure or any interlocutory question at the request of the arbitrators or is required to enter on the reference and to give an award;

- (c) if the arbitrators have by notice in writing advised the parties to the reference, or the umpire, that they are unable to agree, or if the arbitrators have allowed the time or extended time for making their award to expire without making an award, and the parties have not advised the umpire that they intend to grant an extension or further extension of the said period or to apply to the court therefor, the umpire shall forthwith enter on the reference in lieu of the arbitrators;
- (d) an umpire who enters on a reference as provided in paragraph (c), shall have the same powers as if he had been appointed as sole arbitrator, and may for that purpose unless he is required by the parties to hear the evidence of the parties and their witnesses, or, whenever he is called upon by the arbitrators to decide any matter of procedure or any interlocutory question, act upon the evidence recorded in the proceedings before the arbitrators, and may, if he thinks fit, recall for further examination any person who has given such evidence.

20. Statement of case for opinion of court or counsel during arbitration proceedings

- (1) An arbitration tribunal may, on the application of any party to the reference and shall, if the court, on the application of any such party, so directs, or if the parties to the reference so agree, at any stage before making a final award state any question of law arising in the course of the reference in the form of a special case for the opinion of the court or for the opinion of counsel.
- (2) An opinion referred to in subsection (1) shall be final and not subject to appeal and shall be binding on the arbitration tribunal and on the parties to the reference.

21. General powers of the court

- (1) For the purposes of and in relation to a reference under an arbitration agreement, the court shall have the same power of making orders in respect of—
 - (a) security for costs;
 - (b) discovery of documents and interrogatories;
 - (c) the examination of any witness before a commissioner in the Republic or abroad and the issue of a commission or a request for such examination;

[S 21(1)(c) am by s 1 (Sch item 3) of Act 49 of 1996.]

- (d) the giving of evidence by affidavit;
- (e) the inspection or the interim custody or the preservation or the sale of goods or property;
- (f) an interim interdict or similar relief;
- (g) securing the amount in dispute in the reference;
- (h) substituted service of notices required by this Act or of summonses; and
- (i) the appointment of a receiver,

as it has for the purposes of and in relation to any action or matter in that court.

- (2) The provisions of subsection (1) shall not be construed so as to derogate from any power which may be vested in an arbitration tribunal of making orders with reference to any of the matters referred to in the said subsection.
- (3) Notwithstanding anything to the contrary in the arbitration agreement, the court may at any time, on the application of any party to the reference, order that the umpire shall enter upon the reference in lieu of the arbitrators in all respects as if he were a sole arbitrator.

22. Offences

- (1) Any person who—
 - (a) without good cause, fails to appear in answer to a summons to give evidence before an arbitration tribunal; or
 - (b) having so appeared, fails to remain in attendance until excused from further attendance by the arbitration tribunal; or
 - (c) upon being required by an arbitration tribunal to be sworn or to affirm as a witness, refuses to do so; or
 - (d) refuses to answer fully and to the best of his knowledge and belief any question lawfully put to him during any arbitration proceedings; or
 - (e) without good cause, fails to produce before an arbitration tribunal any book, document or thing specified in a summons requiring him so to produce it; or
 - (f) while arbitration proceedings are in progress, wilfully insults any arbitrator or umpire conducting such proceedings, or wilfully interrupts such proceedings or otherwise misbehaves himself in the place where such proceedings are being conducted,

shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand or to imprisonment for a period not exceeding three months: Provided that in connection with the interrogation of any such person or the production of any such book, document or thing the law relating to privilege as applicable to a witness subpoenaed to give evidence or to produce any book, document or thing before a court of law shall apply.

- (2) Any person who, having been sworn or having made an affirmation, knowingly gives false evidence before an arbitration tribunal, shall be guilty of an offence and liable on conviction to the penalties prescribed by law for perjury.

PROVISIONS AS TO AWARDS

23. Time for making award

The arbitration tribunal shall, unless the arbitration agreement otherwise provides, make its award—

- (a) in the case of an award by an arbitrator or arbitrators, within four months after the date on which such arbitrator or arbitrators entered on the reference or the date on which such arbitrator or arbitrators were called on to act by notice in writing from any party to the reference, whichever date be the earlier date; and

- (b) in the case of an award by an umpire, within three months after the date on which such umpire entered on the reference or the date on which such umpire was called on to act by notice in writing from any party to the reference, whichever date be the earlier date,

or in either case on or before any later date to which the parties by any writing signed by them may from time to time extend the time for making the award: Provided that the court may, on good cause shown, from time to time extend the time for making any award, whether that time has expired or not.

24. Award to be in writing

- (1) The award shall be in writing and shall be signed by all the members of the arbitration tribunal.
- (2) If a minority of the members of the arbitration tribunal refuse to sign the award, such refusal shall be mentioned in the award but shall not invalidate it.

25. Publication of award

- (1) The award shall be delivered by the arbitration tribunal, the parties or their representatives being present or having been summoned to appear.
- (2) The award shall be deemed to have been published to the parties on the date on which it was so delivered.

26. Interim award

Unless the arbitration agreement provides otherwise, an arbitration tribunal may make an interim award at any time within the period allowed for making an award.

27. Specific performance

Unless the arbitration agreement provides otherwise, an arbitration tribunal may order specific performance of any contract in any circumstances in which the court would have power to do so.

28. Award to be binding

Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms.

29. Interest on amount awarded

Where an award orders the payment of a sum of money, such sum shall, unless the award provides otherwise, carry interest as from the date of the award and at the same rate as a judgment debt.

30. Power of arbitration tribunal to correct errors in award

An arbitration tribunal may correct in any award any clerical mistake or any patent error arising from any accidental slip or omission.

31. Award may be made an order of court

- (1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.
- (2) The court to which application is so made, may, before making the award an order of court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.

- (3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect.

32. Remittal of award

- (1) The parties to a reference may within six weeks after the publication of the award to them, by any writing signed by them remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the parties may specify in the said writing.
- (2) The court may, on the application of any party to the reference after due notice to the other party or parties made within six weeks after the publication of the award to the parties, on good cause shown, remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the court may direct.
- (3) When a matter is remitted under subsection (1) or (2) the arbitration tribunal shall, unless the writing signed by the parties or the order of remittal otherwise directs, dispose of such matter within three months after the date of the said writing or order.
- (4) Where in any case referred to in subsection (1) or (2) the arbitrator has died after making his award, the award may be remitted to a new arbitrator appointed, in the case of a remittal under subsection (1), by the parties or, in the case of a remittal under subsection (2), by the court.

33. Setting aside of award

- (1) Where—
- (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
 - (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
 - (c) an award has been improperly obtained,
- the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.
- (2) An application pursuant to this section shall be made within six weeks after the publication of the award to the parties: Provided that when the setting aside of the award is requested on the grounds of the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combatting of Corrupt Activities Act, 2004, such application shall be made within six weeks after the discovery of the *[sic]* that offence and in any case not later than three years after the date on which the award was so published.

[S 33(2) subs by s 36 (Sch) of Act 12 of 2004.]

- (3) The court may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.
- (4) 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.

REMUNERATION OF ARBITRATORS AND UMPIRE AND COSTS

34. Remuneration of arbitrators and umpire

- (1) Where the fees of the arbitrator or arbitrators or umpire have not been fixed by an agreement between him or them and the parties to the reference, any party to the reference may, notwithstanding that such fees may already have been paid by the parties, or any of them, require such fees to be taxed, and thereupon such fees shall be taxed by the taxing master of the court.
- (2) Any taxation of fees under this section may be reviewed by the court in the same manner as a taxation of costs.
- (3) The arbitrator or arbitrators or umpire shall be entitled to appear and be heard at any taxation or review of taxation under this section.
- (4) The arbitrator or arbitrators or an umpire may withhold his or their award pending payment of his or their fees and of any expenses incurred by him or them in connection with the arbitration with the consent of the parties, or pending the giving of security for the payment thereof.

35. Costs of arbitration proceedings

- (1) Unless the arbitration agreement otherwise provides, the award of costs in connection with the reference and award shall be in the discretion of the arbitration tribunal, which shall, if it awards costs, give directions as to the scale on which such costs are to be taxed and may direct to and by whom and in what manner such costs or any part thereof shall be paid and may tax or settle the amount of such costs or any part thereof, and may award costs as between attorney and client.
- (2) If no provision is made in an award with regard to costs, or if no directions have been given therein as to the scale on which such costs shall be taxed, any party to the reference may within 14 days of the publication of the award, make application to the arbitration tribunal for an order directing by and to whom such costs shall be paid or giving directions as to the scale on which such costs shall be taxed, and thereupon the arbitration tribunal shall, after hearing any party who may desire to be heard, amend the award by adding thereto such directions as it may think proper with regard to the payment of costs or the scale on which such costs shall be taxed.
- (3) If the arbitration tribunal has no discretion as to costs or if the arbitration tribunal has such a discretion and has directed any party to pay costs but does not forthwith tax or settle such costs, or if the arbitrators or a majority of them cannot agree in their taxation, then, unless the agreement otherwise provides, the taxing master of the court may tax them.
- (4) If an arbitration tribunal has directed any party to pay costs but has not taxed or settled such costs, then, unless the arbitration agreement provides otherwise, the court may, on making the award an order of court, order the costs to be taxed by the taxing master of the court and, if the arbitration tribunal has given no directions as to the scale on which such costs shall be taxed, fix the scale of such taxation.
- (5) Any taxation of costs by the taxing master of the court may be reviewed by the court.

- (6) Any provision contained in an arbitration agreement to refer future disputes to arbitration to the effect that any party or the parties thereto shall in any event pay his or their own costs or any part thereof, shall be void.

36. Costs of legal proceedings

An order made or opinion given by the court under this Act may be made or given on such terms as to costs, including costs against an arbitrator or umpire, as the court considers just.

MISCELLANEOUS PROVISIONS

37. Service of notices

Unless the arbitration agreement provides otherwise, any notice required by any provision of this Act to be served on any person, may be served either—

- (a) by delivering it to the person on whom it is to be served; or
- (b) by leaving it at the usual or last known place of residence of that person in the Republic; or

[S 37(b) am by s 1 (Sch item 4) of Act 49 of 1996.]

- (c) by sending it by post to that person at his usual or last known place of residence in the Republic; or

[S 37(c) am by s 1 (Sch item 4) of Act 49 of 1996.]

- (d) in any other manner authorised by the court.

38. Extension of periods fixed by or under this Act

The court may, on good cause shown, extend any period of time fixed by or under this Act, whether such period has expired or not.

39. This Act binds the State

This Act shall apply to any arbitration in terms of an arbitration agreement to which the State is a party, other than an arbitration in terms of an arbitration agreement between the State and the Government of a foreign country or any undertaking which is wholly owned and controlled by such a Government.

40. Application of this Act to arbitrations under special laws

This Act shall apply to every arbitration under any law passed before or after the commencement of this Act, as if the arbitration were pursuant to an arbitration agreement and as if that other law were an arbitration agreement: Provided that if that other law is an Act of Parliament, this Act shall not apply to any such arbitration in so far as this Act is excluded by or is inconsistent with that other law or is inconsistent with the regulations or procedure authorised or recognised by that other law.

41. ...

[S 41 rep by s 1 (Sch item 5) of Act 49 of 1996.]

42. Repeal of laws

- (1) The Arbitrations Act, 1898 (Act 29 of 1898), of the Cape of Good Hope, the Arbitration Act, 1898 (Act 24 of 1898), of Natal, the Arbitration Ordinance, 1904 (Ordinance 24 of 1904), of the Transvaal, and the Arbitration Proclamation (Proclamation 3 of 1926), of South-West Africa, are hereby repealed.
- (2) Any arbitration, enquiry or trial commenced prior to the commencement of this Act in terms of any law repealed by subsection (1) shall be proceeded with in all respects as if such repeal had not been effected.
- (3) Any arbitration commenced after the commencement of this Act under any arbitration agreement entered into before such commencement, shall be dealt with under this Act in all respects as if such agreement had been entered into after such commencement.

43. Short title

This Act shall be called the Arbitration Act, 1965.

WAYLAND v EVERITE GROUP LTD

1993 (3) SA 946 (W)

Citation	1993 (3) SA 946 (W)
Court	Witwatersrand Local Division
Judge	Levy AJ
Heard	March 10, 1993
Judgment	March 31, 1993
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Arbitration - Reference of dispute to arbitration - Validity of contract G containing arbitration clause in dispute - Arbitration clause to stand or fall with validity of contract in which it is incorporated - If there is some justification for allegation of invalidity, jurisdiction of arbitrator to proceed is doubtful - Reference to arbitration in such circumstances improper.

Headnote : Kopnota

It seems to be eminently reasonable that a clause of a contract (in the H present case an arbitration clause) must stand or fall with the whole body of the contract and not be declared excisable by the parties or that such declaration should have any validity merely on the ground of the parties having elected to say that the clause itself is severable from the contract. Where the signatures that validate the whole contract, including the disputed clause, are challenged, or where it is said that the signatures were not authorised on grounds which, if proved, would render I the contract invalid and unenforceable as between the ostensible parties to it (as in casu), then the arbitration clause must stand or fall with the validity of the main contract, notwithstanding any declaration by its signatories. To do otherwise would be to declare such signatories authorised in the one respect and unauthorised in the other. If, therefore, there is some justification for a party's allegation of invalidity and unenforceability of the contract, then the arbitration clause itself being in doubt and the consequent jurisdiction of the arbitrator to proceed under it being doubtful, a reference to arbitration J would be an improper reference.

1993 (3) SA p947

LEVY AJ

A Where, in an application in a Local Division for the reference, in terms of an arbitration clause in a service contract, of certain disputes between the applicant and the respondent to arbitration, the respondent had averred that the contract was invalid on the ground that the directors of the respondent company had had no authority to conclude the agreement and the Court found that the invalidity or illegality contended for was not wholly unfounded and there was substantial cause for the contention, the Court held that there were compelling reasons for refusing the B application. The application was accordingly dismissed.

[zClz]Case Information

Application for an order that certain disputes between the parties arising out of a service contract be referred to, and determined by, arbitration in terms of the contract. The facts appear from the reasons for judgment.

C C D A Loxton SC for the applicant.

R W Nugent SC (with him D N Unterhalter) for the respondent.

Cur adv vult.

Postea (March 31). D

[zJDz]Judgment

Levy AJ: Applicant seeks an order that the disputes between applicant and respondent in connection with the formation, validity, enforceability or existence of, and/or the authority of the respondent to conclude, and/or the implementation of, and/or the interpretation, application or rectification of the provisions of, and/or the parties' respective rights E and obligations in terms of or arising out of the breach or termination of an agreement entered into between applicant and respondent on 1 November 1990 be referred to and determined by arbitration in terms of the provisions of clause 29 thereof.

F At the time when the agreement was entered into, applicant was then already a member of the senior management staff of respondent and one of its four executive directors. His position was governed by a service contract but the agreement of 1 November 1990, while retaining the clauses of that contract, added to it numerous clauses, being clauses 3, 22-26 and 29-34. Clause 3 makes the new agreement effective from 1 August 1990 while G clauses 22-26, under the heading of 'additional service conditions in the event of a change in effective control', confer such benefits on applicant in the event of his retirement from the service of respondent as has led to the agreement aptly being described as a 'golden parachute scheme'. Clause 22 of the agreement provides that in the event of a change of H control of respondent occurring, then applicant shall be entitled to receive the same remuneration escalated automatically by the average increase in the consumer price index. He shall further be entitled to enjoy the same benefits or advantages in respect of his employment by respondent, including any pension provident fund, deferred compensation, medical aid, share-option scheme, top hat pension plan, car allowance or I other benefits as the remuneration he received and the benefits and the advantages that he enjoyed immediately prior to the effective date of this agreement, and he shall continue to be employed by respondent on the same terms and conditions as the terms and conditions which governed his employment immediately prior to the effective date of the agreement. J Further, he shall be employed by respondent in that capacity or category

1993 (3) SA p948

LEVY AJ

A of employment equal to or superior to the capacity or category of employment in which he was employed by respondent immediately prior to the effective date. Further, he shall be required to perform such duties and exercise such powers in relation to the business of respondent which, taken as a whole, will be the same or similar but not inferior to the B duties which he will have been required to perform and the powers he will have exercised immediately prior to the effective date. If a change in control should occur and if within the specified period of three years the employment of applicant shall be terminated by respondent for reasons other than for reasons justifying summarily dismissal, or applicant should resign from the service of respondent as a result of the failure of C respondent to honour its obligations in terms of clause 22, applicant shall be entitled,

notwithstanding such termination or resignation, to the remuneration and benefits set out in clause 22 of the agreement for a period of two years from the date of that event, ie his termination of employment or his resignation.

D At the time when this agreement was entered into there was a firm belief entertained by the executive directors of respondent that a change of control of respondent was imminent, which led to a consequent climate of uncertainty amongst them regarding the likelihood of their retention in the offices which they then held in the event of such change of control. So prevalent was this feeling that when a certain Arni, the then managing E director of respondent, was replaced by a Mr George Thomas, who was then an executive director of AECL Ltd, Arni felt it necessary to reassure the board of directors individually that he had been asked by the Swiss controlling shareholders to make it clear that this decision to appoint Thomas as managing director of respondent should not generate any F misunderstanding regarding their position in respondent and that it in no way implied any disinvestment intentions on their part. However, shortly after Thomas assumed his duties as managing director of respondent on 1 April 1989, he entered into discussions with Malbak Ltd with a view to a potential merger between a subsidiary of Malbak and respondent. At all material times while Thomas was the managing director, the four executive G directors of respondent were certain Claasen, Bischof, Cvitanich and applicant, while the executive committee of respondent consisted of Thomas, Claasen, Bischof, Cvitanich, a certain Stohr and applicant. Certain Buettiker was the chairman of respondent from November 1990 until 1992. Notwithstanding repeated assurances from the chairman and the H managing director, the sense of insecurity remained with the four executive directors, who of their own initiative investigated a scheme for their protection in the event of a change of control of respondent. Subsequent to that investigation they submitted a memorandum to Thomas setting out their recommendations with regard to what was called 'a golden I parachute scheme for certain critical members of senior management of the Everite Group for your edification', as appears from the covering letter, dated 21 September 1989, signed by Claasen, Bischof, Cvitanich and applicant and addressed to Thomas. Thomas' reaction to this memorandum generally appears to have been favourable and he then wrote to Arni, who was then chairman of respondent, on 23 September 1989, in which he said J that the degree of insecurity in the minds of the

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LEVY AJ

A senior people at respondent has led them to suggest some form of 'golden parachute' and he added his own recommendation that in the light of the scarcity of good management in this country appropriate steps should be taken to reassure them against their sense of insecurity and the loss of members of what he described as a very good team should be avoided. Arni, B for his part, in apparent agreement with Thomas for the need to reassure senior management, authorised Thomas to investigate such financial packages as might reassure them against loss of employment on change of control of respondent and Thomas, in his turn, authorised Claasen to investigate possible packages of remuneration for that purpose. On a visit to Switzerland in April 1990, Thomas met with Buettiker, the Swiss C director of respondent, who approved in principle a package to be approved by the board in accordance with the proposals suggested by Thomas. I should state in parenthesis here that I have largely followed the outline of the facts leading up to the conclusion of the agreement in question as appears from respondent's affidavit, on the simple basis that, where it D differs materially from that of applicant, I must accept for present purposes that the facts are as stated by respondent. There is however little difference between them and none of it of any great moment. On 20 July 1990 Thomas addressed a letter to the members of the board of respondent, including its non-executive members, in which he set out details of proposed schemes, including share-options schemes, for the E benefit of top levels of management of respondent to be entrenched in service agreements to be entered into between respondent and the persons concerned. Those proposals, he said, had the support of the chairman and the controlling shareholder of respondent, but respondent has denied that either the majority shareholder or any other shareholder had

formally F approved the proposals drawn by Thomas or had formally considered the contents of that proposal or the subsequent resolution passed by the board of respondent.

On 31 July 1990 a meeting of respondent's board of directors was held at which were present Thomas, Bischof, Claasen, Cvitanich, certain De Loor, G Goss, Ridley, Stohr, Van der Merwe and applicant. At that meeting the board passed a resolution as appears from the following extract from the minutes of the meeting:

'Terms of employment:

Following a survey amongst leading personnel consultants it was concluded that senior management packages were deficient in certain H aspects, notably severance terms and share incentives.

6.2.1 Severance terms

A schedule, annexure 1 to the minutes, setting out the basis of compensation to be applied to management levels one and two and the varying circumstances was approved. The following resolution proposed by the chairman and seconded by Mr R J Goss was accordingly passed:

"That the managing director be and is hereby authorised to I enter into new service contracts with effect of 1 August 1990 with senior management in their capacities and functions as managers in order to entrench the severance terms set out in annexure 1."

Pursuant to that resolution the special service agreements were entered J into purportedly between respondent and members of its senior management

1993 (3) SA p950

LEVY AJ

A staff in October and November 1990, ie with Thomas, Bischof, Claasen, Cvitanich and applicant. It is respondent's allegation that more than half of the members of the board in attendance at that meeting were 'self-interested in the passage of the resolution' and that all members present at the meeting voted unanimously in favour of the resolution, B including those whose interests were to be served by its passage. Respondent says that the resolution was designed solely to further the personal interests of the executive directors, that it formed no part of the management of the business of the company and was accordingly ultra vires. Respondent further alleges that the terms of the agreement ultimately concluded between respondent and applicant went far beyond the C authority reposed in Thomas and consequently that such additional terms were ultra vires, since no such authority was given and since the contracts concluded constituted an indivisible whole, these contracts fall outside the authority given to the managing director and are thus ultra vires.

It will have been noted that the arbitration clause contained in the D agreement includes disputes arising between the parties in connection with the validity of the agreement. It is applicant's contention that the question then is one solely for determination by an arbitrator to be appointed in accordance with the provisions of the arbitration clause and that he himself would determine whether or not the agreement is valid and E enforceable between the parties, while it is respondent's contention that it is not possible to refer to arbitration the validity of the very agreement which is relied upon to confer jurisdiction on the arbitrator.

Respondent submits that the agreement is of no force or effect on the following grounds:

F (a) The agreement was ultra vires the powers of the directors as it was authorised in breach of their fiduciary duty;

- (b) the agreement is contrary to public policy;
- (c) the resolution authorising the agreement was passed in breach of the articles of association (read with the Companies Act 61 of 1973); and
- G (d) the agreement is in conflict with s 227 of the Companies Act.

Counsel for both parties are agreed that the only matter for determination by me is whether or not there should be a reference to arbitration as claimed by applicant and that it is not for this Court to consider whether the agreement is valid or enforceable at this stage. Respondent relies H upon the views expressed by Corbett J, as he then was, in *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk* 1968 (1) SA 7 (C) at 14B who said:

'It seems to me that the various differences or disputes defined in this clause all presuppose the validity of the agreement itself, because without a valid agreement no dispute as to the interpretation of the I agreement or the rights and obligations of the parties or the performance of obligations under the agreement could arise. The same would apply to a dispute in regard to any matter arising therefrom or incidental thereto. The arbitration clause in this case is similar to that considered in Heyman's case supra which covered all disputes.'

In *Heyman and Another v Darwins Ltd* [1942] 1 All ER 337 (HL) at 343 J Viscount Simon LC said:

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LEVY AJ

A 'An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that dispute cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined B in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void.'

These remarks of Viscount Simon LC were quoted with approval by Tindall JA C in *Scriven Bros v Rhodesian Hides & Produce Co Ltd and Others* 1943 AD 393 at 400. But for the purposes of that case Tindall JA was at pains to point out that it was not a case where either party has attacked the validity of the contract; and, if it were so, it would seem from the tenor of the judgment of Tindall JA that the remarks of Viscount Simon would be apposite in saying that

'(i)f the dispute is as to whether the contract which contains the D clause has ever been entered into at all, that issue cannot go to arbitration under the clause'.

Nor do the qualifications suggested by Corbett J in the *Allied Mineral* case supra afford an answer to respondent's contention of illegality. He said at 13:

'(I)t was suggested in argument by applicant's counsel that the mere E fact that one party to a contract containing an arbitration clause contended that the contract was illegal and void deprives the arbitrator of jurisdiction. I doubt whether this suggestion is sound. Of course, if the contract is in truth illegal and void, then the arbitration clause will generally itself be void with the result that, if the arbitrator's jurisdiction is founded solely upon this clause, such jurisdiction will disappear. But the mere assertion of illegality by one party does not

make F the contract illegal and void. On the other hand, where such an assertion is made by one party and does not appear to be wholly unfounded, this may in itself constitute good cause for refusing an application for a stay of action on the ground of the arbitration clause. One reason for this is that there is a chance that, if the matter proceeds to arbitration, the arbitrator may decide that the contract, including the arbitration clause, G is illegal and void. Not only would the proceedings then be nugatory but the arbitrator

"would be deciding that the very arbitration clause which founded his jurisdiction never existed and therefore he never could have had any jurisdiction to deal with that matter" (see remarks of Green LJ in *Toller v Law Accident Insurance Society Ltd* [1936] 2 All ER 952 at 956 . . .).' H

It seems to me to be eminently reasonable that a clause of a contract must stand or fall with the whole body of the contract and not be declared excisable by the parties or that such declaration should have any validity merely on the ground of the parties having elected to say that the clause itself is severable from the contract. Where the signatures that validate the whole contract, including the disputed clause, are challenged, or I where, alternatively, it is said of them that their signatures were not authorised on grounds which if proved would render the contract invalid and unenforceable as between the ostensible parties to it as in casu, then the arbitration clause must in my view stand or fall with the validity of the main contract, notwithstanding any declaration by its signatories. To J do otherwise would

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LEVY AJ

A be to declare such signatories authorised in the one respect and unauthorised in the other. Nor can it be a matter simply for interpretation of the arbitration clause itself to determine whether it stands or falls with the invalidity or otherwise of the main contract. It has no greater sanctity than the main contract itself, its signatories had no greater authority in entering into the arbitration agreement than they B had in entering into the main agreement and the one must be co-existent with the other.

If therefore there is some justification for respondent's allegations of invalidity and unenforceability of the contract, then, the arbitration clause itself being in doubt and the consequent jurisdiction of the arbitrator to proceed under it being doubtful, a reference to arbitration C would in my view be an improper reference. Cases such as *Parke v The Daily News Ltd and Others* [1962] 2 All ER 929 (Ch) and *Re Lee Behrens & Co Ltd* [1932] 2 Ch 46 strongly suggest that the directors in casu had no authority to conclude the agreement in question and consequently it is invalid, ultra vires and unenforceable. To those English authorities might D be added the case of *Hutton v West Cork Rail Co* (1883) 23 ChD 654 (CA), nor need I consider whether the House of Lords decision in *The Taupo Totara Timber Co Ltd v Rowe* [1977] 3 All ER 123 (PC), a decision of the Privy Counsel on an appeal from New Zealand, is to be distinguished on its facts from the question in the instant case. It is sufficient for me to say, in the words of Corbett J in the *Allied Mineral* case, that the E assertion by respondent on the various grounds already detailed by me, that the invalidity or illegality contended for is not wholly unfounded and has substantial cause for its submission. As Colman J said in *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 391H, there must be compelling reasons for F refusing to refer a dispute to arbitration. I find such reasons to exist where the validity of the arbitration clause itself is challenged on substantial grounds.

The application to refer the disputes in question to arbitration under the provisions of clause 29 of the agreement dated 30 November 1989 is dismissed with costs, such costs to include the costs of two counsel. G

Applicant's Attorneys: Bowens. Respondent's Attorneys: Edward Nathan & Friedland Inc.

DIPENTA AFRICA CONSTRUCTION (PTY) LTD v CAPE PROVINCIAL ADMINISTRATION

1973 (1) SA 666 (C)

Court	Cape Provincial Division
Judge	Corbett J
Heard	September 13, 1972
Judgment	September 14, 1972
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Arbitration - Arbitrator - Choice of - Dispute arising out of the building of a bridge - Dispute as to whether senior counsel or a professional engineer should be appointed - Technical issues in B dispute - Engineer to be appointed - Provision for submission of disputes of law to Supreme Court - Effect.

Headnote : Kopnota

Certain disputes arose between the applicant, a firm of engineering contractors who were the successful tenderers for the construction of a certain road bridge, and the respondent. In terms of clause 5 (c) of the general conditions of the building contract, such disputes had to be C submitted to arbitration in terms of Act 42 of 1965, and the contract further provided that all matters of law arising should be submitted to the Supreme Court. In terms of section 9 of the Act, there being no express provision to the contrary in the building contract, that arbitration had to be by a single arbitrator. A further dispute arose as to the appointment of an arbitrator and the applicant now applied for the appointment of a named senior counsel whilst the respondent made a D counter-application for the appointment of one or other of three named professional engineers.

Held, as a very substantial portion of the enquiry would centre around technical issues, that the interests of the parties would best be served by the appointment of an engineer as arbitrator.

Held, further, however, that, as the issue had been a very finely balanced one, that the costs of the application should be costs in the cause.

1. Semble: That the parties should exercise a wise forbearance in regard E to the raising of issues of law. The practical effectiveness of the provision for submission of all disputes of law to the Supreme Court questioned.
2. [zClz]Case Information
3. Application under sec. 12 (2) of Act 42 of 1965 of the appointment of an arbitrator. The facts appear from the reasons for judgment.
4. J. F. Coaker, S.C., (with him W. P. Schutz), for the applicant.
5. F J. van Z. Steyn, S.C., (with him H. S. McKenzie, S.C.), for the respondent.
6. [zJDz]Judgment
7. CORBETT, J.: This is an application in terms of sec. 12 (2) of the Arbitration Act, 42 of 1965, for the appointment of an arbitrator to act G in certain arbitration proceedings pending between the parties. The applicant company is a firm of engineering contractors who were the successful tenderers for the construction of a certain road bridge over van Staden's Gorge, which bridge forms part of the National Road, Route 2, near Port Elizabeth. The respondent is the Cape Provincial H

Administration, with whom the applicant contracted for the execution of this work in terms of a written contract.

8. Certain disputes have arisen between the parties, both during the construction of the bridge and thereafter, in regard to various aspects of the work. In terms of the building contract, more particularly clause 5 (c) of the general conditions of contract, such disputes have ultimately to be submitted to arbitration in terms of Act 42 of 1965. The arbitration clause provides, inter alia, for the drawing up and submission of statements in the form of pleadings setting out the claim and the reply
9. 1973 (1) SA p667
10. CORBETT J
11. thereto, and it also provides that all matters of law arising either on what I will call the pleadings or at any time during the arbitration proceedings shall be submitted for decision to the Supreme Court. In this context the Supreme Court is agreed to be the Cape Provincial A Division of the Supreme Court, which is to have sole jurisdiction to decide any question of law arising under the contract. It should also be noted that any dispute as to whether a certain question is one of fact or law is itself to be regarded as a question of law.
12. The disputes in question in this case have given rise to three separate claims, and pleadings in terms of the arbitration clause have been drawn up in all three of these claims. In essence these constitute three B separate arbitrations but, as I understand the position, it is the wish of the parties that the same arbitrator should deal with all three arbitrations. In terms of sec. 9 of the Arbitration Act, there being no expression of intention to the contrary in the arbitration agreement itself, the arbitration must be by a single arbitrator. Unfortunately, C however, the parties have been unable to agree as to who the arbitrator should be, or, indeed, what class of professional person he should be, and it is for this reason that the present application has come before this Court.
13. The attitude of the applicant is that the arbitrator should be senior D counsel, and to this end the applicant has nominated Mr. I. A. Maisels, Q.C., of the Johannesburg Bar. The respondent, on the other hand, takes the view that the most appropriate class of person to be appointed is a professional engineer and, in this connection, a member of a well-known firm of consulting engineers was nominated by the respondent. It appears that the applicant objected to this first nominee of the respondents' on E the ground that his firm was acting as the consulting engineers in an engineering contract involving the parent company of the applicant and the Orange Free State Provincial Administration and that there were substantial disputes arising in this contract, which would require adjudication by the consulting engineers and might ultimately lead to F another set of arbitration proceedings. In deference to this objection the respondent withdrew its first nominee and then put forward a panel of three nominees, each of whom is a well-qualified professional engineer. I might just add at this stage that it became apparent during the course of the hearing that the applicant in its turn was not necessarily adamant about the appointment of Mr. Maisels but was G prepared, should the Court feel this to be necessary or expedient, to accept the appointment of any other suitable senior advocate.
14. This disagreement about who should be appointed arbitrator led, as I have indicated, to the present application, the applicant applying for the appointment of Mr. Maisels and the respondent making a H counter-application for the appointment of one or other of its three nominees.
15. The Court is thus placed in the somewhat invidious position of having to make a choice between one or other of these proposals. I say 'invidious', because whatever choice I make it will be, in the nature of things, a choice which will not satisfy one of the parties, and, secondly, because I have to come to this decision without aid of any very clearcut guide lines and determine what type of person would be most
16. 1973 (1) SA p668
17. CORBETT J

18. suitable to conduct an arbitration which is as yet merely in its embryo stages. Be that as it may, it seems to me that I must endeavour to decide, upon the material available, whether the appointment of a senior A advocate or the appointment of a professional engineer is most likely to lead to the expeditious, efficient and just determination of the disputes submitted to arbitration.
19. I propose, therefore, to consider, in the light of these criteria, the merits and demerits of an advocate as opposed to an engineer and weigh up the various considerations in favour of the one vis-à-vis the other. B Ultimately I must then decide where the preponderance of merit or advantage lies and make an appointment accordingly.
20. Generally speaking, an experienced and senior advocate is more skilled in the weighing of evidence, in the assessment of the credibility of witnesses, and, generally, in adjudicating upon disputes of fact. On the C other hand, an engineer, especially one who has had experience in the conduct of arbitrations, may, with the assistance of counsel, be reasonably well equipped to decide issues of fact. This would more particularly be so where the issues of fact relate to or are interwoven with technical matters falling within the purview of his particular skill. In this latter instance the specialised skill of the advocate as a trier of fact would be to some extent offset by the advantage which D the engineer would enjoy by virtue of his specialist knowledge of the technical background, the practices of the trade involved and of the interrelation between the issues of fact and the relevant technology. Where it comes to the evaluation of rival technical propositions or theories, clearly the engineer holds an advantage. In deciding questions E of law, the advocate arbitrator would undoubtedly be more efficient than an engineer, but this factor is of very limited significance in this case because of the mandatory provisions in the arbitration clause for the submission of all disputes of law to the Supreme Court for decision.
21. F I may just here interpolate to reiterate some of the misgivings expressed by me during the course of argument about the practical effectiveness of this provision. This is irrelevant to the issues which I am called upon to decide in this case, but I feel impelled nevertheless to draw attention to the problems which may flow from this provision and express the hope that when this matter does come to arbitration the parties and G their legal representatives will exercise a wise forbearance in regard to the raising of such issues of law. If they do not, then I can only foresee unending problems and frustration, not to mention the spectre of considerable legal costs.
22. Reverting to the merits and demerits of counsel or engineer arbitrator H in this particular case, it does seem to me that when technical matters are being canvassed the engineer is particularly favourably placed in two major respects. Firstly, he has the technical skill and knowledge to follow the evidence without the need for lengthy explanations in regard to technical terms, technical theory and the description of technical concepts which would inevitably have to be given to an arbitrator who was an advocate. In other words, much of the explanatory evidence designed to qualify the advocate acting as arbitrator in order to understand the technical matters involved would be obviated in the
23. 1973 (1) SA p669
24. CORBETT J
25. case of the engineer arbitrator. Depending upon the difficulty and complexity of the technical matters involved, this, of course, could make a very substantial difference to the conduct of the arbitration and more particularly to the extent to which those proceedings might become A protracted. Secondly, it was suggested by Mr. Steyn, who appeared on behalf of the respondent, that, in appropriate instances, the engineer arbitrator could form his own judgment upon technical issues without necessarily having to hear evidence upon these points, i.e. that he could rely upon his own expertise. This may be permissible where the parties agree to the appointment of an arbitrator who has the necessary B expertise and it is to be inferred that he was appointed by the parties with the intention that he should use his expertise to decide disputed issues of a technical nature. However, I am not sure that this would necessarily apply in this case were I, obviously against the wishes of one of the parties, to decide to appoint an engineer, and accordingly I prefer to express no opinion on the correctness or otherwise of this C submission. Nevertheless, whether Mr. Steyn's submission be right or wrong, there is no doubt that, during the course of the arbitration

and in the interests of expedition, the parties could agree that certain technical issues be decided in this manner, i.e. by the leading of a minimum amount of technical evidence and by the arbitrator being left to decide the issue mainly by reference to his own knowledge and skill. D This could, and in most instances undoubtedly would, result in a curtailment of the evidence that it would be necessary to lead and a more expeditious determination of the disputes. This potential advantage which would therefore flow from the appointment of an engineer would, of course, not exist were an advocate to be appointed.

26. E The significance of the factors which I have mentioned in regard to the adjudication of technical issues depends, of course, upon the real extent and complexity of the technical issues actually involved, and I propose to deal with this in a little more detail in a moment. In the F meanwhile I wish to refer briefly to a factor which was considerably stressed by Mr. Coaker, who appeared on behalf of the applicant. He pointed out that certain serious conflicts of fact which were likely to arise in this case involved disputes between the senior personnel of the two firms of consulting engineers appointed to supervise the contract and the senior personnel of the applicant. In view of this it was G suggested that it was important that the arbitrator appointed be someone who, professionally speaking, is quite detached from such an area of conflict, and Mr. Coaker used this as an argument in favour of preferring a lawyer, or an advocate, to an engineer. There is undoubtedly some substance in this submission, but again, of course, it is a question of giving this factor its rightful significance in the H general enquiry involved. As far as the possibility of a professional engineer, quite unconnected with either of the firms of engineers involved in this particular case, being guilty of bias in favour of the respondent is concerned, I do not think that there is any real reason to be apprehensive about this. On the contrary, I feel that in some ways the intimate knowledge of the practices and procedures within the profession may give
27. 1973 (1) SA p670
28. CORBETT J
29. an engineer arbitrator a real advantage, or at any rate be of real assistance to him, in arriving at the truth in regard to these issues.
30. Having regard to the foregoing, it seems to me that inevitably the true extent and complexity of the technical issues involved in this A particular case are therefore of cardinal importance.
31. It was submitted by Mr. Steyn
32. 'that in a scale of relative complexity of matters, the disputes in the present case must be categorised as exceedingly complex. It is submitted that facts of this nature cannot be adequately comprehended by non-technical men within a reasonable time',
33. B and he went on to contend that, if an advocate were appointed as arbitrator, the pre-trial process whereby counsel ordinarily qualify themselves to deal with technical issues would of necessity have to be repeated at the hearing in order to qualify the arbitrator to understand those issues, and this, of course, would result in a considerable protraction of the arbitration and an increase in the general costs involved.
34. C Mr. Coaker, on the other hand, submitted that the prognostications of respondent's counsel in this regard were exaggerated and that in fact the technical issues involved were not such as to present any real problem to a senior counsel, particularly one as gifted and experienced as the one nominated by the applicant.
35. D What in truth is the position? The pleadings relating to the three separate claims which are the subject-matter of the arbitration have been placed before the Court. I have perused them and I have endeavoured, to the best of my ability and in the limited time at my disposal, to get some picture of what the technical issues are likely to be. Briefly, the position as I understand it is as follows: The bridge E which is the subject-matter of the building contract in question takes the form of what I would describe as a bridge supported by a single-span arch crossing a fairly deep gorge. It is alleged by the applicant in its statement of claim that, in the tender documents prepared by the F consulting engineers and issued by the respondent, it was indicated that tenderers might

offer what was termed 'an alternative procedure' for the construction of this arch, which is described as forming the principle feature of the bridge. The applicant in fact did offer an alternative procedure when submitting its tender, and it is averred that by the acceptance of the tender the respondent accepted the alternative G procedure and embodied it in the contract. In addition, it was provided that the quantities of auxiliary material involved in the employment of such alternative procedure were to be stated in setting out this procedure in the tender, that this was done by the applicant and that accordingly the applicant's statement of quantities also became embodied in the contract.

36. H As I understand the position, the areas of dispute concern, in the main, two matters which arose during the course of the construction of the bridge. The first related to the construction of certain concrete box towers. There were two of these, one at each end of the bridge, constructed at the point where the arch met the side of the gorge - approximately at that point. These box towers were constructed not as permanent constituents of the bridge but as, what I might term, impermanent aids to the construction of the bridge. How they came to
37. 1973 (1) SA p671
38. CORBETT J
39. be incorporated in the scheme is apparently a matter of dispute as to whether the work involved in the construction and subsequent removal of these box towers constituted a variation of the contract for which the applicant is entitled to compensation.
40. A In the statement of claim it is averred that after the acceptance of the applicant's tender the consulting engineers called for detailed calculations in support of the procedure which the applicant proposed to use for the construction of the arch. These calculations were submitted, and, according to the applicant, the consulting engineers
41. 'unreasonably and on grounds which were not based upon correct engineering criteria and scientific data rejected the said calculations'.
42. B It is further stated that the engineers gave as a reason for such objection that the technique gave what were termed 'unacceptable bending moments and deflections'. It is apparently common cause that the applicant was obliged by its proposed technique to avoid such excessive C bending moments in the completed section of the arch during the process of construction, and the general case is made out that as a result of the unreasonable and groundless rejection of these calculations the applicant was compelled to take steps to minimise the bending moments and that this was eventually done by means of the erection of the box towers, together with the introduction of suspension cables and flying D cables designed to support the arch during construction partly from the box tower itself. It is further alleged that the solution to this problem to which I have alluded, namely, the box towers and ancillary works, was an instruction from the consulting engineers.
43. A great deal of this is in dispute. The respondent's counsel have handed E in a schedule listing the various issues, factual, legal and technical, which appear to arise in the claims, and from that, which seems to correctly reflect the effect of the pleadings, it appears that, inter alia, there are basic disputes as to the purpose for which the calculations in question were called for and as to whether or not the calculations were rejected unreasonably and on grounds not based upon correct engineering criteria and scientific data. Another matter placed F in issue is whether, as alleged by the applicant, the actual bending moments which would be involved in the applicant's technique were ascertainable from the alternative procedure as described in the applicant's tender. In addition, there are a number of technical issues of an ancillary nature appearing from the pleadings as analysed in this G schedule which was handed in.
44. The second main area of dispute arose in regard to the requirements for the bracing of the deck of the bridge so as to resist forces exerted by winds. The applicant's contention is that the requirements embodied in H the specifications and the drawings prepared by the consulting engineers for tender purposes were not technically or economically feasible, that this became apparent during the course of the work and that as a result of this the applicant was authorised to

vary the specifications and drawings by introducing what are termed flexible hinge connections, by using the concrete box towers in the place of certain steel bracing and by erecting additional scaffolding at certain positions. This variation was said to also involve additional expense and was a matter

45. 1973 (1) SA p672

46. CORBETT J

47. which was not within the contemplation of the parties at the time of the conclusion of the contract.

48. That, briefly, is a summary of what appear to me to be the main areas of A conflict in regard to the first claim, which is the most substantial of the three disputes submitted for arbitration. Of course, the pleadings are by no means as brief or as straightforward as that. Indeed, further particulars were asked for and further particulars were furnished by the plaintiff, consisting of some 150 pages of documents, mainly complex-looking and abstruse mathematical and scientific calculations, B which none of the counsel appears to understand, and which were apparently filed mainly as further particulars to the allegation appearing in para. 32 (b) of the plaintiff's particulars of claim, in which it is alleged that the variations to the contract were necessitated, inter alia, by the defective design embodied in the specifications and drawings for the bracing of the deck during C construction. I might say that it appears from the reply that it is hotly denied that there was any such defective design.

49. A consideration of these pleadings, of which I have given a brief and no doubt very inadequate description in my judgment, leaves me with the impression that the arbitration is likely to give rise to technical issues of considerable difficulty and complexity. It is virtually D impossible at this stage to express it more accurately than that. It is equally difficult, in my view, to determine with any degree of precision to what extent technical issues, as opposed to purely factual issues, will dominate the investigations of the arbitrator. Again, however, I get the impression that a very substantial portion of the enquiry will E centre around such technical issues.

50. In the circumstances, and having weighed and balanced these various factors as carefully as I could, and, I may say, having considered other factors which I have not necessarily dealt with in detail in this judgment, I have come to the conclusion that the interests of the F parties will best be served by the appointment of an engineer as arbitrator.

51. I find my viewpoint reinforced to some extent by the following consideration. This decision, as I see it, turns largely upon an assessment of the technical complexities and difficulties involved in the case. This is an area, at this stage, of very great uncertainty. If these complexities and difficulties are under-estimated and an advocate G be appointed, the disadvantages flowing from that are in my view likely to be far greater than if these complexities and difficulties are over-estimated and an engineer be appointed. The general balance of utility and convenience would therefore seem to favour an engineer appointment in this particular case.

52. H Finally, there is the question of the costs of this application. I am quite satisfied that both parties in approaching the Court acted completely bona fide, and I cannot say that the attitude of the one or the other was in the least unreasonable. As I have said, the task of deciding between the rival contentions has been a difficult and, indeed, to some extent an invidious one. The issue is a very finely balanced one, and in the nature of things, although I have come to a conclusion, it is indeed difficult to say that the one party was right and the other party

53. 1973 (1) SA p673

54. CORBETT J

55. was wrong. In the circumstances it seems to me that it would be only fair to order that the costs of this application be costs in the cause.

56. There is one further point. During the course of argument I asked Mr. Coaker what his client's attitude was to the three nominees put forward A by the respondent in the event of the Court's coming to the conclusion that an engineer should be appointed. He then indicated that his client

would like to have an opportunity to consider this matter in more detail, and I propose therefore to make an order which will give the applicant that opportunity.

57. It is accordingly ordered as follows:

58. (1) that the disputes between the parties which have been submitted B to arbitration be adjudicated upon by a professional engineer appointed as arbitrator;
59. (2) that the applicant be given a period of one month within which to notify the respondent in writing which of the three nominees C submitted by the respondent, namely, Dr. H. L. B. Uhlmann, Prof. M. F. Kaplan and Mr. E. R. P. Chunnett, it chooses as arbitrator;
60. (3) in the event of the applicant failing within the time limit provided for in the preceding paragraph to notify the respondent of its choice, Dr. H. L. B. Uhlmann will be appointed as arbitrator;
61. D (4) the costs of this application will be costs in the cause, such costs to include the costs of two counsel.
62. Applicant's Attorneys: Bowen, Sessel & Goudvis, Johannesburg; E Sonnenberg, Hoffmann & Galombik, Cape Town. Respondent's Attorney: Deputy State Attorney.

STEWART v CITY OF HARARE

1985 (1) SA 34 (ZH)

Citation	1985 (1) SA 34 (ZH)
Court	Zimbabwe High Court
Judge	McNally J
Heard	August 1, 1984; August 2, 1984
Judgment	August 8, 1984
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Arbitration - Arbitrator - Choice of - Dispute arising in connection with abolition of office in respect of applicant's employment with city council - Dispute as to whether one of two nominees, a former Judge and a legal practitioner, should act as arbitrator - Court refusing, in C application under s 8 of Arbitration Act Chap 12 (Z) to choose between two nominees and postponing matter sine die - If agreement on arbitrator not possible each party to submit list of three nominees to Court for decision.

[zHNz]Headnote : Kopnota

Applicant sought abolition of office in respect of his employment with the city council. A dispute had arisen and the D provisions of the relevant enactment provided that the dispute should be referred to a single arbitrator. Applicant wanted to appoint A, a former judge and legal practitioner, and respondent sought the appointment of B, a legal practitioner. In an application for the appointment of one of them in terms of s 8 of the Arbitration Act Chap 12 (Z),

Held, that it would be wrong and not merely invidious for the Court to choose between the two nominees; it would, of course, E be otherwise where the dispute related to an objective criterion as to which the Court could properly make a judgment.

Held, accordingly, that the Court had to decline to appoint either of the persons nominated; the matter was postponed sine die and, if agreement as to who should be the arbitrator was not possible, leave was given to either party on seven days' F notice to the other to set the matter down for further hearing in which case each party was requested to place before the Court a list of three nominees, together with a brief curriculum vitae in each case and an assurance that the nominee would accept the appointment to enable the Court to make a decision.

[zClz]Case Information

Application to appoint an arbitrator. The facts appear from the G reasons for judgment.

J B Colegrave for the applicant.

M J Gillespie for the respondent.

Cur adv vult.

H Postea (August 8).

Judgment

MCNALLY J: Mr Stewart is seeking abolition of office in respect of his employment with the City Council of Harare. A dispute has arisen. The relevant provisions of the Local Authorities Employees Principal Pension Scheme provide that the dispute shall be referred to a single arbitrator. The applicant wants to appoint A, a former Judge and current legal practitioner. The respondent is not happy with that nomination and seeks the appointment of B, a legal practitioner.

The matter comes before me in terms of the provisions of s 8 of the Arbitration Act Chap 12 (Z). The section provides that in these circumstances

1985 (1) SA p35

MCNALLY J

"the Court may... appoint an arbitrator... who shall have all the like powers to act in the reference and make an award as if he... had been appointed by consent of all parties".

Two things may fairly be said about this provision. In the first place, when it is said that "the Court may appoint", it clearly must be read to mean "the Court must appoint". There is no way the Court can ultimately avoid the duty, unless, of course, the parties relieve it of the duty by reaching agreement. See *Re Eyre & Leicester Corporation* [1892] 1 QB 136; *Russell on Arbitration* 19th ed at 147 - 148.

Secondly, it is clear that in the final analysis the Court may be obliged to appoint an arbitrator to whom one or even both parties object.

When the parties' legal representatives appeared before me, it seemed that they were preparing to extol the virtues of their respective candidates while politely declining to cast aspersions upon the other candidate. I therefore indicated, in limine, that this seemed to me an undesirable approach which would place the Court in an invidious position. On instructions from his client, however, Mr Colegrave persisted in pressing for the appointment of his client's nominee. Mr Gillespie in turn, while seeming more willing to agree to an alternative approach, drew attention to the virtues of his contender.

I remain firmly convinced that it would be wrong, and not merely invidious, for the Court to choose between the two nominees. It will, of course, be otherwise where the dispute relates to an objective criterion as to which the Court can properly make a judgment. Such was the situation in *Dipenta Africa Construction (Pty) Ltd v Cape Provincial Administration* 1973 (1) SA 666 (C). There the one side wanted X, a senior counsel and former Judge, while the other side wanted an experienced engineer and nominated a panel of three. It is clear from the judgment that the one side was quite willing to accept the appointment of any suitable senior counsel - they were not insisting on X personally. The dispute therefore was one as to which the Court could make a rational and objective judgment, namely whether the issues could better be resolved by a lawyer or by an engineer. The Court decided in favour of the latter, and directed the one party to select one of the three nominees of the other party.

In the present case it is apparent that each side is unhappy about the choice of the other for reasons which are unexpressed. These reasons may be wholly subjective and wholly unfounded, but even if they are it seems to me inconsistent with the whole concept of arbitration that I should impose on one or the other side an arbitrator in whom they do not have confidence. This is in line with the view taken by DE WAAL JP in the case of *Pretoria Cinemas (Pty) Ltd v Kinemas Ltd* 1931 TPD 407.

Of course, as Mr Gillespie pointed out, it might come to that in the end. If the parties steadfastly decline to agree mutually on any name which is proposed, the Court may eventually have to pluck a name from the air. Such a person may not be acceptable to one of the parties. Indeed, he may not be acceptable to either.

But it would be wrong to argue that just because the Court may

1985 (1) SA p36

MCNALLY J

A eventually be forced to impose an arbitrator on one or both of the parties, it should not do its best to avoid that situation.

One is reminded of the system of jury selection when our law provided for juries. Each side was allowed to object to a certain number of jurors "without assigning cause". The principle was and is a sound one. A party is entitled, within B reason, to be subjective about such matters. But in the final analysis his subjective likes and dislikes may have to give way to the need for a decision.

For these reasons I positively decline to enter this particular arena.

I decline therefore to appoint either of the persons nominated. In order to give the parties an opportunity to agree on the name of some other person, I propose to postpone the matter C sine die. If either party decides that agreement is not possible, leave is given for the matter to be set down again on seven days' notice to the other side, in which case each party is requested to place before the Court a list of three nominees, together with a brief curriculum vitae in each case, and an assurance that the nominee will accept the appointment.

D If agreement is reached, the parties may decide to remove the matter from the roll. Meanwhile, I will reserve the question of costs, drawing attention in passing to the ruling on costs in the Pretoria Cinemas case supra at 411.

Accordingly, the order of the Court is as follows:

1. The matter is postponed sine die and the question of E costs is reserved.
2. Leave is given to either party on seven days' notice to the other to set the matter down for further hearing.

Applicant's Legal Practitioners: Atherstone & Cook. F Respondent's Legal Practitioners: Honey & Blanckenberg.

NORTH EAST FINANCE (PTY) LTD v STANDARD BANK OF SOUTH AFRICA LTD

2013 (5) SA 1 (SCA)

Citation	2013 (5) SA 1 (SCA)
Case No	492/12[2013] ZASCA 76
Court	Supreme Court Of Appeal
Judges:	Lewis JA, Ponnann JA, Shongwe JA, Saldulker JA and Zondi AJA
Heard	May 20, 2013
Judgment	May 29, 2013
Counsel	LW de Koning SC for the appellant.
	O Cook SC (with A Botha) for the respondent.
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

63. Arbitration — Arbitration agreement — Arbitration clause — Enforceability — Contract containing clause invalid — Although general rule being that arbitration clause not surviving in such cases, parties may agree that dispute C regarding validity/enforceability of contract may nevertheless be determined by arbitration, provided that parties foresaw possibility of such dispute arising.
64. Contract — Interpretation — Contract must be interpreted by determining the parties' intention having regard to context and its purpose — Commercially D sensible meaning to be attributed.
65. [zHNz]Headnote : Kopnota
66. The parties had entered into a settlement agreement containing an arbitration clause, and the issue for determination on appeal was whether the arbitration clause would compel the parties to submit to arbitration in the E face of allegations that the settlement had been induced by North East's fraud, ie whether an arbitration clause could survive the demise of the contract in which it was included. The arbitration clause provided specifically that 'any dispute . . . including any question as to the enforceability of this contract' would be referred to arbitration.
67. Held, that there were two issues before the court: (i) whether the arbitration F clause could be construed to compel submission to arbitration on whether the bank was induced by North East's fraud to conclude the settlement agreement; and, if so, (ii) whether the allegations were wholly unfounded. (Paragraph [11] at 5E.)
68. Held, further, that it was in principle possible for parties to agree that the question of the validity of their agreement would be determined by arbitration even G
69. 2013 (5) SA p2
70. A though the reference to arbitration was part of the agreement being questioned — provided that they foresaw the possibility of such a dispute arising. Whether this was so would depend on a purposive construction of the arbitration clause itself and the agreement generally, having regard

to the context of the agreement and what the parties probably intended. (Paragraphs [12] – [13], [16] – [18] and [20] – [23] at 5F – 6D, 7C – 8A and 8E – 9D.)

71. B Held, further, that the purpose of the settlement agreement had been to resolve certain accounting issues, and that the evidence was that the bank had at the time of its conclusion not foreseen that there might have been fraudulent conduct by North East. There was thus no intention that the arbitrator would have to resolve issues relating to fraud, it having been envisaged that the arbitrator's role would be to determine disputes in respect of accounting C issues. (Paragraphs [26] – [28] at 9H – 10G.)
72. Held, further, having regard to the purpose of the settlement agreement and to what the parties envisaged at its conclusion, that it was not intended that the validity or enforceability of the agreement, induced as it was by fraudulent misrepresentations and non-disclosures, would be arbitrable. (Paragraph [30] at 10I – 11A.)
73. D Held, further, as to whether there was any substance to the allegations of fraud, that the bank's allegations were sufficient to conclude that the agreement was probably induced by fraud, and the bank could not be compelled to refer the questions of fraud, and the bank's right to resile from the agreement, to arbitration. (Paragraph [34] at 11I.) Appeal dismissed.
74. [zCAz]Cases Considered
75. E Annotations
76. Case law
77. Southern Africa
78. Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk 1968 (1) SA 7 (C): referred to
79. F Brink v Humphries & Jewell (Pty) Ltd 2005 (2) SA 419 (SCA) ([2005] 2 All SA 343): referred to
80. Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund 2010 (2) SA 498 (SCA): referred to
81. KPMG Chartered Accountants (SA) v Securefin Ltd 2009 (4) SA 399 (SCA) ([2009] 2 All SA 523): dictum in para [39] applied
82. G Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13): referred to
83. North West Provincial Government and Another v Tswaing Consulting CC and Others 2007 (4) SA 452 (SCA): dictum in para [13] applied
84. Sentrale Kunsmis Korporasie (Edms) Bpk v Van Heerden and Others 1972 (2) SA 729 (W): applied
85. H Van Heerden en Andere v Sentrale Kunsmis Korporasie (Edms) Bpk 1973 (1) SA 17 (A): applied
86. Wayland v Everite Group Ltd 1993 (3) SA 946 (W): referred to.
87. England
88. I Ashville Investments Ltd v Elmer Contractors Ltd [1988] 2 All ER 577 (QB) at 599: referred to
89. Fiona Trust & Holding Corporation and Others v Privalov and Others [2007] 1 All ER (Comm) 891: referred to
90. Fiona Trust & Holding Corporation and Others v Privalov and Others [2007] UKHL 40 ([2007] 4 All ER 951 (HL)): referred to
91. Heyman v Darwins Ltd [1942] AC 356 (HL) ([1942] 1 All ER 337): dictum at 357B – D applied.
92. 2013 (5) SA p3
93. [zClz]Case Information

94. LW de Koning SC for the appellant. A
95. O Cook SC (with A Botha) for the respondent.
96. Appeal from the South Gauteng High Court, Johannesburg (Hodes AJ).
97. Order
98. The appeal is dismissed with costs including those of two counsel. B
99. [zJDz]Judgment
100. Lewis JA (Ponnan JA, Shongwe JA, Saldulker JA and Zondi AJA concurring):
101. [1] If there are substantive reasons to believe that a contract has been induced by fraud, does a clause in the contract requiring the parties to submit any dispute between them to arbitration bind the aggrieved C party? This appeal turns on that question and on a construction of the arbitration clause itself. The South Gauteng High Court (Hodes AJ) found that allegations of fraud (inducing the contract between the parties) made by the respondent, Standard Bank of South Africa Ltd (the bank), against the appellant, North East Finance (Pty) Ltd (North East), did not appear unfounded, and constituted sufficient grounds for D it not to compel the bank to submit to arbitration. The high court thus declined the application by North East to compel such a reference. The appeal is with leave of the high court.
102. The factual matrix
103. [2] The questions to be determined must be considered against the E factual matrix or context of the contract, termed a 'settlement agreement' by the parties. In summary, this was that North East conducted business by financing the acquisition of goods by concluding rental agreements with end users. North East discounted the debts owed to it by end users with the bank in terms of an agreement of cession. The F business between the parties commenced in 1999, and the operative cession agreement was concluded in 2001. In terms of the cession North East ceded its rights under various rental agreements to the bank, and agreed to 'offer contracts' to the bank from time to time. The bank was entitled to accept such offers in its absolute discretion.
104. [3] The cession agreement was amended from time to time. In particular G an addendum (the collection addendum) was added in 2003, and it entitled North East to collect payments directly from debtors (end users). The bank would in turn claim payment from North East. That agreement was in turn amended in May 2007. Disputes about the collection of rentals, and the debiting of North East's bank account with the bank, arose in 2008. H
105. [4] In September 2008, following negotiations and meetings to resolve the disputes, the parties entered into a 'settlement agreement', the purpose of which was to phase out and then terminate North East's collection function. The agreement was drafted by Mr Nimrod van Zyl, I North East's attorney, and the brother of the deponent to the founding and replying affidavits in the application, Mr Hermanus van Zyl. The latter was a director of North East. The arbitration clause in issue in this matter was in the settlement agreement, clause 19.1 of which provided:
106. 'In the event of any dispute of whatsoever nature arising between the parties (including any question as to the enforceability of this contract but J
107. 2013 (5) SA p4
108. Lewis JA (Ponnan JA, Shongwe JA, Saldulker JA and Zondi AJA concurring)
109. A 'excluding the failure to pay any amount due unless the defaulting party has, prior to the due date for such payment, by notice in writing to the other party disputed liability for such payment), such dispute will be referred to arbitration in the manner set out below.' [My emphasis.]
110. [5] Prior to the conclusion of the settlement agreement the bank's head B of technology finance, Mr Mark Peters, became involved in the attempts to resolve the disputes. Although he did not sign the agreement for the bank, he was conversant with the nature of the disputes that had arisen, and he deposed to the answering affidavit for the bank. He was also instrumental in implementing the

agreement, primarily in collecting the C debts owed, estimated in 2008 to be worth some R660 million.

111.[6] The process of collection proved more difficult than anticipated. Peters and his team found it hard to get access to information and to understand the systems and processes used by North East prior to the conclusion of the settlement agreement. It is not necessary to examine the details of the investigation, or its outcome, described by Peters. D Suffice to say that after some time Peters concluded that the settlement agreement was induced by fraudulent misrepresentations and non-disclosures: by 2010, he said, he had discovered that procedures had been flouted by North East; transactions had been disguised, funds embezzled and other serious breaches of the fiduciary duty owed by E North East to the bank had occurred. Peters concluded that these irregularities must have been known to Hermanus van Zyl at the time when the settlement agreement was concluded. By deliberately failing to make disclosure of all the irregularities, the bank claimed, North East induced the bank to conclude the contract.

112. F [7] Having discovered the fraud, the bank elected to resile from the agreement and to regard it as void ab initio. It refused to submit the question as to whether there had been fraud inducing the contract to arbitration, maintaining that the arbitration clause fell with the contract (and indeed asserting that the clause had been included in the agreement as part of the fraudulent strategy of the Van Zyls). North East, on the other G hand, contended that any dispute between the parties had to be submitted to arbitration, including one as to the enforceability of the contract. North East, after calling for various pre-arbitration meetings (in terms of clause 19.2 of the agreement) which the bank refused to attend, launched an application in the high court for an order that a dispute existed as to H whether the settlement agreement was void ab initio; that the dispute was arbitrable in terms of clause 19.1 of the agreement; and that a dispute between the parties regarding the quantum of a payment to be made under the settlement agreement was also arbitrable.

113.The findings of the high court

114. I [8] The high court made several findings: that there were numerous disputes of fact relating to the fraudulent conduct of North East, and the conclusion of the settlement agreement, that could not be resolved on the papers before it; that the arbitration clause was part of the agreement and had no separate existence; that the allegations of fraud were 'not wholly unfounded' on the bank's version; that the arbitration clause did J not refer to fraudulent misrepresentations inducing the contract

115.2013 (5) SA p5

116.Lewis JA (Ponnan JA, Shongwe JA, Saldulker JA and Zondi AJA concurring)

117.specifically, such that this was not an issue to be determined by arbitration; that A the agreement to arbitrate was not severable from the rest of the settlement agreement; and that accordingly the court would not compel the bank to comply with the clause.

118.The legal issues B

119.[9] On appeal, North East contended that the arbitration clause conferred jurisdiction on an arbitrator despite the allegations of fraud inducing the settlement agreement, and that in any event the allegations of fraud were denied, or were based on 'hearsay evidence' or 'secondary facts'. The finding of the high court that, on the bank's version, the allegations of fraud were not wholly unfounded could lead, it was C argued, to a party escaping an arbitration clause, when it was no longer considered desirable, by simply alleging fraud.

120.[10] The bank argued that there were three issues for determination on appeal: whether the arbitration clause could survive the demise of the agreement in which it was included; whether it was divisible from the D remainder of the contract and would govern the determination of the question whether there was fraud that induced the agreement including the clause itself; and whether the bank had laid a basis sufficient to persuade the court not to refer the question of fraud to arbitration.

121.[11] As I see it, there are really only two issues for determination. First, E whether the particular arbitration clause should be construed so as to compel submission to arbitration on whether the bank was induced by North East's fraud to conclude the settlement agreement; and if so whether the allegations of fraud do not appear to be 'wholly unfounded'.

122. The effect of fraud on an arbitration clause in general F

123.[12] The first principle that the bank argued required consideration is really not in question. If a contract is void from the outset then all of its clauses, including exemption and reference to arbitration clauses, fall with it. The principle was most recently enunciated by this court in *North West Provincial Government and Another v Tswaing Consulting CC and Others*, 1 where Cameron JA said that an arbitration clause 'embedded in G a fraud-tainted agreement' could not stand. The court referred in this regard to *Wayland v Everite Group Ltd* 2 which in turn relied on *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk*. 3 That decision referred to *Heyman v Darwins Ltd* 4 where Viscount Simon LC said:

124. 'An arbitration clause is a written submission, agreed to by the parties to H the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is as to whether the contract

125. 2013 (5) SA p6

126. Lewis JA (Ponnan JA, Shongwe JA, Saldulker JA and Zondi AJA concurring)

127. A which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for B on this view the clause itself is also void.'

128.[13] North East accepted the general principle expressed in the passage in *Heyman*. But it argued that the arbitration clause itself provided that a dispute as to the enforceability of the settlement agreement had to be determined by arbitration, given the phrase in parentheses: 'including C any question as to the enforceability of this contract'. It contended that there is authority that if an arbitration clause 'specifically says so' the validity of the whole agreement must also be determined by a reference to arbitration. This will, of course, depend on a construction of the clause in the contract to see if it does 'specifically say so'. 5

129. D The interpretation of the arbitration clause

130.[14] North East argued that the arbitration clause in this case specifically said that the validity of the settlement agreement was to be determined by arbitration: that was the effect of the inclusion of the phrase concerning the enforceability of the agreement. The bank argued that E 'enforceability' was not co-extensive with 'validity' and that the question whether the contract was void as a result of the fraudulent misrepresentations or non-disclosures was not one that could be determined by an arbitrator. I do not think that this argument is helpful. The effect of fraud that induces a contract is, in general, that the contract is regarded as F voidable: the aggrieved party may elect whether to abide by the contract and claim damages (if it can prove loss) or to rescind — to regard the contract as void from inception, and to demand restitution of any performance it may have made, tendering return of the fraudulent party's performance.

131. G [15] The bank chose to treat the settlement agreement as void from inception, and when it made that election the contract effectively ceased to exist. It did not have to be cancelled or rescinded: it was void. The terms are often used loosely and confusingly. See *The Law of Contract in South Africa*, 6 where the authors write of rescission of a contract induced H by fraud (if a contract is void there is nothing to rescind), but point out that where the fraud results in a fundamental mistake, it cannot be anything but void from inception. That principle was expressed clearly by this court in *Brink v Humphries & Jewell (Pty) Ltd*. 7 It is not, however,

132. 2013 (5) SA p7

133. Lewis JA (Ponnan JA, Shongwe JA, Saldulker JA and Zondi AJA concurring)

134. necessary (indeed it is not possible, given the disputes of fact in respect A of the alleged fraud) for this court to determine whether the settlement agreement was void from inception or voidable until the bank had elected to resile. I consider that the term 'enforceability' refers to both a void and a voidable contract: if the parties had intended that the question whether fraud inducing the contract should be determined by an B arbitrator, then he or she would determine whether the contract was valid and enforceable, or voidable or void.

135. [16] It is in principle possible for the parties to agree that the question of the validity of their agreement may be determined by arbitration even though the reference to arbitration is part of the agreement being C questioned. That is suggested in Heyman. Lord Porter said: 8

136. 'I think it essential to remember that the question whether a given dispute comes within the provisions of an arbitration clause or not primarily depends upon the terms of the clause itself. If two parties purport to enter into a contract and a dispute arises as to whether they D have done so or not, or as to whether the alleged contract is binding upon them, I see no reason why they should not submit that dispute to arbitration. Equally, I see no reason why, if at the time when they purport to make the contract they foresee the possibility of such a dispute arising, they should not provide in the contract itself for the submission to arbitration of a dispute as to whether the contract ever bound them E or continues to do so. They might, for instance, stipulate that, if a dispute should arise as to whether there had been such a fraud, misrepresentation or concealment in the negotiations between them as to make a purported contract voidable, that dispute should be submitted to arbitration. It may require very clear language to effect this result, and it may be true to say that such a contract is really collateral to the agreement supposed to have been made, but I do not see why it should F not be done.' [My emphasis.]

137. [17] North East contended that the principle set out in Heyman was approved and applied by this court in Van Heerden supra, a matter decided on exception. This particular passage was not, however, referred G to. (I shall return to the passage shortly.) And in Van Heerden this court held that the question whether misrepresentations (included as warranties in the contract) had induced the contract should be referred to arbitration on the basis that the plaintiff relied on breach of warranties. As the bank contended, that case is distinguishable and turned on the nature of the dispute. H

138. [18] North East relied also on the House of Lords decision in Fiona Trust & Holding Corporation and Others v Privalov and Others 9 where Lord Hoffmann endorsed the approach of Longmore LJ in the Court of Appeal in that matter, that a fresh start should be made in determining whether an arbitration clause in an agreement covered a particular I dispute, including whether the contract was valid. The approach set out

139. 2013 (5) SA p8

140. Lewis JA (Ponnan JA, Shongwe JA, Saldulker JA and Zondi AJA concurring)

141. A is instructive, but in my view says not much more than was said in Heyman by the same court: the question must be determined by interpreting or construing the clause itself and the contract generally.

142. [19] The fresh start was needed in part to avoid the very fine distinctions B drawn by the English courts on the basis of the use of different prepositions — as was the case in Heyman where Lord Porter drew a distinction between 'arising under' and 'arising out of' an agreement. More importantly, it was required because s 7 of the Arbitration Act of 1996 introduced a completely new principle in England. It provides:

143. C 'Separability of arbitration agreement

144. Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for the purpose be D treated as a distinct agreement.'

145. The provision in effect reverses the previous principle that a provision in a contract would have the same status as the contract itself unless the parties specifically said otherwise.
146. E [20] The House of Lords in *Fiona Trust* accordingly had to make the fresh start, and Lord Hoffmann did so in line with modern approaches to the interpretation of contracts: the court should have regard to what 'the parties, as rational businessmen, are likely to have intended'. 10 Lord Hoffmann put it this way: 11
147. F 'Arbitration is consensual. It depends on the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. G Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.'
148. [21] It was necessary, therefore, Lord Hoffmann said, to have regard to H the purpose of the agreement as a whole and of the arbitration clause in particular. In doing so, the court would assume that generally parties intended to have all their disputes under an agreement determined by the same tribunal — not some disputes by an arbitrator and others by a court. If the parties intended otherwise, it was easy enough for them to I say so. 12
149. 2013 (5) SA p9
150. Lewis JA (Ponnan JA, Shongwe JA, Saldulker JA and Zondi AJA concurring)
151. [22] In his speech in *Fiona Trust* Lord Hope agreed with the approach A adopted by Lord Hoffmann, saying that if the parties had confidence in their chosen jurisdiction for one purpose there was no reason for them not to have such confidence for another purpose. But he did qualify this by stating that 'one should be slow to attribute to reasonable parties an intention that there should in any foreseeable eventuality be two sets of B proceedings' (my emphasis). 13
152. [23] Lord Hope thus echoed the principle set out by Lord Porter in *Heyman*, quoted above, that if the parties foresee the possibility of a particular dispute arising as to the validity of their contract, they may C provide that it be referred to an arbitrator for resolution. Accordingly if they anticipate that the contract itself may be invalid for want of true consensus or for some other reason, they may make that arbitrable. But that can be determined only by having regard to the context in which the agreement was concluded. This is in line with the South African approach to the interpretation of contracts generally. D
153. Interpretation of the contract in general
154. [24] I do not propose to recite the principles of interpretation comprehensively. They are well settled. The court asked to construe a contract E must ascertain what the parties intended their contract to mean. That requires a consideration of the words used by them and the contract as a whole, and, whether or not there is any possible ambiguity in their meaning, the court must consider the factual matrix (or context) in which the contract was concluded. See *KPMG Chartered Accountants (SA) v Securefin Ltd*. 14 F
155. [25] In addition, a contract must be interpreted so as to give it a commercially sensible meaning: *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund*. 15 This is the approach taken to considering the ambit of an arbitration clause adopted in *Fiona Trust*. We G must thus examine what the parties intended by having regard to the purpose of their contract.
156. Interpretation of the arbitration clause in question
157. [26] North East argued that in construing the arbitration clause we must H take into account the phrase 'including any question as to the enforce-
158. 2013 (5) SA p10
159. Lewis JA (Ponnan JA, Shongwe JA, Saldulker JA and Zondi AJA concurring)

160. A 'ability of this contract'. We must, it contended, give the phrase some meaning. To do that the court is required to look at the settlement agreement as a whole, and its purpose. That we do by looking at the context in which it was concluded. As stated at the outset, the parties had a protracted dispute about the collection of debts and the amounts owed B to each other respectively. The sums ran into millions of rand. The purpose of the settlement agreement was to resolve accounting issues: at the time the bank was oblivious to the malpractices it claimed were perpetrated by North East. In Peters' words, prior to concluding the settlement agreement, the bank —
161. C 'was under the impression that the arrears had arisen primarily due to inadequate management and control The respondent [the bank] did not realise the full extent of the arrears and the type of transactions that had been concluded because it did not have access to the debtors' book, or the applicant's management information system.'
162. D [27] Moreover, said Peters, the bank's investigations were frustrated by North East, which gave it limited access to information. Although the bank had sent an employee to North East to examine its business viability, and the report produced did not suggest any fraud — only inadequate systems — the employee had expressly indicated in the report E that an in-depth investigation was needed in order for the bank to gain some form of 'comfort/discomfort'. Had the bank known the extent of the arrears and the true facts it would not have entered into the agreement at all, it alleged.
163. F [28] Peters alleged also that even the wording of the arbitration clause was 'improperly procured' in order 'to avoid a public scrutiny of its conduct'. The bank argued that it had not foreseen that there might have been fraudulent conduct on the part of North East at the time of concluding the agreement. There was thus no intention that the arbitrator would be expected to resolve issues relating to fraud. It had envisaged G that the arbitrator's role would be to determine disputes in respect of accounting issues.
- 164.[29] North East's counter to that argument was that the arbitration clause provided that the arbitrator would be a senior member of the H Johannesburg Bar who would be able to determine questions relating to fraudulent misrepresentations inducing the agreement itself. In my view that is not an answer. The fact that an experienced lawyer might be able to determine issues relating to fraud does not mean that the parties intended him or her to do so.
165. I [30] I consider that, in the light of the purpose of the settlement agreement, and having regard to what the parties envisaged (because it was what they could foresee) at the time of concluding the agreement, it was not intended that the validity or enforceability of the contract induced by fraudulent misrepresentations and non-disclosures would be J arbitrable. That brings me to the next question: were the allegations
- 166.2013 (5) SA p11
- 167.Lewis JA (Ponnan JA, Shongwe JA, Saldulker JA and Zondi AJA concurring)
- 168.made by the bank, in its answering affidavit, sufficiently substantiated A such that the court should refuse to compel a reference to arbitration? 16
- 169.Substance in the allegations of fraud?
- 170.[31] In his answering affidavit Peters catalogued in detail the results of investigations that he and his team had undertaken, and which led to the B decision to resile from the settlement agreement on the ground that it had been induced by North East's fraudulent misrepresentations and non-disclosures. North East maintained that Peters' evidence was 'secondary' since he had not represented the bank when it concluded the agreement. The facts averred were also labelled secondary since they were no more than inferences drawn by Peters as to what C Hermanus van Zyl must have known. The argument fails to appreciate that Peters had participated in discussions preceding the conclusion of the settlement agreement and had led the bank's enquiries after the agreement was concluded: that it was he who asserted that he had established fraud on the part of North East. In any event, his affidavit was confirmed by a representative of the bank who was party to the agreement and to the D decision of the bank to resile.

- 171.[32] The bank argued that it need do no more than show that there was some justification for its contentions that the agreement was induced by fraud. And it maintained that its allegations had not been denied in E North East's reply — merely evaded. An example of the response to allegations of fraudulent misrepresentations and non-disclosures is to be found in the introductory paragraphs of the reply, where Van Zyl asserted that the issues raised were irrelevant to the question before the court and that 'responding in detail to each and every of those allegations by the respondent will unduly burden the record and serve no purpose'. F So too, the allegation by the bank that the arbitration provision was itself fraudulently induced was met with a bare denial. There was already mutual distrust, asserted North East, and the bank was not reliant on it for any disclosure. That is hardly a justification for deliberate non-disclosure.
- 172.[33] The methods described by Peters for investigating North East's G systems and reconciling data, detailed comprehensively, were met with the response that 'the intricate and involved procedures set out by respondent . . . is a clear example of why the issues between the parties should be resolved by way of arbitration. The arbitrator has been vested with the authority to devise rules and procedures best suited for resolving H the issues.' No purpose would be served by setting out more examples of evasion. Suffice to say that there are several.
- 173.[34] The high court correctly, in my view, held that the disputes of fact could not be resolved in the application. And it also correctly held that I the allegations made by the bank were sufficient to found or to justify the conclusion that the settlement agreement was probably induced by fraud and that the bank could not be compelled to refer the questions of fraud, and the bank's right to resile from the agreement, to arbitration.
- 174.2013 (5) SA p12
- 175.Lewis JA (Ponnan JA, Shongwe JA, Saldulker JA and Zondi AJA concurring)
176. A [35] The appeal is accordingly dismissed with costs including those of two counsel.
- 177.Appellant's Attorneys: Mark-Anthony Beyl Attorneys, Johannesburg; Honey Attorneys, Bloemfontein.
- 178.Respondent's Attorneys: Edward Nathan Sonnenbergs Inc, Johannesburg; Symington B & De Kok, Bloemfontein.
- 179.
180. 1 North West Provincial Government and Another v Tswaing Consulting CC and Others 2007 (4) SA 452 (SCA) para 13.
181. 2 Wayland v Everite Group Ltd 1993 (3) SA 946 (W) at 951H – I.
182. 3 Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk 1968 (1) SA 7 (C) at 14B.
183. 4 Heyman v Darwins Ltd [1942] 1 All ER 337 (HL) at 343F.
184. 5 Sentrale Kunsmis Korporasie (Edms) Bpk v Van Heerden and Others 1972 (2) SA 729 (W), referring to Heyman, which was approved also in this court on appeal: Van Heerden en Andere v Sentrale Kunsmis Korporasie (Edms) Bpk 1973 (1) SA 17 (A) at 27G – H.
185. 6 6 ed by RH Christie & GB Bradfield (2012) at 296 – 7.
186. 7 Brink v Humphries & Jewell (Pty) Ltd 2005 (2) SA 419 (SCA) ([2005] 2 All SA 343) para 2.
187. 8 At 357B – D.
188. 9 Fiona Trust & Holding Corporation and Others v Privalov and Others 2007 UKHL 40 ([2007] 4 All ER 951 (HL)).
189. 10 Paragraph 13.
190. 11 Paragraph 5.

191. 12 Paragraph 13, referring to Longmore LJ's judgment in the Court of Appeal: *Fiona Trust & Holding Corporation and Others v Privalov and Others* [2007] 1 All ER (Comm) 891.
192. 13 The court referred in this regard to *Ashville Investments Ltd v Elmer Contractors Ltd* [1988] 2 All ER 577 (QB) at 599.
193. 14 *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA) ([2009] 2 All SA 523) para 39. See also *Christie op cit* at 225ff and *SWJ van der Merwe et al Contract General Principles* 4 ed (2012) at 264ff.
194. 15 *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA) para 13. See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13) para 18.
195. 16 *Allied Minerals* above at 13A – D approved in *Wayland* above at 951D – H.

DE GOEDE v VENTER

1959 (3) SA 959 (O)

Citation	1959 (3) SA 959 (O)
Court	Oranje-Vrystaatse Provinsiale Afdeling
Judge	De Villiers R
Heard	July 10, 1959
Judgment	July 30, 1959
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Arbitrasie - Arbiters - Benoeming van - Ooreenkoms gekanselleer - Voorsiening dat dispute deur arbitrasie besleg moet word - Aansoek toegestaan - Koste - Tussen prokureur en kliënt - Beveling van.

196.[zHNz]Headnote : Kopnota

197.'n Ooreenkoms het voorsien dat enige dispuut tussen die partye deur arbitrasie besleg moet word en dat elke party een arbiter moet benoem. Die applikante het die ooreenkoms gekanselleer omdat die respondent sekere klousules verbreek het. Sy het geëis dat die geskil wat tussen die partye ontstaan het na arbitrasie verwys moet word. Die respondent het beweer dat, daar die ooreenkoms nie langer bestaan nie, die applikante nie geregtig was om op die arbitrasie klousule te steun nie. Applikante het aansoek gedoen vir 'n bevel wat die respondent beveel om 'n arbiter te benoem.

198.Beslis, dat die aansoek toegestaan moet word.

199.Beslis, verder, daar die respondent deurgaans oor geen bona fide verdediging beskik het nie of altans geen bona fide verdediging in die korrespondensie aan applikante openbaar het nie, dat hy die koste van die aansoek moet betaal op die skaal wat van toepassing tussen prokureur en kliënt is.

200.[zFNz]Flynote : Sleutelwoorde

201.Arbitration - Arbitrators - Nomination of - Agreement cancelled - Provision that disputes to be determined by arbitration - Application granted - Costs - Attorney and client - Granting of.

202.[zHNz]Headnote : Kopnota

203.An agreement provided that any dispute between the parties must be determined by arbitration and that each party must nominate one arbitrator. The applicant cancelled the agreement as the respondent had breached certain of the clauses. She demanded that the dispute which had arisen between the parties should be referred to arbitration. The respondent averred that as the agreement was no longer of any effect the applicant was not entitled to rely upon the arbitration clause. The applicant applied for an order calling upon the respondent to nominate an arbitrator.

204.Held, that the application should be granted.

205.Held, further, as the respondent at no time had a bona fide defence or at any rate the correspondence at no time revealed a bona fide defence that he should pay the costs of the application on an attorney and client scale.

206.[zClz]Case Information

207. Aansoek vir 'n bevel wat respondent beveel om 'n arbiter te benoem. Die feite blyk uit die uitspraak.
208. F. F. S. Smuts, K.A., namens die applikante.
209. J. P. G. Eksteen, K.A., namens die respondent.
210. Cur. adv. vult.
211. Postea (Julie 30).
212. 1959 (3) SA p960
213. [zJDz] Judgment
214. DE VILLIERS, R.: Die huidige is 'n aansoek om koste op die skaal van toepassing tussen prokureur en kliënt wat in die volgende omstandighede ontstaan.
215. Applikante en haar man Mnr. de Goede het in Augustus, 1957 'n geskrewe A ooreenkoms met Menere van der Merwe en Hugo aangegaan, in terme waarvan laasgenoemdes die reg gegee is om gruis en klip te verwyder van die plaas de Bloem, distrik Bloemfontein, tot die 10de Augustus, 1962 met 'n verdere opsie vir 5 jaar teen 'n vasgestelde vergoeding.
216. B Op die 20ste Februarie, 1958 het applikante, bygestaan deur haar man, 'n geskrewe ooreenkoms aangegaan met respondent in terme waarvan laasgenoemde ook die reg gegee is om gruis en klip van gemelde plaas te verwyder teen 'n vasgestelde prys. Die ooreenkoms bepaal in para. 1 dat respondent bogemelde reg gegee is:
217. 'ten einde te voldoen aan sekere kontrak tussen hom en die Suid-Afrikaanse Spoorweë, waarvolgens 500,000 kubieke jaarts gruis en klip aan die Spoorweë gelewer moet word. Hierdie kontrak sal duur tot C die 31ste Augustus 1962 of totdat die voormelde 500,000 kubieke jaarts gruis en klip aan die Spoorweë gelewer is, welke datum ook al die vroegste mag wees.'
218. Voorts bevat die ooreenkoms die volgende saakmakende paragrawe:
219. '11. Venter verbind hom om geen uitgrawings verder weg van die koppie te doen dan die uitgrawings wat vandag bestaan en hy verbind hom ook om geen uitgrawings nader dan 15 voet van enige grensdraad te maak nie. Hy D onderneem ook om alle los klippe ens. wat intussen elders op die eiendom gedeponeer is by verstryking van die kontrak terug te plaas in die opgraving en die terrein andersins netjies op te ruim.
220. 12. Enige dispuut tussen die partye sal deur arbitrasie besleg word, een arbiter benoem te word deur elke party en 'n derde (die voorsittende arbiter) benoem te word deur die twee ander arbiters.
221. 13. Indien enige paalement nie stiptelik op verval-datum betaal word nie, d.w.s. voor of op die 15de van elke maand, en Venter versuim om die gebrek te herstel binne 7 (sewe) dae nadat hy kennis gegee is om dit te E doen sal de Goede die reg hê om hierdie kontrak te kanselleer en skadevergoeding van Venter te eis.'
222. Dit is gemene saak dat op die 2de Maart, 1959 en weer op die 23ste April, 1959 applikante deur haar prokureur briewe aan respondent gerig het waarin dit beweer is dat die ooreenkoms tussen hulle reeds verstryk F het in terme van para. 1 daarvan, en waarin respondent kennis gegee is dat applikante in elk geval gemelde ooreenkoms kanselleer op grond daarvan dat respondent para. 11 verbreek het en versuim het om die betalings in terme daarvan te maak op die vasgestelde datum of binne 'n periode van 7 dae nadat hy skriftelik kennis ontvang het om dit te doen, G en ge-eis het dat respondent die genoemde plaas moet verlaat. Dit is ook gemene saak dat uit hoofde van respondent se weiering om te erken dat die ooreenkoms wettiglik verloop het, of dat applikante die ooreenkoms wettiglik gekanselleer het, applikante ge-eis het dat die geskil tussen die partye na arbitrasie moet verwys word, maar dat respondent konstant geweier het om enige arbiter te benoem.

223. H Uit hoofde van bogemelde het applikante aansoek by hierdie Hof gedoen vir 'n bevel wat respondent beveel om 'n arbiter te benoem vir die doeleindes van arbitrasie en 'n bevel dat respondent prokureur en kliënt koste betaal.
224. In 'n antwoordende verklaring erken respondent dat die ooreenkoms tussen die partye nie meer bestaan nie, en die gevolg is dat dit verder gemene saak is tussen die partye dat daar geen geskil is wat op
225. 1959 (3) SA p961
226. DE VILLIERS R
227. arbitrasie moet besleg word nie en gevolglik verval die aansoek om respondent te verplig om 'n arbiter te benoem en bly daar net oor die vraag van koste.
228. Mnr. Eksteen, namens respondent, het aangevoer dat applikante die verkwiste koste moet betaal omdat die Hof geen reg sou gehad het, in A terme van die ooreenkoms, om die geskil tussen die partye na arbitrasie te verwys nie. Mnr. Smuts, namens applikant, het betoog dat in terme van die beslissing van die Appèlhof in die saak van Scriven Bros v Rhodesian Hides & Produce Co. Ltd. and Others, 1943 AD 393, die Hof wel in die onderhawige geval die reg sou gehad het. Mnr. Eksteen het B verwys na sake soos Irving v Sun Insurance Office, 1906 O.R.C. 24; African Guarantee and Indemnity Co v Hofman, 1916 W.L.D. 27; Hurwitz's Trustee v Magdeburg Fire Insurance Co., 1917 T.P.D. 443, en Toller v Law Accident Insurance Society Ltd., 1936 (2) A.E.R. 952, vir die argument dat aangesien applikante erken dat die ooreenkoms nie meer C bestaan nie, sy nie geregtig is om op die arbitrasie klousule daarin te steun nie. Insover soos bogemelde beslissings outoriteit is vir Mnr. Eksteen se argument bots hulle met die genoemde Appèlhof beslissing wat hierdie Hof bind. Die arbitrasie klousule in die onderhawige saak is baie wyd en in Scriven se saak, supra, waar die Hof met 'n soortgelyke klousule te doen gehad het, het APPÈLREGTER TINDALL die volgende gesê op bl. 400 - 401:
229. D 'The judgment of VISCOUNT SIMON, L.C., in Heyman v Darwins Ltd., 1942 (1) A.E.R. 337, contains some valuable remarks on the scope of an arbitration clause in a contract where the clause was framed in wide and general terms. The learned LORD CHANCELLOR said, inter alia:
230. 'An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the E light of the circumstances in which it is made. If the dispute is as to whether the contract which contains the clause has ever been entered into at all that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void.
231. If, however, the parties are at one in asserting that they entered F into a binding contract, but a difference has arisen between them as to whether there has been a breach by one side or the other, or as to whether circumstances have arisen which have discharged one or both parties from further performance, such differences should be regarded as differences which have arisen 'in respect of', or 'with regard to', or 'under' the contract, and an arbitration clause which uses these, or similar, expressions, should be construed accordingly.'
232. The present is not a case where either party has attacked the validity G of the contract; for it is clear that, after the contract was entered into, transactions took place between the parties on the footing that the contract was in existence. But the heads of argument of Mr. de Villiers, who appeared for Scrivens in this Court, make the point that the company repudiated the contract in toto and was therefore not entitled to avail itself of the arbitration clause, the claim and the counterclaim going to the root of the contract. The fallacy underlying this contention is the assumption that a repudiation of a contract (in H the sense of a refusal to continue performance under it) by one party puts the whole contract out of existence. It is true that a repudiation of a contract by one party may relieve the other party of the obligation to carry out the other terms of the contract after date of repudiation, but the repudiation does not destroy the efficacy of the

arbitration clause. The real object of that clause is to provide suitable machinery for the settlement of disputes arising out of or in relation to the contract, and as that is its object it is reasonable to infer that both parties to the contract intended that the clause should operate even after the performance of the contract is at an end. If, for example, this contract had come to an end on a date stipulated for its termination. I do not think that it

233.1959 (3) SA p962

234.DE VILLIERS R

235. could have been contended successfully that the arbitration clause was no longer operative. So, too, it seems to me that when the contract is prematurely terminated by repudiation by one of the parties, the arbitration clause is still operative. When such a repudiation takes place it may or may not be justified; whether it is justified or not will be 'a question or difference arising out of or in relation to' the contract.'

236. A Dit kan net bygevoeg word dat respondent nie die houding inneem dat die ooreenkoms waaroor die saak gaan nooit bestaan het nie, of dat dit wel aangegaan is maar ab initio van nul en gener waarde was nie. Die ooreenkoms was wettiglik aangegaan en albei partye het handelinge in terme daarvan verrig totdat applikante dit repudieer het. Die geskil wat B daarna ontstaan het of die ooreenkoms nog wettiglik bestaan al dan nie, is 'n geskil wat seer sekerlik val binne die wye bestek van die arbitrasie klousule hierbo uiteengesit (vergelyk ook Metelerkamp v Railway Passengers' Assurance Co., 1924 CPD 302).

237.Mnr. Eksteen het 'n verdere argument aangevoer gebaseer op sake soos C van Schalkwyk v Griesel, 1948 (1) SA 460 (AD), en Collen v A.A. Mutual Insurance Association Ltd., 1954 (3) SA 625 (E), tot die effek dat, aangesien applikante die ooreenkoms repudieer het, sy nie geregtig was om op 'n klousule in die ooreenkoms te steun nie. Sy 'cannot both approbate and reprobate' soos dit gesê is in Bowditch v Peel and Magill, 1921 AD 561. Die stelling is ongetwyfeld waar wat gewone D ooreenkomstes betref maar is nie van toepassing in 'n saak soos die onderhawige nie en die Hof kan nie beter doen as om in die verband te verwys na die woorde van VISCOUNT SIMON, L.C., op bl. 347 in die saak van Heyman and Another v Darwins Ltd., 1942 (1) A.E.R. 337, 'n saak wat met goedkeuring aangehaal is in Scriven se saak voornoemd, te wete:

238. E 'There still remains the difficulty raised by the dicta of LORD SHAW and VISCOUNT HALDANE, which I quoted above. It is said to be wrong to allow a party to a contract, who has refused to perform his obligations under it, at the same time to insist on the observance of a clause of arbitration embodied in the contract. The doctrine of approbate and reprobate is said to forbid this. I appreciate the apparent dilemma but, with the greatest respect, I venture to think it is based on a misapprehension. The key is to be found in the distinction which I have F endeavoured to draw between the arbitration clause in a contract and the executive obligations undertaken by each party to the other. I can see nothing shocking or repugnant to law in one business man saying to another that he regrets he finds himself unable to go on with his deliveries under a contract between them, and at the same time asking the other to join with him in a reference under an arbitration clause in their contract in order to ascertain what compensation is to be paid for his default. The parties have both agreed that all questions between them shall be settled by their own tribunal. The question of the G consequences which are to follow from a breach, including a total breach, of the obligations undertaken by one of the parties is just such a question as both parties have agreed should go to arbitration. It is not a case of one party refusing to perform the obligations he has undertaken in favour of the other and at the same time insisting that obligations in favour of himself shall continue to be performed. The arbitration clause, as I have said, is not a stipulation in favour of either party. I am accordingly of opinion that the doctrine of approbate H and reprobate does not apply to prevent a party to a contract who has declined to proceed further with the performance of his obligations to the other party from invoking an arbitration clause in the contract for the purpose of settling all questions to which his declinature has given rise. In all this I have assumed that the arbitration clause in its terms is wide enough to cover the dispute.'

239. Die gevolg is dat respondent ongetwyfeld verantwoordelik is vir die koste van die aansoek en die enigste oorblywende vraag is of hy veroordeel moet word om koste op die skaal van toepassing tussen prokureur en kliënt te betaal, soos aangevra deur applikante.

240. 1959 (3) SA p963

241. DE VILLIERS R

242. In die uitoefening van sy diskresie sal die Hof natuurlik nie ligtelik beveel dat 'n onsuksesvolle party prokureur en kliënt koste moet betaal nie (vergelyk *de Villiers v Murraysburg School Board*, 1910 CPD 535 te bl. 538). Maar terselfdertyd sal die Hof nie aarsel in 'n geskikte A geval om 'n dusdanige bevel te maak nie. So het byvoorbeeld wyle DE WAAL, R.P., die volgende gesê in die saak van *Magnolia Investments (Pty.) Ltd v Kemp*, 1934 T.P.D. 297, en wel te bl. 300:

243. 'Now while Courts of law do not readily order parties to pay attorney and client costs, they will not hesitate to do so where the conduct of a party has been malicious and reckless or vexatious, or where, in the opinion of the Court, his conduct amounts to a contemptuous disregard of the rights of his opponent, and that is the case here.'

244. B Vergelyk ook soortgelyke uitlatings in sake soos *Ebrahim v Excelsior Shopfitters and Furnishers (Pty.) Ltd*, (2), 1946 T.P.D. 226 te bl. 236; *McMaster v Afrikaanse Historiese Genootskap (Eind.) Bpk.*, 1940 CPD 295 te bl. 297; *Nyele v van Coller*, N.O. (2), 1948 (3) SA 18 (W) te bl. 20; *Sass and Another v Berman*, 1946 W.L.D. 138.

245. C Indien bogemelde toets toegepas word kan daar geen twyfel wees nie dat applikante geregtig is op prokureur en kliënt koste. Volgens die stukke voor die Hof het respondent oor 'n lang periode van meer as 6 maande konstant volgehou dat daar 'n geldige ooreenkoms tussen hom en applikante bestaan, 'n houding wat hy plotseling laat vaar het in sy D antwoordende verklaring gedateerd 25 Junie, 1959 maar dit is nie al nie. 'n Noukeurige ontleding van die menigvuldige briewe wat tussen die prokureurs van die partye gewissel het, oortuig die Hof dat die stelling wat hierbo uiteengesit is in *Magnolia Investments (Pty.) Ltd v Kemp*, supra, waarmee die Hof volkome saamstem hier van toepassing is.

246. E Solank gelede soos die 26ste November, 1958 het applikante beweer dat die ooreenkoms ten einde gekom het in terme van para. 1 van die ooreenkoms, omdat 500,000 kubieke jaarts gruis en klip reeds aan die Suid-Afrikaanse Spoorweë gelewer is. Respondent het in antwoord nie ontken dat 500,000 jaarts klip en gruis aldus gelewer is nie, maar die F houding ingeneem dat omdat die Spoorweë meer klip verlang in terme van 'n ooreenkoms tussen respondent en die Spoorweë, die kontrak tussen applikante en respondent nog voortbestaan. Die onbestaanbare houding is in volhard selfs nadat die uiters duidelike terme van para. 1 van die ooreenkoms tot die kennis van respondent se prokureur gebring is. Nou beweer respondent self in sy antwoordende verklaring dat die ooreenkoms G reeds in November, 1958 ten einde geloop het en wel vir dieselfde rede wat applikante destyds aangevoer het.

247. In Februarie, 1958 het applikante aan respondent geskrywe en gemeld dat twee tjeks vir £312.12.9 en £170.6.8 geteken deur Mnre. van der Merwe en Hugo ontvang is, maar dat dit slegs aanvaar sal word indien dit H aangebied is namens respondent in aansuiwering van sy verpligtinge onder sy ooreenkoms met applikante en respondent is gevra om die aangeleentheid in die reine te bring, aangesien applikante meen dat die ooreenkoms tussen haarself en die here van der Merwe en Hugo reeds verstryk het. In antwoord op die brief is 'n onverstaanbare brief ontvang wat die volgende bevat het:

248. 'Wat betref die laaste paragraaf op bl. 1 van u brief, wil ons meld dat al die tjeks deur Mnr. Venter betaal was namens ons kliënte, Mnre. van der Merwe en Hugo. Die tjeks was oorhandig deur Mnr. Venter aangesien hy 'n kontrak

249. 1959 (3) SA p964

250. DE VILLIERS R

251. met u kliënte het. U sal verder onthou dat u kliënte ook 'n kontrak met ons kliënte Mnre. van der Merwe en Hugo het. Selfs al het die kontrak van Mnr. Venter verstryk dan sal Mnre. van der Merwe en Hugo se kontrak nog voortduur en wel tot ver in die toekoms.'
252. Al wat duidelik is in bogemelde brief is dat respondent beweer dat albei A ooreenkomstes nog van krag is. 'n Verdere brief waarin verduideliking gevra is was ge-ignoreer. Gevolglik het applikante op die 2de Maart, 1959 die genoemde tjeks aan respondent teruggestuur en terselfdertyd vir respondent kennis gegee dat sy die ooreenkoms kanselleer op grond daarvan dat daar 'n onwettige verbreking plaasgevind het van para. 11 B daarvan, deurdat uitgrawings op ongeoorloofde plekke gemaak is, 'n aangeleentheid wat reeds onder respondent se aandag gebring is in die genoemde brief van die 26ste November, 1958. Tegelykertyd is respondent gevra om die plaas te ontruim. In antwoord het respondent ontken dat hy die ooreenkoms enigins verbreek het, geweier om die repudiasie te aanvaar en gemeld dat applikante vry is om enige stappe te neem wat sy C mag goeddink. Nou beweer respondent self in sy antwoordende verklaring en in die alternatief, dat die ooreenkoms tussen die partye reeds vanaf die 2de Maart, 1959 nie meer bestaan nie.
253. Dit was op die tydstip en wel op die 7de April, 1959 dat applikante aangedring het dat die geskil tussen die partye na arbitrasie verwys D moet word en adv. Miller Q.C. as arbiter voorgestel het. Respondent se onbehoorlike antwoord op die uiters billike voorstel was die volgende:
254. 'Alvorens ons 'n arbitrasie oorweeg, sal dit nodig wees dat vooraf bepaal word watter punte deur die arbiters besleg moet word. Ons kliënte sal dit as 'n voor-vereiste stel dat die geldigheid van die oorspronklike ooreenkoms tussen u kliënt en Mnre. van der Merwe en Hugo erken moet word.'
255. E Vervolgens het applikante op die 23ste April, 1959 en op baie duidelike wyse die punte uiteengesit wat na arbitrasie verwys moet word. Terwyl die korrespondensie tot op dié datum steeds gegaan het oor die ooreenkoms tussen applikante en respondent, antwoord respondent na 'n vertraging van ongeveer 'n maand onder die opskrif 'Gruiskontrak J. B. van der Merwe en P. Hugo - Mnr. en Mev. C. M. de Goede' soos volg:
256. F 'Ons het nou opdrag ontvang van ons kliënte, Mnre. J. B. van der Merwe en P. Hugo dat hulle nie bereid is om toe te stem tot arbitrasie nie. Ons kliënte beskou die ooreenkoms van 10 Augustus 1957 as finaal en bindend op u kliënte.
257. As u kliënte afbreuk sou maak op die regte van ons kliënte wat aan hulle gegee word deur hierdie ooreenkoms, sal hulle hul onverwyld op die Hof beroep.'
258. G 'n antwoord wat boekdele spreek. Daarna was applikante verplig om die huidige aansoek aan die Hof te rig.
259. Die Hof kan net tot een gevolgtrekking kom en dit is dat respondent deurgaans oor geen bona fide verdediging beskik het nie, of altans geen bona fide verdediging in die korrespondensie aan applikante openbaar het H nie. Die argumente wat in die korrespondensie aangevoer is, was klaarblyklik ongegrond en respondent moes dit geweet het. Die argumente was ongetwyfeld aangewend om respondent intussen die geleentheid te gee om gruis en klip van die plaas te verwyder. Toe respondent uiteindelik in 'n hoek gejaag is, d.w.s. toe applikante gedreig het om 'n aansoek na hierdie Hof te maak om respondent te verplig om 'n arbiter te benoem, is die brief van die 20ste Mei, 1959 geskryf waarin toe skielik na die ooreenkoms tussen applikante en Mnre. van der Merwe en Hugo verwys is. 'n ooreenkoms wat niks hoegenaamd - te
260. 1959 (3) SA p965
261. DE VILLIERS R
262. oordeel na die korrespondensie - met die aangeleentheid te doen gehad het nie. Selfs op die stadium was dit nie deur respondent erken dat die ooreenkoms tussen homself en applikante nie meer bestaan nie. In respondent se antwoordende verklaring word daar nou beweer dat hy geruime tyd reeds gruis en klip verwyder het van gemelde plaas, uit A hoofde van die ooreenkoms wat van der Merwe en Hugo met applikante gehad het en omdat laasgenoemde hom die reg gegee het. As dit so was kom die vraag onmiddellik op waarom het hy dit nie so aan applikante gestel

gedurende die lang korrespondensie nie. Intendeel het hy deurgaans die houding ingeneem dat albei kontrakte nog bestaan.

263. B Mnr. Eksteen het aangevoer dat die Hof nie applikante se aansoek om prokureur en kliënt koste sal toestaan nie omdat daar nie viva voce getuienis voor die Hof is nie, en omdat die korrespondensie deurgaans gevoer is deur respondent se prokureur en dit nie duidelik is dat respondent met alles wat daarin vervat is saamgestem het nie. Wat die C argumente betref kan dit net geboekstaaf word dat in die aansoek voor die Hof, applikante baie duidelik te kenne gegee het dat sy vir prokureur en kliënt koste sal vra. Die redes daarvoor is gegee en die volledige korrespondensie wat vir sigself spreek is aangeheg. Daar is geen bewering deur respondent dat daar enige ander faktore is wat in aanmerking geneem behoort te word en waarvan die Hof nie weet nie en D respondent het, behalwe wat betref een paragrafie in een brief, hom nie disassosieer met die optrede van sy prokureur nie. Selfs met die verhoor van die aansoek het hy nie aansoek gedoen vir 'n uitstel, sodat hy verdere verklarings kan indien om aan te toon dat sy prokureur nie sy opdragte uitgevoer het nie.

264. E Dit word derhalwe beveel dat respondent die koste van die aansoek betaal op die skaal wat van toepassing is tussen prokureur en kliënt.

265. Applikante se Prokureur: Claude Reid. Respondente se Prokureurs: Symington & de Kok.

PAREKH v SHAH JEHAN CINEMAS (PTY) LTD AND OTHERS

1980 (1) SA 301 (D)

Citation	1980 (1) SA 301 (D)
Court	Durban and Coast Local Division
Judge	Didcott J
Heard	September 18, 1979
Judgment	October 31, 1979
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Arbitration - Purpose of - Such a method for resolving disputes - Where claim not disputed, it is not subject to arbitration.

Arbitration - Arbitration agreement does not deprive the Court of its C ordinary jurisdiction over the disputes which it encompasses - Effect - If arbitrable dispute is taken to Court, the other party must, if he wishes it to go to arbitration, request a stay of proceedings - But Court has a discretion whether to refer matter to arbitration or to tackle the dispute D itself - Accordingly, an exception to a claim cannot be entertained where such exception is based on an arbitration clause in an agreement - Grounds upon which Court will refer dispute to arbitration not all known to Court at exception stage.

Arbitration - Plaintiff's claim in Supreme Court admitted by defendant - Counterclaim by defendant to be referred to arbitration - Such not amounting to proceedings truly separate in their forum - Judgment on E plaintiff's claim can, therefore, be postponed until counterclaim decided by arbitrator and such decision returned to the Court for conversion into a judgment - Such situation covered by Rule of Court 22 (4).

Practice - Judgments and orders - Postponement of judgment on plaintiff's claim under Rule of Court 22 (4) pending decision of defendant's counterclaim - Such postponement possible even where counterclaim referred to arbitration - Rule 22 (4) covering such a situation.

1980 (1) SA p302

Practice - Judgments and orders - Postponement of judgment on plaintiff's claim under Rule of Court 22 (4) pending decision of defendant's A counterclaim - Plaintiff not immune from operation of Rule 22 (4) merely because he is a landlord suing for rent.

Landlord and tenant - Rent - Action by landlord for payment of - Tenant admitting claim for rent but averring that he had a counterclaim for damages in excess of landlord's claim - Landlord not immune from operation of Rule of Court 22 (4) for postponement of judgment on landlord's claim B until counterclaim decided merely because he is a landlord suing for rent.

[zHNz]Headnote : Kopnota

Arbitration is a method for resolving disputes. That alone is its object, and its justification. A disputed claim is sent to arbitration so that the dispute which it involves may be determined. No purpose can be served, on the other hand, by arbitration on an undisputed claim. There is then C nothing for the arbitrator to decide. He is not needed, for instance for a judgment by consent or default. Accordingly, the Court upheld an exception to a

special plea to a claim for the payment of arrear rental in terms of a lease where the special plea admitted that the rental claimed was indeed outstanding and payable, but that the defendant had an illiquid counterclaim in excess of the outstanding rental, which counterclaim had, in terms of a clause in the lease, to be referred to arbitration, and that D plaintiff's claim itself was hit by the arbitration clause and should have been referred to arbitration, it being successfully contended that, since the plaintiff's claim was undisputed, it was not subject to arbitration and that the special plea was, therefore, bad in law.

An arbitration agreement does not deprive the Court of its ordinary jurisdiction over the disputes which it encompasses. All it does is to oblige the parties to refer such disputes in the first instance to E arbitration, and to make it a prerequisite to an approach to the Court for a final judgment that this should have happened. While the arbitration is in progress, the Court is there whenever needed to give appropriate directions and to exercise due supervision. And the award of the arbitrator cannot be enforced without the Court's imprimatur, which may be granted or withheld. But that is by no means all. Arbitration itself is far from an absolute requirement, despite the contractual provision for F it. If either party takes the arbitrable disputes straight to Court, and the other does not protest, the litigation follows its normal course, without a pause. To check it, the objector must actively request a stay of the proceedings. Not even that interruption is decisive. The Court has a discretion whether to call a halt for arbitration or to tackle the disputes itself. When it chooses the latter course, the case is resumed, continued and completed before it, like any other. Throughout, its jurisdiction, though sometimes latent, thus remains intact. The remedy of G a stay of proceedings is discretionary. Its grant depends on a variety of circumstances. At the stage of an exception (relying on an arbitration clause in an agreement for a contention that the Court had no jurisdiction over the dispute between the parties) the Court knows but few of these. It is insufficiently equipped to use its discretion. Instead of an exception in such a situation, the party bent on arbitration must therefore lodge H either a substantive application under the Arbitration Act 42 of 1965 for the requisite stay, or a special plea in the action asking for one. Each side then has the opportunity to furnish by affidavit or to plead the material thought to have a bearing on the exercise of the Court's discretion, together with information tending to show, whenever such controversies have arisen, whether the arbitration agreement in any event fits the case and may freely be invoked by the party relying on it.

Plaintiff had instituted action against the defendants (as lessee and sureties) for the payment of an amount representing two months' rental for the premises leased. The defendants, in a special plea, admitted that the rental was outstanding and payable, but averred that they had an illiquid counterclaim for damages in excess of the outstanding rental, which counterclaim had to be referred to arbitration in terms of clause 25 of the lease. They accordingly prayed for an

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order whereby the grant of judgment on the plaintiff's claim be postponed in terms of Rule 22(4) of the Uniform Rules of Court until their counterclaim had been decided. Plaintiff excepted to the special plea, inter alia, on the ground that, as the counterclaim had to be decided in a different forum, namely by the arbitrator, that Rule 22(4) did not apply A and that the Court's judgment on the plaintiff's claim could never be delayed pending the result of a counterclaim consigned to arbitration. It was further contended that defendants could not ask for the deferment of judgment on plaintiff's claim while the lease stood and first defendant remained in occupation of the premises.

Held, that arbitration in respect of the counterclaim would not amount to B proceedings truly separate in their forum: the Court was already seized of the counterclaim; by referring any dispute thereby engendered to arbitration, it would delegate to the arbitrator its task of deciding the dispute, in accordance with the contract between the parties, and the ensuing change of forum, if so classifiable at all, would be strictly limited in purpose and duration.

Held, further, that, after a temporary sojourn in the new forum, the proceedings would return to the court for its conversion of the C arbitrator's award into a judgment: a judgment could then be passed on the claim and counterclaim simultaneously.

Held, further, that such a situation was covered by the language of Rule 22(4).

Held, further, that the first defendant's obligation to pay the debt claimed from and admitted by him was not suspended when he resorted to Rule 22(4): the day of judgment was put off, and that was all.

Held, further, that, procedurally, plaintiff's claim was halted for the D time being and this was the case irrespective of the claim's peculiar character: ex hypothesi, it was a claim for something already due and there was no reason why the plaintiff should be immune to Rule 22(4) merely because he was a landlord suing for rent, rather than a seller claiming the price of goods which had been delivered to the purchaser, or a lender seeking to recover money advanced to the borrower.

E The dictum in *Greenberg v Meds Veterinary Laboratories (Pty) Ltd* 1977 (2) SA 277 (T) at 286D not approved.

[zClz]Case Information

Exceptions to a plea, a special plea and a counterclaim. The nature of the pleadings appears from the reasons for judgment.

B Law SC (with him P A M Magid) for the excipient (plaintiff).

F P M Wulfsohn SC (with him M Pillemer) for the respondents (defendants).

Cur adv vult.

Postea (October 31).

[zJDz]Judgment

G DIDCOTT J: The premises of a cinema were let by the plaintiff to the first defendant at a monthly rental of R3 500. As sureties for and coprincipal debtors with the first defendant, the other five defendants then guaranteed the payment of such rent. A written lease recorded the first transaction and a deed of suretyship the second. Both documents are H annexures to the pleadings in this case. Their execution is common cause. So are all their terms. The lease chose arbitration as the machinery for the settlement of -

'... any dispute... between the lessor and the lessee in relation to any matter appertaining to this agreement of lease, save and except the question of the amount of rental payable.'

Clause 25 contained that provision. The deed of suretyship, on the other hand, had nothing similar.

Alleging that rent for two months was due under the lease but had not

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been paid, the plaintiff sued the defendants jointly and severally in this forum for R7 000.

A The defendants filed a plea, supplemented by a special plea. A counterclaim was added by the first defendant.

Damages of R382 393 were demanded from the plaintiff in the counterclaim. He was accused of fraudulent misrepresentations concerning the premises and their use, which had induced the first defendant to hire them and robbed it of that sum.

B The plea admitted that two months' rent, amounting to R7 000, was indeed outstanding and payable under the lease, and that the defendants were jointly and severally liable for it. Its payment was nevertheless said to be excused by reason of the first defendant's illiquid counterclaim for much more. This in turn, according to the plea, had to go to arbitration. Clause 25 required that. Alternatively, the Court was the tribunal for it. C The plea ended by requesting that judgment on the plaintiff's claim be delayed until the counterclaim had been determined, either by an arbitrator or by this Court.

The assertion that the first defendant's counterclaim excused it from paying the rent was repeated in the special plea. The dismissal of the D action was sought on the grounds that, such being the case, the plaintiff's claim itself was hit by clause 25 and should have been referred to arbitration.

The plaintiff responded with exceptions to all three pleadings. These must now be considered.

I shall deal first with the exception to the special plea. Its gist was that, since the plaintiff's claim was undisputed, it was not subject to E arbitration. The special plea was therefore bad in law. The point, to my mind, was well taken.

Arbitration is a method for resolving disputes. That alone is its object, and its justification. A disputed claim is sent to arbitration so that the dispute which it involves may be determined. No purpose can be served, on the other hand, by arbitration on an undisputed claim. There is then F nothing for the arbitrator to decide. He is not needed, for instance, for a judgment by consent or default. All this is so obvious that it does not surprise one to find authority for the proposition that a dispute must exist before any question of arbitration can arise. It includes *Re Carus-Wilson and Greene* (1887) 18 QBD 7 (CA); *London and Lancashire Fire G Assurance Co v Imperial Cold Storage and Supply Co Ltd* (1905) 15 CTR 673; *King v Harris* 1909 TS 292. Nor is one taken aback to see what clause 25 actually submitted to arbitration. It was 'any dispute' within the defined zone.

That the plaintiff's claim was undisputed seems beyond doubt. The defendants plainly admitted it. They had an answer, to be sure, in the counterclaim. But that was not truly a defence to the claim. It was an H excuse for not meeting a claim to which there was no defence. Whether the excuse was a good one may well turn out to be disputed. Any such dispute will, however, concern the counterclaim. It will not be a dispute about the claim.

The defendants' counsel, Mr Wulfsohn, argued that the counterclaim had generated a dispute whether, at the end of the affair, the plaintiff would be owed anything at all. No such dispute has yet arisen, but one may indeed develop. It will do so, however, only if the counterclaim is repudiated. And the dispute will then relate not to the admitted claim, but to the contested counterclaim. Its result is all that is left to complete the balance sheet.

My belief that the exception must therefore succeed is strengthened by

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the judgments in two cases I have discovered. They are *Close Settlement Corporation Ltd v Olds* 1917 TPD 636 and *Bede Steam Shipping Co Ltd v Bunge y Born Limitada SA* (1927) 43 TLR 374 (also 27 L1L Rep 410). Each featured A an arbitration agreement, an admitted claim, and a larger counterclaim which was defended. The decision on both occasions was that, since the claim was unopposed, it was not a subject for arbitration. What appears from the report to have been the same contention as Mr Wulfsohn's was advanced, considered and rejected in the *Bede Steam Shipping Co* case.

B On the hypothesis that a dispute over the plaintiff's claim was recognised for the reason suggested by Mr Wulfsohn, counsel debated the question whether, for the purposes of clause 25, it concerned 'the amount of rental payable' and was immune from arbitration on that particular score. The failure of the hypothesis means, however, that this subsidiary issue no longer matters. Mr Law, who appeared for the plaintiff, also criticised C the prayer in the special plea. A stay of the action pending arbitration should have been sought, he maintained,

instead of its outright dismissal. But the exception had not covered the point. It too, in any event, is now academic. So is a separate problem neither raised by the exception nor canvassed in argument. It is whether it was open to the second to sixth D defendants to invoke an arbitration agreement concluded by, and regulating differences between, the plaintiff and the first defendant alone.

The exception to the counterclaim will be considered next. This was the plaintiff's turn to resort to clause 25. It governed the counterclaim, so the exception went, with the result that the Court lacked jurisdiction over such.

The exception was based, however, on a fallacy. An arbitration agreement E does not deprive the Court of its ordinary jurisdiction over the disputes which it encompasses. All it does is to oblige the parties to refer such disputes in the first instance to arbitration, and to make it a prerequisite to an approach to the Court for a final judgment that this should have happened. While the arbitration is in progress, the Court is there whenever needed to give appropriate directions and to exercise due F supervision. And the award of the arbitrator cannot be enforced without the Court's imprimatur, which may be granted or withheld. But that is by no means all. Arbitration itself is far from an absolute requirement, despite the contractual provision for it. If either party takes the arbitrable disputes straight to Court, and the other does not protest, the G litigation follows its normal course, without a pause. To check it, the objector must actively request a stay of the proceedings. Not even that interruption is decisive. The Court has a discretion whether to call a halt for arbitration or to tackle the disputes itself. When it chooses the latter, the case is resumed, continued and completed before it, like any other. Throughout, its jurisdiction, though sometimes latent, thus remains H intact. That all this is so emerges from such cases as *Davies v South British Insurance Co* (1885) 3 SC 416; *Walters v Allison* 1922 NLR 238; *Rhodesian Railways Ltd v Mackintosh* 1932 AD 359; *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C).

It follows that an exception of the sort taken cannot be entertained. So much was decided in *Nash v Muirhead* (1908) 18 CTR 444, and by the Full Bench here in *Pillay v Pillay* 1934 NPD 135. The ruling consequently binds me. It operates even when, as now, the arbitration agreement is already before the Court and its terms are on view. The reason is

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twofold. In the first place, the knockout blow which such an exception aims at the claim in question is too violent a reaction. The sanction for A defiance of the agreement is its enforcement by a stay of the proceedings. That remedy, in the second place, is discretionary. Its grant depends on a variety of circumstances. At the stage of an exception the Court knows but few of these. It is insufficiently equipped to use its discretion. Instead of an exception in a situation like the present, the party bent on arbitration must therefore lodge either a substantive application under the Arbitration Act 42 of 1965 for the requisite stay, or a special plea B in the action asking for one. Each side then has the opportunity to furnish by affidavit or to plead the material thought to have a bearing on the exercise of the Court's discretion, together with information tending to show, whenever such controversies have arisen, whether the arbitration agreement in any event fits the case and may freely be invoked by the party relying on it.

C An additional factor occurs to me. I have already stressed arbitration's intrinsic need for a dispute. It may sometimes emerge from the declaration that the claim which it embodies is indeed disputed. But that is rather unusual. More often no dispute is yet on record at the time for an exception to the declaration. Here one sees another reason, in such a case D at any rate, for the unsuitability of that particular form of objection. A request for a stay, on the other hand, provides the occasion for the dispute's existence to be positively alleged in the special plea or affidavit. Its area will be demarcated simultaneously. Whether it is a difference of the kind envisaged by the arbitration agreement can thus be verified. The present is a case in point. The counterclaim declared no E dispute. It alleged, to be sure, that the plaintiff had not paid the damages for which he was said

to be liable. A dispute over a claim is not, however, the only explanation for or inference to be drawn from a failure to pay the claimed amount. The *Bede Steam Shipping Co* case and *Pillay v Pillay* remind one of this, as well as *Meny-Gibert v Crawley* 1938 CPD 491. That a counterclaim of such dimensions will be fought is no doubt predictable. The Court, in short, may expect a dispute. But that does not allow it to anticipate one.

F I have not overlooked the allegation in the plea that the counterclaim was destined for arbitration. This should not, however, be read in isolation. It was followed immediately by the alternative averment that the Court would have the task of trying the counterclaim. As I understand the defendants' object, it was to cover both contingencies, all that were G on the cards, without committing themselves to either. But that is really by the way. The plaintiff's misconception of his remedy is no less one for a premature allusion to arbitration by the defendants, if such in truth it was.

That leaves the exception to the plea. Its target was the prayer for the postponement of judgment on the claim until the counterclaim had been determined.

H Such is a well recognised move. When accomplished, it solves the problem faced by someone lacking a defence to a claim brought against him, but armed with an illiquid counterclaim which, having that character, does not by set-off discharge or reduce his acknowledged liability. Were he compelled to pay the debt at once, he would be out of pocket while the counterclaim awaited adjudication. Then, in the event of its success, he might find himself with a worthless debtor who had dissipated everything, including the very money won from him. The amount of the counterclaim, once liquidated by a judgment, would

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automatically be set-off against the debt if, on the other hand, he had managed in the meantime to stall the judgment for that. To meet the situation, the equitable principle evolved that:

A '... where reciprocal claims by the parties exist, the proper course is to decide all these claims *passu*, so as to adjudicate upon them all and then arrive at the decision as to who on balance is the really successful party, and consequently in truth the creditor.'

This was said by MURRAY J in *Du Toit v De Beer* 1955 (1) SA 469 (T) at 472B, a leading case on the topic in the days when no Rule of Court dealt with it, but the Court did so through its inherent control of its own B procedures. Amongst others to the same effect were *Hesse and Ritter v Louw* 1930 SWA 92; *Fielding v Sociedade Industrial de Oleos Limitada* 1935 NP 540 and *Hipkin v Nigel Engineering Works (Pty) Ltd* 1941 TPD 155. Rule 22 (4) now authorises the practice. It stipulates:

'If by reason of any claim in reconvention the defendant claims that on the giving of judgment on such claim the plaintiff's claim will be C extinguished either in whole or in part, the defendant may in his plea refer to the fact of such claim in reconvention and request that judgment in respect of the claim, or any portion thereof which would be extinguished by such claim in reconvention, be postponed until judgment on the claim in reconvention. Judgment on the claim shall, either in whole or in part, thereupon be so postponed unless the Court, upon the application of any person interested, otherwise orders...'

D The issue which the exception raised was whether such tactics could be used in a case like this.

The points taken in this connection will be mentioned just now. One that was not must, however, be noted immediately. The defendants believed, or took it for granted, that for defensive purposes they were all in the same boat and, what is more, that it was the first defendant's. So much is E plain from the pleadings. The exception did not challenge this supposition by differentiating the second to sixth defendants from the first and complaining that, whatever its own position might be, they at least could get no respite for a counterclaim belonging to it and not them. I hold no firm view, I hasten to add, that the objection would have been sound. It

was not debated, I have given it but passing thought, and I have formed no F definite opinion on it either way. The less said on the topic, the better in those circumstances, especially as it may present itself and need to be considered properly at a later stage of this very litigation. All that concerns me now is to explain that, since such was the footing on which the case was approached by both sides and put to me, I shall assume that G the first defendant's procedural privileges, if any, were not personal to it as the sole plaintiff in reconvention, but were shared by its sureties too. It will be convenient, once I do that, to confine my attention to the first defendant alone, and to disregard the others in the rest of this judgment.

The plea was attacked, first and foremost, on the grounds that the dilatory answer held good only when the claim and counterclaim were due to H be decided by one and the same tribunal. The Court's judgment on an admitted claim could never be delayed, so it was said, pending the result of a counterclaim which had been consigned to arbitration.

When the exception to the plea was drafted and argued, the plaintiff no doubt expected his exception to the counterclaim to be upheld, and the counterclaim itself to be removed once and for all from the Court's agenda. That, however, has not happened. The counterclaim is still before the Court. It may remain here, for all I know, even if it attracts a dispute. Perhaps the plaintiff will choose, after all, not to seek a stay of it

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for arbitration. Or the request, if made, may be refused. The situation is therefore not quite the one which the exception to the plea postulated. A But I do not think this matters. Arbitration on the counterclaim is not certain, as the plaintiff supposed it would be by now, but it is nevertheless a real prospect. The plea foresaw that, catered for it, and specifically asked for a moratorium in such event. Whether the part of it which did so may stand or must fall is, as I see things, a concrete question which the exception was wide enough to cover.

B Counsel told me that they had found no reported instance of the Court's postponement of judgment on a claim ripe for adjudication, merely in order that proceedings in some other forum might be completed. This, Mr Law submitted, was unthinkable, whether the forum in question was the magistrate's court, a different Division of the Supreme Court, or a C foreign tribunal. To the list he added arbitration. He conceded that, once a reciprocal claim was involved, the case for delay was no weaker in equity on account of its prosecution elsewhere. But a deferment had drawbacks then, he maintained, which outweighed its equitable advantages. Without control over the parallel proceedings, lacking even first hand knowledge of their progress, the Court would tend to lose touch with the situation. More important, indeed fatal altogether to the stratagem, was D the impossibility in such circumstances of the simultaneous judgment on both claims which, when all was said and done, was the essence of the equitable solution. Far from synchronising the verdicts, the one claim's obstruction would usually result in the prior determination of the other. Potential prejudice, instead of being eliminated, would thus be shifted from the defendant to the plaintiff.

E The argument had marked force, I am inclined to think, when applied to proceedings truly separate in their forum. My reaction to it in this case, however, is that arbitration in respect of the counterclaim would not amount to such. I therefore find it unnecessary to reach any final conclusion about the contention itself.

F The distinction which I have drawn can be explained simply. The Court is already seized of the counterclaim. By referring any dispute thereby engendered to arbitration, it would delegate to the arbitrator its task of deciding the dispute, in accordance with the contract between the parties. The ensuing change of forum, if so classifiable at all, would be strictly G limited in purpose and duration. After a temporary sojourn in the new forum, the proceedings would return to the Court for its conversion of the arbitrator's award into a judgment. One could then be passed on the claim and counterclaim simultaneously. By the time it ended, the case would have differed from the average sort only in its intermediate mechanism for resolving the dispute. The difference has its own

undoubted importance. I H can see no reason, however, why it should tell against the dilatory plea in litigation like the present, especially when arbitration usually produces a quicker result than an ordinary trial, and consequently a shorter delay in a judgment postponed in the meantime. Few of the problems posed by Mr Law, and none that matter, would be encountered.

The situation, I believe, is covered by the language of Rule 22 (4). The first defendant has a claim in reconvention. The Court's judgment upholding it will extinguish the plaintiff's claim, provided of course that this remains in abeyance for the time being. And that will be the judgment's

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effect, whether it is the result of an arbitrator's award or the sequel to a judicial investigation. The Rule therefore allowed the first defendant to plead, as it did, that judgment on the claim should be deferred until one was given on the claim in reconvention too. It could probably have A done that with impunity in any event. The Court's inherent power to insist on the simultaneous disposal of reciprocal claims, and to that end to delay the determination of the first, was not curtailed by the Rule. Since it came into operation pleas seeking such relief have been recognised in B situations different from but analogous to the one spelt out there. Examples can be found in LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd 1974 (1) SA 747 (A) and J R and M Moffett (Pty) Ltd v Kolbe Eiendoms Beleggings (Edms) Bpk and Another 1974 (2) SA 426 (O). I shall not, however, pursue this line of thought. There is no need to do so once one is satisfied, as I am, that the proceedings fall within the Rule itself.

C Mr Law relied heavily on S and R Valente (Pty) Ltd v Benoni Town Council 1975 (4) SA 364 (W). That case was similar to this. In its plea the defendant had admitted the plaintiff's claim, mentioned a larger but illiquid counterclaim which it had against the plaintiff, explained that D arbitration on this was already pending, and asked for judgment against it to be postponed until the arbitration was finished. An exception to the plea had been lodged. It came before GALGUT J. He dealt generally with the topic by saying (at 366A):

'Du Toit's case and the Rule of Court contemplate that the claim and counterclaim will be heard in the same forum.'

Weighing the plea itself, he then continued (at 366A - B):

E 'The following would appear to be the relevant considerations: (i)... there is nothing before me to show that the plaintiff cannot pay an amount awarded against him in the arbitration proceedings; (ii) the issues before the Court will not be heard in the same forum; (iii) there is then also the basic principle that a counterclaim of an illiquid character is F incapable of being set off against a claim in convention.'

For those three reasons, the exception was upheld.

The first and third, as it happens, were not used as grounds for the present exception. Since they match these proceedings exactly, however, some passing comment on them is perhaps appropriate. With deference to GALGUT J, I feel bound to say that they do not appeal to me. The embargo G on set off is the distinctive feature of all such cases. Without it, the discharge of the defendant's debt by the plaintiff's larger liability may be pleaded as an outright defence, no counterclaim is called for, and the occasion for judgment to be deferred never arises. The very problem which precipitates the dilatory plea, which it was specially designed to H overcome, and which Rule 22 (4) postulated when authorising it, can hardly count in turn against it. Nor, to my mind, does uncertainty about the plaintiff's resources when the issue is the plea's excipiability, not its merits. The enquiry at that stage is not whether judgment should actually be delayed, but whether its postponement was notionally obtainable and competently sought in the situation pleaded. Together with all the litigation's further

circumstances, the plaintiff's financial state has a bearing no doubt on the eventual fate of the request, although it is not necessarily decisive even then. The request's validity, on the other hand, can never

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depend on that detail. The Rule's total silence about it, apart from all else, convinces one of this. Nor is it the usual practice for the A plaintiff's inability to meet the counterclaim to be pleaded, in my experience at any rate. No similar decision condemning a plea for the want of such allegation has come to my attention.

The second reason, that advanced in these proceedings too, remains. As I have explained, however, I take the view that it does not hit them. No counterclaim was before GALGUT J. The one in question had already gone to B arbitration. The report does not identify the Court which had jurisdiction over the arbitration and the ultimate task of transforming the arbitrator's award into a judgment. For all one knows, it was a different Division altogether. The arbitration's forum from beginning to end may thus have been truly separate from the litigation's. Perhaps the case is distinguishable on these grounds. One must nevertheless recognise that C GALGUT J regarded arbitration as a forum per se distinct and perpetually detached from each and every Court, or so it seems. He appears not to have questioned this, but to have thought it axiomatic. For the reasons I have given, I do not see my way clear to follow his decision on the point.

D The last contention which I must consider comprised an independent assault on the plea. It had nothing to do with the particular prospect of arbitration, but straddled both eventualities, an arbitrator's determination of a dispute over the counterclaim and the Court's. The objection concentrated instead on the nature of the plaintiff's admitted claim, one for rent. Such a claim was special, so it was said. Despite E Rule 22 (4), the first defendant could not ask for judgment thereon to be deferred while the lease stood and it stayed in the premises.

I am not sure that the exception really covered the point. But no such protest was registered by Mr Wulfsohn, and the contention was fully debated. Its importance to the parties and to the litigation's future, F moreover, is obvious. I shall therefore deal with it. In doing so, I shall assume that the first defendant indeed took occupation of the premises and has remained there. Nowhere was this alleged explicitly. It may, however, have been implicit in the pleadings.

The authority on which Mr Law based his argument in this connection was the judgment of FRANKLIN J in Greenberg v Meds Veterinary Laboratories G (Pty) Ltd 1977 (2) SA 277 (T). That decision followed in the wake of a number which had forbidden tenants with grievances to withhold rent while continuing, in pursuance of their leases, to use the premises hired by them. One who did that both had his cake and ate it. His remedy was to quit the premises altogether, provided of course that his complaint H against the landlord justified such extremes. By those means he freed himself from his duty to pay the rent. Otherwise, however, it lasted, and he had to content himself with such separate redress as was open to him. The cases expounding and explaining this general rule had included Sapro v Schlinkman 1948 (2) SA 637 (A); Arnold v Viljoen 1954 (3) SA 322 (C); Tooth and Another v Maingard and Mayer (Pty) Ltd 1960 (3) SA 127 (N); Marcuse v Cash Wholesalers (Pvt) Ltd 1962 (1) SA 705 (FC); Basinghall Investments (Pty) Ltd v Figure Beauty Clinics (SA) (Pty) Ltd 1976 (3) SA 112 (W). The rule was enforced by FRANKLIN J. It applies equally to this case.

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FRANKLIN J, however, went much further. Describing the situation he had, in which the respondent was the landlord and the applicant the tenant, he said (at 286C):

A 'Although the applicant was entitled to cancel the lease and claim damages from the respondent on the ground of the alleged misrepresentations, it is clear on the papers before me that it has elected to abide by the contract.'

The same goes for the current litigation. Then came the passage on which Mr Law relied. FRANKLIN J added (at 286D):

'In my opinion, when a party has a counterclaim for damages, even one B based on fraudulent misrepresentations, it cannot ask for a stay of the main claim for instalments of rent as they fall due in terms of a contract by which it has elected to abide, and it cannot claim to set off its counterclaim for damages against the rental which has already accrued.'

Because of its illiquidity, a counterclaim for damages can never, of course, be set off against the claim in convention, whatever the C plaintiff's cause of action may be. What FRANKLIN J presumably meant, however, was that an admitted claim for rent could not be met, in the sort of case he had in mind, by a request for judgment on it to be postponed so that a set off might operate once the counterclaim's amount was liquidated D by a judgment. This he took to be a corollary to the rule, or so I gather. If he was correct in thinking that, the present plea is plainly bad.

I find myself, however, in respectful disagreement with FRANKLIN J. I see here a clear distinction between contractual obligations and procedural privileges, which strikes me as fundamental to the enquiry. While he occupies the premises, the tenant is obliged to pay the rent as soon as it E falls due. No illiquid claim for more which he may have against the landlord, and no tactical device in litigation calling him to account which he may employ in order to strengthen his counter-attack, can relieve him, even temporarily, of the obligation or the consequences of its breach. If one of these happens to be the landlord's contractual right to exact some penalty, to accelerate some event, or to terminate the tenancy F altogether, for instance, the landlord is at liberty to exercise the right at once, and its exercise takes instant effect. It will remain effective, moreover, no matter what befalls the counterclaim afterwards. The success of that, and the consequent liquidation of its amount, will extinguish the liability for rent, if such remains unsatisfied. It will not, however, G purge the default retrospectively. Nor will it invalidate ex post facto the results which lawfully ensued from the default at the time. The machinery of Rule 22 (4) has nothing to do with any of this. The defendant's obligation to pay the debt claimed from and admitted by him is not suspended when he resorts to it. The day of judgment is put off, and H that is all. Procedurally, the claim's enforcement is halted for the time being. This is the case, I furthermore believe, irrespective of the claim's peculiar character. Ex hypothesi, it is a claim for something already due. I can think of no reason why the plaintiff should be immune to the Rule merely because he is a landlord suing for rent, rather than a seller claiming the price of goods which have been delivered to the purchaser, or a lender seeking to recover money advanced to the borrower. Like the landlord, and to the same degree, each is owed a debt immediately payable for a benefit actually enjoyed.

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In support of his conclusion, FRANKLIN J referred to the decision in *Rosettenville Motor Exchange v Grootenboer* 1956 (2) SA 624 (T). As I A understand it, however, such was not its effect. The case concerned a hire-purchase agreement. The purchaser had sued the seller in the magistrate's court for damages for breach of warranty. The seller had defended the action and counterclaimed for the full balance of the price. This had become payable under the agreement once an instalment was B overdue, and several were. The magistrate had upheld the claim, but dismissed the counterclaim. An appeal followed. It failed in respect of the claim, but succeeded on the counterclaim. In this connection it was common cause that the magistrate ought to have granted judgment for the arrear instalments at least. The only question was whether the entire balance should have been awarded. KUPER J answered this in the affirmative, saying (at 632A - B):

C 'Whilst it is true that the plaintiff could properly ask that judgment on the counterclaim be stayed pending judgment on the claim..., this right could not operate as a basis for permitting the plaintiff to set off his unliquidated claim for damages against the monthly instalments due under the agreement. The procedural right does not enlarge the plaintiff's rights under common law, nor does it operate to permit a set off at the D time the monthly instalments fell due. Immediately the February 1954 instalment fell due, the total balance would become payable unless the February instalment was discharged by payment or set off at that time.'

It is thus apparent that, far from backing the view of FRANKLIN J, the decision reinforces that which I have taken. It drew the same distinction E between the one party's substantive rights when the other defaulted, and the defaulter's procedural remedy delaying their enforcement; and it recognised that these were not incompatible, but could be exercised alongside one another.

No other authority was cited by FRANKLIN J to fortify his opinion, and I know of none. Nor, to my mind and for the reasons I have given, does it F follow in principle from the rule requiring tenants in occupation to pay their rent. Indeed, VAN WINSEN J remarked in *Arnold v Viljoen* (supra) on the absence from that case of a counterclaim concerning the defects in the premises of which the tenant had complained, and took it for granted (at 330E - F) that, had one been there, the judgment on the claim could have been withheld for the time being to enable the two to be decided together.

G The attack on the plea therefore fails. This does not, however, make actual delay in the claim's adjudication a foregone conclusion. I have been concerned with the permissibility of a deferred judgment, not its desirability. The plea's survival means that, if nothing else happens,

judgment on the claim will automatically be postponed until the H counterclaim is ready for one as well. Rule 22 (4) has that effect. But it also allows the plaintiff to apply for the postponement's recall. In that event it will be for the Court hearing the application to decide whether, in all the circumstances of the case, the plaintiff must indeed wait for his rent. Such circumstances will no doubt include the plaintiff's ability to pay the counterclaim if he has to, the hardship he is likely to face if the rent remains unpaid for much longer, and the boon to the first defendant of free accommodation for an indefinite period.

The exception to the special plea is allowed, with costs, and the special

1980 (1) SA p313

DIDCOTT J

plea itself is dismissed, with costs. The exceptions to the plea and the counterclaim are both dismissed, with costs. The costs so awarded will A include, in each case, those incurred by the successful party which have resulted from the employment of two counsel.

Plaintiff's (Excipient's) Attorneys: Clemmans & Johnston. Defendants' (Respondents') Attorneys: Renuka Singh & Co.

SHERWOOD ELEVEN THIRTY INVESTMENTS CC v ROBRIDGE CONSTRUCTION CC AND ANOTHER

2001 (4) SA 741 (W)

Citation	2001 (4) SA 741 (W)
Case No	10885/2000
Court	Witwatersrand Local Division
Judge	Navsa J
Heard	October 16, 2000
Judgment	December 13, 2000
Counsel	J Peter for the applicant. E Wessels for the first respondent.
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

266.Arbitration - Arbitration proceedings - Delay in prosecuting - Parties not bound to commence arbitration de novo after time period within which arbitrator had to act in terms of s 23 of Arbitration Act 42 of 1965 lapsed - To insist on arbitration de novo would be to attempt to escape regulatory effect of Act and to choose option not visualised by Act - Such C rendering nugatory scheme of Act, which provides mechanisms to ensure either finality through enforcing arbitration agreement or cessation of arbitration.

Headnote : Kopnota

267.The applicant and the first respondent had referred a dispute to an arbitrator (the second respondent) in terms of a contract D between them. The first respondent failed to file its statement of claim with the second respondent despite repeated attempts by the applicant to get it to do so. Eventually, some 20 months after the matter had been referred to the arbitrator, the first respondent notified the applicant that it would be filing the statement of claim. The applicant adopted the stance that the period in s 23 of the Arbitration Act 42 of 1965 had lapsed and that it would have no further E part in the arbitration. The applicant approached the Court for an order inter alia declaring the reference to arbitration as of no force and effect and restraining the respondents from giving effect to the reference. The first respondent averred that it was the reference to the arbitrator which had lapsed and not the arbitration agreement itself. Accordingly, it contended that it was entitled to pursue the arbitration de novo. F

268.Held, that the parties were not bound to commence the arbitration de novo after the time period within which the arbitrator had to act in terms of s 23 had lapsed. The Act, although silent on the consequences of the expiration of the time set out in s 23 of the Act, did visualise that, even after the expiration of the statutory time period, the Court, on application, could extend the time period for the making of the award. To have insisted on an arbitration G de novo would have been to attempt to escape the regulatory effect of the Act and to choose an option not visualised by the Act and to render nugatory the scheme of the Act, which provided mechanisms to ensure either finality through enforcing the arbitration agreement or the cessation of arbitration. (At 746H/I - J, 747B/C - D and 747E/F - G/H.)

269. Held, further, that the arbitration agreement between the parties obliged the parties to co-operate and to do whatever was necessary to facilitate and finalise the settlement of a dispute by way of arbitration subject to the Act. The applicant had complied with its contractual obligations. It had reached the point where it had to draw the line and adopt the position that for an arbitration to remain unprosecuted to finality for so long a period of time was untenable. (At 747A - B/C.) I
270. Held, further, that, although the Act provided for other alternative remedies in ss 3(2) and 23, the applicant was not precluded from approaching the Court for the relief sought in the present application. Granting the relief sought would not preclude the parties from pursuing the alternative relief available. (At 747D - D/E.)
271. Held, accordingly, that the applicant was entitled to the relief sought by it. (At 747G/H.) J
272. 2001 (4) SA p742
273. [zCAz] Cases Considered
274. Annotations A
275. Reported cases
276. *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909: referred to
277. *Inter-Continental Finance and Leasing Corporation (Pty) Ltd v Stands 56 and 57 Industria Ltd and Another* 1979 (3) SA 740 (W): applied
278. *May & Co v Attwell Brothers* (1897) 11 EDC 107: distinguished. B
279. [zSTz] Statutes Considered
280. Statutes
281. The Arbitration Act 42 of 1965, ss 3(2) and 23: see *Juta's Statutes of South Africa* 2000 vol 1 at 1-5 and 1-9.
282. [zClz] Case Information
283. Application for an interdict. The facts appear from the reasons for judgment. C
284. J Peter for the applicant.
285. E Wessels for the first respondent.
286. Cur adv vult.
287. Postea (December 13). D
288. [zJDz] Judgment
289. Navsa J: This is an application in which an order is sought in the following terms:
290. 1. Interdicting and restraining the respondents from proceeding with, or taking any steps to give effect to, the reference to E arbitration of a dispute by the first respondent made to the second respondent, dated 18 January 2000.
291. 2. Declaring that the reference to arbitration of a dispute by the first respondent made to the second respondent dated 18 January 2000 is of no force and effect. F
292. 3. Ordering the first respondent to pay the applicant's costs as between attorney and client, incurred between 29 January 1998 and 17 January 2000 as a result of the reference to arbitration of a dispute by the first respondent made to the second respondent dated 13 January 1998.
293. 4. In the alternative to paras 1 and 2, staying the reference to G arbitration of a dispute by the first respondent made to the second respondent dated 18 January 2000 pending:

294. 4.1 payment by the first respondent made to the second respondent of the costs of the applicant as provided in para 3 above; and H
295. 4.2 provision of security for the applicant's costs of arbitration in respect of the reference to arbitration of a dispute by the first respondent made to the second respondent dated 18 January 2000, in a form and an amount to the satisfaction of the Registrar.
296. 5. Costs I
297. 6. Further and/or alternative relief.
298. The background
299. During October 1996 the applicant and the first respondent concluded a written agreement, in terms of which the first respondent J
300. 2001 (4) SA p743
301. NAVSA J
302. undertook to erect a house for the applicant in Dainfern. Other than the clause relating to a reference to arbitration A in the event of a dispute, the other terms of the agreement are not material to this application. Clause 16.2 of the agreement reads as follows:
303. 'The arbitrator shall conduct the arbitration subject to the provisions of the Arbitration Act 42 of 1965 and in accordance with the rules published by the Association of Arbitrators.' B
304. A number of disputes arose in respect of a number of issues relating to the construction of the house and in respect of payment for work. At one stage the first respondent asserted that it was exercising a lien and kept control of the premises in question. Negotiations ensued, resulting in the premises being handed over to the applicant. The C applicant paid money into trust pending the outcome of arbitration proceedings which the parties accepted was the appropriate and agreed method of resolving their dispute.
305. On 8 January 1998 the second respondent, after having been approached by the first respondent to act as arbitrator, enquired D whether the arbitration was proceeding. On 13 January 1998 Mr Robert Bridges, a member of the first respondent, wrote to the second respondent advising him that it was his intention to continue with the arbitration proceedings. Correspondence ensued between the second respondent and the parties concerning dates for a preliminary hearing and the second respondent's rates. A meeting E was held on 3 February 1998 and it was agreed that the parties would prepare a statement of issues by 24 February 1998. In the event of the parties being unable to agree to the statement, normal arbitration procedures for the conduct and finalisation of the arbitration would be followed. In particular, it was agreed that the F first respondent would prepare and finalise a statement of claim and that each party would deposit an amount of R3 000 with the second respondent.
306. During February, March and April 1998 the applicant repeatedly wrote to the first respondent to attempt to get the arbitration proceedings on track. It is common cause that initially dates for the G arbitration hearing were set, namely 6 and 7 May 1998. These dates had to be changed because it became clear that the first respondent was unable to meet with the applicant to finalise a statement of issues or to present a statement of claim. Thereafter, the first respondent's attorney was still not forthcoming with his particulars of claim. The delay was compounded when the first H respondent's attorney travelled overseas during the latter part of July 1998.
307. During September 1998 the applicant's attorney attempted once again to obtain particulars of the first respondent's claim. He failed because the first respondent's attorney once again travelled overseas. The attorney did, however, undertake to give the matter I priority on his return. This he failed to do. In January 1999 the second respondent reminded the first respondent that it was almost a year since the preliminary meeting involving the parties and him and recorded that he had not yet received a statement of claim. The second respondent enquired from the first J
308. 2001 (4) SA p744

309.NAVSA J

310.respondent whether it was still interested in pursuing its claim. The first respondent A did not at that stage take steps to ensure that the arbitration got under way.

311.On 3 May 1999 the applicant's attorney wrote to the first respondent's attorney stating that it appeared that the latter had no intention of proceeding with the arbitration. The applicant's attorney indicated that unless he heard to the contrary he would return B to the applicant the money held in trust pending the conclusion of the arbitration. This letter elicited no response from the first respondent's attorney. Three months later, in August 1999, the first respondent's attorney wrote to the applicant's attorney stating that he had instructions to issue a statement of claim which would be placed before the second respondent. The applicant's C attorney responded by stating that it was ludicrous for an arbitration to commence approximately 20 months after the dispute arose. Further correspondence and meetings took place. After the applicant's attorney consulted with counsel in October 1999 the applicant adopted the attitude that the time period in terms of s 23 of the Arbitration Act D 42 of 1965 (the Act) for the making of an award had lapsed and that the applicant would take no part in any further attempt to have the matter arbitrated.

312.Further correspondence was exchanged between the parties. The second respondent adopted the attitude that because the time period E referred to in s 23 of the Act had lapsed he was functus officio and suggested that a reference to arbitration should begin de novo. In a letter dated 17 January 2000 the applicant's attorney demanded that the first respondent pay its wasted costs, failing which an approach to Court would follow. Further correspondence was exchanged. The divergence of views between the parties concerning the validity of a second reference of the same F dispute to arbitration a second time persisted. This led to the present approach to Court. The second respondent has been cited for such interest as he has in these proceedings. He will abide the order of this Court and is not an active participant in this application.

313.The issues G

314.As is evident from what is stated earlier in this judgment, the applicant adopts the attitude that after a first reference to arbitration has lapsed in terms of s 23 of the Act the respondent, the party who initiated the reference to arbitration, in the absence of an application to Court to extend the time limit within which an award H has to be made in terms of s 23, is not entitled to embark on a second reference to arbitration. Mr Peter, representing the applicant, submitted that when a first referral to arbitration proves abortive, ie no award is made within the four-month period referred to in s 23 of the Act, the arbitration is in a state of limbo and can be revived only upon an application to Court for an extension of time. He submitted that there is no other mechanism to which the I first respondent has recourse.

315.It was submitted on behalf of the applicant that arbitration is underscored by an agreement, that in particular circumstances a dispute will be referred to arbitration. It follows, it was submitted, that if the J

316.2001 (4) SA p745

317.NAVSA J

318.applicant complied with its contractual obligations and did everything in its power to co-operate in an effort to have the dispute A resolved by arbitration and the first respondent failed to reciprocate and frustrated such efforts the first respondent was not entitled to insist on a second referral to arbitration. It was submitted that in these circumstances the applicant was entitled to resort to Court for the relief presently sought. The applicant claims B that it is entitled to wasted costs incurred in pursuing the first arbitration. It submits further that in the event of it being found that a second reference to arbitration is competent, the first respondent should be ordered to provide security for costs as it appears that the lack of diligence in pursuing the first arbitration was due to a lack of funds. C

319.The first respondent submits that in law it is entitled to pursue the arbitration de novo. The first respondent submits that the applicant is not entitled to wasted costs related to the first reference

to arbitration and has not laid a basis for the submission that the first respondent should be ordered to provide security for costs. D

320. Conclusions

321. The relevant part of s 23 of the Act reads as follows:

322. '23 Time for making award

323. The arbitration tribunal shall, unless the arbitration agreement otherwise provides, make its award - E

324. (a) in the case of an award by an arbitrator or arbitrators, within four months after the date on which such arbitrator or arbitrators entered on the reference or the date on which such arbitrator was or such arbitrators were called on to act by notice in writing from any party to the reference, whichever date be the earlier date; and F

325. (b) . . . ,

326. or in either case on or before any later date to which the parties by any writing signed by them may from time to time extend the time for making the award: Provided that the Court may, on good cause shown, from time to time extend the time for making any award, whether the time has expired or not.'

327. Section 23(b) deals with the case of an award by an umpire and has no relevance to the present case. G

328. The arbitration agreement in the present case is specifically made subject to the Act. There has been no agreement in writing to extend the time limits for the making of an award, as contemplated in the latter part of s 23 of the Act. There has been no application to Court by the first respondent for an extension of the time limit in terms H of the proviso to s 23 of the Act.

329. An option available to the applicant was for an approach to Court in terms of s 3(2) of the Act, for an order in terms of the alternatives spelt out in that subsection of the Act.

330. Section 3(2) reads as follows: I

331. 'The Court may at any time on the application of any party to an arbitration agreement, on good cause shown -

332. (a) set aside the arbitration agreement; or

333. (b) order that any particular dispute referred to it in the arbitration agreement shall not be referred to arbitration; or J

334. 2001 (4) SA p746

335. NAVSA J

336. (c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred.' A

337. This option has not yet been exercised. The applicant has, instead, chosen the path followed in the present application, contending that in terms of *Inter-Continental Finance and Leasing Corporation (Pty) Ltd v Stands 56 and 57 Industria Ltd and Another* 1979 (3) SA 740 (W) it was entitled to do so. It was held in that case, that a party B contending that a pending arbitration proceeding is invalid is justified in approaching a Court to seek an order preventing allegedly futile proceedings before they are commenced.

338. I was referred by counsel for the first respondent, in support of its case, to the following passage from *Butler and Finsen Arbitration in South Africa: Law and Practice* (1993) at 259: C

339. 'The Act is silent on the consequences of the expiry of the time for making the award before an award is made. There can be little doubt, however that the effect of the period expiring is that the reference to arbitration lapses, the arbitrator ceases to hold office and neither party would be

bound by any award which the arbitrator may D purport to make thereafter. As it is the reference which lapses rather than the arbitration agreement, the reference is still subject to a binding arbitration agreement and the parties would be bound to commence the arbitration de novo unless they decide or the Court directs that the agreement should cease to have effect.'

340. Counsel for the first respondent referred me to the unreported judgment of Stegmann J in the case of Pasa Construction (Pty) Ltd E v Roofing Construction Co (Pty) Ltd case No 12243/83 - 31 August 1989 where, at p 11, the following is said:

341. '(T)he consequence appears to be that the reference to the arbitration lapsed and that neither party would be bound by any award which the arbitrator might have purported to make thereafter.'

F

342. In context, Stegmann J was dealing with an application seeking to enforce an arbitration award. The arbitration award in that case was made after the expiration of the period stipulated in s 23 of the Act. The arbitration agreement in that case did not extend the time period stipulated in s 23 and there was no subsequent written agreement by the parties to extend the time period. There appears to have been no G application to Court to extend the time for the making of an award. The application was refused by Stegmann J on the basis that there was no valid arbitration award which could be enforced. It is against that background that the passage referred to must be understood. Stegmann J did not say that it followed that the only option H open to the parties was to start an arbitration de novo.

343. With respect, I disagree with the view expressed by Butler and Finsen that the parties are bound to commence the arbitration de novo and consider the reasoning to be flawed. The arbitration agreement is expressly made subject to the Act. The Act, although silent on the consequences of the expiration of the time set I out in s 23 of the Act, does visualise, in the proviso to the section, that even after the expiration of the statutory time period, a Court may, on application, extend the time for the making of an award. In addition, the statutory time period can be extended by agreement, before or after its expiration. J

344. 2001 (4) SA p747

345. NAVSA J

346. The arbitration agreement obliges the parties to co-operate and to do A whatever is necessary to facilitate and finalise the settlement of a dispute by way of arbitration subject to the Act. The applicant, in my view, has complied with its contractual obligations. It has sought to do so beyond the time period prescribed for the making of an award. The applicant has reached a point where it has drawn the line and adopted the position that for an arbitration to remain unprosecuted to finality B for so long a period of time is untenable.

347. Section 23 enables the parties to stipulate in the arbitration agreement itself a period other than the expiry period set out in the section. This was not done. In my view it does not follow that the parties are obliged to start the arbitration de novo. The options open to a party are those set out in ss 3(2) and 23, namely, C to apply for an extension of time and thereby possibly revive what may, perhaps, more accurately be described as an arbitration in limbo, or to seek an order upon good cause shown, in terms of the alternatives referred to in s 3(2) of the Act. Despite these options being open to the parties it does not mean that the applicant is precluded from D approaching the Court for the relief sought in the present application. In the event of a finding in favour of the applicant on the main relief sought, the parties are not thereby precluded from pursuing these options. The question raised in the minority and majority judgments, dealing with a delay in the prosecution of an arbitration, in the case E of Bremer Vulkan Schiffbau und Maschienenfabrik v South India Shipping Corporation Ltd [1981] AC 909 can then, if necessary, be debated.

348. In my view, the parties, having chosen to have their arbitration agreement regulated by the Act, are obliged to have the reference to arbitration dealt with in terms of the Act. To insist on an arbitration de novo is, in my view, to attempt to escape the regulatory F effect of the Act, to choose an option not visualised by the Act and to render nugatory the scheme of the Act, which provides mechanisms to ensure either finality through enforcing the arbitration agreement or the cessation of arbitration

by way of an order in terms of s 3(2) of the Act. It should be borne in mind that the parties agreed expressly, G in the arbitration agreement, to have the arbitration regulated by the Act. For all the reasons referred to earlier in this judgment I consider that the applicant is entitled to the main relief sought by it.

349. Insofar as costs are concerned, it was contended by counsel on behalf H of the applicant that in terms of *May & Co v Attwell Brothers* (1897) 11 EDC 107 it was entitled to the wasted costs related to the first reference to arbitration. The headnote in that case reads as follows:

350. 'Where in a contract arbitration was agreed on as a condition precedent to litigation, and no power was given by the contract to the arbitrators to order the unsuccessful party to pay the costs of I arbitration, and defendants refused to nominate arbitrators or to attend before the arbitrators who were appointed and refused to pay the amount awarded against them,

351. Held, in an action by plaintiffs to recover the amount awarded, that plaintiffs were entitled to recover in addition to the sum awarded as damages the costs of the arbitration which was a condition precedent to litigation.' J

352. 2001 (4) SA p748

353. NAVSA J

354. I am unpersuaded that the conclusions in that case are relevant to the facts of the present case. A

355. The first respondent submits that s 32 read with s 35 of the Act were available to the applicant to recover such wasted costs.

356. It is clear, in my view, that those sections of the Act have no application as they relate to a situation where an award has been made.

357. There is a consideration, in my view, why I should not order the costs related to the first reference to arbitration to be paid by the B first respondent. Counsel for the parties, during further submissions made in Chambers, did not preclude following the options still open to them as set out earlier in this judgment. Under these circumstances it appears to me to be prudent, at this stage, to limit the costs to be paid by the first respondent to the costs of this C application.

358. Following on the conclusions reached by me I grant an order in terms of paras 1, 2 and 5 of the notice of motion.

359. Applicant's Attorneys: Barry Katz and Partners. First Respondent's Attorneys: Mendelow-Jacobs. D

360. (Cases: *Dickenson & Brown v Fishers Executors*, 1915 AD 166, *Hyperchemicals International v Maybaker Agrichem* 1992(1) SA (W), *Bester v Easigas (Pty) Ltd* 1993(1) SA30, *v Diversified Total Support Management (Pty) Limited & Another Health Systems (SA) (Pty) Ltd & Another* 2002 (4) SA 661 (SCA), *Telcordia Technologies Inc. v Telkom SA Ltd* 2007 (3) SA 266 (SCA))

DICKENSON & BROWN v FISHER'S EXECUTORS

1916 AD 374

166 DICKENSON & BROWN v. FISHER'S EXECUTORS.

INNES, C.J.: The Court will not decline the power to suspend execution of the sentence, but the present case is not one in which such an application can be granted. The Court has no doubt as to the conclusions at which it has arrived, and is not prepared to interfere.

25440-42,43,51. / 23600-116,245.
28440-129,160,161 / 36440-252
42440-340,350

DICKENSON & BROWN, Appellants, v. FISHER'S
EXECUTORS, Respondents.

(BLOEMFONTEIN).

57(1)-915.
51(13)-783.
63(1)-187
72(1)435(R)
75(3)636(D)
76(2)1(A)
78(2)124(T)
79(3)632(C)
80(4)738(2A)

1915. February 8, 9, 23. INNES, C.J., SOLOMON, J.A., DE VILLIERS, A.J.A., JUTA, A.J.A., and WESSELS, Actg. A.J.A.

Arbitration.—Award.—Error on face of award.—Practice.—Finality.—Misconduct of arbitrators or umpire.—Arbitration Act 24 of 1898 (N.), secs, 7, 13, 17 (a), 18 and sec. (c) of the schedule to Act.—Reference back to arbitrator or umpire.—Setting aside of award.

There is no distinction in Roman-Dutch law between the effect of a mistake appearing on the face of an award and one, not so appearing.

The only grounds for setting aside an award are (a) misconduct by arbitrators or umpire, or (b) the improperly procuring an award.

An application to have an award made a Rule of Court was opposed on the ground that there was a mistake apparent on the face of it amounting to misconduct on the part of the umpire in the construction of an agreement between the parties on which the matter turned. The application was granted, and a cross-application to set aside the award on the above ground was refused. The present respondents in their application to have the award made a Rule of Court, filed, in addition to their affidavits, copies of the notes of evidence, summons and certain other papers in accordance with the usual practice. Respondents objected as a preliminary point to these notes of evidence and certain other documents being used by the appellants or the Court.

Held, on appeal (reversing the ruling of the Provincial Division), that the appellants could refer to and make use of the notes of evidence and other documents.

Held further, on the merits, that the award could not be set aside in view of the provisions of secs. 7, 13, 17 (a), 18 and sec. (c) of the schedule, Act 24 of 1898 (N.), and of the arbitration clause in the agreement, as there had been no misconduct on the part of the arbitrators or umpire, and as the award had not been improperly procured and did not go outside the terms of the submission, or exceed the powers conferred, and that a *bona fide* mistake of law or fact could not amount to "misconduct," within the meaning of sec. 18 of Act 24 of 1898 (N.).

174 DICKENSON & BROWN v. FISHER'S EXECUTORS.

[SOLOMON, J.A.]

Now it is quite clear that the first point which it is essential that the appellant should establish in order to make out his case is that an award of arbitrators can be set aside on the ground that they have made a mistake of law which is apparent on the face of the award itself, and I proceed, therefore, to consider whether a Court is entitled to set aside an award on that ground.

Now it is not, I think, open to question that as a general rule where parties have referred their disputes to an arbitrator, his award is final and conclusive and no appeal lies from his decision. In the case of *Caledonian Railway Co. v. Turcan* (1898, A.C. 256), which is referred to in the judgment of the court below, the English law is thus stated by LORD HALSBURY: "The parties have selected the arbitrator as judge both of fact and law, and if he be ever so erroneous in the decision at which he has arrived it is conclusive upon the parties ; his award is final, and whether it be right or wrong in point of law, it is a matter with which I am not entitled to deal." And in the same case LORD HERSHELL said: "The arbitrator whether he has decided rightly or wrongly is supreme. There is no power to review his decision, whether he has made a mistake in law or whether he has made a mistake in fact." And that the law of Natal on this subject is to the same effect is, I think, quite clear. For that law we have to look now not to the principles of our common law but to the statute law as it is set forth in the Arbitration Act, 1898. In the case of the *Dutch Reformed Church v. Town Council of Cape Town* (15 S.C.R. 14), the late CHIEF JUSTICE had occasion to examine into the Roman-Dutch law of awards, and he pointed out that under that system a practice had been introduced called "reductie" which was to all intents and purposes an appeal against the award. He remarks, however, "As an instance of the great and silent influence of English procedure upon the practice of the Court that no case can be found in which the Dutch process of 'reductie' has been resorted to in this Colony. Certainly since the appointment of English and Scotch Judges in 1828 the principle of the finality of awards became firmly established in our Courts." That was so before any legislation had been introduced on the subject, and since that time the question is placed beyond doubt. The Natal Act 24 of 1898 provided in sec. 7 that "a submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions set forth in the

[SOLOMON, J.A.]

schedule to this Act, so far as they are applicable to the reference under the submission." And sec. (o) of the schedule provides as follows: "The award to be made by the arbitrator, arbitrators or umpire shall be in writing, and shall if made in terms of the submission, be final and binding on the parties and the persons claiming under them respectively." What the result would be, if the parties in the submission provided that the award should not be final, it is not necessary to enquire for here there is an express provision in the deed of partnership that "the decision of the arbitrator or umpire, as the case may be, shall be absolutely final and binding on the parties." The case, therefore, falls within the terms of the Act of 1898, and it is clear that the legislature intended to provide by statute that all awards to which the Act applies should be final and conclusive and that there should be no appeal therefrom. Provision, is, however, made that in certain circumstances an award may be set aside by the Court. Sec. 18 provides as follows: "Where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured, the Court may set the appointment or award aside." Now in my opinion that section must be read to be exhaustive, and to provide that it is in these cases and in those only that it is competent for a Court to set aside an award. That, of course, would not debar a Court from interfering where an arbitrator has made his award extend to matters which have not been submitted to him, for to that extent his award would be null and void, as has been decided in many cases in England. Moreover sec. (o) of the schedule to the Act of 1898, to which I have already referred, provides that the award shall be final and binding upon the parties "if made in terms of the submission." I have no doubt, therefore, that an award could always be challenged if the arbitrator has exceeded his powers, but where he has made his award in terms of the submission, I am of opinion that the Court has jurisdiction to set it aside only in cases which can be brought under the provisions of par. 18 of the Act, that is where it has been proved either that the arbitrator has misconducted himself or that the award has been improperly procured.

Now in the present case it is not suggested that the award has been improperly procured, but it is contended that the arbitrator has misconducted himself within the meaning of the words as used in the section under consideration. Now I do not propose to attempt

[SOLOMON, J.A.]

to give any definition of the word "misconduct," for it is a word which explains itself. And, if it is used, in its ordinary sense, I fail to see how there can be any misconduct unless there has been some wrongful or improper conduct on the part of the person whose behaviour is in question. The same word occurs in par. 13 of the Act, where it is provided that "the Court may upon motion remove any arbitrator or umpire who has misconducted himself in connection with the matters referred to arbitration," and I think we must presume that the word was intended to have the same meaning in both sections, unless there is some good ground for coming to a different conclusion.

Now if the word misconduct is to be construed in its ordinary sense it seems to me impossible to hold that a *bona fide* mistake either of law or of fact made by an arbitrator can be characterised as misconduct, any more than that a Judge can be said to have misconducted himself if he has given an erroneous decision on a point of law. Nor can I conceive of a Court removing an arbitrator for misconduct merely because he has made a mistake whether of law or fact. Cases may no doubt arise where, as was said by the late CHIEF JUSTICE in the case of *Landeshut v. Koenig* (20 S.C.R., at p. 34), "the mistake is so gross or manifest that it could not have been made without some degree of misconduct or partiality on the part of the arbitrator." But in such cases the mistake would merely be evidence to show that there had been misconduct and if an award were set aside in such circumstances it would be really on the ground of misconduct and not of mistake. It may be also that an arbitrator has been guilty of the grossest carelessness and that in consequence he had come to a wrong conclusion on a question of fact or of law, and in such a case I am not prepared to say that a Court might not properly find that there had been misconduct on his part. But in ordinary circumstances where an arbitrator has given fair consideration to the matter which has been submitted to him for decision, I think it would be impossible to hold that he had been guilty of misconduct merely because he had made a *bona fide* mistake either of law or of fact.

Can it make any difference then that the mistake appears on the face of the award? It is impossible on principle to see how it can. The mistake is the same whether it is disclosed by the arbitrator or not. How then can it be misconduct in the one case but not in the

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other? And how can it be suggested that a comparatively slight mistake appearing on the face of the award is misconduct, whereas a gross one which does not appear, is not? In truth, if the word "misconduct" is to be construed in sec. 18 in its ordinary sense it is in my opinion impossible to hold that an arbitrator is guilty thereof merely because he has made a mistake of law that appears on the face of his award.

But it was contended on behalf of the appellant that the word "misconduct" is employed in a special sense in the section in question, and that in that sense it includes a mistake of law made by the arbitrator, if it appears on the face of the award. The argument is developed in the following manner: The statute in question, it is said, is taken over from the English Act on the same subject; in the English Courts it has for very many years been accepted as law that an arbitrator who has made a mistake of law appearing on the face of the award was guilty of misconduct; in the English Act of 1889 the word was employed in a special sense as covering such an act on his part; and consequently we should place upon the word "misconduct" the same meaning as is given to it by the Courts in England.

Now it is clear that the Natal Act of 1898 is based upon the English Act of 1889, and sec. 18 of the former Act is taken practically verbatim from the latter. It is also true that in some of the text books on English Law it is stated that "misconduct" is a word of wide import and that it includes the case where the award is on its face erroneous in matter of law. (See Halsbury on the *Laws of England*; Russell, on *Awards*). But though it is undoubtedly regarded as law in England that an award may be set aside where there is a mistake of law appearing on the face of the award, I have been unable to find any case in which it has been held that in such a case there has been misconduct on the part of the arbitrator. On the contrary it appears to me that the Courts have treated a mistake of that nature as a separate and distinct ground for setting an award aside. For instance in the leading case of *Hodgkinson v. Fernie* (27 L.J., N.S.C.P. 66) WILLIAMS, J., in his judgment says: "The Courts here always met these applications (to set aside awards) by saying, 'You have constituted your own tribunal; you are bound by its decision,' the only exceptions to that rule are where the award is the result of corruption or fraud

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and one other, which, though it is to be regretted, is now, I think, firmly established, viz., where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award." And WILLES, J., says, "It is quite clear that before the passing of the last Common Law Procedure Act the Court could not as a general rule interfere with the discretion of an arbitrator. An exception had been introduced in the case of a mistake of law apparent on the face of the award. I do not say that my reason assents to that exception. We are bound by the course of the decisions, I regret that we are so." That case was heard in 1857 and it will be seen that even at that time it was regarded as settled law that a Court could interfere in the special case where a mistake of law appeared on the face of an award, though not on the ground of misconduct. But at what time this rule was laid down for the first time or on what ground it was based I have been unable to discover. In looking into some of the older cases, however, it is clear that the law on the subject of the setting aside of awards has varied very considerably from time to time.

Thus in the case of *Price v. Williams* (1 Ves. Jun. 365, decided in 1791), the LORD CHANCELLOR, LORD THURLOW, said: "I think the parties have by choosing private judges placed it beyond the reach of any principle of law." In the same year, however, in *Knox v. Symmonds* (1 Ves. Jun. 369), he said: "In order to induce the Court to interfere there must be something more, as corruption in the arbitrator, a gross mistake either apparent upon the face of the award or to be made out by evidence." A further development seems to have been reached in the cases of *Ching v. Ching* (6 Ves. Jun. 282); *Kent v. Elstob* (3 East 18), and *Young v. Walter* (9 Ves. Jun. 364)), which decided that where the parties intend that the arbitrator shall decide according to law and he meaning so to decide mistakes the law, the Court will set that right; but if they mean to have the judgment of the arbitrator on matters of law instead of that of the Court, he may take all moral considerations into his judgment and the award cannot then be impeached as being contrary to law. Moreover at the time when the above case of *Kent v. Elstob* was decided, viz., in 1802, it was not yet settled that the Court would only consider cases of mistake in law appearing on the face of the award, for in that case LAWRENCE, J., says, "it is not necessary that the arbitrator's reasons for

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making his award should appear upon the face of it in order to enable the Court to examine them." But in the case of *Sharman v. Bell* (5 M. & S., at p. 505), which was heard in 1816, the law on this point seems to have been settled, for in his judgment LORD ELLENBOROUGH says, "If the arbitrator had raised the question on the face of the award, the Court must have taken notice of it, the arbitrator not having done this I presume the doubt which he first entertained must have been refused and I think we should be departing from the practice of the Court, if we were now to discuss it." And BAYLY, J., said, "I have always considered it as a rule that where a matter is referred to a gentleman at the bar, his award is conclusive, unless some question be raised on the face of the award or upon some collateral instrument which is to be considered as a part of it, as in *Kent v. Elstob*."

The distinction that was drawn in these cases as to whether the parties meant the arbitrator to decide according to law or not was subsequently swept away, but the rule that a mistake could be dealt with only if it appeared on the face of the award has survived up to the present day. It is true that in the case of *In re Hall and Hinds* (10 L.J., C.P. 210) the Court set aside an award on the ground of a mistake of fact which did not appear on its face, but that was done on the ground that, as stated by TINDAL, C.J., "the mistake as a matter of carelessness is so gross as to amount, though not in a moral point of view yet in the judicial sense of that word, to misconduct on the part of the arbitrators. *Lata culpa et crassa negligentia* both by the civil law and our own approximate to and cannot be distinguished from *dolus malus* or misconduct."

The remarkable thing about the English decisions is that the rule that an award can be set aside on the ground of a mistake of law appearing on the face of it has grown up along side of the statutory provisions on the subject of arbitration. In the first statute, that of 9 Will., 3 Ch. 15, provision was made for enforcing awards "unless it shall be made to appear on oath to such Court that the arbitrator or umpire misbehaved themselves and that such award, arbitration or umpirage was procured by corruption or other undue means." And in the Act of 1889 which is still in force it was provided that "where an arbitrator has misconducted himself on an arbitration or award has been improperly procured, the Court may

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set the award aside." And the Courts in England have always continued to give effect not only to the statutory provisions but also to the judge-made law which was crystallised in the leading case of *Hodgkinson v. Fernie*. In the case of *Landauer v. Asser* (1905, 2 K.B. 184) LORD ALVERSTONE said, "there is no doubt whatever that if this case be established (viz., that there was an error of law apparent on the face of the award) the award ought to be set aside; see *Hodgkinson v. Fernie*." And in the later case of *British Westinghouse Co. v. Underground Electric Railway Co.* (1912, A.C., at pp. 686), the LORD CHANCELLOR, LORD HALDANE, said: "it was further argued before your Lordships that the arbitrator was in reality made judge of law as well of fact, and that the well-known case of *Hodgkinson v. Fernie* was wrongly decided. I see no ground for this contention, and I am of opinion that the doctrine of *Hodgkinson v. Fernie* to the effect that where an error of law appears on the face of the award the error can be reviewed, is a well-established part of the law of the land. I do not think that the Arbitration Act intended to make any modification of the existing rule in this respect." It will be seen, therefore, that the rule is supported not on the ground that it comes within the provisions of the statute law regarding misconduct on the part of an arbitrator, but that by judicial decisions it had become part of the established law of the land. What then is the position in South Africa? We have a statute on the subject providing in what cases an award may be set aside, but it is impossible to say that there has been here as in England, a series of decisions extending over very many years embodying the principle that the Court has power to go outside of the statute and set aside an award on the ground that the arbitrator has made a mistake of law apparent upon the face of the award. I can find no case reported in the South African reports in which such a rule has been laid down. No doubt in the present case it was assumed by the Court below that our law on this subject was identical with the English law, and it may be that a similar assumption has been made in other cases. But as far as I can find no case has yet arisen in which the point has been raised and determined. That being so it is in my opinion impossible for us to say, as was said by the LORD CHANCELLOR, in the case already referred to, that the rule relied upon by the appellants is part of the well-established law of this country. Nor do I think that it is matter for regret

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that this is so, for I share the doubts expressed by WILLIAMS and WILLES, JJ., in the case of *Hodgkinson v. Fernie* as to the wisdom of introducing any such principle into the law. If, however, the legislature thinks differently the statute law on the subject can be amended, but until that is done we are in my opinion limited in our jurisdiction to set aside awards to cases falling within the language of sec. 18 of the Arbitration Act of 1898, and we are precluded, therefore, from interfering merely on the ground that there is a mistake of law apparent on the face of the award. That being so it becomes unnecessary to consider whether in law the umpire has made a mistake in the construction which he has placed upon the partnership deed, or whether, if such a mistake were made, it has led him to a wrong decision. These are matters which were strenuously argued on both sides, but as we were led to understand that there are further legal proceedings pending between the parties arising out of the deed in question, it is better that we should express no opinion on these points. It is sufficient to say that even if it were held that a mistake had been made it would certainly not be such a gross mistake as would justify an inference that the arbitrator had been guilty of misconduct or of *crassa negligentia*.

There is only one other point on which it is necessary to say anything. Mr. *Tatham* suggested that, if we did not see our way to set aside the award, we should remit it for the reconsideration of the umpire with directions to him as to the construction to be placed upon the deed of partnership. Now under sec. 17 (a) we have the power "to remit the matters referred to the reconsiderations of the arbitrators or umpire"; and undoubtedly this is a very useful power conferred upon the Court, and one which may often be beneficially exercised. It is unnecessary to consider the circumstances in which the Court will send back an award for reconsideration, but I am decidedly of opinion that this is not a case in which we should be justified in exercising this jurisdiction.

On the whole, then, for the reasons given I have come to the conclusion that the appeal should be dismissed with costs.

INNES, C.J., DE VILLIERS, A.J.A., JUTA, A.J.A., and WESSELS, Actg. A.J.A., concurred.

Appeal accordingly dismissed with costs.

Appellant's Attorneys: *Calder & Calder*, Durban; Respondents' Attorneys: *Shepstone & Wylie*, Durban.

HYPERCHEMICALS INTERNATIONAL (PTY) LTD AND ANOTHER v MAYBAKER AGRICHEM (PTY) LTD AND ANOTHER 1992 (1) SA 89 (W)

Citation	1992 (1) SA 89 (W)
Court	Witwatersrand Local Division
Judge	Preiss J
Heard	September 12, 1990; September 13, 1990; September 14, 1990
Judgment	September 24, 1990
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Arbitration - Arbitration Act 42 of 1965 - Review of arbitrator's award - Grounds for review - Section 33(1) of Act - 'Legal C misconduct' a creation of English law and not a ground for review in terms of s 33(1) of Act - 'Misconduct' of arbitrator has always been interpreted in South African law to refer to wrongful, unlawful or dishonest conduct.

Costs - Attorney and client costs - When to be awarded - Parties to D arbitration applying for setting aside of arbitrator's award on basis unfounded in South African law - Applicants' attack on arbitrator vexatious in nature - Court awarding costs on attorney and client scale against applicants.

[zHNz]Headnote : Kopnota

The applicants sought the setting aside of an award made by an E arbitrator (second respondent) in arbitration proceedings conducted in respect of a toll manufacturing contract concluded between the first applicant and the first respondent. The contract between the parties contained a clause providing that the parties would submit any dispute to arbitration for final determination and award and that the award would be the sole and exclusive remedy between them. The issue which the arbitrator had to decide upon was whether the repudiation of the manufacturing agreement by first respondent was justified by reason of F alleged fraudulent misrepresentation committed by the first applicant. The second respondent handed down a written award in favour of first respondent and, in accordance with an agreement between the parties, without giving any reasons therefor. The applicants, although specifically disavowing any reliance upon dishonesty on the part of the second respondent, alleged in their founding affidavit that he had 'legally misconducted' himself in relation to his duties as arbitrator in that his award indicated a departure from a judicial frame of mind in G determining the issues between the parties, and more particularly that there was a total lack of evidence to support the award which indicated a total want of judicial capacity amounting to 'legal misconduct'. The respondents contended in limine that the applicant's complaints were not cognisable by s 33(1) of the Arbitration Act 42 of 1965 since that section was exhaustive of all possible remedies and the applicant's case could not be brought within its ambit. In considering whether the applicant's founding affidavit made out a prima facie case that fell H within the provisions of s 33(1) of the Act, the Court held that the term 'legal misconduct' was a term that had been defined in English law and that it was not a part of South African law: our Courts, in dealing with pre-1965 arbitration statutes, had held that 'misconduct' on the part of an arbitrator referred to some wrongful or improper conduct on his part; that a bona fide mistake either of law or of fact could never be characterised as misconduct, and that the

misconduct which entitled a Court to set aside the award of an arbitrator must amount to dishonesty. I The Court in the instant case held that these pre-1965 statutes were substantially similar to the 1965 Act, which led to the conclusion that the Legislature intended the words in the 1965 Act to bear the meaning which had been judicially determined in similarly worded pre-1965 statutes, and that 'legal misconduct' was not a ground for review in terms of s 33(1)(a) of the 1965 Act.

Dickenson & Brown v Fisher's Executors 1915 AD 166 applied.

J Clark v African Guarantee and Indemnity Co Ltd 1915 CPD 68 applied. 'Leave to appeal was refused by Preiss J and subsequently by the Appellate Division - Eds.'

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A Donner v Ehrlich 1928 WLD 159 applied.

It had been contended in the alternative for the applicants that the pre-1965 decisions represented an old approach which had been implicitly overruled by a new extended criterion, which criterion served to bring the applicant's complaints, even though they fell short of imputations of dishonesty, within the ambit of s 33(1)(a); ie 'legal misconduct' was also now to be apprehended in this subsection. This contention was based upon the analysis of certain sections of the Arbitration Act of 1965 in B Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere 1976 (2) SA 1 (A). The Court held that there was nothing in this analysis to indicate that the field of review of an arbitrator's award had been extended beyond the limits defined in the pre-1965 authorities and that the Court in Theron's case had merely indicated that a Court of law still possessed the power in specified instances to control an arbitration.

The Court accordingly held, in the light of the applicants' disavowal of C imputations of dishonesty, that there was no basis for their application to have the second respondent's award set aside and upheld the respondents' argument in limine.

As to the question of costs, the Court held that arbitrators, although they had to anticipate robust and frank arguments, were entitled to the protection of the Court where intemperate and unfounded allegations were made against them. The Court held that the applicants should be ordered D to pay attorney and client costs, inter alia because the language used by them in their application, which had no foundation in South African law, was calculated to impute incompetence of a serious character and were clearly intended to launch a vexatious attack upon the second respondent.

[zClz]Case Information

Application to set aside an arbitrator's award in terms of s 33(1) of E the Arbitration Act 42 of 1965. The facts appear from the reasons for judgment.

H Z Slomowitz SC (with him N N Lazarus) for the applicants.

R H Zulman SC (with him R W Nugent) for the first respondent. I A Maisels QC (with him P A Solomon SC and A C Thompson) for the second respondent.

Cur adv vult. F

Postea (September 24).

[zJDz]Judgment

Preiss J: This is an application to set aside an arbitrator's award in terms of s 33(1) of the Arbitration Act 42 of 1965.

A written contract described as a toll manufacturing agreement was G concluded on 31 October 1988 between the first applicant (Hyperchemicals) and the first respondent (Maybaker). A dispute between the parties to the agreement was referred to arbitration before a senior counsel practising at Johannesburg, who is the second respondent. The second applicant (Farm-AG) was a third party in the arbitration.

H The resort to arbitration for the settlement of disputes arising out of the toll manufacturing agreement was countenanced by art 21 thereof. The submission to arbitration in clause 2 provided for an agreement by the parties

'to submit their dispute to arbitration . . . for final determination and award'.

I This provision in the submission must be read together with s 28 of the Arbitration Act 42 of 1965, which provides:

'Unless the arbitration agreement provides otherwise an award shall subject to the provisions of this Act be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms',

J and with art 21 of the agreement, which provides inter alia as follows:

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A 'The parties agree that the award of the arbitrator shall be the sole and exclusive remedy between them regarding any claims, counterclaims, issues or accountings presented or pledged to the arbitrator.'

The issue between the parties was defined by pleadings lodged by Hyperchemicals as claimant and Maybaker as defendant. Hyperchemicals alleged that Maybaker had unlawfully repudiated the toll manufacturing B agreement. It sought an order for specific performance plus damages and, in the alternative, damages in lieu of performance. At a later stage its claim for specific performance was withdrawn.

Maybaker alleged that it was entitled to avoid the agreement, as it had done, by reason of fraudulent misrepresentations on the part of C Hyperchemicals in that the latter had failed to disclose that it did not intend to honour the agreement, more particularly that it intended to use certain product information in breach of the agreement.

Another ground for avoiding the agreement was an alleged breach by Hyperchemicals of a material implied term that it would act in good faith.

D Finally, Maybaker alleged that there had been a fraudulent failure on the part of Hyperchemicals to disclose that it intended to produce a certain chemical insecticide in breach of the agreement, and a fraudulent misrepresentation that it did not intend to produce such substance.

The issue which the arbitrator was called upon to decide was whether Maybaker was entitled to avoid the toll manufacturing agreement on the E grounds alleged in the plea, or whether Hyperchemicals was entitled to enforce it. In terms of the submission to arbitration the parties agreed that the hearing would commence in Johannesburg on 16 January 1990 and that the arbitrator would make his award within one month after the hearing ended. Presumably, in order to facilitate the making of an award F without delay, the arbitrator was not required to give reasons for his award.

In the result the arbitrator heard evidence and argument, the latter extending over two full days. In his affidavit the arbitrator indicated that he spent an entire weekend studying the record and the argument and that he reflected on the matter from time to time during the ensuing G week. He finally decided to make his award, which was of an interim nature, in favour of Maybaker. He handed down his written award on 8 February 1990.

The only witness called by Maybaker was Mrs Milley, an officer of an American corporation, Allied Signal Inc. She testified to meetings which H she held with a representative of Hyperchemicals, Mr Maingard, in the United States of America on 9 September 1988, and with Messrs Richardson and Wu of Hyperchemicals, again in the United States of America on 4 November 1988. Messrs Maingard and Richardson gave evidence for Hyperchemicals. The arbitrator must have accepted the evidence given by I Mrs Milley in preference to that of Hyperchemicals' witnesses, since his award represented a due discharge of the onus which Maybaker bore in establishing the alleged fraudulent non-disclosures and misrepresentations. Since the arbitrator, as he was enjoined, gave no reasons for his decision, this is the only conclusion to be derived from J the content of his award.

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A The arbitrator, who was cited as the second respondent, elected to file an answering affidavit, at the end of which he sought the dismissal of the application and an order that his costs of opposition be paid. In this regard his joinder of issue, though uncommon, is perfectly proper. In the case of *Port Sudan v Chettiar* [1977] 1 LI LR 166 (QB) at 178, Donaldson J said the following: B

'The modern practice is for a notice of motion alleging misconduct, whether technical or actual, to be served upon the arbitrator or umpire concerned. He then has a choice whether

(a) to take a full part in the proceedings as an active party; or

(b) to file an affidavit setting out any facts which he considers may C be of assistance to the Court; or

(c) to take no action, in which case it will be assumed only that he has no wish to do more than accept the decision of the Court.

This practice is based upon the consideration of natural justice, that no one should have his conduct criticised without being given an opportunity for replying or explaining.'

D And at 179:

'In cases in which a party impugns the conduct of arbitrators in other than the most technical respects and the complaints failed, the arbitrators will be entitled to an order for costs if they appear.'

See also Russell on Arbitration 20th ed at 445 and 451.

E The argument on the application for review took the form of an objection in limine at the instance of both respondents to the effect that no case for review of an arbitrator's award was made out. In other words, it was contended that the applicant's complaints were not cognisable by s 33(1) of the Arbitration Act since that section is exhaustive of all possible remedies and since the applicant's case could F not be brought within its ambit.

An argument in limine of this character is similar to an exception to a summons that it does not disclose a cause of action, but with one essential difference. In *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 469C-E, Miller J states:

G 'It has been said (see *Aspek Pipe Co* (supra at 529)) that in the case of an objection in limine of the kind now under consideration the enquiry is only whether a prima facie case has been made out in the petition. It must be borne in mind, however, that where proceedings are brought by way of application the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to file an exception would not necessarily in a petition H be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential

evidence which would be led at a trial, and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that he does not support the relief claimed, is sound.'

See also *Aspek Pipe Co (Pty) Ltd and Another v Mauerberger and Others* 1968 (1) SA 517 (C) at 519F; *Prok Africa (Pty) Ltd and Another v NTH (Pty) Ltd and Others* 1980 (3) SA 687 (W) at 692H-695A; *Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793C-F.

Accordingly, in deciding the issue in limine I must consider whether J the founding affidavit makes out a prima facie case that falls within the

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A provisions of s 33(1). It is against this background that I assess the ambit of that subsection. It recites:

'Where -

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

(b) an arbitration tribunal has committed any gross irregularity in the B conduct of the arbitration proceedings or has exceeded his powers; or

(c) an award has been improperly obtained,

the Court may on application of any party to the reference after due notice to the other party or parties make an order setting the award aside.'

Against the background of s 33(1) the founding affidavit sets out the C grounds of review.

In correspondence which preceded the application, and in argument before me, any reliance upon alleged dishonest conduct on the part of the arbitrator was specifically disavowed. I shall have more to say about this when I come to consider the question of costs. The grounds D appear in the following portions of the founding affidavit.

'32. Hyperchemicals and Farm-AG maintain that:

32.1 The arbitrator legally misconducted himself in relation to his duties as arbitrator in that his award indicates a departure from a judicial frame of mind in determining the issues between the parties. More particularly, there was a total lack of evidence to support the award which indicates a total want of judicial capacity amounting to legal E misconduct. In short, reading the evidence and the arguments it is the applicants' contention that no fair-minded man applying his mind judicially could have come to the conclusion indicated by the award.

Hyperchemicals and Farm-AG also contend that against the background of the evidence, the arguments and the documents F put up, the arbitrator erred so grossly that the only or proper inference to be drawn is legal misconduct on his part.

32.2 The arbitrator exceeded his powers, more particularly in failing to apply South African law correctly in the resolution of the disputes.

32.3 The award was improperly obtained in that it was based on the evidence of a certain Mrs Milley whose evidence was, on a proper analysis thereof, in the light of all of the evidence, G documents and the like, including the failure by Maybaker to call certain witnesses, false. If her evidence was not false, it in

no way supported the defences raised in the plea, was incapable of supporting the award and the arbitrator's reliance on it amounts to legal misconduct.

...

H 45 In short, Hyperchemicals and Farm-AG submit that to the extent that the arbitrator must necessarily have found any of the foregoing as a basis for finding against Hyperchemicals based upon methomyl or the use of methomyl, at the very least the arbitrator could not have applied his mind judicially to the evidence, there being a total lack of evidence to support the award. In the alternative, the arbitrator erred in so gross a fashion and so manifest a fashion that he could only have come to his award on the basis of legal misconduct.

...

52. In these circumstances, too, I submit that it is clear that the arbitrator in finding for Maybaker must necessarily have been guilty of legal misconduct in the respects already set out.

J ...

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A 55. I wish further to say that a consideration of the evidence as a whole together with the documents discovered and referred to during the evidence and the argument as well as the failure of Maybaker to call any witnesses apart from Mrs Milley discloses also that there was no credible evidence that either Maingard or I had even said that we were entering into the agreement for the purpose of breaching it or to steal the product information. This is an aspect B of the matter which I am advised requires a consideration of the whole record and it will be more fully developed by counsel in argument. For the assistance of the Court and to indicate broadly the basis upon which the matter will be argued, I annex hereto marked FR10 heads of argument which were drawn by Hyperchemicals' senior and junior counsel for it at the arbitration and which forms C the basis of the argument by them at the arbitration. As I have already said, I have also annexed hereto the full argument of counsel on both sides which indicates all references to the record which will be relied upon in the argument in this matter to show the legal misconduct on the part of the arbitrator.'

Some confusion stems from the allegation in para 32.2 supra when it was averred that the arbitrator exceeded his powers, more particularly in D failing to apply South African law correctly. At first blush this would appear to be a reference to s 33(1)(b) of the Act, and the reference to South African law certainly conveyed that the arbitrator had wrongly resorted to foreign law. The argument brought forward by the applicants' counsel served to indicate that this was no more than a corollary of the E ground allegedly covered by s 33(1)(a), namely misconduct on the part of the arbitrator.

It follows that my decision is to be devoted solely to the question whether the grounds set forth in the founding affidavit are capable of constituting misconduct within the meaning of s 33(1)(a).

In the light of a disavowal of any imputation of dishonesty I am left F with what the applicants call 'legal misconduct'. This is a term hitherto unencountered in South African decisions. It is known to English law where it has been defined. In Mustill and Boyd Commercial Arbitration 2nd ed at 551 the learned authors say:

'Although from the point of view of logic the word misconduct is G entirely appropriate to describe the conduct of proceedings otherwise than in the way required by law, the choice of language has proved to be unfortunate, especially since the 1889 Act referred only to the arbitrator having misconducted himself. Arbitrators who would have felt regret but no more on being informed by the Court that they had conducted the reference in a way which did not comply with their legal obligations were understandably resentful of the implication that the H work which they have carried out in good faith involved personal misconduct. The Courts

have been sensitive to this resentment and have constantly taken pains to point out to arbitrators that allegations of misconduct do not necessarily mean what they appear to say. . . . There has been a tendency to invent a category of technical misconduct which is contrasted with misconduct of a more personal nature.'

I In Halsbury para 622 at 330 occurs the following passage (quoted in Jacobs The Law of Arbitration in South Africa at 138):

'It is difficult to give an exhaustive definition of what may amount to misconduct on the part of an arbitrator or umpire. The expression is of wide import for an arbitrator's award, unless set aside, entitled the beneficiary to call on the executive power of the State to enforce it, J and it is the Court's function to ensure that the

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PREISS J

A executive power of the State is not abused. It is accordingly misconduct for an arbitrator to fail to comply with the terms express or implied of the arbitration agreement, but even if the arbitrator fully complies with those terms he will be guilty of misconduct if he makes an award which on grounds of public policy ought not to be enforced. Much confusion has been caused by the fact that the expression "misconduct" is used to describe both these quite separate grounds for setting aside B an award and it is not wholly clear in some of the decided cases on which of these two grounds the award has been set aside. However on one or other of these grounds the expression includes on the one hand that which is misconduct by any standard such as being bribed or corrupted and on the other hand mere technical misconduct such as making a mere mistake as to the scope of the authority conferred by the agreement of reference. That does not mean that every irregularity of procedure C amounts to misconduct.'

The applicants use phrases such as 'legally misconducted himself', 'departure from a judicial frame of mind', 'total lack of evidence', 'legal misconduct' and 'evidence incapable of supporting the award'. In the development of his argument Mr Slomowitz for the applicants stated D that these grounds were all manifestations of legal misconduct which, so he averred, was covered by the provisions of s 33(1)(a) despite the fact that dishonesty was specifically eschewed.

There are a number of cases in South African law which deal with attempts to review an arbitrator's award. The cases precede the Arbitration Act of 1965 and relates to its statutory forerunners. Mr E Slomowitz has argued that the cases deal with statutes that are not strictly analogous and that in any event they indicate an old narrow approach which has been rendered obsolete by modern and more enlightened authority, notably the decision in Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere 1976 (2) SA 1 (A), more especially per Jansen JA at 22-3. I shall revert to this case F after I have dealt with the so-called 'old approach'.

The leading case is Dickenson & Brown v Fisher's Executors 1915 AD 166, where the Court was called upon to consider s 18 of the Natal Arbitration Act 24 of 1898. The section provides:

'When an arbitrator or umpire has misconducted himself or an G arbitration or award has been improperly procured the Court may set the appointment or award aside.'

(The statute bears a resemblance to s 33(1)(a) and 33(1)(c) of the 1965 Act.) Solomon JA delivered the judgment of the Court. At 175-6 he states:

H 'I have no doubt, therefore, that an award could always be challenged if the arbitrator has exceeded his powers, but where he has made his award in terms of the submission, I am of opinion that the Court has jurisdiction to set it aside only in cases which can be brought under the provisions of para 18 of the Act, that is

where it has been proved either that the arbitrator has misconducted himself or that the award has been improperly procured.

I Now in the present case it is not suggested that the award has been improperly procured, but it is contended that the arbitrator has misconducted himself within the meaning of the words as used in the section under consideration. Now I do not propose to give any definition of the word "misconduct", for it is a word which explains itself. And, if it is used, in its ordinary sense, I fail to see how there can be any misconduct unless there has been some wrongful or improper conduct on J the part of the person whose behaviour is in question.'

1992 (1) SA p96

PREISS J

A And at 176 the learned Judge continues as follows:

'Now if the word misconduct is to be construed in its ordinary sense it seems to me impossible to hold that a bona fide mistake either of law or of fact made by an arbitrator can be characterised as misconduct, any more than that a Judge can be said to have misconducted himself if he has given an erroneous decision on a point of law.' B

And:

'But in ordinary circumstances where an arbitrator has given fair consideration to the matter which has been submitted to him for decision, I think it would be impossible to hold that he had been guilty of misconduct merely because he made a bona fide mistake either of law or of fact.'

C In developing his views as to the meaning of 'misconducted himself', the learned Judge cited the English case *In re: Hall & Hinds* 10 LJ CP 210, saying (at 179):

'It is true that in the case of *In re: Hall & Hinds* (10 LJ CP 210) the Court set aside an award on the ground of a mistake of fact which did not appear on its face, but that was done on the ground that, as stated by Tindall CJ,

D "(t)he mistake as a matter of carelessness is so gross as to amount, though not in a moral point of view yet in the judicial sense of that word, to misconduct on the part of the arbitrators. *Lata culpa et crassa negligentia* both by the civil law and our own approximate to and cannot be distinguished from *dolus-malus* or misconduct.'"

E The learned Judge (at 180) states clearly that the English decision does not represent South African law, saying:

'It will be seen, therefore, that the rule is supported not on the ground that it comes within the provisions of the statute law regarding misconduct on the part of an arbitrator, but that by judicial decisions F it has become part of the established law of the land. What then is the position in South Africa? We have a statute on the subject providing in what cases an award may be set aside, but it is impossible to say that there has been here, as in England, a series of decisions extending over very many years embodying the principle that the Court has power to go outside of the statute and to set aside an award on the ground that the arbitrator has made a mistake of law apparent upon the face of the award.'

And at 181: G

'If, however, the Legislature thinks differently the statute law on the subject can be amended, but until that is done we are in my opinion limited in our jurisdiction to set aside awards to cases falling within the language of s 18 of the Arbitration Act of 1898, and we are precluded, therefore, from interfering merely on the ground that there H is a mistake of law apparent on the face of the award. That being so it becomes unnecessary

to consider whether in law the umpire has made a mistake in the construction which he has placed upon the partnership deed, or whether, if such a mistake were made, it has led him to a wrong decision.'

I have quoted extensively from the above decision to indicate what the learned Judge of appeal considered would fall outside the meaning of I misconduct, save to state that s 18 required 'some wrongful or improper conduct on the part of the person whose behaviour is in question' (at 176).

In *Clark v African Guarantee and Indemnity Co Ltd* 1915 CPD 68, Gardiner J (one month before *Dickenson & Brown* (supra) was heard) had to consider the effect of a Cape Act 29 of 1898, which provided that an arbitrator's award should be final and binding. The learned Judge stated J (at 78):

1992 (1) SA p97

PREISS J

A 'No case in our Courts was quoted in argument in which an award was actually set aside on the ground that there was no evidence to support the arbitrator's finding, and I am satisfied that before the Court would interfere it would be necessary to show that the lack of evidence established a total want of the judicial capacity which is required even of an ordinary fair-minded layman appointed to adjudicate by the parties to a dispute. If the arbitrator has taken evidence and has fairly B considered it, the Courts will not set aside the conclusion he has come to upon that evidence because he has drawn inferences which, though possible, are not acceptable to the Court.'

In *Donner v Ehrlich* 1928 WLD 159, Solomon J considered the effect of s 16(2) of Ord 24 of 1904 (T). It states:

'When an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured the Court may set the award aside. . . .' C

(Again the resemblance to ss 33(1)(a) and 33(1)(c) should be noted.) The learned Judge (at 160) states:

'As I read *Dickenson & Brown v Fisher's Executors* 1915 AD 166, the misconduct which entitled a Court to set aside the award of an arbitrator must amount to dishonesty. I think that is the true reading D of the judgment. It is possible that dishonesty may be inferred from the manner in which the arbitration has been held; in other words, there need not be direct proof that the arbitrator, for example, has accepted a bribe, in order to find him guilty of misconduct. But I think that, unless I have misinterpreted the judgment in that case, this Court could not upset the award in the present case unless dishonesty were adduced from the evidence or the manner in which the arbitration has been E conducted.'

And at 161:

'Now *Dickenson & Brown v Fisher's Executors* is express authority for the proposition that a mistake made by an arbitrator, either of fact or of law, is no ground for interfering with an arbitrator's award, and F unless I misinterpret that judgment, so long as a mistake is bona fide it does not matter whether it is a gross mistake or a slight mistake, in either case there is no foundation for this Court's jurisdiction to interfere with the award and set it aside.'

In *McKenzie NO v Basha* 1951 (3) SA 783 (N) a Full Court dealt once more with the Natal Act 24 of 1898, the statute that was under scrutiny G in the case of *Dickenson & Brown* (supra). Broome JP said the following at 786B-D):

'Mr Warner's first ground must be examined in the light of these principles. He cited no authority in support of the bald proposition that the Court may set aside an award on the sole ground that there is no evidence to support it and I have no hesitation in rejecting it. Before the Court will interfere in such a case it is

essential that the absence of evidence be related to one or other of the grounds provided by the Act as explained in Dickenson's case.'

In *Syphus and Others v Schoeman* 1923 CPD 113 at 116 Gardiner JP stated:

'It is not necessary for me to consider whether I should have come to the same conclusion, for no appeal arises from the decision of arbitrators or umpire. Even if they went wrong in their law, this would not necessarily be a ground for setting aside their award. As was said by Halsbury LC in *Holmes Oil Co v Pump-Herston Oil Co* (Court of Sessions R 18 at 53):

"One of the advantages which people are supposed to get by a reference to arbitration is the finality of the proceedings when the arbitrator has once stated his determination. They sacrifice something for that advantage - they sacrifice

1992 (1) SA p98

PREISS J

A the power to appeal. If, in their judgment, the particular Judge whom they have selected has gone wrong in point of law or in point of fact, they have no longer the same wide power to appeal which an ordinary citizen prosecuting his remedy in the courts of law possesses, but they sacrifice that advantage in order to obtain a final decision between the parties. It is well-settled law, therefore, that when they have agreed to refer their difficulties to arbitration, as they have B here, you cannot set aside the award simply because you think it wrong."

(See also *Dickenson & Brown v Fisher's Executors* 1915 AD 166.)'

There is one reported decision which deals with the legal effect of an award after the introduction of the present Act of 1965. It follows the principles enunciated in the pre-1965 cases. It is *RPM Konstruksie (Edms) Bpk v Robinson en 'n Ander* 1979 (3) SA 632 (C). At 636A-B, Fagan J says: C

'Ek vind dit nie nodig om te beslis of die arbiter wel 'n regsdwaling begaan het nie. Indien hy wel een begaan het is dit op sigself ook geen rede om die bevinding tersyde te stel nie. Die partye het die arbiter aangestel om hul geskil te besleg en is gebonde deur sy bevinding selfs al fouteer hy op die feite of die reg. Sien *Dickenson & Brown v Fisher's Executors* 1915 AD 166 te 174-6.' D

I have already referred to the argument advanced by Mr Slomowitz that all the pre-1965 decisions deal with different arbitration statutes and that consequently they offer scant guidance for an analysis of the 1965 Act. It will be seen that they are substantially similar. Section 18 of the Natal Arbitration Act 24 of 1898 contains the phrase 'where an arbitrator has misconducted himself', as does s 16(2) of Transvaal Ord E 24 of 1904. Section 33(1)(a) of the 1965 Act speaks of a situation 'where a member of an arbitration tribunal has misconducted himself'. In my view the statutes are entirely analogous and lead me to the conclusion that the Legislature intended the words in the 1965 Act to bear the meaning which had been judicially determined in similarly worded pre-1965 statutes. By way of illustration I cite the case of *S v F R J Southey (Pty) Ltd and Another* 1979 (1) SA 858 (T) at 860E-H, where Theron J states:

'That case was dealt with in terms of Act 28 of 1918. However, the definition of "occupier" in terms of that Act is substantially the same as that in Act 22 of 1941. It seems to us that what was said by Steyn in *Die Uitleg van Wette* 4th ed at 138 is apposite to the present case. The G learned author considered what was stated by Maxwell 7th ed at 265, viz:

"It may be taken for granted that the Legislature is acquainted with the actual state of law. Therefore, when the words of an old statute are either incorporated in, or by reference made part of, a new statute, this is understood to be done with the object of adopting any legal interpretation which has been put on them by the

Courts. So the same words appearing in a subsequent Act in pari materia, the H presumption arises that they are used in the meaning which has been judicially put on them that, unless there is something to rebut that presumption, the new statute is to be construed as the old one was."

The author then expressed the view:

"Wat Maxwell hier sê kan slegs slaan op interpretasies deur die eie Howe. Sulke interpretasies, as hul vas en seker is, skep wel volgens I Ex parte Minister of Justice: In re R v Bolon 1941 AD te 345 die vermoede dat die Wetgewer, by 'n herhaling van die uitgelegde bepaling, daardie bepaling met sy uitgelegde betekenis wil bestendig."

I now deal with the alternative argument put forward by Mr Slomowitz that the pre-1965 decisions represent an old approach which has been J implicitly overruled by a new extended criterion. This new criterion, so

1992 (1) SA p99

PREISS J

A runs the argument, serves to bring the applicants' complaints, even though they fall short of imputations of dishonesty, within the ambit of s 33(1)(a). In other words 'legal misconduct' is now also to be apprehended in this subsection. The case relied upon is Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere B 1976 (2) SA 1 (A). The applicants base their contention largely upon the analysis of certain sections of the Arbitration Act of 1965 by Jansen JA at 22, leading to the following conclusion at 23C-D:

'Verwysing na die analoge geval van arbitrasie sou dus, wat ons gemenerereg betref, daarop dui dat 'n kontraktuele tribunaal wel aan 'n redelikhedsmaatstaf onderworpe kan wees; en wat die Engelse reg betref, C daarop dat die finale beslissing van minstens regskeppings by die hof moet berus. Dit pas in by die mening hierbo uitgespreek dat in die algemeen, benewens die formele maatstaf, ook die uitgebreide formele maatstaf in ons reg toegepas moet word.'

The so-called 'uitgebreide formele maatstaf' is defined at 20D-F in the following terms: D

'Dit moet dus aanvaar word dat wat statutêre liggame betref, die formele maatstaf (vir ingryping op hersiening) in ons regspraak ten opsigte van handelinge van suiwer regsprekende aard uitgebrei is om nie slegs die geval te dek waar die bevinding op geen getuienis hoegenaamd berus nie, maar ook die geval waar die getuienis nie sodanig is dat rederlikerwys op grond daarvan tot daardie bevinding geraak kan word E nie. Aangesien selfs dan die wesenlike toets - vervolgens die uitgebreide formele maatstaf genoem - nie is of die Hof self anders sou beslis het nie, bly die onderskeiding tussen appèl en hersiening ongeskonde.'

I have carefully considered the passage at 22 where the learned Judge of Appeal refers to selected provisions of the Arbitration Act. In my F view there is nothing in that analysis to indicate that the field of review of an arbitrator's award has been extended beyond the limits defined in the pre-1965 authorities. The learned Judge in my view was merely indicating that a Court of law still possessed the power in specified instances to control an arbitration, for example by freeing a party from the binding force of a submission in terms of s 3(2) or by G exercising a discretion to halt legal proceedings which are incompatible with the submission in terms of s 6, or by referring a legal issue to a Court of law at the request of one of the parties to an arbitration in terms of s 20(1). In other words, the reference of an issue to arbitration does not exclude a Court's interference absolutely. I H certainly do not read into this analysis any indication that the field of review has been extended or altered beyond the field so positively laid down in Dickenson & Brown v Fisher's Executors (supra) and its successors. It says no more than that some remnants of judicial interference derived from the common law persist in this statute.

As to the key passage at 23C-D, the learned Judge of Appeal, on the analogy of judicial interference with arbitration, holds that the common law does not limit an aggrieved party to the so-called 'formele maatstaf', but to an extended criterion. It does not serve to put a reverse twist upon this conclusion and to argue from it that the 'uitgebreide formele maatstaf', in this case reliance upon legal misconduct, has been engrafted upon arbitration law.

1992 (1) SA p100

PREISS J

A My conclusion is fortified by significant omissions in the judgment of Jansen JA. *Dickenson & Brown v Fisher's Executors* (supra) is merely cited (at 22H) but neither analysed nor criticised. Not a word is said about all the cases which follow it. One would at least have expected some reference in the judgment to s 33(1) of the Act if the applicant's contention is to have any weight. There is no such reference whatsoever.

B Mr Slomowitz fairly conceded that he could only succeed in overturning the arbitrator's award if 'legal misconduct' was held to be a ground for review. My conclusion is that it is not. Mistake, no matter how gross, is not misconduct; at most, gross mistake may provide evidence of misconduct in the sense that it may be so gross or manifest that it could not have been made without misconduct on the part of the arbitrator. In such a case a Court might be justified in drawing an inference of misconduct. The award would then be set aside, not for mistake, but for misconduct. The applicants' contentions fall entirely short of this type of situation. The disavowal of imputations of dishonesty leaves the applicant with no more than a flimsy basis from which legal misconduct is sought to be inferred and which, in any case, is not a recognised ground for review in terms of s 33(1).

It follows that the founding affidavit fails to make out a prima facie case for review and that the argument in limine must be resolved in favour of the respondents. This conclusion disposes finally of the application. It is strictly unnecessary for me to apply my mind to the question whether legal misconduct was prima facie established since that is not in my view a category recognised by s 33(1). Nevertheless, for guidance in possible subsequent proceedings, I have decided to indicate my views however briefly.

F Had I been required to do so, I would have found that legal misconduct was not established, even prima facie. The accepted evidence of Mrs Milley and the implicit rejection of Mr Maingard's testimony indicates sufficiently that Hyperchemicals was planning to steal the process, and since there was nothing in the evidence to indicate that Hyperchemicals had changed its mind at the time the agreement was signed, the requisite fraud was established. Similarly, in terms of the pleadings filed by Maybaker, the conclusion of the contract by Hyperchemicals amounted to a representation that it would abide by its terms. In my view all the essential elements which go to prove a fraudulent misrepresentation were established.

H In the light of this brief comment on the evidence before the arbitrator, the respondents' criticism that the applicants were attempting to argue an appeal under the guise of a review acquires greater force and appears to be justified. If anything, the criticism is even more pointed when it is appreciated that the applicants were represented by senior and junior counsel, who accepted what the effect of Mrs Milley's evidence might well be, and who were parties to the compilation of a draft order which the arbitrator was invited to make in the event of a finding in favour of the one or the other party to the arbitration.

There remains the question of costs, which includes the costs attendant upon the condonation of the late filing of the applicant's replying affidavit where costs by agreement were made costs in the cause.

1992 (1) SA p101

PREISS J

A The first respondent gave notice that he would seek an order for attorney and client costs in this application, and the second respondent gave notice that he would seek attorney and own client costs, an even more stringent scale.

In deciding upon an appropriate scale I do not lose sight of the fact that arbitrators, especially when they sit in matters of commercial B confrontation where allegations of fraudulent misrepresentations are made, must anticipate robust and frank arguments. On the other hand, arbitrators are entitled to the protection of the Court where intemperate and unfounded allegations are made against them.

I have decided that the applicants should be ordered to pay attorney C and client costs and my reasons are the following:

(a) Although the applicants indicated that dishonesty was not to be imputed to the arbitrator, they used language which was calculated to impute incompetence of a serious character. The language was extravagant and, as I have found, constituted a D basis for review which is unfounded in law. Phrases abound such as 'a departure from a judicial frame of mind', 'a total want of judicial capacity amounting to legal misconduct', 'no fair-minded man applying his mind judicially could have come to the conclusion indicated by the award', and 'gross carelessness'. These are vexatious accusations.

(b) The basis for these attacks were stated in correspondence E preceding the application to be a statement in *Dickenson & Brown v Fisher's Executors* (supra at 179). Not only is the passage incomplete, but it stems from the English decision in *In re Hall & Hinds* (supra) which is not an accurate reflection of South African law. The reliance upon Theron's case supra for the first time in argument would seem to constitute a last minute attempt F to clothe the ground of 'legal misconduct' with some semblance of respectability.

(c) I am of the view that the applicants, by their use of strong language, intended to launch a vexatious attack upon the arbitrator. If I have overstated or misjudged their actual intent, the effect of their attack is nonetheless vexatious. In G this regard the remarks of Gardiner JP in *In re Alluvial Creek Ltd* 1929 CPD 532 are appropriate. At 535 the learned Judge says:

'An order is asked for that he pays the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court H considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the I justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear.'

Although I am of the opinion that a more punitive scale than party and party costs is appropriate, I am unpersuaded that the most stringent penalty of attorney and own client costs should J be awarded to the second respondent. As was stated in *Cambridge*

1992 (1) SA p102

PREISS J

A Ian AG v Cambridge Diet (Pty) Ltd and Others 1990 (2) SA 574 (T) at 589D-E, the latter scale represents extreme opprobrium. The present application, though vexatious, falls short of this description. Nor am I disposed to award the second respondent the costs of three counsel. The applicants and the first respondent were content to have two counsel. The nature of the B dispute and the volume of the evidence would, in my view, certainly justify the employment of two counsel but not three. Much as I would like to ensure

that the arbitrator, the second respondent, should not be out of pocket, I do not see my way clear to countenance the fees attendant upon the employment of more than two counsel.

C To sum up, the argument in limine is upheld in favour of the respondents. The application is dismissed with costs.

1. The applicants are ordered to pay the costs of the first and second respondents on the scale as between attorney and client and on the footing of the employment of two counsel each.

D 2. As to the application for condonation of the late filing of the replying affidavit, the applicants are to pay costs on the same basis save that such costs shall be taxed on the party and party scale. The applicants are to be liable jointly and severally for the payment of such costs.

Applicant's Attorneys: Bell, Dewar & Hall. First Respondent's E Attorneys: Edward Nathan & Friedland Inc. Second Respondent's Attorneys: Webber Wentzel.

BESTER v EASIGAS (PTY) LTD AND ANOTHER

1993 (1) SA 30 (C)

Citation	1993 (1) SA 30 (C)
Court	Cape Provincial Division
Judge	King J and Brand AJ
Heard	April 10, 1992; May 15, 1992
Judgment	June 3, 1992
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Arbitration - The award - Requirement that award be made within four months of arbitrator having entered on the reference - Entering on the reference an ongoing process which commenced when parties appeared for the first time before the arbitrator - Court empowered in appropriate cases to extend the period of four months even after award made - Party held to have waived right to insist on compliance where he had participated in proceedings for eight months after arbitrator had entered on the reference - Arbitration Act 42 of 1965 s 23(a).

D Arbitration - The award - Setting aside of - Misconduct of arbitrator - Arbitration Act 42 of 1965, s 33(1)(a) - 'Misconduct' implying moral turpitude or mala fides.

Arbitration - The award - Setting aside of - Gross irregularity by arbitrator in conduct of arbitration proceedings - Arbitration Act 42 of 1965, s 33(1)(b) - Such ground of review envisaging gross irregularity in 'conduct' and not 'result' of proceedings - Not every irregularity will constitute ground of review - Review only justified where irregularity of such serious nature that aggrieved party had not had his case fully and fairly determined.

[zHNz]Headnote : Kopnota

F The ground of review envisaged by the use of the phrase 'gross irregularity in the conduct of the arbitration proceedings' in s 33(1)(b) of the Arbitration Act 42 of 1965 relates to the conduct of the proceedings and not the result thereof. Furthermore, every irregularity in the proceedings will not constitute a ground for review under s 33(1)(b). In order to justify a review on this basis, the irregularity must have been of such a serious nature that it resulted in the aggrieved party not having his case fully and fairly determined.

G The applicant had been employed by the first respondent in a managerial position but was dismissed after a disciplinary enquiry and a subsequent appeal. After the parties had failed to reach agreement at a conciliation board meeting the applicant brought proceedings in the industrial court but these proceedings were stopped in favour of independent arbitration. The arbitrator decided that the applicant had not been unfairly dismissed. In proceedings to set aside the arbitrator's award it was contended in limine on behalf of the applicant that, as the award had been made more than four months after the arbitrator had entered on the reference as envisaged by s 23(a) of the Arbitration Act 42 of 1965, it fell to be set aside. It was contended on behalf of the applicant that the arbitrator only entered on the reference when the hearing of evidence was concluded and that the Court was not entitled to extend the four month period after the award had already been made. The Court held that 'entering on the reference' was an ongoing process which had commenced when the parties appeared for the first time before the arbitrator some eight months before final submissions were made and that it was clear from

all the circumstances that the applicant had waived any right which he might have had to rely on the award being made more than four months after the arbitrator had first entered on the reference. The Court held furthermore that it could extend the period of four months after the award had been made and in the circumstances of the case it was appropriate to do so.

As regards the merits of the attack on the arbitrator's award, the J applicant contended that

1993 (1) SA p31

BRAND AJ

A the word 'misconduct' was used in s 33(1)(a) of the Act in a technical sense as denoting irregularity and not any moral turpitude and that this technical meaning also covered cases where there was a breach of the rules of natural justice.

Held, that there was no justification for extending the meaning of the word 'misconduct' on the basis alleged by the applicant: the wording of the present Act followed that of the Natal Arbitration Act 24 of 1898 which had consistently been interpreted as connoting moral turpitude or mala fides. B

Held, further, that there was no room for the inference that the arbitrator had been mala fide. Application dismissed.

[zClz]Case Information

Application for the setting aside of an arbitrator's award. The facts appear from the reasons for judgment.

N M Arendse for the applicant.

C Merwe Scholtz for the first respondent.

No appearance for the second respondent.

Cur adv vult.

D Postea (June 3).

[zJDz]Judgment

Brand AJ:

Introduction

This is an application in terms of s 33(1) of the Arbitration Act 42 of E 1965 ('the Act'). Applicant seeks an order setting aside an award made by second respondent sitting as arbitrator in an arbitration between applicant and first respondent. In applicant's heads of argument, the two grounds upon which this relief is sought are summarised as follows:

(a) in terms of s 33(1)(a) of the Act, on the basis that second F respondent misconducted himself in relation to his duties as arbitrator, in that 'he displayed a total want of judicial capacity in making the award' and

(b) in terms of s 33(1)(b) of the Act, on the basis that second respondent committed a gross irregularity in the conduct of the arbitration proceedings, in that 'there was no proper evaluation G of the evidence led before the tribunal'.

The application is opposed by first respondent, but second respondent abides the decision of this Court.

Historical background

First respondent is involved in the marketing and delivery of liquid H petroleum gas ('LPG') through distributors and dealers. Applicant was employed by first respondent from 1 May 1984 until his dismissal on 10 November 1988. During the latter part of this period, applicant occupied a managerial position as 'Cash and Carry Manager' of first respondent's southern branch. The 'cash and carry' division is involved in the I marketing of small quantities of LPG as opposed to bulk sales. Applicant's immediate superior during this period was the manager of first respondent's southern branch, Mr A P Smith ('Smith').

Applicant's dismissal on 10 November 1988 was preceded by a disciplinary enquiry and thereafter an appeal. Both these proceedings were domestic in nature. After his dismissal, applicant applied for the establishment of a J conciliation board in terms of s 35 of the Labour Relations

1993 (1) SA p32

BRAND AJ

A Act 28 of 1956. At the conciliation board meeting, the parties failed to reach agreement. Thereafter applicant sought relief in the industrial court in terms of s 46 of Act 28 of 1956, but these proceedings were not prosecuted, the parties agreeing to go to arbitration under the auspices of the Independent Mediation Service of South Africa ('IMSSA').

B In terms of the arbitration agreement between the parties, second respondent, who is a practising attorney and member of IMSSA, was selected as arbitrator. His terms of reference, as appears from the arbitration agreement, were the following:

'2. The issue which he will be asked to decide is whether the dismissal C of V R Bester (ie applicant) on 10 November 1988 was in his opinion fair and he will have the power to make any award he deems appropriate, which may include reinstatement.

3. We agree that the arbitrator will have the power to decide upon the procedure which he will follow at the hearing of this matter.'

D The parties also agreed that second respondent's decision 'will be final and binding' upon them.

The arbitration proceedings commenced on 25 October 1989 and ran for 16 days during the period from 25 October 1989 to 23 March 1990. Thereafter second respondent requested the parties to hand in written submissions E with the opportunity to reply to the submissions of the other party. By agreement, these replies were to be filed by 8 June 1990. The award was handed down on 28 August 1990. In terms of the award, second respondent decided that applicant was not unfairly dismissed.

Award out of time

In the heads of argument by applicant's counsel, a new point was raised F for the first time, which is in the nature of a point in limine, namely that the award falls to be set aside on the basis that it was made more than four months after second respondent 'entered on the reference' as envisaged in s 23(a) of the Act. The relevant provisions of s 23 are the following:

'23. The arbitration tribunal shall, unless the arbitration agreement G otherwise provides, make its award -

(a) in the case of an award by an arbitrator . . . within four months after the date on which such arbitrator . . . entered on the reference or the date on which such arbitrator was . . . called on to act by notice in writing from any party to the reference, whichever is the earlier date; and

(b) . . .

H or in either case on or before any later date to which the parties by any writing signed by them may from time to time extend the time for making the award: provided that the Court may, on good cause shown, from time to time extend the time for making any award, whether that time has expired or not.'

The submissions by Mr Arendse, on behalf of applicant, in this regard can be summarised as follows:

I (a) In the matter under consideration, the four month period started to run when second respondent 'entered on the reference', since none of the other alternative situations for the commencement of this period, provided for in s 23, are present.

(b) Second respondent 'entered on the reference' on 23 March 1990 when J the hearing of evidence was concluded.

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A (c) Since the award was only handed down by second respondent on 28 August 1990, he had failed to comply with his statutory duty and the consequence of this failure is that the award is a nullity.

(d) This Court does not have the power to extend the time period of four months after the award has been made.

The submission in (a) above is, in my view correct. The submission in (b), B namely that second respondent only entered on the reference when the hearing of evidence was concluded, is a somewhat startling one. The fact that Mr Arendse was, in all the circumstances of the case, driven to this submission is, in my view, not without significance.

Mr Arendse obviously realised that an argument to the effect that second C respondent should have made his award within four months after the commencement of the arbitration on 25 October 1989 would be untenable. It could not be suggested by or on behalf of applicant that he expected second respondent to make his award while the parties were still presenting evidence, particularly since applicant himself asked for the D matter to be postponed for one month during this period. Furthermore, it appears ex facie the award that, after the hearing of evidence had been concluded on 23 March 1990, applicant agreed that 8 June 1990 would be the final date for the filing of written submissions. Again it could hardly be suggested by or on behalf of applicant that he expected second respondent to make his award before these written submissions had been filed. In E these circumstances, it is understandable why this point was never raised by applicant in his founding or his replying affidavit.

In my view, the contention that second respondent only entered on the reference, as contemplated in s 23(a), when the hearing of oral evidence was concluded cannot be supported. The decision in Bhoola v Bhoola 1945 NPd 109 at 113, that an arbitrator enters on the reference when he 'begins F judicially to enquire into the case' is, with respect, obviously correct. Mr Arendse sought to invoke the dictum of Philips AJ in Members of the Sugar Industry Central Board v Maritz and Another 1984 (4) SA 101 (T) at 107C that 'reference means the process of actually deciding the dispute' in support of his argument. In my view, this dictum does not lend any G support to Mr Arendse's proposition. The fact that 'the reference' is an ongoing process does not detract from the fact that this ongoing process commenced (ie that the arbitrator 'entered on the reference') when the parties appeared before second respondent for the first time on 25 October 1989.

H In my view, it is clear from all the circumstances that applicant, through his conduct, waived any right he had to rely on the award being made after four months from 25 October 1989 and that 'good cause' appears eminently from the papers for extending the four month period until the date upon which the award was actually made. Mr Arendse submitted, however, that this Court is not empowered by the proviso to s 23(a) of the I Act to extend the four month period after the award has already been made.

This contention brought Mr Arendse into direct conflict with the decision in *Naidoo v Estate Mahomed and Others* 1951 (1) SA 915 (N). In this case it was decided that, on a proper interpretation of the relevant provisions of the Natal Arbitration Act 24 of 1898, the Court is empowered J to extend the time period after the award has been made. The ratio

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A decidendi appears from the following dicta by De Wet J at 921D-922B:

'The Act, in the Schedule, provides that it is an implied provision of a deed of submission that "the arbitrator shall make his award in writing within three months after entering on the reference". Section 16 of the Act makes provision that

"the time for making an award may, from time to time, be enlarged by order of Court, whether the time for making a award has expired or not". B

The English Arbitration Act of 1889, 52 and 53 Victoria, has a similar provision, the wording of which is almost the same. In England the Courts have interpreted this provision as enabling the Court to enlarge the time, not only after the time for making the award has expired, but even after the award itself has been made. See Halsbury Laws of England (vol 1 para C 1108, Hailsham ed) and the cases cited. Russell on Arbitration and Awards (13th ed at 141) dealing with this question, states that

"the power can be exercised although the award has in fact already been made after the period fixed for making it has expired. The effect of an order of enlargement is that the extended time is to be treated as if it D had been originally given in the submission. Consequently, the award and all else done in the arbitration during such extended time is rendered valid and effective."

. . . Dealing with the question of whether the Court could enlarge the time after the award had been made, Blackburn J (in *Lord v Lee* (1868) LR 3 QB 404) at 409, said:

"Surely it is a very salutary enactment which enables a Judge to cure a E defect which he thinks a mere defect of form, and which the parties might have cured themselves. I am, therefore, clearly of the opinion that the section gives power to the Judge to enlarge the term for making the award at any time, and under any circumstances in which he thinks there is good cause for his intervention (of course he would not grant an order if he saw that injustice might be done thereby) and the effect F of the enlargement is the same as if it had been by the parties; it amounts to a ratification, and is as if the enlarged time had been originally in the submission."

Mr Arendse submitted that the *Naidoo* case should not be followed because, firstly, it was wrongly decided and, secondly, it is distinguishable on the basis that the wording of the Natal Act, which was considered in that case, is different from the wording of the Act which finds application in G this case.

I do not agree with either of these contentions. I have quoted fairly extensively from the judgment in the *Naidoo* case because I find the reasoning which appears therefrom persuasive and I am therefore in respectful agreement with the result. Needless to say that in particular H cases, of which the case under consideration is a good example, a contrary interpretation will lead to an unfair and unsatisfactory result. It would allow a party to an arbitration who goes through the whole arbitration without giving any indication of his intention to rely on the time period and who, through his conduct, in fact gives every indication of his intention to the contrary, to take this point with impunity when the I arbitrator's decision goes against him.

It is true that there are some differences in the wording of the Natal Act and the wording of the Act under consideration. However, I do not consider these differences to be material. On the contrary, the present

Act is in my view so similar in wording to the Natal Act that it gives rise to the inference that the Legislature, which is presumed to have J known the

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A existing state of the law when it promulgated the present Act, intended the decision in the Naidoo case to be followed. (See, also, Joubert (ed) Law of South Africa vol 1 'Arbitration' para 480.)

For these reasons I hold the view that this Court can and should extend the time period contemplated in s 23(a) of the Act to the date upon which B the award was actually made, from which it follows that in my opinion the point in limine must fail.

Misconduct

Section 33(1)(a) of the Act upon which applicant relies for his objection to the award on the basis of misconduct on the part of second C respondent, reads as follows:

'33(1) Where -

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator . . . ;

(b) . . .

(c) . . . D

the Court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.'

The locus classicus on the meaning of the word 'misconduct' in pre-1965 legislation, is the judgment of Solomon JA in Dickenson & Brown v Fisher's Executors 1915 AD 166. Since the evaluation of applicant's case in this regard turns in essence on the interpretation of the term 'misconduct', I E find it necessary to quote fairly extensively from the judgment in the Dickenson & Brown case.

At 175 in fine-176, Solomon JA is reported to have expressed himself as follows:

F 'Now in the present case it is not suggested that the award has been improperly procured, but it is contended that the arbitrator has misconducted himself within the meaning of the words as used in the section under consideration. Now I do not propose to attempt to give any definition of the word "misconduct", for it is a word which explains itself. And, if it is used, in its ordinary sense, I fail to see how there can be any misconduct unless there has been some wrongful or improper G conduct on the part of the person whose behaviour is in question. . . .

Now if the word misconduct is to be construed in its ordinary sense it seems to me impossible to hold that a bona fide mistake either of law or of fact made by an arbitrator can be characterised as misconduct, any more than that a Judge can be said to have misconducted himself if he has given an erroneous decision on a point of law. . . . Cases may no doubt arise where, as was said by the late Chief Justice in the case of Landeshut v H Koenig 20 SC 33 at 34, "the mistake is so gross or manifest that it could not have been made without some degree of misconduct or partiality on the part of the arbitrator". But in such cases the mistake would merely be evidence to show that there had been misconduct and if an award were set aside in such circumstances it would be really on the ground of misconduct and not of mistake. It may be also that an arbitrator has been guilty of the grossest carelessness and that in consequence he had come to a wrong I conclusion on a question of fact or of law, and in such a case I am not prepared to say that a Court might not properly find that there had been

misconduct on his part. But in ordinary circumstances where an arbitrator has given fair consideration to the matter which has been submitted to him for decision, I think it would be impossible to hold that he had been guilty of misconduct merely because he had made a bona fide mistake either of law or of fact.'

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A From the report in the Dickenson & Brown case it appears that it was contended on behalf of the appellant in that case that the term 'misconduct' bore a technical or special meaning in English law which includes, for example, a mistake of law and that this technical meaning should be engrafted upon our law on the basis that the statute in question was taken over from the English Act. B

His Lordship then discussed the English authorities referred to and came to the following conclusions at 180:

'It will be seen, therefore, that the rule is supported not on the ground that it comes within the provisions of the statute law regarding C misconduct on the part of an arbitrator, but that by judicial decisions it had become part of the established law of the land. What then is the position in South Africa? We have a statute on the subject providing in what cases an award may be set aside, but it is impossible to say that there has been here, as in England, a series of decisions extending over very many years embodying the principle that the Court has power to go outside of the statute and set aside an award on the ground that the D arbitrator has made a mistake of law apparent upon the face of the award. I can find no case reported in the South African reports in which such a rule has been laid down.'

And at 181:

'If, however, the Legislature thinks differently the statute law on the subject can be amended, but until that is done we are in my opinion E limited in our jurisdiction to set aside awards falling within the language of s 18 of the Arbitration Act of 1898. . . .'

Subsequent to the promulgation of the Act (ie the 1965 Act) it has been decided in a number of cases, at least by implication, that the difference in the wording of this Act and the 1898 Natal Act, which formed the F subject of consideration in the Dickenson & Brown case, is not of such significance that it justified a deviation from the judgment by Solomon JA in that case. (See in this regard, for example, Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk 1968 (1) SA 7 (C) at 16; RPM Konstruksie (Edms) Bpk v Robinson en 'n Ander 1979 (3) SA 632 (C) at 636; Hyperchemicals International (Pty) Ltd and Another v G Maybaker Agrichem (Pty) Ltd and Another 1992 (1) SA 89 (W) at 99.)

Mr Arendse conceded that this Court is bound by the authority of the Dickenson & Brown case. He nevertheless submitted that in the Act under consideration the word 'misconduct' is used 'in a technical sense as denoting irregularity and not any moral turpitude and that this technical H meaning also covers cases where there is a breach of the rules of natural justice'. In my opinion, this submission cannot be supported since it is patently in conflict with the decision in the Dickenson & Brown case. Mr Arendse sought some authority for his submission in certain dicta by Selikowitz J in Benjamin v SOBAC South African Building and Construction (Pty) Ltd 1989 (4) SA 940 (C) at 971B-D. In so far as the judgment in the I Benjamin case can be interpreted as authority for the wide interpretation of the term 'misconduct' contended for by Mr Arendse, it can, in my respectful view, not be followed.

With reference to the Dickenson & Brown case, it is in my view significant that in the 1965 Act the Legislature used substantially the J same wording as was used in the 1898 Natal Act, which formed the subject of

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A consideration in the Dickenson & Brown case. This was done despite the express invitation by Solomon JA (at 181) to the Legislature that it should amend the Act if its intention was that our Courts should follow the English law in this regard. In these circumstances, the fact that the Legislature chose to use substantially the same wording in the 1965 Act, in my view, justifies the inference that it was the intention of the B Legislature that the Courts should not extend the grounds for the setting aside of arbitrators' awards beyond those which appear from the language of s 33(1) of the Act under the guise of giving a technical meaning to the term 'misconduct'.

I am fortified in my view by the recent decision of Preiss J in C Hyperchemicals International (Pty) Ltd and Another v Maybaker Agrichem (Pty) Ltd and Another (supra), the gravamen of which appears from the following passages from the report.

At 95C-D the argument of the applicants in that case is summarised as follows: D

'The applicants use phrases such as "legally misconducted himself", "departure from a judicial frame of mind", "total lack of evidence", "legal misconduct" and "evidence incapable of supporting the award". In the development of his argument Mr Slomowitz for the applicants stated that these grounds were all manifestations of legal misconduct which, so he averred, was covered by the provisions of s 33(1)(a) despite the fact E that dishonesty was specifically eshewed.'

After considering the authorities relied upon by the applicant for these propositions, Preiss J expressed himself as follows at 100B-D:

'Mr Slomowitz fairly conceded that he could only succeed in overturning the arbitrator's reward if "legal misconduct" was held to be a ground F for review. My conclusion is that it is not. Mistake, no matter how gross, is not misconduct; at most, gross mistake might provide evidence of misconduct in the sense that it may be so gross or manifest that it could not have been made without misconduct on the part of the arbitrator. In such a case a Court might be justified in drawing an inference of misconduct. The award would then be set aside, not for mistake, but for misconduct. The applicants' contentions fall entirely short of this type of situation. The disavowal of imputations of dishonesty leaves the G applicant with no more than a flimsy basis from which legal misconduct is sought to be inferred and which, in any case, is not a recognised ground for review in terms of s 33(1)'.

Mr Arendse submitted that Preiss J went too far in the Hyperchemicals case in that he equated 'misconduct' in the context of s 33(1)(a) with H 'dishonesty'. I do not understand Preiss J to have done that. In my respectful view, the learned Judge did no more than to decide that the decision in the Dickenson & Brown case is still binding authority as far as the meaning of 'misconduct' in the 1965 Act is concerned; that, in the light thereof, there is no room for the concept of 'legal misconduct' in our law and that, in order to succeed on the basis of misconduct on the part of the arbitrator as contemplated in s 33(1)(a), the applicant must I show 'misconduct' in the sense of moral turpitude or mala fides on the part of the arbitrator.

Mr Arendse also submitted that, in the Hyperchemicals case, Preiss J lost sight of the provisions of s 33(1)(c) of the Act in terms whereof an award falls to be set aside on the basis that it was 'improperly obtained'. If the arbitrator had been dishonest, for instance in accepting J a bribe, so the

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A argument went, the award would be subject to review on the basis that it had been improperly obtained.

I do not agree with this contention. In my view, there are three answers thereto. Firstly, Preiss J did not, as I have already indicated, limit 'misconduct' to 'dishonesty'. Secondly, the learned Judge did not lose sight of s 33(1)(c). On the contrary, he specifically pointed out that the ground contemplated in this subsection bears a resemblance to the provision in the 1898 Natal Act, in terms whereof the Court was authorised to set aside an award on the basis that 'the award has been improperly procured'. Thirdly, it is obvious, in my opinion, that dishonest or blameworthy conduct on the part of the arbitrator will not always be covered by s 33(1)(c) of the Act. As I understand the Act, the position is, broadly speaking, that s 33(1)(a) deals with improper conduct on the part of the arbitrator whereas s 33(1)(c) contemplates misconduct on the part of the successful party. Where the successful party bribes the arbitrator, the two subsections will overlap. This overlap is of no significance, however, in determining the meaning of either of the two subsections.

On the basis of my understanding of the judgment in the Hyperchemicals case, I am in respectful agreement therewith and I therefore intend to follow it.

The ground upon which applicant's case is founded in this regard, as summarised by Mr Arendse in his heads of argument, is that second respondent 'displayed a total want of judicial capacity in making the award'. I am in respectful agreement with Preiss J in the Hyperchemicals case that this is a somewhat meaningless phrase. In my opinion, applicant can therefore only succeed on the ground under consideration if he can show that there was some improper, mala fide conduct on the part of second respondent in relation to his duties as arbitrator.

Applicant does not rely on any direct evidence of 'misconduct' (in this sense) by second respondent. What applicant therefore has to prove is not only that second respondent made mistakes, but that these mistakes were so gross or manifest as to justify the inference of mala fides on the part of second respondent. This placed applicant in the difficult position where he had what was described in a similar context as 'a hard row to hoe', particularly since 'one does not lightly infer dereliction of duty and untruthfulness from a responsible body' (per Holmes JA in Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd 1976 (1) SA 887 (A) at 895B-F). These remarks apply mutatis mutandis to this case. In my view the same can be said about second respondent, who is an attorney of this Court and a member of IMSSA.

Mr Arendse went through the record of the arbitration proceedings with a fine tooth comb and in his thorough argument he criticised basically every finding made by second respondent against his client. In view of the conclusion that I have arrived at regarding this aspect of applicant's case, I find it unnecessary, however, to discuss the merits of Mr Arendse's points of criticism in great detail.

Ex facie the award it appears that second respondent came to the conclusion that first respondent 'had not acted unreasonably in dismissing' the applicant and that 'his dismissal was substantially fair' as a result of his findings of fact under the following three headings:

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- A (a) Conflict of interest.
- (b) Poor service to customers of first respondent.
- (c) Poor achievement against objectives.

Under the heading 'conflict of interest', second respondent found against applicant on two bases, namely (a) that applicant devoted time which he should have spent on first respondent's affairs to a business which he conducted in his private capacity under the name of The Gas Shop and (b) that applicant allowed the accounts of The Gas Shop with first respondent as well as with a subsidiary of first respondent, Easigas (Bellville), to become substantially in arrears.

Applicant's attack on these findings amount to no more than criticism of C second respondent's evaluation of the evidence relevant to this aspect which was placed before him, and criticism of certain credibility findings by second respondent. In my view, it is unnecessary for this Court to decide whether these points of criticism are valid or not. It is sufficient to find that the criticism raised on behalf of applicant, even if valid, falls far short of justifying the inference that second D respondent was not bona fide in these (alleged) errors of judgment.

As to second respondent's findings against applicant under the second heading, ie poor service to first respondent's customers, applicant's objection is in essence that these findings are primarily based on two letters of complaint by customers of first respondent. It is contended on E behalf of applicant that these two letters should not have been admitted as evidence by second respondent, alternatively, that second respondent placed too much weight on the hearsay evidence contained therein.

Regarding the admissibility of the letters, it was conceded by Mr Arendse (rightly in my view) that the mere fact that the contents of the F letters constitute hearsay evidence would not make the letters inadmissible per se in arbitration proceedings. Mr Arendse submitted, however, that second respondent should have exercised his discretion against the admission of these letters, since the contents thereof were severely prejudicial to applicant. In my view, there is much to be said for the way in which second respondent exercised his discretion in this regard. First respondent's reason for not calling the authors of the G letters as witnesses, namely that it did not want to involve its customers in a dispute with one of its employees, appears to me to be quite acceptable. In any event, the question is not whether this Court agrees with second respondent in the exercise of his discretion. The question is whether it can be said that second respondent was so grossly unreasonable H in the exercise of this discretion that it justifies the inference of mala fides on his part. In my view, there is no room whatsoever for such an inference.

The alternative contention, namely that second respondent attached too much weight to the contents of these letters, appears to me to be insupportable on the facts. From second respondent's award it appears, in I my view, that he was very careful not to make any findings which were based solely on the contents of the letters. He only made findings on the basis of complaints in the letters where the correctness of those complaints was corroborated by some other evidence, for example admissions by applicant. An example of second respondent's reasoning in this regard J appears from the following paragraphs in the award:

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A '5.2.1.3 The grievant (ie applicant) denied that he had promised Merlies a scale to enable them to participate in the campaign, and this was not pursued under cross-examination. In view of the fact that the only other evidence in this regard was the letter, I find that the company (ie first respondent) failed to show, on a balance of probabilities, that the grievant had underperformed in this regard.

B 5.2.1.4 The grievant testified that there was a misunderstanding between himself and Delport (the author of the letter) with regard to the placement of the advertisement pertaining to the campaign. However, he concedes that Delport "blew his top" about this incident and it was not contested that Delport withdrew the advertisement. This Delport would not have done unless he was upset about the placement. Accordingly, I find, on a balance of probabilities, that the grievant did underperform in this regard.' C

In view of the manner in which second respondent dealt with the contents of the letters, which appears from the foregoing and other examples in the award, Mr Arendse was driven to the argument that applicant's admissions regarding the contents of the letters should not have been D taken into account by second respondent since the letters should not have been admitted. This left Mr Arendse solely with his main contention, ie his objection to the fact that the letters were admitted in evidence. Since I have already indicated that, in my

view, this main contention does not render applicant's case any support, it follows that applicant's attack on the findings under the second heading of the award must fail.

E Under the third heading, ie poor achievement against objectives, first respondent's case was, inter alia, that applicant failed to achieve the targets set for him as cash-and-carry manager. Second respondent's findings in this regard appear from the following passages in the award:

'5.1.1 It was common cause that volume targets were set by agreement F between Smith and the grievant (ie applicant). The differences between the parties were whether:

5.1.1.1 The nature of the grievant's role as cash and carry manager and the division of the market had changed to such an extent that the targets became irrelevant. The effect of the grievant's changed role was clouded G by a lot of conflicting evidence and it is impossible for me to determine whether it had any bearing on his ability to achieve his targets. What was clear was that the changed division of the market was of such a nature that volumes which had previously been excluded from the cash and carry figures were included either before or sometime during 1988. If anything, this would have made it easier for the H grievant to achieve his targets. In any event, the figures presented at the arbitration showed that actual sales for 1988 were 40,9% below target by November 1988, which is a substantial under-achievement.

5.1.1.2 The competition in the market increased to such an extent so as to justify this under-achievement. The evidence in this regard was that there had been increased activity in the market by competitors, but I certainly not to the extent to warrant a 40% under-achievement.

In view of the foregoing, I find, on a balance of probabilities, that the grievant was a poor achiever.'

On behalf of applicant an attack was made against these findings on the basis of the evidence presented at the arbitration. A full exposition of J these

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A arguments would involve an unwieldy recital of the facts. I find this unnecessary. In my view, it is sufficient to state in this regard that Mr Arendse's argument amounts to no more than a criticism of second respondent's evaluation of the evidence and that this criticism, even if valid, again falls far short of justifying an inference of misconduct (in B the aforementioned sense) on the part of second respondent.

A further basis upon which second respondent found against applicant under the heading of poor achievement, is that he failed to give adequate supervision to Mr Mkosi, a representative reporting to him. Applicant's main objection to this finding is that it is based on the evidence of Mr C Mkosi, who was called as a witness by applicant, and that applicant's failure to supervise Mr Mkosi was not part of first respondent's case against him. This complaint is, in my view, even at face value, incapable of supporting a valid objection.

The issue to be decided by second respondent was whether applicant was fairly dismissed. In determining this issue, second respondent was D entitled to rely on all relevant evidence. Neither the fact that this evidence was not specifically relied upon by first respondent at the time when applicant was dismissed, nor the fact that the evidence originated from a witness called by applicant could detract from the relevance of such evidence.

E Finally, in this context, it was submitted by Mr Arendse that the cumulative effect of the alleged mistakes by second respondent justifies the inference that he misconducted himself in relation to his duties as arbitrator. Mr Arendse's proposition is thus that a series of errors which may each be attributable to a bona fide error can nevertheless collectively justify the inference of mala fides. I do not have to find F that this proposition can

never be accepted, though I must admit to some difficulty in contemplating such a situation. Would one then have to investigate whether the arbitrator also made some errors in favour of the applicant in order to establish whether the arbitrator is just in the habit of erring before you can infer mala fides? Be that as it may. Suffice it to say for the purposes of the present case that, even if Mr G Arendse's proposition may theoretically be valid in a particular case, this is not such a case. The errors relied upon by Mr Arendse are so marginal that it is debatable whether they can be described as errors at all. Even if all these alleged errors are therefore accepted as such and even if it were permissible to look at the 'cumulative effect' thereof, I would still hold the view that an inference of mala fides on the part of H second respondent is not justified.

In these circumstances, my opinion is that applicant has failed to make out a case that second respondent has misconducted himself in relation to his duties as arbitrator, and that, in the event, applicant cannot succeed I on the basis under consideration.

The award against public policy

A further point raised by Mr Arendse, which, incidentally, was not raised on applicant's papers, was that second respondent's award falls to be set aside on the basis that it is contrary to public policy. His argument in this regard was that, since applicant was in fact unfairly dismissed, the award amounts to a ratification or condonation of an unfair J dismissal

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A which constitutes an unfair labour practice as defined in the Labour Relations Act 28 of 1956. Thus, so the argument went, the award is illegal or at least against public policy. In developing this argument, Mr Arendse sought to rely on the judgment of the majority of the Full Bench in Veldspun (Pty) Ltd v Amalgamated Clothing & Textile Workers Union of SA B and Another 1992 (3) SA 880 (E) ((1992) 13 ILJ 41).

In the Veldspun case, the parties to the arbitration were involved in a labour dispute. The arbitrator's award imposed a so-called 'closed-shop' arrangement on the employer (appellant) and the trade union (first respondent). Zietsman AJP (as he then was) found that, in terms of this C imposed arrangement, the employer was compelled to act illegally; that in making such an award the arbitrator exceeded his powers and that the award should thus be set aside (at 56H). Erasmus J agreed that the award should be set aside on the basis that the arrangement which was thereby imposed on the parties was contrary to public policy (at 61F-G).

In my view, the Veldspun case is clearly distinguishable on the facts. D The award in the present matter amounts to no more than a factual finding that applicant was not unfairly dismissed. The award in itself can therefore by no stretch of the imagination be interpreted as compelling or even authorising either of the parties to do something which is illegal or against public policy.

E The question whether the award would be against public policy if applicant's dismissal was in fact unfair is not open for consideration. The fairness of the dismissal must be taken to have been finally decided between the parties, unless and until second respondent's award is set aside by this Court on one of the other grounds relied upon by applicant. F The contention that the award falls to be set aside on grounds of public policy on the basis that applicant's dismissal was in fact unfair thus involves applicant in a circuitous argument in that the award can only be set aside on the basis of public policy after it has already been set aside on one of the other bases advanced by applicant.

Gross irregularity in the conduct of the proceedings

G In this regard, applicant relies on s 33(1)(b) of the Act, the relevant provisions of which are the following:

'33(1) Where -

(a) . . .

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings . . .

(c) . . .

We have not been referred to any decision by our Courts where the phrase 'gross irregularity in the proceedings' within the context of s 33(1)(b) of the Act formed the subject of consideration. Generally speaking, this phrase is however not foreign to our law and it has in fact been discussed in a number of reported cases.

From these authorities it appears, firstly, that the ground of review envisaged by the use of this phrase relates to the conduct of the proceedings and not the result thereof. This appears clearly from the following dictum of Mason J in *Ellis v Morgan*; *Ellis v Dessai* 1909 TS 576 at 581:

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A 'But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result but to the method of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.'

(See also, for example, *R v Zackey* 1945 AD 505 at 509.)

B Secondly it appears from these authorities that every irregularity in the proceedings will not constitute a ground for review on the basis under consideration. In order to justify a review on this basis, the irregularity must have been of such a serious nature that it resulted in the aggrieved party not having his case fully and fairly determined. (See, for example, *Ellis v Morgan* (supra); *Coetser v Henning and Ente* NO 1926 C TPD 401 at 404; *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another* 1938 TPD 551; and cf also *S v Moodie* 1961 (4) SA 752 (A).)

It is clear in my view that this complaint relates to the result and not to the method of the arbitration proceedings. From the authorities referred to it thus appears that, even on the basis that this complaint is valid, it cannot support a review application on the ground of gross irregularity in the conduct of the proceedings.

During the course of this argument, Mr Arendse referred to procedural rulings which were made by second respondent against his client. His submission was that these rulings constituted gross irregularities as contemplated in s 33(1)(b). In the light of the conclusion I have come to regarding these objections, I find it unnecessary to discuss everyone of them in extenso. In my view it is adequate to give a brief summary of the rulings to which objection is made.

(a) At the arbitration applicant objected to the introduction of certain letters of complaint by first respondent's customers, as evidence. From the record (which was kept by second respondent in long hand) it appears that second respondent gave the following ruling in this regard:

'I have discretion to rule on admissibility of and weight to be accorded to evidence. No strict rules of evidence. Letter G admissible. Weight to be accorded to contents will depend on evidence and should be argued at end of case.'

(b) During the arbitration, applicant objected to the fact that some of first respondent's employees present had consulted with first respondent's attorney. Mr Arendse conceded that this objection was not a valid one. His contention was however that second respondent should have warned first respondent that its witnesses should not consult with its attorney while being under cross-examination. This contention is somewhat

surprising in the light of the further concession by Mr Arendse that there is no proof that such consultations ever took place.

I (c) At the arbitration applicant objected to a certain Mr Du Plessis giving evidence on a discussion which occurred between applicant and Mr Du Plessis subsequent to applicant's dismissal. The passage from the record which is relevant to this aspect reads as follows:

'Grievant objected to witness being called only to testify J about discussion

1993 (1) SA p44

BRAND AJ

A which witness and grievant had about Easigas. Objection overruled. Can object to specific questions.'

It also appears from the record that no objection was then raised by applicant against any specific question which was put to Mr Du Plessis. In any event, it is clear from the award that second B respondent placed no reliance on the testimony of this witness.

(d) During the cross-examination of one of first respondent's witnesses, objection was raised to a certain line of questioning by applicant. Second respondent made the following ruling:

'Questions pertaining to the financial loss suffered by grievant as a consequence of opening, running or disposing of C the Gas Shop not relevant to the arbitration. Questions indicating an attitude by either Easigas or Easigas (Bellville) toward the grievant as a consequence of the opening or running of the Gas Shop are relevant.'

The first problem I have with these submissions by Mr Arendse is that they were never pertinently raised in applicant's papers. Neither first or D second respondent therefore had the opportunity to deal therewith.

Secondly, I am not satisfied that these rulings constituted irregularities at all.

Thirdly, even if on a very technical approach these rulings can be described as 'irregularities', it cannot be said in my view that it resulted in applicant not having a fair trial. E

In the circumstances I hold the view that applicant has not made out a case on this basis either.

Conclusion

For these reasons my judgment is that the application should be dismissed with costs. F

King J concurred.

Applicant's Attorneys: Jassiem & Associates. First Respondent's G Attorneys: Findlay & Tait Inc.

TOTAL SUPPORT MANAGEMENT (PTY) LTD AND ANOTHER v DIVERSIFIED HEALTH SYSTEMS (SA) (PTY) LTD AND ANOTHER 2002 (4) SA 661 (SCA)

Citation	2002 (4) SA 661 (SCA)
Case No	457/2000
Court	Supreme Court of Appeal
Judge	Smalberger Adp, Marais JA, Cameron JA, Brand JA and Lewis AJA
Heard	February 25, 2002
Judgment	March 25, 2002
Counsel	P P Delport SC (with D J Coetsee) for the appellants. C D S Loxton SC (with G E Turner) for the first respondent. M D Kuper SC (with D N Unterhalter) for the second respondent.
Annotations	Link to Case Annotations

B

1. [zFNz]Flynote : Sleutelwoorde
2. Arbitration - The award - Review of - Grounds for review - Misconduct of arbitrator - Arbitration Act 42 of 1965, s 33(1)(a) - What constitutes - Applicable principles reiterated - Misconduct not to be lightly inferred solely on strength of errors in arbitrator's C judgment, particularly where such errors not gross.
3. Arbitration - The award - Review of - Applicability of s 33(1) of Constitution of the Republic of South Africa Act 108 of 1996 - Function of arbitrator not administrative but judicial in nature - Section 33(1) not applicable to consensual (private) arbitrations - Semble: Section 33(1) may well be applicable to compulsory (statutory) D arbitrations.
4. Arbitration - The award - Review of - Applicability of s 34 of Constitution of Republic of South Africa Act 108 of 1996 - Semble: Fairness requirement of s 34 of Constitution not applying to consensual (private) arbitrations. E
5. Arbitration - The arbitrator - Power of - Utilisation of assistant - Though not per se objectionable, arbitrator not entitled to delegate decision-making function - Should be circumspect in utilising services of assistant - Where parties agree to appointment of assistant, consensus to be reached on his or her functions - Where no such agreement, assistant not to perform tasks that encroach on normal F functions of arbitrator - Question ultimately whether arbitrator exercised own judgment in deciding issues.
6. [zHNz]Headnote : Kopnota
7. In October 1995 a written agreement was concluded between I (Pty) Ltd and the second appellant, as sellers, and the first G respondent, as purchaser, for the sale of a business owned and conducted jointly by I (Pty) Ltd and the second appellant. I (Pty) Ltd subsequently ceded its claims against the first respondent to the first appellant. Clause 30 of the agreement provided that any disputes arising out of the agreement would be resolved by arbitration. The clause specifically provided that unless the terms of submission H provided otherwise, the arbitrator's award would not be subject to

appeal. A dispute as to the first respondent's liability for payment of portion of the purchase price was referred to arbitration, the second respondent having been appointed as arbitrator. Both the appellants and the first respondent had filed a claim and counterclaim respectively. The second respondent dismissed all claims with costs. A Provincial Division then dismissed I an application by the appellants for an order setting aside the arbitrator's award in terms of s 33(1) of the Arbitration Act 42 of 1965.

8. The purchase price of the business amounted to R49 439 500, which was to be paid in four instalments: an initial instalment of R2 439 500, and three further conditional instalments of R13,5 million, R13,5 million and J
9. 2002 (4) SA p662
10. R20 million respectively. The first sum of R13,5 million was to become payable on fulfilment of any one of three conditions set A out in the agreement. The agreement also provided for the payment of interest on all of the above-mentioned sums. It was common cause that first respondent paid the initial instalment and the first two of the subsequent instalments; that the first respondent refused to make any interest payments to the appellants; and that it also denied liability for payment of the final instalment of R20 million. The B appellants accordingly claimed some R4 million interest allegedly due on the first three instalments, as well as the R20 million due in respect of the final instalment. In its plea and counterclaim the first respondent, though admitting that interest was due on the first instalment, contended that the second instalment had been paid in the reasonable and bona fide but mistaken belief that it was due, and claimed set-off of the second instalment against payment of C the interest due, leaving an overpaid balance of R11 675 761,64, which it claimed on the basis of the *condictio indebiti*.
11. The second respondent dismissed the appellants' first claim on the ground that the appellants had failed to establish that any of the preconditions for payment of the second instalment had been met, and that the first respondent had not been legally obliged to make such D payment. He accordingly found that the second instalment had been paid by mistake and, as liability for such payment was a prerequisite for the interest claimed in respect of the second instalment, the appellants' claim for accrued interest had to fail and the interest admittedly due in respect of the first instalment had to be set off against the second instalment. (The second respondent's dismissal E of the first respondent's counterclaim was not challenged.) The appellants' first ground of review was that the second respondent's disregard of facts that were common cause and undisputed evidence was so grossly careless that it amounted to misconduct as intended in s 33(1)(a) of the Arbitration Act. The second ground was that the second respondent had abdicated F his duties in favour of his assistant, one M, and that this amounted to misconduct, alternatively to a gross irregularity, as intended in s 33(1)(a) and (b) of the Act. On appeal to the Supreme Court of Appeal,
12. Held, that proof that the second respondent had been guilty of such misconduct or had committed a gross irregularity in the conduct of the arbitration was a prerequisite for the setting aside of the award, and that the onus in this regard was on the G appellants. It was clear from the authorities that the basis on which an award could be set aside due to misconduct was very narrow. A gross or manifest mistake was not sufficient, but at best provided evidence of misconduct which, taken alone or in conjunction with other considerations, would ultimately have to be sufficiently compelling to justify an inference (as the most likely inference) of what had in the past variously been described as 'wrongful and improper conduct', H 'dishonesty', 'mala fides or partiality' or 'moral turpitude'. (Paragraph [21] at 672E - I.)
13. Held, further, as to the implications of s 33(1) of the Constitution of the Republic of South Africa Act 108 of 1996, that s 33(1) dealt only with administrative action. In an enquiry as to whether conduct amounted to 'administrative action', the focus was not on the position of the functionary, but on the nature of the power I exercised, viz whether it was administrative or not. (Paragraph [23] at 673C - D/E.)
14. Held, further, that arbitration did not fall within the purview of 'administrative action' as intended in s 33(1), but arose from the exercise of private (rather than public) powers. This followed from

arbitration's various distinctive attributes. The hallmark of arbitration was that it was an adjudication, J

15. 2002 (4) SA p663

16. flowing from the parties' consent to the arbitration agreement. The parties defined the powers of A adjudication and were equally free to modify or withdraw that power at any time by way of further agreement. As arbitration was a form of private adjudication, the function of the arbitrator was not administrative but judicial in nature. Since decisions made in the exercise of judicial functions did not amount to administrative action, s 33(1) of the Constitution did not apply to a matter such as the present. (Paragraphs [24] - [25] at 673E - 674A/B.) B

17. Semble: the position might well be different with statutorily imposed arbitrations. In the light of the administrative justice provisions of s 33(1) of the Constitution, the decision in *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A), which set out the principles relevant to the setting aside of arbiters' decisions, C might well merit reconsideration in the context of compulsory (as opposed to consensual) arbitrations. (Paragraph [26] at 674A/B - C.)

18. Held, further, as to the relevance of the fairness requirements of s 34 of the Constitution, that, while it seemed at first blush that they applied to consensual (private) arbitrations, closer analysis might lead to a different conclusion. It was a moot point whether the words 'a fair public hearing before . . . another D independent and impartial tribunal or forum' applied to proceedings before an arbitrator or whether they had to be restricted to statutorily established adjudicatory institutions. Parties to private arbitration proceedings could by agreement exclude any form of public hearing. In addition, the proper interpretation of s 34 might involve the vexed question of whether a constitutional right could be waived. (Paragraph [27] at 674C - F.) E

19. Held, further, that, since the ambit and application of s 34 was not fully argued, its proper interpretation had to be left open. In any event, even if the fairness requirement of s 34 did apply to private arbitrations, there was nothing precluding the parties themselves from defining what was fair. The fairness requirement was satisfied where parties resorting to arbitration agreed to forego a right of appeal and accepted that the well-known and well-established F principles governing arbitration applied. Consequently, viewing the Arbitration Act through the prism of the Bill of Rights did not justify any departure from those principles. (Paragraph [28] at 674F/G - H.)

20. Held, further, as to the first ground of review, that the second respondent had made a cardinal error in finding that one of the conditions for payment of the second instalment of R13,5 million had not been met, an error with potentially unfortunate financial G implications for the appellants. It was not, however, a gross error. Nor did the other errors relied on by the appellants amount to gross errors. In any event, as previously pointed out, even a gross error did not per se justify the setting aside of an award. (Paragraphs [33] - [35] at 676B/C - 677D.)

21. Held, further, as to whether an inference of impropriety and mala fides amounting to dishonesty could be drawn from the H second respondent's collective mistakes, that such misconduct could not lightly or readily be inferred solely on the strength of errors in his judgment, particularly where such errors were not of a gross nature. In the present case it was far more likely that the errors had been bona fide. There was accordingly no room for a finding of misconduct on the part of the second respondent. (Paragraph [36] at 677D - F.) I

22. Held, further, as to the second ground of review, that an arbitrator was not entitled to delegate his function and accordingly had to be circumspect about utilising the services of an assistant. If the parties to an arbitration agreed to the appointment of an assistant, it was important that they should reach consensus on his or her functions. Failing such agreement, any assistant J

23. 2002 (4) SA p664

24. employed by the arbitrator should not be allowed to perform tasks that might A intrude on the normal functions of the latter. In no circumstances should the assistant usurp the arbitrator's decision-making function or act in a manner subversive of his or her independence. Ultimately, the

question was whether the arbitrator had exercised his or her own judgment. (Paragraph [41] at 678G - J.)

25. Held, further, that there was nothing to suggest that the second respondent had been influenced by M to the extent that his B view had been replaced by that of M. It could not be found that the issues had not been fully and fairly determined by the second respondent himself. The second respondent accordingly had not misconducted himself in utilising M's services. (Paragraphs [46] - [47] at 680B/C - G.) Appeal dismissed.
26. The decision in the Transvaal Provincial Division in *Total Support Management (Pty) Ltd and Another v Diversified Health Systems C (South Africa) (Pty) Ltd and Another* upheld.
27. [zCAz]Cases Considered
28. Annotations
29. Reported cases
30. *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994 (1) SA 162 D (A): discussed and dictum at 169C - E applied
31. *Bester v Easigas (Pty) Ltd and Another* 1993 (1) SA 30 (C): applied
32. *Carephone (Pty) Ltd and Others v Marcus NO and Others* 1999 (3) SA 304 (LAC): referred to
33. *Commissioner for Inland Revenue v First National Industrial Bank Ltd* 1990 (3) SA 641 (A): dictum at 652H - J applied E
34. *Dickenson & Brown v Fisher's Executors* 1915 AD 166: dictum at 176 applied
35. *Donner v Ehrlich* 1928 WLD 159: dictum at 160 applied
36. *Dutch Reformed Church v Town Council of Cape Town* (1898) 15 SC 14: applied
37. *Ellis v Morgan*; *Ellis v Dessai* 1909 TS 576: dictum at 581 applied
38. *Hyperchemicals International (Pty) Ltd and Another v Maybaker Agrichem (Pty) Ltd and Another* 1992 (1) SA 89 F (W): dicta at 97B - 98H and 99H - I applied
39. *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC): dictum in para [21] applied G
40. *Kolber and Another v Sourcecom Solutions (Pty) Ltd and Others; Sourcecom Technology Solutions (Pty) Ltd v Kolber and Another* 2001 (2) SA 1097 (C): dictum at 1106J - 1108D applied
41. *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC): dictum in para [24] applied
42. *Patcor Quarries CC v Issroff and Others* 1998 (4) SA 1069 (SE): dictum at 1082G applied H
43. *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC): dictum in para [141] applied
44. *Recsey v Reiche* 1927 AD 554: distinguished
45. *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A): I applied.
46. [zSTz]Statutes Considered
47. Statutes
48. The Arbitration Act 42 of 1965, s 33(1)(a) and (b): see *Juta's Statutes of South Africa* 2000 vol 1 at 1-10
49. The Constitution of the Republic of South Africa Act 108 of 1996, ss 33(1), 34: see *Juta's Statutes of South Africa* 2000 vol 5 at 1-149. J

50. 2002 (4) SA p665
51. [zClz]Case Information
52. Appeal from a decision in the Transvaal Provincial Division (Ngoepe JP). The fact appear from the judgment of Smalberger A ADP.
53. P P Delport SC (with D J Coetsee) for the appellants.
54. C D S Loxton SC (with G E Turner) for the first respondent.
55. M D Kuper SC (with D N Unterhalter) for the second respondent.
56. In addition to the authorities cited in the judgment of the Court, counsel for the parties referred to the following: B
57. Administrator, Transvaal v Theletsane 1991 (2) SA 192 (A) at 196C - 197D, 200E - H
58. Appel v Leo 1947 (4) SA 766 (W) at 766
59. Arundel Mansions (Pty) Ltd v Hendry 1969 (3) SA 576 (T) at 577F - H, 578 C
60. Avis v Verseput 1943 AD 331 at 345
61. Benjamin v Sobac South African Building and Construction (Pty) Ltd 1989 (4) SA 940 (C) at 971B - D
62. Caledonian Railway Co v Turcan (1898) AC 256
63. Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC and Others 2001 (3) SA 1013 (SCA) at paras D [16] - [22]
64. Cavaleiro v Coetzee and Others NNO 1982 (3) SA 695 (T) at 698D - F
65. Clark v African Guarantee and Indemnity Co Ltd 1915 CPD 68
66. Coetzer v Henning and Ente NNO 1926 TPD 401 at 404
67. Commissioner for Inland Revenue v First National Bank Ltd 1990 (3) SA 641 (A) at 652H - J E
68. Commissioner of Customs and Excise v Rennies Group t/a Renfreight 1999 (3) SA 771 (SCA) at 786A - G
69. Cone Textile (Pvt) Ltd v Ayres and Another 1980 (4) SA 728 (ZA) at 735H
70. Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange 1983 (3) SA 344 (W) F
71. De Jager v Grunder 1964 (1) SA 446 (A) at 463
72. Dobson v Groves (1844) 14 LJ QB 17 at 21 - 3
73. Ellison and Others v Bray (1864) 9 LT 730
74. Ex parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area and Another G 1998 (1) SA 78 (CC) at 83C - 86G
75. Farjas (Pty) Ltd and Another v Regional Land Claims Commissioner, KwaZulu-Natal 1998 (2) SA 900 (LCC) at para [18]
76. Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC) H
77. Goldfields Investments Ltd v City Council of Johannesburg and Another 1938 TPD 551
78. Gordon v Haefele 1914 CPD 909 at 914 - 15
79. Graaf-Reinet Municipality v Jansen 1917 CPD 604
80. Great North Farms (Edms) Bpk v Ras 1972 (4) SA 7 (T) at 9C - H I

81. Haigh v Haigh [1861] 5 LT 507 at 508
82. Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others 2000 (4) SA 621 (C) at 640E - 641B
83. Herbert Porter & Co Ltd and Another v Johannesburg Stock Exchange 1974 (4) SA 781 (T) J
84. 2002 (4) SA p666
85. Hira and Another v Booysen and Another 1992 (4) SA 69 (A) at 93A - 94A A
86. Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2000 (2) SA 934 (T)
87. In re Alluvial Creek Ltd 1929 CPD 532 at 535
88. Iscor Pension Fund v Jerling and Others 1978 (3) SA 858 (T) at 861E - F
89. James v Mendelowitz 1984 (4) SA 383 (C) at 390I - 391A B
90. Jinna v Laattoe and Others 1981 (1) SA 432 (C) at 435G
91. Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A) at 152A - E
92. Kannenberg v Gird 1966 (4) SA 173 (C) at 186G - 187E
93. Klaassen v Benjamin 1941 TPD 80 at 86 C
94. Kynoch Feeds (Pty) Ltd v CCMA and Others (1998) 4 BLLR 384 (LC) at 386D - E
95. Linton v Corser 1952 (3) SA 685 (A) at 694H - 696A
96. Louis Dreyfus & Co v Arunachala Ayya LR 58 IA 381
97. Maharaj v Chairman, Liquor Board 1997 (1) SA 273 (N) at 276J - 277E D
98. Marais v Democratic Alliance 2002 (2) BCLR 171 (C) at para [49]
99. Martens v Le Roux 1917 NPD 411 at 414 - 15
100. McKenzie NO v Basha 1951 (3) SA 783 (N) at 786B - D
101. Menzies, Birse and Chiddy v Hall 1941 CPD 297 at 301
102. Mine Workers' Union v Brodrick 1948 (4) SA 959 (A) at 975
103. Minister van Wet en Orde v Matshaba 1990 (1) SA 280 (A) at 285E - I E
104. Mobil Oil Southern Africa (Pty) Ltd v Mechin 1965 (2) SA 706 (A) at 710H, 711E - G
105. Nel v Le Roux NO and Others 1996 (3) SA 562 (CC) at para [24]
106. Newmark van de Velde v Moffson 1941 CPD 152 at 153
107. Nichol v Burger 1990 (1) SA 231 (C) at 237H - I F
108. Pennington v Friedgood 2002 (1) SA 251 (C)
109. Permanent Secretary, Department of Education, Eastern Cape and Another v Ed-U-College (PE) (Section 21) Inc 2001 (2) SA 1 (CC) at paras [15] - [17]
110. Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E - 635C G
111. Postmaster-General v Taute 1905 TS 582 at 590
112. R v Consett Justices, Ex parte Postal Bingo Ltd 1967 QB 9 at 20
113. R v Welsh Pool Justices, Ex parte Holley [1953] 2 All ER 807 at 809
114. RPM Konstruksie (Edms) Bpk v Robinson en 'n Ander 1979 (3) SA 632 (C) at 637B H

115. Roman v Williams NO 1998 (1) SA 270 (C) at 281F, 284G - 285A
116. Rudolph and Another v Commissioner for Inland Revenue and Others 1996 (2) SA 886 (A) at 890E - 891I
117. S v Davidson & Bernhardt Promotions Ltd 1983 (1) SA 676 (T) at 679B - 682B
118. S v Rossouw 1968 (4) SA 380 (T) at 385C - D I
119. Schierhout v Union Government (Minister of Justice) 1926 AD 286 at 289 - 90
120. Schoch NO v Bhetay and Others 1974 (4) SA 860 (A) at 865, 866A - B
121. Shidiack v Union Government 1912 AD 642
122. Smith v Bezuidenhout & Co 1967 (3) SA 41 (O) at 44 J
123. 2002 (4) SA p667
124. Steeleedale Cladding (Pty) Ltd v Parsons NO and Another 2001 (2) SA 663 (D) at 672F - 673I A
125. Suid-Afrikaanse Nasionale Lewensassuransie Maatskappy v Rainbow Diamonds (Edms) Bpk en Andere 1982 (4) SA 633 (C) at 641E - 643G
126. Timoney & King v King 1920 AD 133 at 139 B
127. Transnet Ltd v Goodman Bros (Pty) Ltd 2001 (1) SA 853 (SCA) at para [34]
128. Union Government (Minister of Finance) v Gowar 1915 AD 426 at 445 - 6
129. Devenish, Govender and Hulme Administrative Law and Justice in South Africa at 25 C
130. Harms Amler's Precedents of Pleadings 5th ed at 365 - 6
131. Jacobs The Law of Arbitration in South Africa at 87 - 90
132. Mustill and Boyd Commercial Arbitration 2nd ed (1989) at 30 - 52
133. Russel On Arbitration 21st ed paras 4 - 002, 6 - 057. D
134. Cur adv vult.
135. Postea (March 25).
136. [zJDz]Judgment
137. Smalberger ADP:
138. Introduction
139. [1] On 25 October 1995 a written agreement (the agreement) was concluded between Interpharm Integrated Pharmaceutical Benefit Management (Pty) Ltd (Interpharm) and the second appellant, Mr G W F Slabbert (Slabbert), as sellers, and the first respondent, Diversified Health Systems (South Africa) (Pty) Ltd (DHS), as purchaser, for the sale of the pharmaceutical benefit management business (the business) owned and conducted jointly by Interpharm and Slabbert. Subsequently Interpharm ceded any claims it might have against DHS arising out of the agreement to the first appellant, Total Support Management (Pty) Ltd (TSM). (I shall, where appropriate, refer G to TSM and Slabbert jointly as the appellants.)
140. [2] Clause 30 of the agreement provided for the resolution of any disputes arising out of or in connection with the agreement by an H arbitrator agreed upon by the parties or, failing consensus, by an arbitrator nominated by the President of the Law Society of the Transvaal. Clause 30.12.3 specifically provided that 'unless the terms of submission provide otherwise, the arbitrator's determination shall be final and not subject to appeal . . .'. I

141.[3] A dispute arose concerning DHS's liability for payment of portion of the purchase price and interest, a matter dealt with in more detail below. The dispute was duly referred to arbitration. As the parties could not agree upon an arbitrator the second respondent, Mr P E B Reynolds, a senior attorney of some 40 years' standing, was nominated as such. J

142.2002 (4) SA p668

143.SMALBERGER ADP

144.[4] The arbitration was duly conducted before the second respondent in September 1999. The parties had earlier filed a claim A and counterclaim respectively. Five witnesses testified for the appellants; DHS closed its case without leading any evidence. The second respondent delivered his written judgment and award on 21 October 1999. Both the appellants and DHS were unsuccessful in their respective claims. The dismissal of the claims was accompanied by B an adverse order as to costs in each instance.

145.[5] On 1 December 1999 the appellants launched an application in the Transvaal Provincial Division of the High Court in terms of s 33(1) of the Arbitration Act 42 of 1965 (the Act) to set aside the award made by the second respondent. The matter in due C course came before Ngoepe JP. The learned Judge dismissed the application with costs, but granted the appellants leave to appeal to this Court.

146.The issues in the arbitration and their determination

147.[6] In terms of clause 9 of the agreement the purchase price of the D business and assets (as defined) was R49 439 500 payable, as provided for in clause 10, as follows:

148. 10.1 The sum of R2 439 500 shall be paid by the purchaser in cash on the closing date [as defined].

149. 10.2 The guaranteed amount [the sum of R47 000 000] shall be paid to the seller in the following manner: E

150. 10.2.1 the purchaser shall pay to the seller:

151. 10.2.1.1 The sum of R13 500 000 upon the happening of the earlier of the following events:

152. 10.2.1.1.1 the target of 500 000 individual lives under claims clearing agreements being achieved by IDS; or F

153. 10.2.1.1.2 the expiry of a period of 12 months after the closing date.

154. 10.2.1.2 A further sum of R13 500 000 once the consolidated net earnings before taxes, exclusive of any royalties or administrative fees, of the TSM Group for a period of 12 consecutive G months has reached R6 500 000;

155. provided that should an agreement between IDS on the one hand and Medscheme (Pty) Ltd or the alliance of Affiliated Medical Administrators on the other be concluded upon mutually acceptable terms and conditions for the processing by IDS of claims for the members of H the other contracting party, the purchaser shall ensure that the aggregate of the amounts referred to in clauses 10.2.1.1 and 10.2.1.2 above is paid to the seller on the effective date of such agreement.

156. 10.2.2 The purchaser shall pay to the seller the sum of R20 000 000 once the volume of claims cleared by IDS has reached an average of 500 000 per month over a period of three consecutive months, provided that such target volume is achieved within three years I of the closing date, failing which the purchaser shall with effect from the third anniversary of the closing date have no further obligation to effect payment of the said sum to the seller.'

157.In clause 10.2.5 provision was made for the payment of interest. J

158.2002 (4) SA p669

159.SMALBERGER ADP

160.[7] It is common cause that DHS paid to the appellants: A

161. (1) the amount of R2 439 500 referred to in clause 10.1;

162. (2) the amount of R13 500 000 referred to in clause 10.2.1.1 (the first payment) on 30 October 1996;

163. (3) the amount of R13 500 000 referred to in clause 10.2.1.2 (the second payment) on 21 January 1997. B

164.[8] It was also common cause between the parties:

165. 1. That interest as provided for in clause 10.2.5 on the first payment, in an amount of R1 824 238,36, was payable by DHS to the appellants in respect of the period 28 October 1995 to 30 October 1996, and that the appellants were entitled to what is referred to as mora interest on that amount from 31 October 1996 C to date of payment.

166. 2. That interest as provided for in clause 10.2.5 on the second payment up to 21 January 1997 (if payable) amounted to R2 253 954,45, on which amount alleged mora interest would have been payable from 22 January 1997 to date of payment. D

167. 3. That DHS refused to make any interest payments to the appellants.

168. 4. That DHS denied liability to pay the amount of R20 000 000 referred to in clause 10.2.2 and interest thereon to the appellants. E

169.[9] In their statement of claim in the arbitration proceedings the appellants claimed from DHS the amount of R4 078 192,81 (being the sum of the amounts referred to in [8]1 and 2 above) together with 'mora interest' (the first claim), and the amount of R20 000 000 referred to in clause 10.2.2 (the second claim).

170.[10] In its plea and counterclaim DHS, in response: F

171. 1. Admitted making the second payment to the appellants but claimed that it was paid in the bona fide and reasonable but mistaken belief that it was due when it was not.

172. 2. Admitted that interest was payable on the first payment in the sum of R1 824 238,36. G

173. 3. Claimed set-off of the second payment against the amount of interest payable, leaving a balance overpaid of R11 675 761,64.

174. 4. Claimed repayment of that amount on the basis of the *condictio indebiti*.

175. 5. Denied liability for any other amounts. H

176.[11] The second respondent made the following award:

177. 1. He dismissed the appellants' first claim with costs. The underlying reasoning was: the appellants failed to establish that any of the pre-conditions for liability to make the second payment had been fulfilled; accordingly DHS was not under a legal liability to make the second payment when it did so on 21 January 1997; the second I payment was made by mistake; liability for such payment was an essential prerequisite for the interest claimed in respect of the second payment; the appellants' claim for accrued interest on the second payment thus failed; the interest admittedly due in respect of the first payment had to be set off against the natural J

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180. obligation owing by the appellants to DHS as a result of the latter having A mistakenly made the second payment.
181. 2. He dismissed the appellants' second claim with costs. It is not necessary to dwell on his reasons for doing so as the appellants did not seek to attack the award in this respect.
182. 3. He dismissed DHS's counterclaim with costs, on the grounds that B DHS had not established the essential requirements of a claim under the *condictio indebiti* and was therefore not entitled to repayment of the balance of the second payment after deduction of the interest due by it in respect of the first payment. DHS has never sought to challenge this finding.
183. The issues arising from the arbitration C
184. [12] In their application to review and set aside the second respondent's award the appellants only attacked that part of the award dismissing their first claim. The gravamen of their initial complaint, as set out in Slabbert's founding affidavit, was that the second respondent D
185. 'made a mistake so gross and so manifest and was so grossly careless in ignoring facts that were common cause between the parties and evidence that was not disputed in cross-examination that an inference of misconduct as envisaged by s 33(1)(a) of the Arbitration Act, 1965 on the part of second respondent can be made'.
186. (I shall refer to this as the first ground of review.) E
187. [13] The appellants subsequently filed a supplementary founding affidavit after their attorney had received schedules from the second respondent detailing his attendances and fees, and those of his assistant, Mr D Milo (Milo), relating to the arbitration. I shall deal more fully below with how Milo came to be involved in the matter. The F gist of the appellants' allegations in their supplementary and later replying affidavits was that the final judgment and award handed down in the arbitration represented the findings and award not of the second respondent, but of Milo. The appellants accordingly submitted that the second respondent's conduct relating to the role played by Milo amounted to misconduct on his part, alternatively, to a gross G irregularity in the conduct of the proceedings as envisaged by s 33(1)(a) and (b) respectively of the Act (the second ground of review).
188. The applicable legal principles
189. [14] Section 33(1) of the Act provides: H
190. '(1) Where -
191. (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
192. (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or I
193. (c) an award has been improperly obtained,
194. the Court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.'
195. [15] In *Dickenson & Brown v Fisher's Executors* 1915 AD 166 this Court considered the provisions of s 18 of Natal Act 24 of 1898 which provided J
196. 2002 (4) SA p671
197. SMALBERGER ADP
198. for the setting aside of an arbitral award where, inter alia, 'an arbitrator or umpire has A misconducted himself'. In the course of his judgment (concurrent in by all the other members of the Court) Solomon JA stated (at 176) that there could not be misconduct, if the word was used in its ordinary sense, 'unless there has been some wrongful or improper conduct on the part of the person whose behaviour is in question' and rejected the notion 'that a bona fide mistake either of

law or of fact made by an arbitrator can be characterised as misconduct . . .'. He B went on to hold (also at 176) that

199. 'in ordinary circumstances where an arbitrator has given fair consideration to the matter which has been submitted to him for decision, I think it would be impossible to hold that he had been guilty of misconduct merely because he had made a bona fide mistake either of law or of fact'. C

200.[16] Earlier in his judgment (at 174) Solomon JA referred to the case of Dutch Reformed Church v Town Council of Cape Town (1898) 15 SC 14 where De Villiers CJ had occasion to examine the Roman-Dutch law of awards, and where it was pointed out that under that system a practice had been introduced called 'reductie' which D was to all intents and purposes an appeal against the award. De Villiers CJ remarked that no case could be found in the Cape Colony in which the process of 'reductie' had been resorted to and added that

201. '[c]ertainly since the appointment of English and Scotch Judges in 1828 the principle of the finality of awards became firmly established in our Courts'. E

202. Solomon JA went on to observe:

203. 'That was so before any legislation had been introduced on the subject, and since that time the question is placed beyond doubt.'

204. In the light of the authorities referred to below this remains the position in our law today. F

205.[17] In *Donner v Ehrlich* 1928 WLD 159 Solomon J considered the effect of s 16(2) of Ordinance 24 of 1904 (T), the wording of which was virtually identical to that of s 18 of Natal Act 24 of 1898. He stated (at 160):

206. 'As I read *Dickenson and Brown v Fisher's Executors* (1915 AD 166), the misconduct which entitles a Court to set aside the G award of an arbitrator must amount to dishonesty. I think that is the true reading of the judgment.'

207. He went on to hold (at 161) that even a gross mistake, unless it establishes mala fides or partiality, would be insufficient to warrant interference.

208.[18] Later cases, some of which are referred to in *Hyperchemicals International (Pty) Ltd and Another v Maybaker H Agrichem (Pty) Ltd and Another* 1992 (1) SA 89 (W) (the *Hyperchemicals* case) at 97 - 8 followed the same line. That was the position which existed in 1965 when the Act came into operation. In the *Hyperchemicals* case Preiss J came to the conclusion that the Legislature intended the words of the Act to bear the meaning which had been judicially determined in similarly worded I pre-1965 statutes (at 98E - F). This led him to reject the argument that 'misconduct' as envisaged in s 33(1)(a) of the Act embraced the notion of what was referred to as 'legal misconduct' - conduct calling for the application of a less stringent test for interference than laid down in the authorities referred to. J

209. 2002 (4) SA p672

210. SMALBERGER ADP

211.[19] Preiss J also rejected an alternative argument that the pre-1965 decisions represented an old approach which had been A implicitly overruled by a new extended criterion which resulted in complaints falling short of imputations of dishonesty being brought within the ambit of s 33(1)(a) of the Act. This argument was based in the main upon the analysis of certain sections of the Act undertaken by Jansen JA in *Theron en Andere v Ring van Wellington B van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A) at 22 (which included a reference to the decision in *Dutch Reformed Church v Town Council of Cape Town* (supra)). Preiss J concluded (at 99H - I):

212. 'I certainly do not read into this analysis any indication that the field of review has been extended or altered beyond the field so positively laid down in *Dickenson & Brown v Fisher's C Executors* (supra) and its successors. It says no more than that some remnants of judicial interference derived from the common law persist in this statute.'

213.[20] In *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A) (the Veldspun case) this Court (at 169C - E) confirmed the legal position as laid down in *Dickenson & Brown v Fisher's Executors* and *Donner v Ehrlich*. See also *Bester v Easigas (Pty) Ltd* and *Another* 1993 (1) SA 30 (C) and *Kolber and Another v Sourcecom Solutions (Pty) Ltd and Others; Sourcecom Technology Solutions (Pty) Ltd v Kolber and Another* 2001 (2) SA 1097 (C) at 1106J - 1108D. E

214.[21] Because the submission to arbitration did not provide otherwise, the parties were precluded by the provisions of clause 30.12.3 of the agreement from appealing against the decision of the second respondent. The appellants can challenge the second respondent's award only by invoking the statutory review provisions of s 33(1)(a) and (b) of the Act. F Proof that the second respondent misconducted himself in relation to his duties or committed a gross irregularity in the conduct of the arbitration is a prerequisite for setting aside the award. The onus rests upon the appellants in this regard. As appears from the authorities to which I have referred, the basis on which an award will be set aside on the grounds of misconduct is a very narrow one. A gross or manifest mistake is not per se misconduct. G At best it provides evidence of misconduct (*Dickenson & Brown v Fisher's Executors* (supra at 176)) which, taken alone or in conjunction with other considerations, will ultimately have to be sufficiently compelling to justify an inference (as the most likely inference) of what has variously been described as 'wrongful and improper conduct' (*Dickenson & Brown v Fisher's Executors* (supra at 176)), 'dishonesty' and 'mala fides' or partiality' (*Donner v Ehrlich* (supra at 160 - 1)) and 'moral turpitude' (*Kolber and Another v Sourcecom Solutions (Pty) Ltd and Others* (supra at 1108A)).

215.The Constitution I

216.[22] The above principles are well established and firmly entrenched in our law. They govern the present appeal unless there are provisions in the Bill of Rights in the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution) that require their reassessment and re-evaluation. That follows from the fact that all statutes must be J

217.2002 (4) SA p673

218.SMALBERGER ADP

219.interpreted through the prism of the Bill of Rights (*Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at 558E - F (para [21])). We raised with counsel the question of what, if any, the implications of s 33(1) of the Constitution were in relation to the appeal. The answer, for reasons that follow, is that it has no relevance. B

220.[23] Section 33(1) of the Constitution provides:

221. 'Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.'

222.It is only administrative action which is subject to the administrative justice right in s 33(1). Generally speaking, C administrative action is conduct of an administrative nature performed by a functionary in the exercise of a public power or the performance of a public function. Compare in this regard the definition of 'administrative action' in s 1 of the Promotion of Administrative Justice Act 3 of 2000. The focus of the enquiry as to whether conduct is 'administrative action' is not on the position which the D functionary occupies, but on the nature of the power he or she is exercising. 'What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not' (*President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at 67B (para [141])). E

223.[24] Arbitration does not fall within the purview of 'administrative action'. It arises through the exercise of private rather than public powers. This follows from arbitration's distinctive attributes, with particular emphasis on the following. First, arbitration proceeds from an agreement between parties who consent to a process by which a decision is taken by the arbitrator that is binding F on the parties. Second, the arbitration agreement provides for a process by which the substantive rights of the parties to the arbitration are determined. Third, the arbitrator is chosen, either by the

parties, or by a method to which they have consented. Fourth, arbitration is a process by which the rights of the parties are determined in an impartial manner in respect of a dispute between parties which is formulated at the time that the arbitrator is appointed. See Mustill and Boyd Commercial Arbitration 2nd ed (1989) at 41.

224.[25] The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement. This is reflected in s 3(1) of the Act. As arbitration is a form of private adjudication the function of an arbitrator is not administrative but judicial in nature. This accords with the conclusion reached by Mpati J in Patcor Quarries CC v Issroff and Others 1998 (4) SA 1069 (SE) at 1082G. Decisions made in the exercise of judicial functions do not amount to administrative action (cf Nel v Le Roux NO and Others 1996 (3) SA 562 (CC) at 576C (para [24]), and compare also the exclusionary provision to be found in (b)(ee) of the definition of 'administrative action' in s 1 of the Promotion of Administrative Justice Act).

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227.Justice Act). It follows, in my view, that a consensual arbitration is not a species of administrative action and s 33(1) of the Constitution has no application to a matter such as the present.

228.[26] The position may be different in the case of statutorily imposed arbitrations (cf Carephone (Pty) Ltd v Marcus NO and Others 1999 (3) SA 304 (LAC)). In the light of the administrative justice provisions of s 33(1) of the Constitution the decision in the Beldspun case may merit reconsideration in the context of compulsory as opposed to consensual arbitrations. The principles laid down in that case still hold good in the latter type of matter.

229.[27] The further question that arises is whether the fairness requirements of s 34 of the Constitution apply to consensual or private arbitrations. While at first blush it may seem that they do, closer analysis may lead to a different conclusion. The section provides:

230. 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

231.It is a moot point whether the words 'another independent and impartial tribunal or forum' in their contextual setting apply to private proceedings before an arbitrator or whether they must be restricted to statutorily established adjudicatory institutions. The word 'fair' qualifies 'public hearing' and the phrase 'fair public hearing' relates not only to proceedings before a court but also before 'another independent and impartial tribunal or forum'. In a private arbitration the parties may by agreement exclude any form of public hearing - the need for anonymity or secrecy may well underlie the decision to resort to arbitration. The proper interpretation of s 34 may also involve the vexed question whether there may be a waiver of a constitutional right.

232.[28] The ambit and application of s 34 was not fully argued before us and its proper interpretation must be left open. It may well not be of application. Even if the fairness requirement of s 34 applies to private arbitrations there is nothing which precludes the parties themselves from defining what is fair. In my view, the fairness requirement is satisfied where parties who resort to arbitration agree to forego a right of appeal and accept that the well-known and well-established principles governing arbitration will apply. Consequently, viewing the Act through the prism of the Bill of Rights does not in my view justify any departure from those principles. H

233.The first ground of review

234.[29] The appellants rely upon the following main considerations to justify an inference of misconduct on the part of the second respondent:

235. 1. He ignored the fact that the onus to prove set-off, and what this entailed, rested on DHS. I

236. 2. He held that the second payment had been made by mistake without any evidence or facts to support such a finding.

237. 3. He found, contrary to the tenor of cross-examination by the appellants' counsel, and contrary to what was submitted in J

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240. argument, that neither the appellants nor DHS relied on the first condition A stipulated for in clause 10.2.1.2 of the agreement.

241. 4. He ignored the fact that there is a presumption against payment by a person of money not owing, and that this created a prima facie case that the second payment was due and payable when it was made.

242. 5. Certain factual and credibility findings made by him were not B justified.

243.[30] In terms of clause 10.2.1.2 of the agreement DHS was liable to make the second payment on fulfilment of any one of three conditions - (1) the attainment by the TSM group of certain specified target earnings, (2) the conclusion of an agreement between IDS C (Interpharm Data Systems (Pty) Ltd) and Medscheme (Pty) Ltd, or (3) the conclusion of an agreement between IDS and the alliance of Affiliated Medical Administrators (AMA), in both instances (2) and (3) upon mutually acceptable terms and conditions for the processing of claims by IDS. It is clear from the evidence of Slabbert that the appellants claimed the second R13,5 million from DHS because they believed that D condition (3) had been fulfilled; and it was on the strength of this claim that DHS made the second payment. The appellants' claim for interest on this amount was predicated on the second payment having been due and payable. Interest being ancillary to a principal debt, without a valid debt that is enforceable a party cannot be held liable E for interest (Commissioner for Inland Revenue v First National Industrial Bank Ltd 1990 (3) SA 641 (A) at 652H - J). The appellants set out to prove that condition (3) had been fulfilled, but the second respondent held, after a comprehensive review of the relevant evidence, that they had failed to do so. Consequently they were not entitled to any interest on the second payment. F

244.[31] That left the question whether DHS was entitled to set off the interest admittedly due by it in respect of the first payment against the second payment, which it claimed to have made by mistake. In his judgment the second respondent stated that 'he was prepared to find that the second payment of R13,5 million was made by the defendant [DHS] in the mistaken belief that it was due'. DHS not G having called any witnesses in this regard, there was no evidence to justify such a finding. In any event, the onus was on DHS to prove that the second payment was not due and payable and, if it succeeded in so doing, that it mistakenly believed that it was. This involved proof, in the first instance, that none of the three H pre-conditions for payment had been fulfilled. Failing that set-off could not operate.

245.[32] At no stage of the hearing did the appellants concede that condition (1) (the attainment of the specified target earnings) had not been fulfilled. It was therefore incumbent on DHS to prove this. It is common cause that in their heads of argument, which were read out to I the second respondent, the appellants specifically made the point that DHS had failed to prove that the specified target earnings had not been achieved. The second respondent therefore erred in holding that 'it is common cause that neither the plaintiffs [appellants] nor the defendant [DHS] J

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247.SMALBERGER ADP

248.rely on the first condition stipulated for in clause 10.2.1.2 of the agreement, namely whether the target A earnings had been reached . . .'. Had he not erred in this regard, the second respondent would presumably have concluded that DHS failed to establish that it was entitled to set off the interest it admittedly owed the appellants in respect of the first payment against the second payment, for want of proof that the latter was due and payable. B

249.[33] The second respondent's error was a cardinal one with potentially unfortunate financial implications for the appellants. It is an error which is perhaps more readily discernible with hindsight. It is common cause that no evidence was led with regard to the fulfilment or otherwise of condition 1. All the evidence was C concentrated on the fulfilment of condition 3. Whether or not the target earnings had been reached would have been a matter largely within the knowledge of the appellants. One would have expected them to have relied on condition 1 if there was a case to be made out for its fulfilment. These considerations together with no more than a D relatively fleeting reference to condition 1 in the appellants' heads of argument may have induced the mistaken belief on the part of the second respondent that when all was said and done the non-fulfilment of condition 1 was never really in issue. The second respondent concerned himself only with condition 3. His finding that, irrespective of whom the onus was on, he was satisfied that no agreement had been concluded between IDS and AMA would have E justified the conclusion he came to on set-off if only condition 3 had been in issue. I do not wish to be thought to be making excuses for second respondent's error. I mention these factors because, at the end of the day, I do not believe that the second respondent's error can be described as gross. F

250.[34] I do not propose to consider the remaining complaints in detail. For their contention that there is a presumption against payment by a person of money not owing, and that this created a prima facie case that the second payment was due and payable when it was made, the appellants relied upon the decision in *Recsey v Reiche* 1927 AD 554 at 556. Even if there is a legal G presumption to that effect, and it applies in a matter such as the present, all of which is open to doubt, it would be of no real significance, first, because it would have been rebutted by the positive finding by the second respondent that condition 3 had not been fulfilled and, second, in the light of my conclusion that set-off was not established because DHS failed to discharge the onus resting on it. The second respondent's finding that condition 3 H had not been fulfilled was based on his assessment of the relevant evidence and the credibility of the witnesses who testified. I am not convinced that the second respondent erred in any respect in arriving at such finding. Even if he did, it would make no difference to the ultimate conclusion I have come to on an overall conspectus of the matter. I

251.[35] The question arises whether the appellants have succeeded in making out a case of misconduct, as envisaged by s 33(1)(a) of the Act, against the second respondent - given that he erred in regard to set-off and even accepting that he may have erred in other respects. Mr Delpont, J

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254.for the appellants, conceded that, if the principles laid down in *Dickenson & Brown v Fisher's* A Executors (supra) and later decisions applied, as I have held to be the case, then an error of fact or law, or both, even gross error, would not per se justify the setting aside of the second respondent's award. Accepting that he would have to go further than that, he contended that the most probable inference to be drawn from the second respondent's collective mistakes was that he B was guilty of deliberate partiality or conscious bias in favour of DHS, a clear imputation of impropriety and mala fides, amounting to dishonesty, on the part of the second respondent. This despite the fact (1) that no allegations were made in the founding affidavit to that effect (as one would have expected) and the second respondent was not afforded an opportunity to deal with them (as he should have C been); (2) that DHS's counterclaim, which was substantially in excess of the appellants' claims for interest, was dismissed by the second respondent; and (3) that no other considerations indicative of bias or mala fides on his part were relied upon. In the circumstances the inference contended for lacks conviction and probability. D

255.[36] Misconduct in the required sense will in any event not lightly or readily be inferred on the part of an arbitrator who is a professional man of considerable experience in his field with a reputation to uphold, solely on the strength of errors made in his judgment, especially where, as in the present instance, such errors E could never be described as gross. In my view, it is, as a matter of inference, more likely that any errors made by the second respondent were bona fide mistakes made by him in the course of a difficult adjudication. In the result there is no room for a finding of misconduct on his part. It follows that the first ground of review cannot succeed. F

256. The second ground of review

257.[37] This ground focuses on the extent of Milo's involvement in the arbitration and his participation in the preparation of the judgment and award. The crux of the appellants' argument is that the judgment was in fact that of Milo, having been prepared by him without G material input from the second respondent, and that in abdicating his responsibilities in this regard the second respondent misconducted himself or was guilty of a gross irregularity. (As to the meaning of an irregularity in this context, see *Ellis v Morgan*; *Ellis v Dessai* 1909 TS 576 at 581.) For this allegation the appellants rely primarily, if not solely, on inferences H they seek to draw from details appearing in the schedules of fees delivered by the second respondent on behalf of himself and Milo after the conclusion of the arbitration. A related argument is that the functions entrusted to Milo by the second respondent went beyond those expressly or impliedly agreed upon between the parties and that this constituted a gross irregularity. I

258.[38] At the pre-arbitration conference it was agreed that the second respondent would have an assistant working with him throughout the arbitration, and that the assistant's fee would be included within the second respondent's fee. On 4 May 1999 the second respondent wrote J

259. 2002 (4) SA p678

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261. a letter to the attorneys for the parties in which he stated, inter alia, that 'upon A reflection I consider that there should be a charge for my assistant's time in view of the apparent complexity of this matter'. He suggested that his assistant be paid R700 a day for the arbitration and R300 per hour 'for ancillary related work outside the arbitration proceedings'. This was agreed to. During the course of the arbitration the parties further agreed to increase the assistant's remuneration to a flat rate of R300 per hour, including the arbitration proceedings. B

262.[39] No agreement was reached as to the precise nature and scope of the services to be rendered by the assistant (Milo). The appellants accept that he would have been required to do research on behalf of the second respondent. For the rest they claim their understanding to C have been that Milo would do the equivalent of the work they allege is normally done by the registrar of a Judge of the High Court, ie attendances at Court, general secretarial work and related matters. They claim that at no time did it enter their minds 'that the second respondent would discuss the merits of the disputes between the parties with his assistant or would require [as they allege] the D assistant to write the judgment and award for him . . . '.

263.[40] It is common cause that the services eventually rendered by Milo included (1) assisting with the arrangements for the pre-arbitration meeting; (2) being involved in correspondence and discussions with the parties' attorneys; (3) taking down detailed E notes during the arbitration; (4) participating in discussions regarding the merits of the dispute with the second respondent; (5) doing research; (6) preparing the first draft of the award; and (7) subsequently effecting changes to the initial draft. What is in issue is whether he acted beyond the functions agreed upon by the parties, F expressly or impliedly, and whether his conduct amounted to a usurpation of the second respondent's duties.

264.[41] When selecting an arbitrator the parties to the arbitration agree to someone in whom, by dint of his (or her) experience and ability, they can repose the necessary confidence and trust to determine their dispute. What they seek is a judgment from the person G chosen. An arbitrator is not entitled to delegate this function. He alone must perform the duties he has undertaken and with which he has been entrusted, unless the parties agree otherwise. Because of the essentially personal nature of his appointment he should be circumspect about utilising the services of an assistant. Making use of an H assistant is not per se objectionable. Where the parties agree to an arbitrator doing so, care should be taken to reach consensus on what precise functions the assistant may perform, to obviate any later dispute in this regard. Failing agreement, an assistant should not be allowed to perform tasks that may encroach on what would be regarded as the normal functions of an arbitrator. In no circumstances may the assistant be allowed to usurp I the decision-making function of the arbitrator or act in a manner subversive of his independence. Ultimately the

question to be asked, and answered, is whether the arbitrator exercised his own judgment in deciding the issues. This will depend upon the facts of each particular case. J

265.2002 (4) SA p679

266.SMALBERGER ADP

267.[42] There is no justification for the appellants' purported belief that Milo would only play a formal or secretarial role in the A arbitration. The reference in the letter of 4 May 1999 to the 'apparent complexity of this matter' coupled with the reasonably substantial fees it was suggested should be paid to the assistant, inter alia, 'for ancillary related work outside the arbitration proceedings' clearly signalled the second respondent's intention to involve Milo to a greater extent than that. If, as the appellants have conceded, Milo was to undertake B research, he would have had to be sufficiently acquainted with the issues and those aspects on which the second respondent required the benefit of research. He would have needed to understand what the second respondent wanted done for his consideration in that regard. To render the research effective discussion of the merits with the C second respondent would have been not only unavoidable but also desirable to provide the necessary guidance. The results of the research and discussion could reasonably and logically have led to the preparation by Milo of a document constituting a draft award for the second respondent's consideration. There could be no breach of the second respondent's duty as an arbitrator if he availed himself of D assistance expressly or impliedly agreed upon.

268.[43] Despite their protestations to the contrary, it must have been reasonably obvious to the appellants, having regard to what was agreed upon and anticipated, that Milo would be closely involved in the arbitration. There can be no objection in principle to that, provided E always, in keeping with what has been said above, that the second respondent did not abdicate his responsibilities in favour of Milo and, in effect, allow him to decide the dispute. The second respondent has made it clear, however, that this was not the case. He admitted that he discussed the matter, including the merits, with Milo throughout. He wanted him to be conversant with all aspects of the F dispute. In his answering affidavit the second respondent further states:

269. '[W]e also discussed the manner in which I would structure my award when the time came, and I advised my assistant of my views on the various issues as it proceeded and, at the end of the proceedings, my views as to the result and award I had in mind and intended. He also G gave me the benefit of his own research and answers to my comments, and prepared memoranda for me, which we then also discussed.'

270.[44] It was Milo who, after the conclusion of the arbitration proceedings, suggested that he should prepare a rough draft of the award while the second respondent was temporarily absent in Cape H Town. The second respondent agreed to this, according to him,

271. 'subject to my direction, following my views (of which he was fully aware as we had discussed them), and also the manner in which I had told him I required the draft to be prepared. My assistant was also aware of my views in general as to what my award would be, as I had told him. Accordingly, it was clear to us that the draft was subject to I my overall supervision and prior direction.'

272.[45] The second respondent went on to explain that the draft presented to him by Milo contained matters with which he did not agree or which required change to reflect more accurately his emphasis and views; its J

273.2002 (4) SA p680

274.SMALBERGER ADP

275.structure was not what he wanted; he devoted 15 hours to a consideration of the draft, its re-drafting and discussing A aspects of it with Milo; he applied his mind to the relevant authorities, memoranda prepared by Milo and the heads of argument; what was reflected in his schedule of fees as proof-reading actually amounted to a substantial re-drafting of the draft to reflect his own views and conclusions. The schedule of fees bears out the second respondent's claim to have devoted considerable time to the draft. B

276.[46] No contrary facts were advanced by the appellants. There is thus nothing to refute what was said by the second respondent. Nor is there any reason why his word should not be accepted, particularly having regard to the principles that apply in motion proceedings. The C suggestion in the Court below that the matter be referred to evidence was never strenuously pursued. Based on what appeared in his answering affidavit it is apparent that the award was the product of the second respondent's own, independent view. There is nothing to suggest that he was influenced, consciously or unconsciously, by Milo D to an extent where the latter's view became his. There is no substance in the appellants' contentions to the contrary, which are based on unfounded speculation and unwarranted inferences flowing from the schedules of fees viewed in isolation, without proper regard to their contextual and factual setting. There is no basis for a finding that the appellants did not have the issues fully and fairly determined by E the second respondent himself.

277.[47] In the result the appellants have failed to establish that the second appellant committed any irregularity, let alone a gross irregularity, in the conduct of the arbitration proceedings. Nor, in utilising Milo's services to the extent that he did, could there have been any misconduct on his part. The requirements of F s 33(1)(a) and (b) of the Act have not been satisfied. It follows that the second ground of review cannot succeed either.

278.Costs G

279.[48] Two issues arise under this head. Mr Delport asked that, whatever the outcome of the appeal, a special costs order should be made in respect of the costs attendant upon the procurement and introduction of numerous affidavits and annexures relating to the duties and functions of Judges' clerks or registrars elsewhere, notably the United States of America, in terms of a notice of motion H dated 5 May 2000 filed by the respondents jointly. The affidavits and foreign material ultimately served no purpose in the determination of the issues on appeal. They were introduced because of the appellants' objection to certain allegations made by the respondents regarding the functions of Judges' clerks or registrars elsewhere as hearsay. While the respondents went to unnecessary lengths in this regard their conduct did not exceed the I bounds of reasonableness to such an extent as to warrant a departure from the normal rule that the costs incurred should follow the result.

280.[49] Mr Kuper, for the second respondent, asked for a punitive order if the appellants persisted in their allegations of personal impropriety. I J

281.2002 (4) SA p681

282.have referred to those allegations, which impute grave impropriety to the second appellant, in para [35]. Mr A Delport was not prepared to forego his reliance on them even though he sought to distance himself from any imputation of dishonesty. The appellants' continued reliance on impropriety, however, inevitably means that they persist in their unwarranted attack on the second respondent's integrity. There is no justification for such a spurious attack. It was ill-conceived and groundless. To mark our B displeasure the appellants will be ordered to pay the second respondent's costs of the hearing before us on an attorney and client scale.

283.Order

284.The appeal is dismissed with costs including, in respect of both C respondents, the costs of two counsel. In addition the appellants are ordered to pay the second respondent's costs of the hearing on 25 February 2002 on an attorney and client scale.

285.Marais JA, Cameron JA, Brand JA and Lewis AJA concurred. D

TELCORDIA TECHNOLOGIES INC v TELKOM SA LTD

2007 (3) SA 266 (SCA)

Citation	2007 (3) SA 266 (SCA)
Case No	26/05
Court	Supreme Court of Appeal
Judge	Harms JA, Conradie JA, Cloete JA, Lewis JA and Ponnann JA
Heard	October 30, 2006 and October 31, 2006
Judgment	November 22, 2006
Counsel	W H Trengove SC, D M Fine SC and A E Franklin SC (with them J P V McNally and K H Shoji) for the appellant. C H J Badenhorst SC and G J Marcus SC (with them D B Spitz and S Budlender) for the responde
Annotations	Link to Case Annotations

286. B

287.[zFNz]Flynote : Sleutelwoorde

288.Arbitration - Award - Review of - Grounds for setting aside.

289.Arbitration - Arbitration Act 42 of 1965 - Appeal against decision to review and set aside C award given in private arbitration proceedings - Whether alleged errors of law committed by arbitrator can found review under s 33(1) of Act - Circumstances in which refusal by arbitrator to state case for opinion of court under s 20 constituting gross irregularity in conduct of proceedings - Whether arbitrator exceeding powers - Whether Court a D quo correctly exercising discretion in appointment of new arbitration tribunal.

290.Arbitration - Arbitration Act 42 of 1965 - Statement of case to Court in terms of s 20(1) for opinion during arbitration proceedings - Party's 'right' to state case - Statement of case being matter for discretion of arbitrator - Party to arbitration E proceedings having no 'right' to state case for opinion of court.

291.Arbitration - Award - Review of - Grounds for setting aside - Material error of law - Parties agreeing to arbitration - Parties thereby limiting interference by courts to procedural irregularities set out in s 33(1) of Act - Accordingly, award not reviewable on ground of material error of law.

292.Arbitration - Award - Review F of - Proper approach of Court on review - Court not to misconceive its function and treat review as appeal - Court not to enquire into correctness of award but to confine itself to examining correctness of procedure adopted in arriving at award.

293.Arbitration - Award - Setting aside of - Arbitrator exceeding powers in conduct of arbitration proceedings in terms of Arbitration Act 42 of 1965, s 33(1)(b) - What constitutes - Whether arbitrator mandated with interpretation of agreement exceeding powers in incorrectly G interpreting agreement, in determining applicable law, or in determining admissibility of evidence.

294.Arbitration - Award - Setting aside of - Gross irregularity by arbitrator in conduct of arbitration proceedings - Arbitration Act 42 of 1965, H s 33(1)(b) - Such ground of review envisaging gross irregularity in 'conduct', and not 'result' or outcome, of proceedings - Qualification being that 'gross irregularity' committed where decision-maker misconceiving whole nature of enquiry or duties in

connection therewith - Misconception of nature of enquiry - What constitutes - Whether mistaken interpretation of agreement by arbitrator mandated with interpretation thereof amounting to misconception of nature of enquiry. I

295.[zHNz]Headnote : Kopnota

296.The parties had entered into a so-called Integrated Agreement in terms of which the appellant, Telcordia, was to provide the respondent, Telkom, with a state-of-the-art telecommunications system. A dispute arose as to Telcordia's delivery obligations of certain highly specialised software under the J

297.2007 (3) SA p267

298.agreement, which hinged on the parties' respective interpretations of the agreement. The A dispute was referred to arbitration and the arbitrator ultimately accepted Telcordia's interpretation of the agreement.

299.Telkom then proceeded to launch an application in the High Court for the review and setting aside of the arbitrator's award on the grounds that:

300. (1) in incorrectly interpreting the Integrated Agreement, the arbitrator had committed a material error so fundamental that he had misconceived the nature of the enquiry and his duties; and B

301. (2) by denying Telkom the opportunity to apply to court under s 20 of the Arbitration Act 42 of 1965 for an order compelling him to state legal questions for the decision by the court, the arbitrator had committed a gross irregularity and acted irrationally.

302.Telkom relied on: (i) the common-law ground of review of awards tainted by material error of law; and (ii) review in terms of C s 33(1)(b) of the Act, on the ground of the arbitrator's having committed a gross irregularity in the proceedings or having exceeded his powers by misconceiving the whole nature of the enquiry and his duties in connection therewith.

303.The High Court upheld the application on the latter ground and reviewed and set aside the arbitrator's award. On appeal, D

304.Review for material error of law

305.Held, that, by agreeing to arbitration, the parties had limited the grounds of interference in their contract by the courts to the procedural irregularities set out in s 33(1) of the Act. By necessary implication, they had waived the right to rely on any further grounds of review, whether at common law or otherwise. (Paragraph [51] at 292A - B.) E

306.Held, further, that the Act did not allow for review on the ground of material error of law and Telkom could accordingly not avail itself of this ground of review. (Paragraph [67] at 297C.)

307.'Gross irregularity'

308.Held, that the general principle was that an irregularity related to the conduct of the proceedings rather than to the merits. F A qualification to that general principle was that a 'gross irregularity' was committed where the decision-maker misconceived the whole nature of the enquiry, ie he misconceived his mandate, or his duties in connection therewith. (Paragraphs [71] and [72] - [73] at 297I - 298A and 298C - E.)

309.Held, further, that, in the present case, the arbitrator's mandate included interpreting the Integrated Agreement. An arbitrator G was always entitled to be wrong on the merits and a wrong interpretation of the agreement did not amount to a misconception of the nature of the enquiry and therefore to an irregularity. (Paragraph [85] at 301J - 302C.)

310.Held, further, that a wrong interpretation of the agreement also did not entail the arbitrator's exceeding his powers. The power given to him was to, rightly or wrongly, interpret the agreement; H determine the applicable law; and determine what evidence was admissible. Errors of this kind

- had nothing to do with his exceeding his powers but were errors committed by him within the scope of his mandate. (Paragraph [86] at 302D - 303B.)
311. Held, further, that, on the evidence, the arbitrator had clearly understood his duties and consciously used the powers he had according to his terms of reference. (Paragraphs [90] - [93] at 303G - 304E.)
312. Held, further, that the Court a quo had erred in treating the review application as an appeal: instead of considering whether the gross irregularities alleged had been committed, it had re-interpreted the agreement, coming to a conclusion different to that of the arbitrator and, on that basis, had found that the arbitrator failed to apply his mind, and misconceived the whole nature of J
313. 2007 (3) SA p268
314. the enquiry and his duties in connection therewith, ie he was found to have committed an irregularity, and simultaneously to have A exceeded his powers. (Paragraph [99] at 305H - 306C.)
315. Held, further, that the Court a quo had misconceived its function in the additional respect that it dealt with the review as an appeal in the broad sense, taking into account facts that had not been before the arbitrator. (Paragraph [109] at 308E.) B
316. Section 20 of the Act
317. Held, that Telkom had no 'right' to approach the Court and the arbitrator had not infringed any such right when he declined, on Telkom's application, to state a case for the opinion of the court. (Paragraph [156] at 320B.)
318. Appeal upheld. Order of the Court a quo set aside and replaced with one dismissing the application. (Paragraphs [157] and [158] at 320C - E.) C
319. [zCAz] Cases Considered
320. Annotations
321. Reported cases
322. Southern African cases D
323. Administrator, South West Africa v Jooste Lithium Myne (Eiendoms) Bpk 1955 (1) SA 557 (A): referred to
324. Administrator, Transvaal v Kildrummy Holdings (Pty) Ltd and Another 1978 (2) SA 124 (T): referred to
325. Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd 1994 (1) SA 162 (A): E referred to
326. Bester v Easigas (Pty) Ltd and Another 1993 (1) SA 30 (C): referred to
327. Briscoe v Deans 1989 (1) SA 100 (W): referred to
328. Brisley v Drotsky 2002 (4) SA 1 (SCA) (2002 (12) BCLR 1229; [2002] 3 All SA 363): applied
329. Crystal Springs Aerated Water Co v Kan [1902] TH 21 at 27: compared
330. Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd 2001 (2) SA 284 (SCA) ([2001] 1 All SA 581): F referred to
331. Dickenson & Brown v Fisher's Executors 1915 AD 166: applied
332. Dorman Long Swan Hunter (Pty) Ltd v Karibib Visserye Ltd 1984 (2) SA 462 (C): compared
333. Doyle v Shenker & Co Ltd 1915 AD 233: applied
334. Du Toit v Minister of Transport 2006 (1) SA 297 (CC) (2005 (11) BCLR 1053): referred to G
335. Dutch Reformed Church v Town Council of Cape Town (1898) 15 SC 14: referred to

336. *Ellis v Morgan; Ellis v Dessai* 1909 TS 576: referred to
337. *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A): compared
338. *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 551: applied H
339. *Government of the Republic of South Africa v Midkon (Pty) Ltd and Another* 1984 (3) SA 552 (T): referred to
340. *H A Millard & Son (Pty) Ltd v Enzenhofer* 1968 (1) SA 330 (T): referred to
341. *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A): referred to
342. *Hyperchemicals International (Pty) Ltd and Another v Maybaker Agrichem (Pty) Ltd and Another* 1992 (1) SA 89 (W): I referred to
343. *Johnston v Leal* 1980 (3) SA 927 (A): referred to
344. *Kannenberg v Gird* 1966 (4) SA 173 (C): referred to
345. *Lamprecht and Another v McNeillie* 1994 (3) SA 665 (A): referred to
346. *Local Road Transportation Board and Another v Durban City Council and Another* 1965 (1) SA 586 (A): referred to J
347. 2007 (3) SA p269
348. *Lukral Investments (Pty) Ltd v Rent Control Board, Pretoria, and Others* 1969 (1) SA 496 (T): referred to A
349. *Mabaso and Others v Native Commissioner, Ladysmith, and Another* 1958 (1) SA 130 (N): referred to
350. *Marlin v Durban Turf Club* 1942 AD 112: referred to
351. *Metalmil (Pty) Ltd v AECl Explosives and Chemicals Ltd* 1994 (3) SA 673 (A): referred to B
352. *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) ([2006] 2 All SA 469): referred to
353. *National Board (Pretoria) (Pty) Ltd and Another v Estate Swanepoel* 1975 (3) SA 16 (A): compared
354. *Paper, Printing, Wood and Allied Workers' Union v Pienaar NO and Others* 1993 (4) SA 621 (A): referred to C
355. *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241): compared
356. *Primich v Additional Magistrate, Johannesburg, and Another* 1967 (3) SA 661 (T): referred to D
357. *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and Other Related Cases* 1985 (4) SA 809 (A): referred to
358. *Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317: compared
359. *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA): compared
360. *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A): applied E
361. *Shill v Milner* 1937 AD 101: referred to
362. *South African Jewish Board of Deputies v Sutherland NO and Others* 2004 (4) SA 368 (W): distinguished
363. *Steeledale Cladding (Pty) Ltd v Parsons NO and Another* 2001 (2) SA 663 (D): referred to F
364. *Stocks Civil Engineering (Pty) Ltd v Rip NO* (2002) 23 ILJ 358 (LAC) ([2002] BLLR 189): dictum in para [38] criticised

365. The Rhodesian Railways Ltd v Mackintosh 1932 AD 359: referred to
366. Theron en Andere v Ring van Wellington van die NG Sendingkerk in SA en Andere 1976 (2) SA 1 (A): referred to
367. Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another G 2002 (4) SA 661 (SCA): referred to
368. Van der Walt v Minnaar 1954 (3) SA 932 (O): referred to
369. Visser v Estate Collins 1952 (2) SA 546 (C): referred to.
370. Foreign cases
371. Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 223 (HL) ([1969] 1 All ER 208: H distinguished
372. Armah v Government of Ghana [1968] AC 192 (PC) ([1966] 3 All ER 177): referred to
373. Attorney-General for Manitoba v Kelly [1922] 1 AC 268 (PC): referred to
374. Bull HN Information Systems Inc v Hutson 229 F3d 321 (1st Cir 2000): compared I
375. CBI NZ Ltd v Badger Chiyoda [1989] 2 NZR 669: referred to
376. Czarnikow v Roth, Schmidt & Co [1922] 2 KB 478 (CA) ([1922] All ER Rep 45): referred to
377. Dawahare v Spencer 210 F3d 666 (6th Cir 2000): compared
378. FR Absalom Ltd v Great Western (London) Garden Village Society Ltd [1933] AC 592 (HL): referred to J
379. 2007 (3) SA p270
380. First Options of Chicago Inc v Kaplan 115 SCt 1920 (514 US 938): referred to A
381. Fox v Wellfair Ltd [1981] 2 Lloyd's Rep 514 (CA): referred to
382. Giacomo Costa Fu Andrea v British Italian Trading Co Ltd [1963] 1 QB 201 (CA) ([1962] 2 All ER 53: referred to
383. Halfdan Grieg & Co A/S v Sterling Coal & Navigation Corporation and AC Neleman's Handel- en B Transportonderneming (The Lysland) [1973] 1 Lloyd's Rep 296 (CA) ([1973] 2 All ER 1073): referred to
384. In re King and Duveen [1913] 2 KB 32: dictum at 36 applied
385. Interbulk Ltd v Aiden Shipping Co Ltd (The Vimeira) [1984] 2 Lloyd's Rep 66 (CA): referred to
386. Lee v Showmen's Guild of Great Britain [1952] 2 QB 329 (CA) ([1952] 1 All ER 1175): referred to C
387. Lesotho Highlands Development Authority v Impregilo SpA [2005] UKHL 43: dictum in para 25 applied
388. Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc 473 50 US 614 (1985): referred to
389. Montrose Canned Foods Ltd v Eric Wells (Merchants) Ltd [1965] 1 Lloyd's Rep 597 (QBD): referred to D
390. Page v Hull University Visitor [1993] AC 682 (HL) ([1993] 1 All ER 97): referred to
391. Pioneer Shipping Ltd and Others v BTP Tioxide Ltd (The Nema) [1982] AC 724 (HL): compared
392. Re Racal Communications Ltd, In re [1981] AC 374 (HL) ([1980] 2 All ER 634): referred to E
393. Re The International Commercial Arbitration Act, SBC (Quintette Coal Ltd v Nippon Steel Corp) 1986, C14 1990 CanLII 304 (BC SC): referred to

394. *Societe Franco-Tunisienne D'Armement-Tunis v The Government of Ceylon (The Massalia)* [1959] 2 Lloyd's Rep 1 (CA): referred to
395. *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union and Others* [1980] 3 WLR 318 (HL) ([1980] 2 All ER 689): referred to F to
396. *Suovaniemi v Finland* ECHR case No 31737/96 (23 February 1999): referred to
397. *Trustees of Rotoaira Trust v Attorney-General* [1998] 3 NZLR 89 (HC): referred to
398. *United Mexican States v Feldman Karpa* 2005 CanLII 249 (ON CA): referred to G
399. *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 (QBD): referred to.
400. [zSTz] Statutes Considered
401. Statutes
402. The Arbitration Act 42 of 1965, ss 20(1), 33(1)(b): see *Juta's Statutes of South Africa* 2005/6 vol 1 at 1-8, 1-10. H
403. [zClz] Case Information
404. Appeal from a decision in the Transvaal Provincial Division (De Villiers J) against an order setting aside an international arbitration award, directing the constitution of a new arbitration tribunal under s 33(4) of the Arbitration Act 42 of 1965 and ordering the appellant to pay the costs. The facts and issues appear from the judgments I of Harms JA and Cloete JA (the remainder of the Court concurring).
405. W H Trengove SC, D M Fine SC and A E Franklin SC (with them J P V McNally and K H Shoji) for the appellant.
406. C H J Badenhorst SC and G J Marcus SC (with them D B Spitz and S Budlender) for the respondent. J
407. 2007 (3) SA p271
408. In addition to the authorities cited in the judgment of the Court, counsel for the parties referred to the following: A
409. *Administrasie van Transvaal v Oosthuizen en 'n Ander* 1990 (3) SA 387 (W) at 392A - B
410. *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A) at 37C - F
411. *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A) at 764E - F B
412. *Aitcheson v Cargey* (a) (1824) 2 Bing 199 at 204
413. *Algoa Milling Co Ltd v Arkell and Douglas* 1918 AD 145 at 158
414. *Atteridgeville Town Council v Livanos t/a Livanos Brothers* 1992 (1) SA 296 (A) at 304B - I
415. *Bailie v Langerman* (1888) 2 SAR 220 C
416. *Barnes v Logan* 122 F3d 820 (9th Cir 1997) at 821 - 822
417. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) in paras [44], [45]
418. *Baume & Co Ltd v AH Moore Ltd* [1958] 2 All ER 113 (CA)
419. *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC) in paras [88] - [89] D
420. *Bernstein and Others v Bester and Others* NNO 1996 (2) SA 751 (CC) in paras [105] - [106]
421. *Birkenruth Estates (Pty) Ltd v Unitrans Motors (Pty) Ltd* 2005 (3) SA 54 (W) at 64F - G

422. BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979 (1) SA 391 (A) at 415H - 416A, E 418A - 420A
423. Blue Circle Ltd v Valuation Appeal Board, Lichtenburg 1991 (2) SA 772 (A) at 788
424. Body Corporate Houghton Villas v GOT Construction (Pty) Ltd 2002 (1) SA 760 (W) at 762C - D, F F
425. Botha v Van Rooyen 1983 (3) SA 866 (T) at 870B - E
426. Braithewaite v Foreign Hardwood Co [1905] 2 KB 543 (CA) at 551
427. British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673 (HL) at 686
428. Brown v ITT Consumer Fin Corp 211 F3d 1217 (11th Cir 2000) at 1223 G
429. Brummer v Gorfil Brothers Investments (Pty) Ltd 1999 (3) SA 389 (SCA)
430. Carephone (Pty) Ltd v Marcus NO and Others 1999 (3) SA 304 (LAC) in paras [21], [24], [31] - [36]
431. Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) H 2001 (4) SA 938 (CC) in para [45]
432. Chelsea West (Pty) Ltd v Roodebloem Investments (Pty) Ltd 1994 (1) SA 837 (C)
433. Chief Lesapo v North West Agricultural Bank and Another 2000 (1) SA 409 (CC) in paras [13] - [19] I
434. Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd and Others 1980 (1) SA 796 (A)
435. Clark v African Guarantee & Indemnity Company Ltd 1915 CPD 68 at 77
436. Computer Investors Group Inc v Minister of Finance 1979 (1) SA 879 (T) at 892B - C J
437. 2007 (3) SA p272
438. Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk 1964 (2) SA 47 (T) at A 49E - F
439. Coopers & Lybrand and Others v Bryant 1995 (3) SA 761 (A) at 767H - 768E
440. Crest Enterprises (Pty) Ltd v Rycklof Beleggings (Edms) Bpk 1972 (2) SA 863 (A) at 869ff B
441. Culverwell and Another v Brown 1990 (1) SA 7 (A) at 16I - AB, 28E - G
442. Daniels v Campbell NO and Others 2004 (5) SA 331 (CC) in paras [43] - [46]
443. David Taylor & Son Ltd v Barnett Trading Co [1953] 1 All ER 843 (CA) C
444. Dawnford Investments CC and Another v Schuurman 1994 (2) SA 412 (N) at 419E - 420D
445. De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlathuzana Civic Association Intervening) 2002 (1) SA 429 (CC) in para [24]
446. De Villiers and Another NNO v BOE Bank Ltd 2004 (3) SA 1 (SCA) D
447. De Wet v Deetlefs 1928 AD 286 at 290
448. Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A) at 454G - H
449. Derby-Lewis and Another v Chairman of the Committee on Amnesty of the Truth and Reconciliation Commission 2001 (3) SA 1033 (C)
450. Design and Planning Services v Kruger 1974 (1) SA 689 (T) at 699 E
451. Devland Investment Co (Pty) Ltd v Administrator, Transvaal 1979 (1) SA 321 (T)
452. Dietz v Pohl (1829) 1 Menz 397

453. Director of Hospital Services v Mistry 1979 (1) SA 626 (A)
454. East Asiatic Co Ltd v Hanson 1933 NPD 297 at 301
455. Ellis v Morgan 1909 TS 576 at 581 F
456. Erasmus v Pienaar 1984 (4) SA 9 (T) at 21E - 23A, 23F - 25E
457. Ese Financial Services (Pty) Ltd v Cramer 1973 (2) SA 805 (C) at 809D - E
458. Fercometal SARL v Mediterranean Shipping Co SA (The Simona) [1989] AC 788 (HL) at 796, 801, 804 - 805 G
459. Field v Grahamstown Municipality 1928 EDL 135 at 144
460. First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC) in paras [31], [63], [65] H
461. Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) in paras [57], [96]
462. Fryer v King (1843) 3 Menz 160
463. Gbangbola v Smith & Sheriff Ltd [1998] 3 All ER 730
464. Geldenhuys and Neethling v Beuthin 1918 AD 426 at 444
465. General Rubber Co Ltd v Hessa Rubber Maatschappij [1927] 28 Lloyd's LR 362 I
466. GNH Office Automation CC and Another v Provincial Tender Board, Eastern Cape and Another 1998 (3) SA 45 (SCA) at 51F - G
467. Government of RSA v York Timbers Ltd (1) [2001] 2 All SA 51 (A) at 71d - h
468. Grant Brothers v Harsant 1931 NPD 477 at 480 J
469. 2007 (3) SA p273
470. Groenewald v Smith (1839) 3 Menz 158 A
471. Haden Young Ltd, Re Petition for Judicial Review [2003] ScotCS 140
472. Hampson v Dixon 6 HCG 159 at 162, 164
473. Handley v Nationwide Anglia Building Society [1992] 29 EG 123; [1992] 2 EGLR 114
474. Hansen, Schreder & Co v De Gasperi [1903] TH 100 at 103 B
475. Hardy v Walsh Manning Securities LLC 341 F3d 126 (2nd Cir 2003) at 128 - 134
476. Hartsrivier Boerderie (Edms) Bpk v Van Niekerk 1964 (3) SA 702 (T) at 707G - 708C
477. Henry Southeran Ltd v Norwich Union Life Assurance Society [1992] 31 EG 70; [1992] 2 EGLR 9 C
478. Highveld 7 Properties (Pty) Ltd v Bailes 1999 (4) 1307 (SCA) at 1317 para [26] - 1318 para [31]
479. HMBMP Properties (Pty)Ltd v King 1981 (1) SA 906 (N) at 910B - F
480. Hoffmann and Carvalho v Minister of Agriculture 1947 (2) SA 855 (T) at 871 D
481. Homestake Mining Co v United Steelworkers 153 F3d 678 (8th Cir 1998) at 681
482. Hudson v Hudson and Another 1927 AD 259
483. Hurwitz Trustees v Magdeburg Fire Insurance Company 1917 TPD 443
484. In re Palmer & Co and Hosken & Co [1898] 1 QB 131 at 137 E
485. Inrybelange (Edms) Bpk v Pretorius 1966 (2) SA 416 (A)

486. Intercity Property Referrals CC v Sage Computing (Pty) Ltd and Another 1995 (3) SA 723 (T) at 728F - 729C
487. Intercontinental Export Company (Pty) Ltd v MV Dien Danielson 1982 (3) SA 534 (N) at 529E - 541D F
488. Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC) in paras [22] - [26]
489. Jakob Boss Sohne v Federal Republic of Germany (ECHR case No 18749/91, delivered 2 December 1991) G
490. Johannesburg City Council v Chesterfield House (Pty) Ltd 1952 (3) SA 809 (A) at 825A
491. Johannesburg Consolidated Investment Co v Johannesburg Town Council [1903] TS 111
492. Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A) at 152B - D H
493. Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening) 1999 (2) SA 1 (CC) in para [17]
494. Khaile v Administration Board, Western Cape 1983 (1) SA 473 (C) at 479 - 480
495. Klopper v Van der Merwe 1976 (1) SA 221 (O) I
496. Kragga Kamma Estates CC and Another v Flanagan 1995 (2) SA 367 (A) at 373H - 374A
497. Krige v Wallace 1990 (3) SA 724 (C) at 739H - 740A
498. Kruger v Carlton Paper of South Africa (Pty) Ltd 2002 (2) SA 335 (SCA) J
499. 2007 (3) SA p274
500. Lane and Fey NNO v Dabelstein and Others 2001 (2) SA 1187 (CC) in para [4] A
501. Langston Clothing (Properties) CC v Danco Clothing (Pty) Ltd 1998 (4) SA 885 (A) at 889E
502. Laprade v Kidder, Peabody & Co Inc 2001 US App Lexis 7381 (DC Cir 2001) at 6 - 7 B
503. Laurence v Verhoef and Others NNO 1993 (2) SA 328 (W)
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517. Mervis Brothers v Interior Acoustics 1999 (3) SA 607 (W) at 612G - J
518. Mia v DJL Properties (Waltloo) (Pty) Ltd and Another 2000 (4) SA 220 (T) at 230E - J
519. Milne NO v Singh NO and Others 1960 (3) SA 441 (D)
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522. Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) in para [20]
523. Moleko v Bantu Administration Affairs Board 1975 (4) SA 918 (T)
524. Moodley and Another v Moodley and Another 1990 (1) SA 427 (D) at 431C - H H
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544. Patcor Quarries CC v Issroff and Others 1998 (4) SA 1069 (SE) at 1082G
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547. President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae) 2005 (5) SA 3 (CC) in paras [39] - [43]
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556. S v Bhoolia 1965 (1) SA 762 (A) at 766
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576. Stocks & Stocks (Gauteng) (Pty) Ltd v A & P Electrical CC 1998 (4) SA 266 (W) D
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638. Cur adv vult. C
639. Postea (November 22).
640. [zJDz]Judgment
641. Harms JA:

642.A. Introduction D

643.[1] This appeal relates to the review of consensual international commercial arbitration proceedings. The review is under s 33(1) of the Arbitration Act 42 of 1965. The Court below, per De Villiers J, upheld an application brought by Telkom SA Ltd for the review of an arbitral award. It set aside an interim award (which was final in effect) in favour of the appellant, E Telcordia Technologies Inc, a Delaware corporation. The arbitrator was Mr Anthony Boswood QC, a London barrister. Telkom is a local company and is the present respondent. The High Court not only set aside the award; in addition it removed the arbitrator and appointed three new arbitrators, retired South African Judges, in his stead. F

644.[2] In spite of the fact that the argument before the High Court lasted six weeks, and the hearing of the application for leave to appeal another three days, the Court dismissed the latter application out of hand. This Court, on petition, granted the necessary leave. We uphold the appeal for the reasons that follow but because of the G nature of the submissions this judgment contains some repetition.

645.[3] The High Court in essence held that the arbitrator had committed gross irregularities in the proceedings in the course of interpreting a contract between the parties. The alleged irregularities H related in summary to the nature of the evidence that the arbitrator took into account; and whether he had failed to appreciate the import of South African law in relation to both contractual interpretation and to the amendment of written contracts. Matters not decided below but raised as grounds of review were, broadly, whether the arbitrator had exceeded the bounds of the terms of reference; whether he had made I findings without evidence; whether he had failed to give Telkom the opportunity to lead further evidence; and whether he had erred in refusing to state a case for an opinion by the court in terms of s 20 of the Act.

646.[4] The High Court in setting aside the award disregarded the principle J

647.2007 (3) SA p279

648.HARMS JA

649.of party autonomy in arbitration proceedings 1 and failed to give due deference A to an arbitral award, something our courts have consistently done since the early part of the 19th Century. 2 This approach is not peculiar to us; it is indeed part of a worldwide tradition. Canadian law, for instance, 'dictates a high degree of deference for decisions . . . for awards of consensual arbitration tribunals in particular.' 3 And the B 'concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes' 4 have given rise in other jurisdictions to the adoption of 'a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimise judicial intervention when reviewing international commercial C arbitral awards'. 5

650.[5] Blackmun J made these pointed remarks in this regard: 6

651. 'As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international D arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration", Kulukundis Shipping Co v Amtorg Trading Corp 126 F2D 978, E 985 (CA2 1942), and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favouring commercial arbitration.' F

652.[6] The structure of the remainder of this judgment is as follows:

653. B. The arbitration clause (paras [7] - [10]).

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655.HARMS JA

- 656. C. The non-variation clause (paras [11] - [13]). A
- 657. D. The structure of the Integrated Agreement and Telcordia's delivery obligations (paras [14] - [22]).
- 658. E. The dispute (paras [23] - [24]).
- 659. F. Telcordia's claims (paras [25] - [27]). B
- 660. G. The second amendment (para [28]).
- 661. H. The May issues (paras [29] - [30]).
- 662. I. The arbitrator's award (para [31]).
- 663. J. The grounds for review (paras [32] - [43]). C
- 664. K. The relationship between the Constitution and the Arbitration Act (paras [44] - [51]).
- 665. L. The meaning of s 33(1)(b): 'gross irregularity' and 'exceeding powers' (paras [52] - [79]). D
- 666. M. The nature of the inquiry, the duties of the arbitrator, and the scope of his powers (paras [80] - [89]).
- 667. N. How did the arbitrator understand his duties? (paras [90] - [93]). E
- 668. O. The findings by the High Court relating to the arbitrator's misconceptions about his duties, and exceeding his powers (paras [94] - [101]).
- 669. P. The primary question and the Shifren doctrine (paras [102] - [116]). F
- 670. Q. The sign-off requirement (paras [117] - [122]).
- 671. R. The disclaimers (paras [123] - [126]).
- 672. S. Testing for compliance (paras [127] - [131]). G
- 673. T. The London agreement (paras [132] - [142]).
- 674. U. The s 20 issue (paras [143] - [156]).
- 675. V. Conclusion (para [157]).
- 676. W. The order (para [158]). H

677.Repudiation is dealt with in the accompanying judgment of Cloete JA.

678.B. The arbitration clause

679.[7] The agreement which formed the subject matter of the arbitration is known as the Integrated Agreement and was concluded on 14 June 1999. It contained an arbitration clause which was independent of the validity of the Integrated Agreement. The clause provided that 'all disputes between the parties that may arise' had to be determined by an arbitrator. This included 'disputes related to interpretation' of the agreement, as well as 'disputes of a legal nature'. It further stated that the J

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681.HARMS JA

682.award would be final and binding, and the parties undertook to give effect to the award. A

683.[8] The arbitration had to take place before a single arbitrator in terms of the rules of the International Chamber of Commerce (the ICC). Under these rules, a sole arbitrator has to be of a nationality other than those of the parties. No provision was made for an arbitral appeal board. Mr Boswood was appointed accordingly. B

684.[9] The terms of reference cited and incorporated the arbitral clause. In addition, they provided that the issues that had to be decided were those that arose from the claims and counterclaims as set out in the pleadings. Importantly, they contained a provision to the effect that the arbitrator did not necessarily have to decide all the issues raised in the pleadings if he deemed it unnecessary or inappropriate. On the other hand, he could also decide 'any further issues of fact or law' which he, in his discretion, deemed 'necessary or appropriate'. And he was entitled to decide the issues 'in any manner or order he deems appropriate'. D

685.[10] Both the proper law and the law governing the arbitration proceedings were, in terms of the Integrated Agreement, South African law, and our courts have jurisdiction over the arbitration and the review proceedings. E

686.C. The non-variation clause

687.[11] One of the principal complaints of Telkom was that the arbitrator did not understand and did not apply our law dealing with variations of written contracts. The Integrated Agreement contained a non-variation clause - the contract could only have been amended by means of a written agreement signed by certain duly authorised persons - as well as a provision preventing either party from relying on waiver or estoppel. The exact terms of the non-variation clause are of little consequence because it is common cause that the Integrated Agreement was not amended according to its terms. G

688.[12] The effect of a non-variation clause has been the subject of two judgments of this Court, namely *Shifren* 7 and, latterly, *Brisley v Dotsky*. 8 For the sake of convenience I intend to refer to the principles as the *Shifren* doctrine. The arbitrator, although not formally schooled in South African law, understood the principles perfectly well and he summarised them in these terms: a non-variation clause is in principle valid; it takes effect so as effectively to entrench both itself and all the other provisions of the contract against oral variation; courts do not have a general discretion to ignore it in favour of an oral amendment on the ground of some over-arching notion of bona fides; and the principle does not create an unreasonable straitjacket because the general principles of the law of contract still apply, and these may release a party from its workings. One

689.2007 (3) SA p282

690.HARMS JA

691.of these would, for instance, be the rule that a party may not approbate and reprobate. This would mean, as Telkom correctly accepted during argument, that a party may not rely on a non-compliant variation (for instance, in its pleadings) and subsequently invoke the non-variation term in order to avoid the effect of the amendment.

692.[13] To this the arbitrator added: 9 B

693. 'My own provisional view, expressed with all due diffidence, would be that the position may be very different in a case where the evidence shows that A and B have orally agreed on a mode of performance by B of his contractual obligation to A different from that originally specified in the contract, where that different mode of performance was agreed upon for the mutual benefit of both parties, and where B has, to the knowledge and with the acquiescence of A, done the work and/or laid out the necessary resources in pursuance of that different mode of performance. In such a case it would be, to say the least, most surprising if the law was that A, when presented with the results of B's substituted performance, could simply refuse to accept it on the ground that the agreement to such substituted performance was not concluded in writing or otherwise memorialised in accordance with the requirements of a No Oral Variation Clause. I was shown a number of authorities which strongly suggest that such is, indeed, not the law.'

694. He relied in this regard on the judgment in *Van der Walt v Minnaar* 10 which, it would appear to me, E provides some support for his view. The effect of *Van der Walt v Minnaar* is, quite sensibly, that the acceptance of substituted performance does not amount to a variation of the contract.

695. D. The structure of the Integrated Agreement and Telcordia's delivery obligations F

696. [14] Telkom provides mainly two types of telecommunication services: voice and non-voice. Voice services are services and network components that provide customers with the ability to transmit voice conversations over a telecommunication network. Non-voice services enable customers to transmit data. The main object of the Integrated Agreement was to provide Telkom with a state-of-the-art automated G telecommunication system driven by 14 different, highly specialised software products. These had to be developed and individualised to satisfy Telkom's specific operational requirements. They had to provide Telkom with the capability of managing both Voice and Non-Voice Flow-Thru service activation and provide quality assurance of the H activated services. Flow-Thru was defined as an end-to-end process flow. The information had to flow between functions, organisation parts, and groups of systems.

697. [15] These software systems had to be delivered in phases called releases. For present purposes two releases are important: Telcordia I had to ship (a) the Voice software on 30 June 2000; and (b) the Non-Voice software on 29 December 2000. The total contract value of the Voice software

698. 2007 (3) SA p283

699. HARMS JA

700. was some US\$51,8 million and US\$34,8 million for the Non-Voice software. A

701. [16] Both shipments of software had to be preceded by the shipment (six months earlier) of the 'specifications' of the software to be delivered. These 'Software Feature Specifications (FDD)' were defined in the Integrated Agreement. It is important to note at this juncture that the arbitrator found as a fact that B specifications - called FSDs or Feature Specification Descriptions - were mutually developed and agreed between Telcordia and Telkom, and that Telkom had paid for them some US\$5,1 million and US\$3,48 million, respectively, on the agreed dates. C

702. [17] The essence of the dispute the arbitrator was called on to decide at the proceedings that gave rise to the interim award related to the bench-mark of Telcordia's software Voice ('06/00') and the Non-Voice ('12/00') delivery obligation. This depended on an interpretation of the Integrated Agreement. D

703. [18] Thus far I may have created the impression that the Integrated Agreement was a contract that could be read and understood from the first page to the last. Nothing could be further from reality. But first some background. In October 1998, Telkom issued to prospective bidders a Request for Bid, setting out its requirements. Telcordia responded by means of Statements of Compliance (SOC), E contained in 14 binders, stating the extent to which it could or would comply with the Request for Bid. The up-dated Request for Bid and SOC's were incorporated into the Integrated Agreement as 'exhibits'. (The Integrated Agreement had various parts, all except the first (which was also called the Integrated Agreement) referred to as exhibits; and all F had different contractual rankings.)

704. [19] The Project Plan (exhibit F) ranked first. The Project Plan was defined as the detailed plan and schedule for the delivery of the software systems. It was to include the delivery milestones for the software and the dates on which it had to be delivered; and it was to identify the capability of the software (the 'specific functionality G (and features) to be included in each release of the Licenced Software delivered by Telcordia on a particular delivery milestone'). The Project Plan could have been amended by means of the 'scope change provisions'. 11

705. [20] The Project Plan consisted of a number of 'annexures'. Annexure A was the Flow-Thru WBS (work breakdown structure) Project H Schedule for the execution of the various tasks required. Annexure B was a bar chart containing a very brief summary of some of the information set out in Annexure A. For instance, in relation to the Non-Voice release it indicated the shipping date and then gave the periods for installation, testing, live pilot and production/roll- I out. This particular

bar contained a caveat which is dealt with later. Annexure D contained a payment schedule while Annexure E set out certain general assumptions as well as

706.2007 (3) SA p284

707.HARMS JA

708.Telkom's responsibilities, and some conditions precedent. A

709.[21] Exhibit C, ranking lower than the Project Plan, dealt with the software 'specifications' and defined this term. In particular it stated in clause 9.2 that the software had to be delivered in compliance with the conditions of the Integrated Agreement and that the Project Plan would be the operative document for Telcordia's delivery obligations. 12 B

710.[22] I have not quoted the text of the other relevant contractual provisions because they have been set out in great detail by both the arbitrator and the High Court and because this judgment is not concerned with the interpretation of the Integrated Agreement but with the question whether the arbitrator committed reviewable irregularities. C

711.E. The dispute

712.[23] I have already alluded to the dispute between the parties concerning Telcordia's delivery obligations. Telcordia, in short, contended that it had to deliver software that complied with the preceding specifications (the FSDs), which had been mutually D developed and agreed upon, and had been paid for by Telkom. Telkom, on the other hand, argued that the Project Plan had precedence over exhibit C, which contained the definition of 'specifications'. The Project Plan, it said, in terms of the Integrated Agreement had to identify the specific functionality and features of each release. This meant that these E must be sought in the Project Plan, especially the WBS read with the bar chart. In any event, clause 9.2.2 required that the software should be in accordance with the Project Plan. Because the Project Plan was not specific and did not detail the required functionalities and features, the Integrated Agreement by necessary implication required that all the features and functionalities necessary for F purposes of providing the 06/00 Voice and 12/00 Non- Voice Flow-Thru had to be included in the respective releases.

713.[24] Telcordia justified its 06/00 delivery and its tender to deliver the 12/00 software on its interpretation of its delivery obligations. Telkom, relying on its contrary interpretation, disputed G that Telcordia had duly performed in relation to the 06/00 release, which justified its refusal to pay the balance outstanding on that release; and, in addition, Telkom rejected Telcordia's tender of the 12/00 software. Telcordia therefore sent Telkom a notice, requiring it to cure its alleged repudiation. Telkom

714.2007 (3) SA p285

715.HARMS JA

716.refused to do so and Telcordia accordingly sent a notice of cancellation. Telkom, in turn, purported A to cancel on the ground that Telcordia's delivery of the 06/00 and its tender of the 12/00 software were not in accordance with its obligations under the Integrated Agreement; and that Telcordia's attempted cancellation amounted to a repudiation, which Telkom accepted. Many of the claims and counterclaims were therefore B dependent on the correct interpretation of the Integrated Agreement in relation to the capability of the software that had to be delivered.

717.F. Telcordia's claims

718.[25] Some of Telcordia's claims need special mention because of the fact that they play a role in this judgment. Claim B was in C respect of the balance owing in respect of the 06/00 release. Telkom had paid 60% of the amount due on delivery but had failed to pay the balance. Telcordia relied in the main on the Integrated Agreement for its entitlement to be paid. In the alternative it relied on the so-called London agreement, something I deal with in part T of this D judgment. This agreement was concluded orally in London on 12 October 2000. Telkom undertook to pay the 60% immediately (which it did) and the balance with the 12/00 release. All this is common cause. What is not is Telkom's reliance on conditions precedent for payment of the 40%. E

719.[26] Claim C was for the moneys due as a result of the 12/00 release, of which Telkom refused to accept delivery. These moneys were claimed on either a contractual basis or as damages.

720.[27] Claim G dealt with Out of Scope services (extras). As mentioned, there is a provision dealing with changes to the Project Plan by means of extras. Telkom's plea to this claim included a F reliance on the Shifren principle. Significantly, for what follows, it was not raised in connection with any other claim, including claims B and C.

721.G. The second amendment G

722.[28] Telcordia's so-called second amendment was an amendment to its plea to Telkom's counterclaim. There it raised an alternative, based on the supposition that Telkom's primary interpretation would have been upheld and Telcordia's interpretation rejected. In this Telcordia relied in relation to the Non-Voice software on a term of the moratorium agreement, which had been entered into 'on or about 1 April 2000', and also on an oral or implied agreement somewhat later H concerning the Voice software. Telkom informed the arbitrator that it would rely on Shifren and Telcordia stated that it would raise estoppel. These issues were not expressed in the pleadings because the ICC rules do not permit further pleadings but they were nevertheless issues in the arbitration and were articulated in para 3 of the May issues. I

723.H. The May issues

724.[29] The parties agreed during the course of the arbitration to a separate adjudication of some aspects of the case. The issues thus formulated were referred to as the May issues. The outcome would have disposed of J

725.2007 (3) SA p286

726.HARMS JA

727.much of the case: indeed, Telkom's view was that a ruling in its favour would have disposed of all Telcordia's claims. As it A turned out, the ruling was in Telcordia's favour and a dismissal of all Telkom's claims followed.

728.[30] The May issues were thus formulated (para 2.1 reflecting Telcordia's interpretation of its contractual obligations while para 2.2 reflected Telkom's understanding): 13

729. 1. On a proper construction of the Integrated Agreement (IA) B dated 24 June 1999, having regard to the terms thereof and all admissible evidence in relation thereto:

730. 1.1 what is the contractual baseline for determining the specific features and functionality of the software to be delivered by Telcordia to Telkom in each of the various software releases provided for in C the IA?;

731. 1.2 how are the contractual delivery dates for particular software features and functionality to be determined?

732. 2. In particular, on a proper construction of the IA, having regard to the terms thereof and all admissible evidence in relation thereto, was Telcordia required: D

733. 2.1 to deliver software in June and December 2000 which complied with the Feature Specification Descriptions (FSDs) in respect of each of those software releases (as contended by Telcordia); or

734. 2.2 to deliver all features and functionality necessary for purposes of providing Voice Flow-Thru by way of the June 2000 software E releases and all features and functionality necessary for purposes of providing Non-Voice Flow-Thru by way of the December 2000 software release (as contended by Telkom)?

735. 3. If Telcordia was required in terms of the IA to deliver all features and functionality necessary for purposes of providing Voice F Flow-Thru by way of the June 2000 software release and all features and functionality necessary for purposes of providing Non-Voice Flow-Thru by way of the December 2000 software release, was Telcordia's obligation modified in any way as a

consequence of the allegations pleaded in Telcordia's second amendment (of which notice was given on 25 March 2002) and, if so, in precisely what way was the obligation modified?'

736.I. The arbitrator's award G

737.[31] The arbitrator accepted Telcordia's interpretation in relation to the primary question and accordingly found it unnecessary to deal with the subsidiary questions. He went further by disposing of another issue, namely the repudiation issue. This he did by holding that Telkom had repudiated the Integrated Agreement and that Telcordia had validly accepted the repudiation, and by dismissing Telkom's H counterclaims. Whether he was entitled to do this is a matter which is dealt with in the accompanying judgment of Cloete JA where the relevant parts of the award are quoted. Suffice it to say already at this juncture that the position of the parties, as expressed by Telkom, was that the arbitrator was requested, in the best interests of the I parties and in accordance with the spirit of the ICC rules, to decide as many of the issues that could fairly have been determined in the light of the evidence, both oral and written, led at the May proceedings.

738.2007 (3) SA p287

739.HARMS JA

740.J. The grounds for review A

741.[32] The grounds for any review as well as the facts and circumstances upon which the applicant wishes to rely have to be set out in the founding affidavit. These may be amplified in a supplementary founding affidavit after receipt of the record from the presiding officer, obviously based on the new information which has become available. 14 B

742.[33] Telkom, in its founding affidavit, relied for reviewing the arbitrator's award on some of the provisions of s 33(1) of the Act. It reads:

743. 'Where -

744. (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; C or

745. (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

746. (c) an award has been improperly obtained,

747. the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.' D

748.Telkom did not rely on para (c) but on misconduct under (a) and the two grounds of (b), namely gross irregularity and the exceeding of power.

749.[34] Telkom alleged that the arbitrator had committed gross irregularities in the conduct of the proceedings by - E

750. (i) breaching an undertaking or promise to receive further evidence relevant to the 'London agreement';

751. (ii) failing to refer legal questions for the opinion of the court under s 20; and

752. (iii) proceeding to hand down his award in the face of a pending s 20 application. F

753.[35] The accusation of misconduct in relation to his duties was based on the allegations that the arbitrator -

754. (i) had made key findings which were 'grossly incorrect, unfair and unreasonable'; and G

755. (ii) had expressly ignored relevant evidence which manifested bias and partiality. 15

756.[36] The statement that the arbitrator had exceeded his powers was based on the allegations that
-

757. (i) he proceeded to hand down his award in the face of a pending s 20 application; H

758. (ii) he had made key findings which were 'grossly incorrect, unfair and unreasonable';
and

759. (iii) he had ignored important provisions of the Integrated Agreement.

760.[37] The arbitrator filed a short report to the court in which he dealt with the nub of the attack on his integrity; his alleged inability to deal with South African law; the allegation that he had I made findings for which

761.2007 (3) SA p288

762.HARMS JA

763.there was no evidence; his alleged breach of an undertaking; and some allegations concerning s 20.
A

764.[38] Telkom used, if not abused, its right to amplify by filing a supplementary affidavit of 120 pages in which it attacked the arbitrator's report and expanded on the allegation of bias. In addition, Telkom raised a new ground of review, relating to the B finding that Telcordia had validly cancelled the agreement and the dismissal of Telkom's counterclaims. This argument was based on both legs of s 33(1)(b).

765.[39] In its replying affidavit and without explanation or apology Telkom withdrew the allegation of misconduct. This allegation, as noted, had two legs but as time went on Telkom sought, C successfully in the High Court, to rely on some of the facts that were proffered in support of this allegation.

766.[40] At the hearing in the High Court Telkom relied on two review grounds only, namely the s 20 issue and the repudiation D issue. But during Telcordia's argument in answer, and through the intervention of the Court, the alleged 'grossly incorrect' findings (on which Telkom no longer relied) were metamorphosed into 'gross irregularities' and expanded, and, in the event, became the basis of the judgment below. E

767.[41] The case as developed by Telkom in its written argument also deviated appreciably from the allegations that were levelled against the arbitrator in the founding papers, and the number of points taken was in inverse proportion to their merit. During the hearing of the appeal another seismic shift took place. F

768.[42] Symptomatic of this case is the 'verbal manipulation' 16 indulged in by the High Court and by Telkom by reclassification and relabelling. As the Bard said about roses, a spade remains a spade even if called a shovel or a pitchfork. Telkom, for example, raised for the first time on appeal the complaint that the arbitrator had acted irrationally. It spent pages G and pages on the legal argument but did not even bother to provide us with the factual foundation for the submission. This came only after a questionnaire from this Court was put to the parties. In the answer given by Telkom we were told that what in the past had been called gross irregularities or misconduct was now irrational behaviour. For the legal submission Telkom relied on the panoply of the common law, H the rule of law, the right to a fair trial, the right to property, and the Act. During oral argument, though, Telkom limited its submission. Irrationality, it now said, was a species of gross irregularity. This submission failed to appreciate that irrationality is an outcome standard while, as I shall demonstrate, gross irregularity is a process standard. Interestingly, it is not alleged that the arbitrator's I interpretation of the Integrated Agreement was irrational. As will appear in due course, there is no factual basis for any of these attacks.

769.2007 (3) SA p289

770.HARMS JA

- 771.[43] After all is said and done, the grounds of review ultimately relied on were these: A
772. (a) by interpreting the Integrated Agreement incorrectly the arbitrator committed a material error so fundamental that he misconceived the nature of the inquiry and his duties;
773. (b) by breaching an undertaking to hear oral evidence on the London agreement the arbitrator committed a gross irregularity; B
774. (c) by denying Telkom the opportunity to apply to court under s 20 of the Act for an order compelling him to state legal questions for the decision by the court, the arbitrator committed a gross irregularity and acted irrationally; C
775. (d) by deciding the repudiation question and dismissing Telkom's counterclaims the arbitrator exceeded his authority and decided a question without evidence, thereby committing a gross irregularity and acting irrationally.
- 776.K. The relationship between the Constitution and the Arbitration Act D
- 777.[44] As a starting point, the constitutionality of the Arbitration Act is not in issue and its validity is a given. 17 Indeed, Telkom conceded without any judicial prodding that the Act as interpreted by our courts passes constitutional muster. However, the Act must be read in the light of the provisions of the Bill of Rights and the meaning attributed to it must promote the spirit, purport and objects of the Bill of Rights. E
- 778.[45] Two sections of the Bill of Rights were raised during argument. They are s 33, which deals with just administrative action, and s 34, which deals with access to courts. In the light of the judgment of this Court in *Total Support* 18 the administrative justice provision can be discounted. There it was pointed out that F administrative justice is concerned with the exercise of public power or the performance of a public function, something with which consensual arbitration is not concerned. 19 Smalberger ADP said in this regard (para [24]):
779. 'Arbitration does not fall within the purview of "administrative action". It arises through the exercise of G private rather than public powers. This follows from arbitration's distinctive attributes, with particular emphasis on the following. First, arbitration proceeds from an agreement between parties who consent to a process by which a decision is taken by the arbitrator that is binding on the parties. Second, the arbitration agreement provides for a
- 780.2007 (3) SA p290
- 781.HARMS JA
782. process by which the substantive rights of the parties to the arbitration are determined. Third, the arbitrator is chosen, A either by the parties, or by a method to which they have consented. Fourth, arbitration is a process by which the rights of the parties are determined in an impartial manner in respect of a dispute between parties which is formulated at the time that the arbitrator is appointed.' B
- 783.Telkom did not argue that this decision was wrong and approached the matter from a different angle, as I shall indicate later. 20
- 784.[46] That brings me to the access to courts provision, s 34, which reads as follows: C
785. 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'
- 786.[47] The question whether s 34 is at all applicable was also discussed in *Total Support* but this Court left the question open. On balance, I believe that s 34 is indeed applicable. This would be in accordance with the approach of the European Court of Human D Rights (ECHR). 21 But, as Smalberger ADP said (para [28]), there is nothing to prevent parties from defining (at least in private consensual disputes) what is fair for purposes of their dispute. This is consonant with the approach

in *Napier v Barkhuizen* 22 where Cameron JA, with reference to *Brisley v Drottsky*, 23 said (para [12]): E

787. '[T]he Constitution prizes dignity and autonomy, and in appropriate circumstances these standards find expression in the liberty to regulate one's life by freely engaged contractual arrangements. Their importance should not be underestimated.'

788.And (para [13]): F

789. '[T]he Constitution requires us to employ its values to achieve a balance that strikes down the unacceptable excesses of "freedom of contract", while seeking to permit individuals the dignity and autonomy of regulating their own lives. This is not to envisage an implausible contractual nirvana. It is to respect the complexity of G the value system the Constitution creates. It is also to recognise that intruding on apparently voluntarily concluded arrangements is a step that judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements.'

790.[48] The rights contained in s 34 (as the ECHR accepted) may be H waived unless the waiver is contrary to some other constitutional principle or otherwise contra bonos mores. Parties to a private dispute may, for instance, compromise their dispute and thereby forgo all their rights

791.2007 (3) SA p291

792.HARMS JA

793.under s 34. By agreeing to arbitration, parties waive their rights pro tanto. 24 A They usually waive the right to a public hearing. They may even waive their right to an independent tribunal. 25 Counsel gave the example of two children who ask a parent to arbitrate their commercial dispute. The example in the ECHR is even more telling. The B parties each appointed their own arbitrator and they, in turn, appointed a third. The one arbitrator had earlier acted for and advised the one party to the dispute. The second party became aware of this but proceeded happily with the arbitration. The national court had held that the second party thereby waived his right to an independent tribunal. The ECHR confirmed that such a waiver was permissible and not inimical to a fair trial guarantee similar to that in s 34. C

794.[49] In this case, by agreeing to arbitration under the ICC rules, the parties agreed (in terms of art 28.1) to the following: 26

795. 'Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to recourse insofar as such waiver can validly be made.' D

796.In addition, art 33 provides:

797. 'A party who proceeds with the arbitration without raising its objection to a failure to comply with any provision of these Rules, or of any other rules applicable to the proceedings, any direction given by the Arbitral Tribunal, or any requirement under the arbitration E agreement relating to the constitution of the Arbitration Tribunal, or to the conduct of the proceedings, shall be deemed to have waived its right to object.'

798.[50] By agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else. 27 F Typically, they agree to waive the right of appeal, 28 which in context means that they waive the right to have the merits of their dispute re-litigated or reconsidered. 29 They may, obviously, agree otherwise by appointing an arbitral appeal panel, something that did not happen in this case. G

799.2007 (3) SA p292

800.HARMS JA

801.[51] Last, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set A out in s 33(1) of the Act. By necessary implication they waive the

right to rely on any further ground of review, 'common law' or otherwise. If they wish to extend the grounds, they may do so by agreement but then they have to agree on an appeal panel because they cannot by agreement impose jurisdiction on the court. However, as B will become apparent, the common-law ground of review on which Telkom relies is contained - by virtue of judicial interpretation - in the Act, and it is strictly unnecessary to deal with the common law in this regard. But, by virtue of the structure of the judgment below and the argument presented to us, it is incumbent on me to take the tortuous route. C

802.L. The meaning of s 33(1)(b): 'gross irregularity' and 'exceeding powers'

803.[52] The term 'exceeding its powers' requires little by way of elucidation and this statement by Lord Steyn says it all: 30 D

804. 'But the issue was whether the tribunal "exceeded its powers" within the meaning of s 68(2)(b) [of the English Act]. This required the courts below to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have. If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under s 68(2)(b) is involved. Once the matter is approached correctly, it is clear E that at the highest in the present case, on the currency point, there was no more than an erroneous exercise of the power available under s 48(4). The jurisdictional challenge must therefore fail.'

805.Apart from the proper application of the test nothing more was made in argument of the meaning of the term. The argument focused on the F meaning of 'gross irregularity in the conduct of the arbitration proceedings'.

806.[53] This term must be understood in context, historical and textual. (I have already dealt with the constitutional considerations.) The ground is to all intents and purposes identical to a ground of review available in relation to proceedings of inferior G courts. 31 Although the textual setting

807.2007 (3) SA p293

808.HARMS JA

809.is different, which might affect its meaning, 32 I am content to hold that for present purposes the two provisions are A identical and that cases decided in relation to the review of inferior courts are relevant in determining the meaning and scope of para (b).

810.[54] The Act was preceded by three colonial statutes. They, following the approach of the pre-Union courts, broke completely with B the Roman-Dutch tradition by providing that an arbitral award is not appealable, that is, that its merits may not be the subject of attack. 33 But they particularly provided that an award could be set aside on the ground of misconduct or if improperly procured. 34

811.[55] The review of an award based on a wrong construction of a deed of partnership was the subject of Dickenson & C Brown. 35 This Court held that a review on this basis was impermissible on two grounds. The first was the general principle that when parties select an arbitrator as the judge of fact and law, the award is final and conclusive, irrespective of how erroneous, factually or legally, the decision was. Second, the D colonial laws (in that case the one of Natal) did not change the position. Such an error, he held, could not amount to misconduct unless the mistake was so gross and manifest that it could not have been made without some degree of misconduct or partiality, in which event the award would be set aside not because of the mistake, but because of misconduct. 36 E

812.[56] Solomon JA recognised that it would have been a valid ground for setting aside the award if an arbitrator had 'exceeded his powers': to exceed one's powers does not go to merit but to jurisdiction. He also held that there is no distinction between a mistake on the face of the award and one not appearing on the face of F it, a rule abolished in England only in 1969. 37 Furthermore, he held that the English rule, which permitted courts to set aside awards on the ground of mistakes of law, was not part of our law. 38

813.2007 (3) SA p294

814.HARMS JA

815.[57] Did the introduction by the 1965 Act of para (b) indicate a changed intention? Is it likely that the Legislature would A have intended to introduce a review on substantive grounds (taking into account that an appeal is also not possible) by using the procedural language of 'gross irregularity in the conduct of the arbitration proceedings'? I think not and this Court also did not think so when called upon to decide the effect of errors of law on an award under B the current Act. In two instances, namely Veldspun and Total Support this Court confirmed the correctness of the Dickenson & Brown approach. 39

816.[58] Telkom expressly disavowed reliance on a general power of courts to review errors of law committed by arbitrators but instead relied on (i) a common-law power to review awards that are tainted by C 'material errors of law' and (ii) s 33(1)(b), arguing that where the arbitrator misconceives the whole nature of the inquiry or his duties in connection therewith he commits a gross irregularity in the proceedings. The High Court, I should mention, decided the matter on ground (ii). D

817.[59] I intend to deal first with the common-law point. As Telcordia mentioned, Telkom was unclear on whether it intended to rely on the common law relating to arbitration or that concerning administrative law. Dickenson & Brown, 40 I have said, held that there was no common-law review under arbitration law. In addition, I have already expressed the view that a party to a consensual arbitration under the E Act is not entitled to rely on an administrative common-law review ground.

818.[60] In our law the principles of administrative justice have now been subsumed by the Constitution and, as stated, the considerations underlying them are different from those that apply to F arbitration. This difference has also been recognised in England, as Lord Steyn said: 41

819. 'The reasoning of the lower courts, categorising an error of law as an excess of jurisdiction, has overtones of the doctrine in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 which is so well known to the public law field. It is, G however, important to emphasise again that the powers of the court in public law and arbitration law are quite different. This has been clear for many years, and is now even more manifest as a result of the enactment of the 1996 [English Arbitration] Act.'

820.[61] Telkom sought to rely in argument on *Anisminic* and a statement by H

821.2007 (3) SA p295

822.HARMS JA

823.Malan J 42 (relying indirectly on *Anisminic*) for the proposition that all decisions based on A a material error of law stand to be reviewed. As mentioned, *Anisminic* was concerned with administrative action, as was Malan J's judgment. In any event, *Anisminic* has been misunderstood by many, including Denning MR, who sought to derive from it the general principle mentioned by Malan J. Denning MR put his view with characteristic vigour when he said in a public lecture that no B court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. 43 He was soon put right by the House of Lords in *Racal*. 44

824.[62] *Racal* was followed by the House in *Page*, 45 a judgment on which Malan C J relied for his general proposition so eagerly embraced by Telkom. The House emphasised 46 that in the case of decisions of administrative tribunals made under statutory powers a relevant error of law in the actual making of the decision, which affects the decision, may be corrected on review unless Parliament intended that the administrative body was to be the final arbiter of questions of law. If, however, a law provided that a judicial body's D decision was to be final and conclusive on a question of law, there was no reason to assume that a review would be permitted. In *Page* the issue concerned the position of a 'visitor', someone who, in terms of university rules, was the 'sole judge' of the interpretation and application of the university's domestic rules. Errors of law committed by a visitor within his jurisdiction were E held not to be subject to judicial scrutiny.

825.[63] As mentioned, even before the 1979 English Arbitration Act, legal questions, such as the construction of a contract that had been specifically referred to an arbitrator, could not be reviewed

on the ground of error. 47 In the present case, it F will be recalled, the interpretation of the contract was specifically referred to the arbitrator.

826.[64] This Court, in *Hira and Another v Booyesen and Another*, 48 dealing with a statutory administrative tribunal, referred with approval to *Anisminic* and to *Racal*, and did so without suggesting that the *Denning G* approach, which had been rejected in *Racal*, was correct. It was in this context that Corbett CJ formulated the following rule (at 93C - D):

827. 'Where the complaint is that the tribunal has committed a material error of law, then the reviewability of the decision will depend, basically, upon whether or not the Legislature intended the tribunal to have exclusive authority to H

828.2007 (3) SA p296

829.Harms JA

830. decide the question of law concerned. This is a matter of construction of the statute conferring A the power of decision.'

831.[65] Corbett CJ was at pains to draw a distinction between common-law reviews and those based on statute (such as the present) 49 and to state expressly that the quoted rule (and the others mentioned by him) applies to the former. 50 Apart from the fact that I do not believe that he intended to propound a rule applicable to consensual B arbitrations, the rule would in any event prevent the review of material errors of law because the arbitrator was, subject to the limitations in the Act, intended to have exclusive jurisdiction over questions of fact and law. That follows from the provisions of the Act, which exclude appeals and limit reviews. The fact that a court may be C approached to decide a question of law under s 20 does not affect this conclusion. If s 20 were used, a review or appeal for an error of law is not possible because, once again, the opinion of the court (of first instance) and even that of counsel (learned or otherwise) is final. A statutory provision such as that contained in s 28, that unless the D arbitration agreement provides otherwise, an award is, subject to the provisions of the Act, final and not subject to appeal, and that each party to the reference must abide by and comply with the award in accordance with its terms, clearly indicates that the Legislature intended the arbitral tribunal to have exclusive authority to decide whatever questions were submitted to it, including any question of law. That is what the parties agreed. This does not imply that the E arbitrator has the exclusive right to decide the scope of his jurisdiction because if he exceeds his powers the award is reviewable on that ground.

832.[66] Telkom also sought to rely on a tacit term of the arbitration agreement, submitting that it would not have agreed to a term permitting the arbitrator to commit a gross error of law. In F this regard Telkom referred to what Jansen JA had said in *Theron* 51 when dealing with the interpretation of a constitution of a church, namely that it is not to be assumed that parties to a contract would have agreed to be subjected to unreasonable actions. 52 Although I agree with the generality of the proposition, it should be stressed that G the judgment of Jansen JA dealt with the question of whether a church body had interpreted its constitution correctly and had followed the correct disciplinary appeal procedure:

833.2007 (3) SA p297

834.HARMS JA

835.in other words, he sought to determine the scope of the mandate of the church body as agreed in its A constitution. This question, he held, was not something falling within the exclusive jurisdiction of the church body. Apart from the fact that the principles concerning domestic tribunals are not the same as those governing administrative or arbitration proceedings 53 here the scope of the arbitrator's mandate is not in issue. 54 B

836.[67] In any event, the parties bound themselves to arbitration in terms of the Act and if the Act, properly interpreted, does not allow a review for material error of law, one cannot imply a contrary term. Also, parties cannot by agreement extend the grounds of review as contained in the Act. C

- 837.[68] Even assuming the jurisdiction to review on the ground of material error of law, the question arises as to what is meant by the adjective 'material'. Telkom sought to draw a distinction between 'mere' errors and 'material' errors and in effect argued that all errors that make a party lose the arbitration are material. This D approach renders the difference between appeals and reviews meaningless and in effect gives a right of appeal, which the Act prohibits.
- 838.[69] Errors of law can, no doubt, lead to gross irregularities in the conduct of the proceedings. Telcordia posed the example where E an arbitrator, because of a misunderstanding of the audi principle, refuses to hear the one party. Although in such a case the error of law gives rise to the irregularity, the reviewable irregularity would be the refusal to hear that party, and not the error of law. Likewise, an error of law may lead an arbitrator to exceed his powers or to misconceive the nature of the inquiry and his duties in F connection therewith.
- 839.[70] Hira v Booyesen concerned the scope of the tribunal's mandate or 'jurisdiction'. The tribunal had to determine whether Hira had done something 'in public'. It misconstrued this term, which defined its powers, and, accordingly, committed a 'material' error. Fortunately I need not pursue this further G because Telkom relied on only one type of error as being material: where a decision-maker misconceives the whole nature of the inquiry or his duties in connection therewith. This common-law ground also applies to a review under a statute that provides that a gross irregularity in the course of the proceedings may be reviewed. It is therefore H unnecessary to delve much further and redo the exercise that Corbett CJ did in Hira v Booyesen and analyse the line of cases again.
- 840.[71] That brings me to the judgments of Greenberg and Schreiner JJ in Goldfields Investment. 55 The case dealt with a review of a lower court on I
- 841.2007 (3) SA p298
- 842.HARMS JA
- 843.the statutory ground of 'gross irregularity' and held that the term encompasses the case A where a decision-maker misconceives the whole nature of the inquiry or his duties in connection therewith. In the light of the general acceptance of the rule, also by this Court, a reconsideration of its validity does not arise. But that is not the end of the inquiry because it is apparent that both the High Court and Telkom misunderstood the B rule and misapplied it. I therefore propose to analyse the case law in this regard and then consider whether the arbitrator's alleged misconceptions fall within the rule.
- 844.[72] It is useful to begin with the oft quoted statement from Ellis v Morgan 56 where Mason J laid down the basic principle in these terms: C
845. 'But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.'
- 846.[73] The Goldfields Investment qualification to this general principle dealt with two situations. The one is where D the decision-making body misconceives its mandate, whether statutory or consensual. By misconceiving the nature of the inquiry a hearing cannot in principle be fair because the body fails to perform its mandate. 57 Goldfields Investment provides a good example. According to the applicable Rating Ordinance E any aggrieved person was entitled to appeal to the magistrates' court against the value put on property for rating purposes by the local authority. The appeal was not an ordinary appeal but involved, in terms of the Ordinance, a rehearing with evidence. The magistrate refused to conduct a rehearing and limited the inquiry to a determination of the F question whether the valuation had been 'manifestly untenable'. This meant that the appellant did not have an appeal hearing (to which it was entitled) at all because the magistrate had failed to consider the issue prescribed by statute. The magistrate had asked himself the wrong question, that is, a question other than that which the Act directed him to ask. 58 In this sense the hearing was unfair. Against that setting the words of Schreiner J should be understood: 59 G

847. 'The law, as stated in *Ellis v Morgan* (supra) has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and bona fide, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect. And if from the magistrate's reasons it appears that his mind

848.2007 (3) SA p299

849.HARMS JA

850. was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the Court's not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the inquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial. I agree that in the present case the facts fall within this latter class of case, and that the magistrate, owing to the erroneous view which he held as to his functions, really never dealt with the matter before him in the manner which was contemplated by the section. That being so, there was a gross irregularity, and the proceedings should be set aside.'

851.[74] The other line of cases, which dealt with reviews of inferior courts, was concerned with orders made where a jurisdictional fact was missing or, put differently, 'a condition for the exercise of a jurisdiction had not been satisfied'. 60 A typical example is *Primich*. 61 The magistrate could order, in terms of the relevant court rule, the provision of security if the plaintiff was not resident in the country. The magistrate, in spite of the limitation on his jurisdiction, made such an order against a plaintiff who was resident in the country. Objectively, this was not a case of an error of law; it was an error of fact dressed up as an error of law. Decisions of a factual nature can all too easily be dressed up as issues of law. 62 There was no indication that the magistrate had misinterpreted the rule; he misunderstood the facts, holding that a jurisdictional fact was present while it was not. A similar instance was *Visser v Estate Collins*. 63 In terms of the statute concerned, the magistrates' court could set aside a void judgment granted by default provided the application for rescission was made within one year of the date on which the applicant first had knowledge of the invalidity. The magistrate set aside a void judgment by default without any evidence as to when the applicant had become aware of the invalidity. Once again, the magistrate had failed to determine whether a jurisdictional fact for the setting aside of the judgment was present. Whether this was due to an error of law is really beside the point.

852.[75] In all these cases the complaint was directed at the method or

853.2007 (3) SA p300

854.HARMS JA

855.conduct and not the result of the proceedings. 64 Where the legal issue is left for the decision of the functionary any complaint about how he reached his decision must be directed at the method and not the result. This is known as the *Doyle v Shenker* 65 principle.

856.[76] It is wrong to confuse the reasoning with the conduct of the proceedings. Although the line may be fine and sometimes difficult to draw, I believe that the following example makes the difference clear. In *Jooste Lithium* 66 the inspector had the authority to decide any dispute that

could arise in regard to the validity of the pegging or beaconing of claims and to decide any dispute arising through over-pegging. Against that background O H Hoexter JA said: 67 C

857. 'It is clear that in deciding the disputes which he is authorised to decide, there is entrusted to the inspector the duty not only of finding the relevant facts but also of deciding the legal issues involved (see Johannesburg City Council v Chesterfield House (Pty) Ltd 1952 (3) SA 809 at p 825 (AD). In deciding the legal issues involved it would also be the duty of the inspector to interpret the relevant sections of the Proclamation and the regulations.' D

858.[77] The Proclamation conferred a right of appeal from the inspector to the Administrator, whose decision was to be final. With that in mind, Hoexter JA continued: 68

859. 'It seems to me, with respect, that the learned Judge erred in holding that the interpretation of the regulations is a matter for E the Court and that the Administrator is bound by the Court's interpretation. In my opinion the Legislature intended that the regulations should be interpreted in the first instance by the inspector and on appeal by the Administrator. It is for the Administrator to decide any legal issues involved in a dispute as to the pegging of a claim, and the most important legal issue is the interpretation of the regulations. It cannot be said that the F wrong interpretation of a regulation would prevent the Administrator from fulfilling its statutory function or from considering the matter left to it for decision. On the contrary, in interpreting the regulations the Administrator is actually fulfilling the function assigned to it by the statute, and it follows that the wrong interpretation of a regulation cannot afford any ground for review by the Court. (See Doyle v Shenker & Co Ltd 1915 AD 233.) G

860. The present case differs from cases like Goldfields Investment Ltd v City Council of Johannesburg, 1938 TPD 551, in which the result of the wrong interpretation of a section in the relevant statute was that the magistrate never directed his mind to the issue which in terms of the statute it was his duty to decide. In the present case the Administrator must direct [his] mind to the issue whether the requirements of the regulations have been observed and in order to decide that issue it is bound to interpret the regulations.' H

861.[78] It will be necessary to consider the facts on which the High Court relied to determine whether what the arbitrator did in this matter falls within the purview of Goldfields Investment or within Doyle v Shenker. This does not mean that the two principles are mutually exclusive. It

862.2007 (3) SA p301

863.HARMS JA

864.simply means that if the arbitrator does not fall foul of Goldfields Investment, A the principles of Doyle v Shenker apply.

865.[79] Before turning to the facts it is necessary to dispose of Telkom's concluding argument on this aspect of the case. It was that the issue of 'gross irregularity' should be answered by asking whether Telkom, in the words of Schreiner J, had a fair trial on the interpretation issue. That a party is entitled to a fair trial, as B Telcordia said, is not contentious. Telkom accepted that the High Court never had asked itself this question and that its own heads of argument had not dealt with the point. When invited by us to state why the hearing had been unfair, counsel who argued this aspect deferred to his lead counsel who, in turn, chose to disregard the invitation. We were C left with a chasm between the legal and factual argument.

866.M.The nature of the inquiry, the duties of the arbitrator, and the scope of his powers D

867.[80] Before considering the attack on the arbitrator on the ground that he had committed gross irregularities in the conduct of the arbitration proceedings (by misconceiving the nature of the inquiry and his duties) or exceeded his powers, it is necessary to determine the nature of the inquiry, the arbitrator's duties, and his powers. E

868.[81] As mentioned at the outset, according to the Integrated Agreement the arbitrator had to determine all disputes between the parties, including disputes relating to the interpretation of the agreement and disputes of a legal, financial and technical nature; the procedural rules of the ICC

were to apply; the laws of the Republic would govern the agreement; and, subject to the arbitration clause, F the parties consented to the jurisdiction of South African courts.

869.[82] The May issues, as defined, required the arbitrator to determine Telcordia's primary contractual obligation under the Integrated Agreement 'having regard to the terms thereof and all admissible evidence in relation thereto'. In this regard he had to G choose between two opposing contentions. It is clear from the way the May issues were defined that the questions were interdependent and that, depending on the outcome of, say, question 1, question 3 could have fallen away.

870.[83] In short, the arbitrator had to: (i) interpret the agreement; (ii) by applying South African law; (iii) in the light of H its terms; and (iv) all the admissible evidence.

871.[84] In addition, the arbitrator had, according to the terms of reference, the power (i) not to decide an issue which he deemed unnecessary or inappropriate; (ii) to decide any further issues of fact or law, which he deemed necessary or appropriate; (iii) to decide the I issues in any manner or order he deemed appropriate; and (iv) to decide any issue by way of a partial, interim or final award, as he deemed appropriate.

872.[85] The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to J

873.2007 (3) SA p302

874.HARMS JA

875.inadmissible evidence does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. It only A means that he erred in the performance of his duties. An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry - they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from B saying that they constitute a misconception of the nature of the inquiry. To adapt the quoted words of Hoexter JA: 69 it cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the C contrary, in interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by a court.

876.[86] Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African D law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly. 70 Errors of the kind mentioned have nothing to do with him exceeding E his powers; they are errors committed within the scope of his mandate. To illustrate, an arbitrator in a 'normal' local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd. F

877.[87] In support of this I revert to Doyle v Shenker, 71 a case that dealt with a review on the ground of a gross irregularity in the proceedings. Innes CJ said in a passage that speaks for itself: 72 G

878. 'Now a mere mistake of law in adjudicating upon a suit which the magistrate has jurisdiction to try cannot be called an irregularity in the proceedings. Otherwise a review would lie in every case in which the decision depends upon a legal issue, and the distinction between procedure by appeal and procedure by review, so carefully drawn by statute and observed in practice, would largely disappear. Yet in this case it is a mistake of law alone which is relied upon as H constituting gross irregularity. There is neither allegation nor suggestion that the magistrate, his attention having been drawn to sec. 37, deliberately refused to apply his mind to it, or to consider it. The position, if

the section means what the applicant contends, is that the magistrate either honestly misinterpreted or completely overlooked it. In either event it would not, I am afraid,

879.2007 (3) SA p303

880.HARMS JA

881. be the first occasion on which a court of law has misread a statutory provision or overlooked one not A brought to its notice at the trial. Whichever supposition were the correct one, the result would be (still assuming the correctness of the applicant's interpretation) an unfortunate error of law which, but for the special prohibition of the statute would afford good ground for an appeal. But there would be no gross irregularity in the proceedings, and therefore no justification for a review.' B

882.[88] Innes CJ added: 73

883. 'It was suggested that, in the present instance, the fact that the magistrate did not deal with the merits, would constitute a gross irregularity. But if he considered the document to be conclusive, there was no need to discuss the merits. He may have been wrong in that view, but that would be an error of law only, and not an irregularity. C

884. The admission of illegal evidence is in itself an independent ground of review. 74 But the document in question was not improperly received in evidence; indeed, it could not properly have been excluded. If the magistrate's reading of it, and of the bearing of the statute upon it, was wrong, that could again be a mistake of law, which, as already pointed out, could afford no basis for review proceedings.' D

885.[89] There is another matter that falls under this rubric and that concerns the repudiation issue. I have already mentioned that at the conclusion of the May hearing the arbitrator was requested, in the best interests of the parties and in accordance with the spirit of the ICC rules, to decide as many of the issues as could fairly have been E determined in the light of the evidence, both oral and written, led at the May proceedings. Using this power he decided that Telkom had repudiated and that Telcordia had accepted the repudiation. It was within the power of the arbitrator, in the light of the extension agreement between the parties, to decide the scope of his mandate. 75 F

886.N. How did the arbitrator understand his duties?

887.[90] The arbitrator understood clearly that his duty was to interpret the agreement and that he had, in this regard, to choose between the conflicting contentions of Telcordia and Telkom. Nowhere in his award is there any indication that he sought to do anything else. He understood particularly well that he had to determine the meaning G of the contract with reference to its true construction and that he could only have regard to admissible evidence. 76 In fact, he complained during the hearing about the relevance of some of the evidence relating to construction but the parties insisted that he should hear it. He 'stressed' (his word) that his interpretation H was based on the wording and structure of the Integrated Agreement itself.

888.[91] The arbitrator understood that he had to apply South African law.

889.2007 (3) SA p304

890.HARMS JA

891.He knew that he could only rely on background evidence and not on surrounding circumstances, and he stated that he had kept this A in mind in interpreting the Integrated Agreement. 77 He did not refer to any identifiable surrounding circumstances in his award although he did refer to the subsequent conduct of the parties in order to interpret the agreement without finding that the agreement was ambiguous. This he B did consciously, relying on Christie, 78 who in turn relies on Shill v Milner 79 as explained by Goldstone J in Briscoe v Deans. 80 The rule is that evidence of subsequent conduct is admissible, even where the agreement is on its face unambiguous, if the parties by consent lead such evidence. C

- 892.[92] The arbitrator was fully conscious of Shifren and, as I have mentioned, his award shows that he understood the principle and its implications fully. He did, however, come to the conclusion that the doctrine did not arise in the circumstances of the case. D
- 893.[93] In the end, the arbitrator accepted Telcordia's interpretation and he answered the questions put accordingly. Some of the questions became academic as a result of the primary finding and therefore he did not answer them. In fact, they could not have been answered in the light of his conclusion. In answering only some questions and refraining from answering others, and in making rulings and orders consequent upon his primary finding, he consciously used E the powers he had according to his terms of reference. 81
- 894.O.The findings by the High Court relating to the arbitrator's misconceptions about his duties, and exceeding his powers F
- 895.[94] The findings of the High Court on this issue are many and repetitive 82 and are scattered all over the judgment. I have no intention of dealing with them all but shall limit myself to the main findings. The first finding was that the arbitrator had misinterpreted the pleadings. For this the High Court undertook a detailed analysis of the pleadings to find that Telkom had relied on Shifren in relation to the primary (interpretation) G question. The problem is that Telkom had never alleged that the arbitrator had misconstrued the pleadings - it was not a ground of review - and before us Telkom did not seek to make out such a case. I can only say that the court embarked on what could in fairness be described as a judicial snipe hunt. 83 H
- 896.[95] Although formulated as a separate and alternative ground, the essence of the High Court's finding in relation to the interpretation of the
- 897.2007 (3) SA p305
- 898.HARMS JA
- 899.Integrated Agreement was that the arbitrator had 'failed to refer to and apply' the applicable principles of proper A interpretation, and that this constituted a misconception of the whole nature of the inquiry and of his duties in connection therewith, and that he had exceeded his powers.
- 900.[96] The statement that the arbitrator had failed to refer to the applicable principles of construction, as I have indicated in the B preceding section of this judgment, amounts to a gross misrepresentation of what the arbitrator did. The court, when dealing with the inadmissibility of surrounding circumstances, provided the reader with a veritable compendium of case law while the arbitrator articulated the same rule in a single sentence but the court did not refer to a single rule of interpretation that the arbitrator had C failed to take into account.
- 901.[97] Particularly disturbing about the High Court's treatment of the arbitrator is that it simply ignored the fact that the arbitrator had relied on authority for utilising evidence concerning subsequent conduct where the agreement is unambiguous in interpreting a contract. The Court did not even consider this D rule - accepted by Telkom as valid - in coming to its decision. It also ignored the fact that Telkom itself had submitted to the arbitrator that evidence of subsequent conduct of the parties would irrefutably contradict Telcordia's primary contractual argument; that no argument was addressed to the arbitrator by either E party that the evidence led was inadmissible; and that Telkom did not allege in the review proceedings that the arbitrator had relied on irrelevant or inadmissible evidence. How it could be said, in these circumstances, that the arbitrator had committed a gross irregularity is incomprehensible.
- 902.[98] The High Court in any event failed to distinguish between the interpretation issue and the contractual compliance issue, a F distinction the arbitrator perceived at an early stage of the proceedings. The interpretation issue was whether the 'specifications' were to be found in FSDs; and the compliance issue was whether, by delivering the particular FSDs and, thereafter releasing or tendering the software described in the FSDs, Telcordia G had complied with its contractual obligations. However, the court considered the latter also to be a matter of interpretation as is

apparent from its treatment of the sign-off and disclaimer issues, matters to which I shall revert in due course.

903.[99] The High Court's approach was to interpret the agreement afresh; to come to a different conclusion about its meaning; and then H to conclude that as a result of the difference 'the arbitrator did not apply his mind thereto in a proper manner, [and] that he misconceived the whole nature of the inquiry and his duties therewith' and that he simultaneously exceeded the bounds of his powers. But it was not for the High Court to reinterpret the contract; its function was to I determine whether the gross irregularities alleged had been committed. By its reinterpretation the Court dealt with the matter as an appeal, reasoning in effect that because the arbitrator was wrong it had to follow that he had committed an irregularity. The failure to apply the applicable principles of interpretation or to come to a wrong conclusion does not amount to a 'gross J

904.2007 (3) SA p306

905.HARMS JA

906.irregularity', as the quotations from Doyle v Shenker 84 illustrate. It is circuitous to reason, as the court did, that this A alleged failure amounted to a misconception of the whole nature of the inquiry and that consequently the failure amounted to a gross irregularity. The Court sought to distinguish Doyle v Shenker on the basis that in that case the magistrate committed an error of law while acting within his jurisdiction, implying that by B interpreting the Integrated Agreement the arbitrator had acted outside his jurisdiction, which is simply wrong. If one considers the length of the proceedings, the arbitrator's active involvement in defining and refining the issues, and the detailed and reasoned award, it was as presumptuous as it was fallacious for the Court to have held that the C arbitrator did not apply his mind properly to the issues at hand.

907.[100] The High Court justified its approach in first interpreting the Integrated Agreement by reference to judgments dealing with statutory reviews where courts, in order to determine whether the functionary had acted within the scope of the statute, first D interpreted the enabling statute. This was always done in order to determine the powers and mandate of the functionary. 85 The parallel exercise in this instance required a consideration of the terms of reference and the provisions of the Act, not of the Integrated Agreement. E

908.[101] The gravamen of the High Court's decision on the gross irregularity resulting from a wrong interpretation was that the arbitrator had failed to apply Shifren when answering the primary question about the delivery baseline. In addition, the court relied on what it thought were three further errors of interpretation to which I shall revert. As stated before, I do not intend to F reinterpret the contract because that is not the issue and it does not matter for purposes of a review whether the arbitrator was right or wrong. I shall accordingly limit myself to a discussion of the reviewable acts said to have been committed by the arbitrator. G

909.P. The primary question and the Shifren doctrine

910.[102] The primary question in terms of the May issues was whether Telcordia's interpretation relating to its software delivery obligations was correct or whether the interpretation advanced by Telkom was the correct one. Telcordia's case, as repeatedly stated, was that it had to deliver software which complied with the FSDs. H Telkom's case, on the other hand, was that Telcordia had to deliver 'all' features and functionalities necessary for purposes of providing the two Flow-Thrus. Both parties relied on the terms of the Integrated Agreement for their different points of view. I

911.[103] The arbitrator upheld Telcordia's interpretation while the High Court upheld Telkom's interpretation. In doing so, the court ignored the

912.2007 (3) SA p307

913.HARMS JA

914. fact that Telkom had, in its pleadings, disavowed the allegation that 'all' had to be delivered and that it was unable to A articulate before the arbitrator exactly what had to be delivered - it advanced eight versions.

915. [104] Telcordia's case, simply put, was this. The Project Plan provided for the delivery by Telcordia of complete specifications (named FDDs in the Project Plan but called in practice, according to B the finding of the arbitrator, FSDs) of the software that had to be delivered subsequently. In other words, the specifications were 'deliverables' - part of Telcordia's delivery duty. They did not form part of the Integrated Agreement because they did not exist for a reason, which was spelt out in the definition of C 'specifications': specifications in exhibit C were defined to be the 'requirement specifications', which Telcordia had to supply six months before the delivery date of the actual software, that fully described the capabilities of the software that had to be delivered. In particular, the agreement recorded that 'the parties understand and agree that (Telcordia's) Integrated Response (ie, the SOC's) to (the Request for Bid) is not a typical off-the-shelf offering and D that Specifications for the Licenced Software (to be provided by Telcordia) shall be subject to mutual development and agreement by the Parties, and sign off by Telkom'. E

916. [105] In other words, what was required by way of software delivery had to be developed and agreed to by the parties. According to annexure D to the Project Plan, Telkom had to pay substantial amounts for the FDDs. Because FDDs had to be developed in co-operation and agreement with Telkom in the course of performing the contract, FDDs F (which were thus mutually developed and agreed upon during the course of the Integrated Agreement and were to be delivered) did not amend the Integrated Agreement. They did not change the ultimate delivery obligation, which was to comply eventually with the SOC's. Since a set of FDDs was developed for each release, it had to follow that they would also determine when particular features and functionalities had G to be delivered.

917. [106] The arbitrator understood this to be Telcordia's case where he stated that the FSDs were not a substitute for the contractual requirements 'but rather the means whereby they are met'. But the High Court, although recognising that Telcordia alleged that it had H tendered delivery of the software in terms of the Project Plan while at the same time alleging that it had tendered the software as described in the agreed FDDs, and which had been paid for by Telkom as such, failed to understand this. I

918. [107] In the light of this it is not surprising that Telcordia did not in its pleadings rely on an amendment of the Integrated Agreement which had been effected by the FSDs. It is also not surprising that Telkom did not plead that the FSDs were impermissible amendments to the agreement. This explains why Telkom never argued before the arbitrator that Shifren J

919. 2007 (3) SA p308

920. HARMS JA

921. prevented Telcordia from relying on the FSDs. 86 Even when Telkom A launched the s 20 proceedings after the conclusion of the proceedings before the arbitrator, it did not raise Shifren in connection with the primary question. It raised it in relation to Telcordia's second amendment and later in relation to the London agreement. 87 This confirms the impression the B arbitrator had, namely that Telkom's reliance on Shifren did not arise in relation to the primary question; and it effectively disposes of the High Court's interpretation of the pleadings and its assessment of the course of the proceedings, namely that Telkom had raised Shifren in the present context. 88 C

922. [108] It is no wonder that the arbitrator said, both in his award and in his memorandum, that Shifren did not arise in the context of the primary question and did not need to be considered for the purpose of his award. For the High Court to have held that the arbitrator had ignored the Shifren rule by failing to consider Telkom's Shifren argument in this context is inexplicable. It was not the arbitrator who misconceived the issue; D it was, with respect, the court.

923. [109] The High Court found (contrary to the finding of the arbitrator) that one had to look to the Project Plan and the SOC's to determine the specific functionalities and features of the software to be delivered. For this finding the court relied - impermissibly - on parts of the contract that the

parties by agreement did not place before the E arbitrator. This is another indication of the fact that the court misconceived its function: it even dealt with the review as an appeal in the broad sense taking into account facts that were not before the lower tribunal.

924.[110] The arbitrator, in reaching his conclusion, had regard to the evidence of Telcordia's expert witness, Prof Bernstein, which was to the effect that the SOCs could not in themselves identify the F specific features and functionalities that had to be included in each individual release of customised software. This evidence the arbitrator used in order to give business efficacy to the agreement. The High Court held that the evidence was inadmissible. I fail to see on what basis it could so have been held. It was expert evidence that was G necessary for the arbitrator to construe the agreement by placing him as near as may be in the position of the parties to the agreement. 89

925.[111] Furthermore, since Telkom had abandoned the argument that the SOCs identified the specific features and functionalities of the H software that had to be delivered, it is difficult to appreciate how it can be said that the arbitrator committed a gross irregularity by failing to accord to the

926.2007 (3) SA p309

927.HARMS JA

928.SOCs a contractual meaning which neither party propounded. Telkom jettisoned this argument for good reason: it was A common cause that the SOCs did not contain a description of the features and functionalities of each software release; further that the specifications referred to in the Project Plan were those defined in exhibit C; and in addition that these had to be mutually developed, delivered by specific dates and paid for on agreed dates. It was B common cause that the SOCs were not mutually developed nor were they intended to be; and, additionally, they were not deliverables - they were pre-existing documents. This explains why Telkom's case was that Telcordia had to deliver all features and functionalities necessary, and not that the SOCs defined the specific software functionalities. But the 'all' C argument also had a fatal flaw in the view of the arbitrator because the Project Plan envisaged delivery of upgrades of software. No wonder the arbitrator had a problem with Telkom's case (he could never establish what its case about the FSDs was) and why Telkom as a last resort sought to attack the validity of the contract on the basis that it had no exigible content. D

929.[112] I digress for a moment and deal with the essence of the arbitrator's reasoning. He accepted that the Project Plan had to identify the specific functionality and features to be included in each release. He found that neither the WBS nor the bar charts performed this function and that the only way in which the Project Plan could be read as identifying the specific functionality and feature of each E release is if the 'specifications' were read into it. After developing the point he concluded that 'the parties must have intended that the necessary detailed and specific descriptions of those obligations should be found elsewhere.' 90 F

930.[113] It is quite clear that the 'elsewhere' the arbitrator had in mind was the delivery obligation of 'specifications', ie the FSDs. The High Court was under the impression that the arbitrator had thereby referred to the moratorium agreement (discussed G above in part G) which, according to it, amounted to an invalid variation of the Integrated Agreement. The court also held that FSDs had their origin in the moratorium agreement, something in conflict with the arbitrator's factual finding that they were not so derived. 91 (Some were developed as a result of the moratorium agreement but that is beside the point since there had to be agreement about their content.) As early as 29 October H 1999, it was Telcordia's stated position that the FSDs defined the software that had to be delivered and that they were official Telcordia deliverables, which required sign-off by Telkom. 92 By December 1999, Telcordia had already delivered the 06/00 FSDs and during March 2000, Telkom had paid for them in full. The moratorium agreement was concluded

931.2007 (3) SA p310

932.HARMS JA

933.thereafter, at the end of March 2000. There are two additional points. Telkom relied A on the moratorium agreement as part of its defence to the claim (which raises the

approbation/reprobation question) and, as the arbitrator explicitly stated, he had not made any findings in relation to the moratorium agreement. His statement that once Telkom had agreed in terms of the relevant FSDs what a particular release should contain, B it was not open to it to complain that the same release did not contain something in addition, was entirely consistent and logical, especially in the light of his view that the FSDs had to be agreed to between the parties without thereby amending the Integrated Agreement.

934.[114] The arbitrator found as a fact that the parties jointly developed and agreed to the content of the FSDs; that they were C delivered when the 'specifications' had to be delivered; and that Telkom paid the contract price for 'specifications' for them. The evidence about subsequent conduct was, as the arbitrator noted, in the circumstances admissible (see the discussion above). It was, accordingly, proper for the arbitrator to have had regard to 'the events which happened' in interpreting the Integrated Agreement. The High Court, without considering the basis on which the arbitrator D used the evidence, held that it was inadmissible. It erred.

935.[115] The foregoing also disposes of Telkom's submission that the arbitrator transgressed the parol evidence rule. This was not an E issue foreshadowed in the review application. In any event, the basis of the argument was, once again, that the FSDs altered the terms of the Integrated Agreement, an argument that I have already dismissed. The submission furthermore conflates and confuses different matters: the integration rule (or parol evidence rule); 93 the rules relating to F interpretation; 94 and the Shifren rule. The integration rule concerns agreements that precede the relevant written jural act. 95 They may not be proved because they are supposed to have been subsumed by or integrated into the written jural act. 96 The arbitrator did not once refer to evidence which could even remotely have been so classified. G

936.[116] But, as the arbitrator noted, some of the December FSDs were not signed off by Telkom. I have already mentioned that according to the definition of 'specifications' they were not only subject to mutual development and agreement by the parties, but also required 'sign off' by Telkom. 97 This is the subject of another debate to which I shall turn. In the present setting, H however, the fact that the FSDs were not signed off has no bearing on the meaning of the Integrated Agreement, especially as to what the baseline was. It could only mean that Telcordia should not have been paid for them, but Telkom, so the arbitrator held, had no

937.2007 (3) SA p311

938.HARMS JA

939.explanation for having paid. 98 As I have said earlier, the interpretation issue was whether the 'specifications' were to be A found in FSDs; and the compliance issue was whether, by having delivered the particular FSDs and by delivering the software described therein or tendering delivery, Telcordia had complied with its contractual obligations.

940.Q. The sign-off requirement B

941.[117] The High Court found that because the arbitrator had held that the 12/00 FSDs qualified as 'specifications', although they had not all been signed off by Telkom, he committed an irregularity in the interpretation of the contract; that he rewrote the contract; and that he ignored the evidence about the absence of sign-off. All this, according to the court, meant that the arbitrator had misconceived C the nature of the inquiry and his duties in connection therewith.

942.[118] The High Court further found that the sign-off requirement in the definition of specifications 'probably' referred to the contractual requirement in the non-variation clause that amendments D be in writing and signed by both parties, and 'probably' required sign-off only by Telkom because the specifications would, in the nature thereof, be prepared by Telcordia for Telkom's acceptance. These provisional views, which are devoid of any merit, are further indications of the fact that the court conflated the interpretation and compliance issues. E

943.[119] The High Court also dealt with the absence of 'agreement' about the content of the 12/00 FSDs. It appears that the court held as a matter of fact that there was no agreement about their content, a factual finding in conflict with that of the arbitrator. The arbitrator's factual finding to the

effect that there was agreement on the 12/00 FSDs is binding on the parties. I may add that although F Telkom complained in its supplementary affidavit about the arbitrator's finding, it did not allege that the finding amounted to either misconduct or gross irregularity; that was reserved for the lack of any finding about sign-off. G

944.[120] The High Court's judgment in any event did not do justice to the findings of the arbitrator. The arbitrator did not 'ignore' the evidence about the absence of a formal sign-off; on the contrary, he repeatedly noted that the FSDs had not been signed off. The arbitrator also did not 'rewrite' the contract - he understood that signing off was required, and he never suggested otherwise. H

945.[121] It is apparent that the arbitrator thought, rightly or wrongly, that having mutually developed and agreed on the contents of the FSDs, and having paid for them, the formal requirement of signing off was dispensed with by Telkom. This one can deduce from the arbitrator's reference (in another context) to the principle that I acceptance of substitute performance does not fall foul of Shifren 99 and the lack of

946.2007 (3) SA p312

947.HARMS JA

948.response by Telkom to the letter of 6 July 2000 written by Telcordia's A solutions architect, Mr Bariso, who said that sign-off was required as an acknowledgement of the receipt of the FSDs.

949.[122] The arbitrator may have been wrong but this does not mean that he has misconceived the nature of the inquiry or his duties, or B that he acted irrationally. The statement by Innes CJ quoted earlier has to be borne in mind, namely that the failure to deal with facts that go to the merits of a case is not an 'irregularity'. 100 Even if one assumes that the arbitrator had forgotten about the significance of the lack of signing off, his oversight is still not an irregularity. A factual issue was once again dressed up as a question of law and cross-dressed as a procedural irregularity. 101 C

950.R. The disclaimers

951.[123] The FSDs contained disclaimers inserted by Telcordia. These were not all worded in identical terms but they stated in essence that the features contained in them represented Telcordia's 'current understanding of the functionality required to support this D solution' and that they did not represent a 'commitment on behalf of Telcordia to implement the functionalities' since 'such commitments are made by formal contracts'. E

952.[124] The arbitrator did not deal with the disclaimers in his award. This led to a finding by the High Court that he had 'apparently ignored the issue' although the 'relevant facts were placed before him'; and this, in turn, meant that he had misconceived the whole nature of the inquiry. The disclaimers, in my judgment, had nothing to do with the interpretation of the Integrated Agreement and by 'ignoring' them the arbitrator could not have erred in his F interpretation or committed a material error of law.

953.[125] The failure to have dealt with a particular factual subissue does not mean that the arbitrator misunderstood the nature of the inquiry. It also does not mean that the arbitrator ignored them. It is equally conceivable that he thought that the issue was not worth G pursuing in the light of some of his other findings, which I repeat: he found that the FSDs were deliverables; that they did not amend the Integrated Agreement; that they prescribed the scope of the software that had to be delivered; that they were mutually developed and agreed; and that they were paid for in full without error. H

954.[126] What then is the value of a unilateral statement by Telcordia about the status of the FSDs, inserted without Telkom's consent (as pointed out by Telkom)? I would have thought that the answer is self-evident: nothing. It follows that this attack has to fail. I

955.S. Testing for (SOC) compliance

956.[127] The Project Plan made provision for the testing of software for

957.2007 (3) SA p313

958.HARMS JA

959.SOC compliance. As the arbitrator accepted, the Project Plan 'suggests' that testing had to take place release by release. A If SOC-testing had to be release by release, according to Telkom and the High Court, Telcordia's argument concerning the FSDs would of necessity have been incorrect. The arbitrator, rightly or wrongly, did not agree.

960.[128] As Telkom accepted in its founding affidavit, the arbitrator held that testing for SOC compliance had to take place B once everything had been delivered and not with each release. The High Court also accepted that the arbitrator 'in effect' had made such a finding. This is an understatement. C

961.[129] There is nothing to justify the conclusion that the arbitrator misconceived the nature of the inquiry. At most the arbitrator may have misconceived the importance of the testing provision in the Project Plan. He did not as the High Court held (contrary to its 'in effect' finding) ignore the provision. He thought that the provision, which the Court held was definitive of the whole issue, only 'suggested' the possibility but, in the context D of the Integrated Agreement as a whole, he must have come to the conclusion that what he called a suggestion could not have overridden the other considerations which he took into account in reaching his conclusion on the interpretation of the Integrated Agreement. E

962.[130] Once again, by virtue of the nature of the inquiry before the High Court, and before us, I do not wish to deal with either the argument by Telcordia about the correctness or that of Telkom about the incorrectness of the arbitrator's conclusion - both are beside the point. F

963.[131] This also applies to the debate surrounding the caveat in the bar chart. Evidence was led to put a perspective on its meaning and Telcordia made much of this in support of its argument about the interpretation of the Integrated Agreement. The arbitrator noted the argument but did not deal with it. In order to bolster its argument that the arbitrator's interpretation of the Integrated Agreement was correct, Telcordia repeated the argument before the High Court. The court did not agree with Telcordia, accepting instead an interpretation which was first mooted by Telkom G in its replying affidavit in the review application. Importantly for present purposes, the court did not hold that the arbitrator had committed any reviewable act in this regard and it could in any event not have done so in view of the fact that Telkom did not attempt to H make out such a case. The meaning of the caveat was thus yet another irrelevant side-show in the review proceedings.

964.T. The London agreement

965.[132] That disposes of the High Court's decision and Telkom's attempt to review the award on the ground of the arbitrator's I interpretation of the Integrated Agreement. I now turn to deal with the other review grounds, the first of which relates to the London agreement.

966.[133] Telkom did not pay the agreed US\$23,3 million for the 06/00 software shipment on due date as required by the Project Plan. Its J

967.2007 (3) SA p314

968.HARMS JA

969.ostensible reason was that the software did not comply with the Project Plan and had a number of critical gaps based on its A understanding of Telcordia's delivery obligations. Eventually, and pursuant to the oral London agreement, Telkom paid 60% of the invoice.

970.[134] Telcordia claimed, as a self-contained claim 'B', payment of the balance of 40% based on the allegation that B the software complied with the FSDs, that Telkom took delivery of the software, and had not paid the full price. In addition, Telcordia claimed amounts that were payable in respect of this software shipment at later pay-points.

971.[135] Telcordia did not rely on the London agreement in its original statement of claim. Telkom, on the other hand, in its C answering pleading, did so. Its defence to the claim for payment was that the 40% balance would have been paid in December 2000 'on condition that rectification by Telcordia of the discrepancies [Telkom's problems with the 06/00 release] was verified by Telkom'.

Rectification of the software, it was alleged, had to take place by means of the 12/00 release, which had to remedy the critical gaps, D and had to be verified by means of a demonstration of the 12/00 release during November 2000. Importantly, Telkom did not allege that the November demonstration was a precondition for its accepting delivery of the 12/00 shipment; and Telkom did not allege (in the pleadings or in the repudiation correspondence) that it was entitled to reject E delivery of the 12/00 software on this ground. Nor did it in the counterclaim allege any breach of the demonstration undertaking.

972.[136] Although the London agreement was not one of the May issues, the wide-ranging evidence covered it to some extent. Towards the conclusion of the argument before the arbitrator Telkom had F second thoughts about the agreement and tentatively argued that the London agreement might not have been covered by the arbitration clause and that in any event it might have been in conflict with Shifren.

973.[137] An affidavit with supporting documents was filed by Telcordia just before the conclusion of argument setting out its G version of the London agreement. The documents gave the arbitrator the impression that Telkom's version about the precondition for payment was implausible. He then told Telkom that if it wished to dispute Telcordia's version it should file affidavits to that effect. In response Telkom then filed the evidence of two Telkom employees, H Messrs Morgan and September. Their statements tended to confirm the allegations contained in Telkom's pleadings. However, they did not state that a predelivery demonstration (or anything else) was a precondition for acceptance of delivery of the 12/00 software. 102 I

974.[138] The next stage in the proceedings was the filing of the s 20

975.2007 (3) SA p315

976.HARMS JA

977.application in which Telkom argued, as foreshadowed, that the High Court should decide whether the London agreement fell outside A the scope of the arbitration agreement. The arbitrator pointed out that the point is probably bad. I agree. It is difficult to see how a party to arbitration can rely on an agreement; fight the case on that basis; ask the arbitrator to hear evidence on the issue; complain that he failed to give enough attention to it; and when the shoe pinches claim that B the agreement falls outside the purview of the arbitration. This is just another instance of Telkom's inconsistency in the conduct of its case. Telkom also raised the question whether, in any event, the London agreement was in breach of the Shifren principle. C

978.[139] In the review application Telkom performed another dizzying pirouette. In the first set of affidavits Telkom attacked the award on the ground that the alleged November-demonstration precondition had not been fulfilled but when the arbitrator stated in his memorandum that he had made no findings with regard to the London agreement, Telkom - in the supplementary founding affidavit - alleged for the first time that the London agreement amounted to a separate and independent compromise D agreement, which was not in conflict with Shifren and which made acceptance of the 12/00 software subject to two suspensive conditions. E

979.[140] Telkom's case on review was that the arbitrator committed a gross irregularity in the proceedings by deciding the issue that Telkom's failure to take delivery of the 12/00 software could constitute a repudiation without hearing the evidence of Morgan and September about the two suspensive conditions, something he undertook to do. The arbitrator's undertaking on which Telkom relied was not F in the terms Telkom suggests. The arbitrator asked for affidavits dealing with the pleaded issue surrounding the London agreement, namely the preconditions to payment of the 40%. If, he said, there was a serious dispute on this issue he would require cross-examination. As he noted in his memorandum, Telkom neither pleaded nor advanced any case to the effect that the London agreement was determinative of G Telcordia's delivery obligations under the Integrated Agreement.

980.[141] The arbitrator kept his promise: he did not decide the issue pleaded although he expressed the prima facie view that Telkom's version was not supported by the H documents. 103 Expressing

prima facie views on common cause documents is not improper and can by no stretch of the imagination be considered to be an irregularity.

981.[142] There is accordingly no basis for the allegation that the arbitrator had failed to afford Telkom a hearing on this matter, which was not before him and was only articulated, without proper supporting evidence,

982.2007 (3) SA p316

983.HARMS JA

984.during the review proceedings. He was entitled to ignore any evidence by Morgan and September that dealt with issues not pleaded (assuming they gave such evidence).

985.U. The s 20 issue

986.[143] This brings me to the last ground of review with which I shall deal. It concerns the events surrounding Telkom's s 20 B application. Section 20 of the Act is in these terms:

987. 'Statement of case for opinion of court or counsel during arbitration proceedings

988. (1) An arbitration tribunal may, on the application of any party to the reference and shall, if the court, on the application of any such C party, so directs, or if the parties to the reference so agree, at any stage before making a final award state any question of law arising in the course of the reference in the form of a special case for the opinion of the court or for the opinion of counsel.

989. (2) An opinion referred to in ss (1) shall be final and not subject to appeal and shall be binding on the arbitration tribunal and on the D parties to the reference.'

990.[144] Telkom asked the arbitrator to state a number of questions of law by means of a special case for the opinion of the court. The arbitrator refused and proceeded to finalise his award. Telkom then launched an application to the High Court, for an order that the arbitrator state a case. Before the application could be heard the E award had already been published by the ICC. Upset, Telkom sought to review the arbitrator on two further grounds. As mentioned earlier, the first was that he committed a gross irregularity and exceeded his powers by refusing to state a case; and secondly, that he prevented Telkom from itself securing the statement of a case. 104 The first ground was abandoned before us. F

991.[145] It will be recalled that the primary question raised in the May issues concerned the interpretation of the Integrated Agreement. Interpretation is usually regarded as a legal question but it is not necessarily so. It may be a mixed question of fact and law, as the present case illustrates. 105 The G remaining May issue raised the applicability of Shifren in relation to the moratorium agreement (the alternative response in Telcordia's second amendment). This issue could only have arisen if the arbitrator had found against Telcordia on the primary question. After prehearings, three weeks of oral evidence (plus forests of paper evidence), argument written and oral, and at the conclusion of the latter on 1 August 2002, Telkom, patently fearing an H unfavourable decision, suggested that the arbitrator should state a case concerning the applicability of Shifren in relation to the moratorium and London agreements. The arbitrator refused because, as he said, these issues were alternative issues and they might never arise, depending on his conclusion on the primary question. He also informed I the parties that he proposed to go ahead with writing the award as quickly as possible.

992.2007 (3) SA p317

993.HARMS JA

994.[146] Two weeks later, on 14 August, Telkom tried another tactic. It now asked the arbitrator to state, in addition to the A Shifren point, the primary question for an opinion by the court and requested him to defer his award if he was not prepared to accede to their request. The arbitrator (after obtaining Telcordia's answer) responded on 27 August by not only raising a number of valid concerns about the request to state a case but by stating that B his award would be available in final draft form shortly after 9 September; that he would then submit the draft to the ICC for

consideration pursuant to its art 27; 106 and that he would inform the ICC of Telkom's request and leave it to the ICC.

995.[147] Without responding to the letter due to an oversight, Telkom issued its s 20 application. The founding affidavit was sworn C on 28 August and the arbitrator informed of the application on 30 August. Keeping his word, the arbitrator submitted his draft award to the ICC on 9 September and informed the ICC of Telkom's request. Eventually, on 27 September the award was signed and on the same date the arbitrator submitted a report to court setting out D his reasons for having refused Telkom's request for a stated case. Apart from some general policy considerations he referred to the stage of the proceedings when the request was made; the incongruity in Telkom's stance; the evidence led; the wasted costs; the lateness of E the requests; the close analogy between this instance and the Midkon case; 107 the importance of evidence for construing the Integrated Agreement; the fact that the s 20 option was not exercised within a reasonable time; and Telkom's changes of heart about the validity of the London agreement.

996.[148] In his report the arbitrator added that he did not accede to Telkom's request since it was a matter for the court to decide, implying that he preferred to leave the question of referral to the F court. This implication, on which Telkom's submission about irrationality was based, is not understood because once the arbitrator had issued his award the court was precluded from ordering him to state a case for its opinion. G

997.[149] The first question was whether the arbitrator in fact prevented Telkom from obtaining a court order. If he did, it would have amounted to an irregularity. On the facts as set out he did not. Telkom knew at the end of August that he was not going to delay the award. He gave them a timetable. According to existing South African law, as expressed in Midkon, 108 he had no H duty to delay his award in order to enable Telkom to approach the court. Nobody prevented Telkom from asking in the

998.2007 (3) SA p318

999.HARMS JA

1000. notice of motion or thereafter for an interim order to delay the issuing of the award, A which was the duty of the ICC and not of the arbitrator. This Telkom did not do.

1001. [150] There are further reasons why the award cannot be reviewed on the basis of 'irregularity' or irrationality. These require a discussion of the scope of s 20 and depend on whether Telkom had a B 'right' under s 20 to approach the court, which right the arbitrator frustrated.

1002. [151] The first matter I wish to address is the nature of the arbitrator's discretion. Eloff J, in Kildrummy, 109 sought to curtail the general and unrestricted discretion the section gives to the arbitrator. There is no reason, having regard to the wording of the C section, for such an approach. Rules circumscribing the way any discretion has to be exercised are generally unacceptable. Eloff J sought to justify his approach with reference to a dictum by Denning MR in Halfdan Grieg. 110

1003. 'When one party asks an arbitrator or umpire to state his award in the form of a special case, it is a matter for his discretion. If D the issues are on matters of fact and not of law, he should refuse to state a case. If they raise a point of law, it depends on what the point of law is. He should agree to state a case whenever the facts, as proved or admitted before him, give rise to a point of law which fulfils these requisites. The point of law should be real and substantial and such as to be open to serious argument and appropriate for decision by a court of law . . . as distinct from a point which E is dependent on the special expertise of the arbitrator or umpire The point of law should be clear cut and capable of being accurately stated as a point of law - as distinct from the dressing up of a matter of fact as if it were a point of law. The point of law should be of such importance that the resolution of it is necessary for the proper determination of the case - as distinct from a side issue of little importance. F

1004. If those three requisites are satisfied, the arbitrator or umpire should state a case.'

1005. [152] The Master of the Rolls, it will be recalled from my discussion of Anisminic, 111 was a proponent of the view that all matters of law should fall within the sole domain of courts. The other

Judges who sat with Denning MR did not concur in this regard. Scarman LJ made it quite clear that the discretion is 'unqualified' (at 1083) and Megaw LJ was of the view that the exercise was not a matter of general principle but depended on the circumstances of the case (at 1080). Eloff J justified his adoption of the Denning test on the basis that our Legislature would have intended s 20 to have the meaning attached to a similar section by English courts. But as Preiss J mentioned in Midkon, 112 there is a vital distinction between our statute and the (now repealed) English statute.

1006. 2007 (3) SA p319

1007. HARMS JA

1008. There is in any event no justification for presuming that our Legislature (past or present) intended to give the meaning to words A that foreign courts may have done, especially where the Denning test came after the passing of the Act. 113 Ultimately Eloff J relied on Theron's case, 114 which I have discussed earlier and all that I wish to say is that the passage relied on was put in its correct perspective by this Court and that it does not support B him. 115 In other words, I hold that there is no obligation on an arbitrator to state a case if the requirements set out by Denning MR are present. They are important factors to consider but they are not definitive. By way of a metaphorical footnote: The Denning approach gave rise to legislative action and what he had done to arbitration law was soon undone by the adoption of the Arbitration Act of 1979. 116 C

1009. [153] If an arbitrator decides not to state a case, the aggrieved party may under s 20 approach the High Court. The court must then determine whether or not the arbitrator had erred in the exercise of his discretion as happened in both Kildrummy and Midkon. If there is no fault to be found with the D arbitrator's exercise of his discretion, the court cannot order him to state a case. As mentioned, Telkom accepts that there was nothing wrong with the arbitrator's reasoning and that his refusal to state a case was justifiable. Once that is the case, the s 20 application was doomed from the outset especially since Telkom did not in that application seek to impugn the arbitrator's decision. E

1010. [154] Moreover, s 20 can be used only if the legal question arises 'in the course of' the arbitration. It is not intended to apply where the parties agree to put a particular question of law to the arbitrator. Any other interpretation of the section would defeat its purpose and 'it would be futile ever to submit a question of law to an arbitrator'. 117 Its purpose, at the F very least, is not to enable parties, who have agreed to refer a legal issue to an arbitrator to renege on their deal. They have in such a case chosen their decision-maker for the particular issue and they are bound by their choice. In this case, the primary question, as well as the validity of the moratorium agreement, was specifically referred to the arbitrator for his decision. To allow a party in these circumstances G to utilise s 20 would frustrate the arbitration agreement. It is not against public policy to agree to the finality of an extra-curial decision on a legal issue especially where the review rights contained in s 33 remain available, enabling the courts to retain control over the fairness of the proceedings. 118 H

1011. [155] Finally, a party does not have the right to have a hypothetical question stated because it does not in truth 'arise' in the arbitration

1012. 2007 (3) SA p320

1013. HARMS JA

1014. proceedings. The arbitrator made it quite clear that the Shifren issue was at that stage hypothetical because A it could only 'arise' once he had come to a conclusion on the primary interpretation question in favour of Telkom. In the event he concluded otherwise and the issue never arose.

1015. [156] I therefore conclude that since Telkom had no right to approach the High Court in the circumstances of the case the B arbitrator did not infringe any of its rights when he, in the face of the s 20 application, proceeded to do what he said he would do.

1016. V. Conclusion

1017. [157] Cloete JA has dealt with the repudiation issue and I agree with his judgment. This means that the appeal has to succeed with costs. Telcordia is in the circumstances of the case entitled to the C costs of three counsel during all stages of the proceedings, including the petition for leave to appeal, which Telkom opposed.
1018. W. The order D
1019. [158] The following order is made:
1020. (a) The appeal is upheld with costs, including those consequent on the employment of three counsel, which shall also be allowed in relation to the different stages of the application for leave to appeal. E
1021. (b) The order of the Court a quo is set aside and in its stead the following order issues:
1022. 'The application is dismissed with costs, including the costs of three counsel.'
1023. [zJDz]Judgment
1024. Cloete JA: F
1025. [159] The issues which remain for decision in this appeal are whether, as argued by Telkom, the arbitrator, in finding that Telkom had repudiated the Integrated Agreement so entitling Telcordia to cancel it, exceeded his authority or decided a question without evidence, thereby committing a gross irregularity. If this were to be the case, the dismissal of Telkom's counterclaim would also fall to be set aside. G
1026. [160] In the section of his award entitled 'Telcordia's delivery obligations' the arbitrator summarised Telcordia's argument as to its delivery obligations under the Integrated Agreement, and followed with a summary of Telkom's argument. In each instance, he also dealt with the parties' respective contentions on repudiation. H Reduced to the barest essentials Telcordia's argument was that its contractual obligations were to be found in the FSDs, whereas Telkom's argument was that Telcordia's contractual obligations were to be found in the SOC's. The arbitrator concluded that Telcordia's case was to I be preferred and gave detailed reasons for this conclusion. In the next section of his award, entitled 'Termination of the Integrated Agreement: Telkom's Counterclaim', the arbitrator commenced by saying:
1027. '102. In their submissions to me both parties proceeded, quite correctly in my view, on the footing that the answer given to the question considered in the previous section of this Award would determine which party's termination of J
1028. 2007 (3) SA p321
1029. CLOETE JA
1030. the Integrated Agreement was justified in law. Since, as I have found, Telcordia's tender of the A December 2000 software release was in accordance with its contractual obligations, it must follow that Telkom's subsequent refusal to accept delivery of the software, or to go on with the contract, was a repudiation of the Integrated Agreement which Telcordia was entitled to accept as discharging the contract, by its letter dated 12 January 2001. It is clear law that the test for repudiation is an objective one, so that it makes no difference that Telkom may have considered B that it was perfectly entitled to act as it did.' 119
1031. The arbitrator then said:
1032. '103. It follows from the above that Telkom's counterclaim, which depends for its validity on the proposition that the IA [Integrated Agreement] was properly terminated by it in consequence C of Telcordia's breach, must fail.'
1033. Several sections of the award follow, none of which are relevant for present purposes, before the concluding section entitled 'Formal Award'. The formal award reads in part:

1034. '1. That the Answer to Question 1.1 in the List of Issues 120 to be determined by this Award is D that the contractual baseline for determining the specific features and functionality of the software to be delivered by Telcordia to Telkom in each of the various software releases provided for in the IA is the Feature Specification Descriptions (FSDs) applicable to such release. Question 1.2 does not require a separate answer.
1035. 2. That the Answer to Question 2.1 in the said List of Issues E is that on the true construction of the IA and in the events which happened Telcordia was required to deliver software in June and December 2000 which complied with the FSDs in respect of each of those software releases. Question 2.2 does not require a separate answer, and Question 3, does not arise.
1036. ... F
1037. 4. That by refusing to take delivery of software which complied, in all material respects, with the FSDs applicable to the December 2000 software release Telkom repudiated the IA.
1038. 5. That Telkom's counterclaims are dismissed.'
1039. (Italics added.) G
1040. It is necessary to emphasise for reasons which will become apparent that at no point prior to this had the arbitrator discussed the question whether the December 2000 ('12/00') software release complied with the FSDs applicable to it. All that he had said, in passing, was the following:
1041. 'It is to be noted that Telkom was not contending, and has not H subsequently contended, that what was delivered by the December 2000 release was not in compliance with the FSDs ...'.
1042. [161] Telkom submitted that the arbitrator exceeded his powers in making any finding in regard to repudiation, as this was not covered by the May issues. Indeed, Telkom went so far as to say that the arbitrator's
1043. 2007 (3) SA p322
1044. CLOETE JA
1045. finding was a 'dramatic development' as contemplated in those cases in South Africa 121 and in A England 122 which hold that it is a gross irregularity for an arbitrator to decide a dispute on a point that has not been put to the parties and on which they have not been heard. It is true that the May issues as originally formulated involved questions of interpretation of the Integrated Agreement and not performance of it. But the deponent to the replying affidavit delivered on behalf of B Telkom in these proceedings said unequivocally:
1046. 'I admit that, during the course of the proceedings, the scope and focus of the issues widened and that, at the end of the May hearing, Telkom said that the Arbitrator should decide as many of the issues between the parties as could fairly be determined in the light of oral and documentary evidence presented during May.' C
1047. Indeed, by the end of the hearing in 2002, each party had requested the arbitrator to deal with its right to cancel on the basis of the evidence that had been placed before him. Telkom even sought judgment in respect of its counterclaim. The arbitrator's statement in para 102 of his award (quoted in the previous paragraph of this judgment) that D the parties proceeded on the footing that his decision on Telcordia's delivery obligations would determine which party's termination of the Integrated Agreement was justified in law, is amply justified by the record. Far from being a 'dramatic event', the arbitrator did no more than what the parties had requested him to do. E
1048. [162] Telkom submitted that the arbitrator had nevertheless exceeded his authority, in that the question whether it had repudiated the Integrated Agreement could not fairly have been determined by the arbitrator on the evidence before him, because it might have been able to justify its conduct - which would not then have F amounted to a repudiation - by showing that the 12/00 software release did not comply with the FSDs. The argument amounts to this: the arbitrator held

that it had repudiated the Integrated Agreement by insisting that Telcordia perform in terms of its fallacious interpretation of the contract. But if the software tendered by Telcordia did not comply with the FSDs, that would have entitled G it to refuse to receive the software. Therefore if it can establish such non-compliance, its rejection of the software was justified. And if its rejection was justified, it cannot amount to repudiation. The finding by the arbitrator that it had repudiated the Integrated Agreement was therefore premature and he exceeded his powers in making the finding at H that stage of the arbitration. It must be borne in mind, as pointed out by

1049. 2007 (3) SA p323

1050. CLOETE JA

1051. Harms JA in para [89] of his judgment that it was within the power of the arbitrator to decide the scope of his mandate. That apart, A there are at least three reasons why Telkom's contention must fail - two of fact, and one of law.

1052. [163] First, as the arbitrator observed, it was never Telkom's case, either on the pleadings or during the 2002 hearing, that the B 12/00 software release did not comply with the FSDs. Telkom sought in this Court to argue the contrary. Its argument is unsustainable. So far as the pleadings are concerned, Telcordia alleged in its statement of claim that Telkom had repudiated the Integrated Agreement inter alia 'by refusing to take delivery of the December 2000 release notwithstanding that Telcordia tendered delivery of such release in C accordance with the Project Plan and that Telkom is obliged to take delivery thereof'. These allegations were simply 'disputed' by Telkom in its plea; but that bald denial was wholly inadequate to support a case that Telkom was entitled to reject the software tendered because it did not comply with the FSDs. A defendant who wishes D to raise the exceptio non adimpleti contractus on the basis of an incomplete tender must particularise in the plea in what respects performance was defective and will ordinarily have to give evidence on this aspect first (although the overall onus to disprove the existence of the defects will remain on the E plaintiff). 123 The reason is obvious: a plaintiff cannot be expected to prove a negative where the complaints of the defendant are unknown. Furthermore, when Telcordia requested further particulars from Telkom as to the respects in which Telkom alleged that the software tendered in December 2000 failed to comply with Telcordia's delivery obligations, Telkom replied that Telcordia should have regard to the SOC's and the fact that the December release was required to contain all features and functionality necessary to F achieve Non-Voice Flow-Thru. It was not even suggested that there was any discrepancy between the software tendered and the FSDs. In other words, Telkom's pleaded case involved a comparison of the FSDs with the SOC's and not a comparison between the software and the requirements of the FSDs. G

1053. [164] So far as the hearing is concerned, Telkom's counsel made it clear that Telkom did not follow the acceptance-test procedure in respect of the software tendered, which is the procedure for which the Integrated Agreement provides to identify and remedy shortcomings in the software, because it was known that the software contained 'gaps' and would accordingly not comply with Telkom's interpretation of Telcordia's obligations. Telkom's counsel at no time suggested that H Telkom was entitled to reject the 12/00 software release because it did not comply with the FSDs.

1054. [165] The second reason why Telkom's argument that it could have justified its conduct by showing that the 12/00 software release I did not comply with the FSDs must fail, is this. Telcordia was entitled to remedy any shortcomings during the subsequent testing process. The testing

1055. 2007 (3) SA p324

1056. CLOETE JA

1057. process could take place only over a period of time and only within Telkom's own systems and Telcordia was entitled and obliged A through updates to rectify any problems. It was simply not open to Telkom to reject the software release on the basis that it did not comply with the FSDs, because the contract contemplated that this could well be the case and it allowed Telcordia to cure any defects in the software within the time allowed for performance. The corollary to B Telcordia's right is that Telkom was not entitled to refuse to accept the December software when it was

tendered even if it did not fully comply with the FSDs - it was obliged to receive it and proceed with the testing process.

1058. [166] In any event Telkom's argument is unsound in law. Telkom C prayed in aid the *falsa causa non nocet* principle laid down in cases such as *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) and *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) ([2001] 1 All SA 581). Those cases hold that:

1059. 'Where a party seeks to terminate an agreement and relies upon a wrong reason to do so he is not bound thereby, but is entitled to D take advantage of the existence of a justifiable reason for termination, notwithstanding the wrong reason he may have given.' 124

1060. But this principle has no application in a case such as the present, where it is the other party who has cancelled the contract. In such a case, the party who repudiated cannot put the clock back and E undo the valid cancellation by relying on a ground that he legitimately could have, but did not, advance, in substitution for the ground that he did advance and which resulted in the cancellation of the contract. Once cancelled, the contract is irrevocably at an end. The rule exists for the protection of an innocent party and does not enure to the benefit of a party guilty of a breach of contract: it does not F entitle the latter to claim that, since it could have done something similar without breaching the contract, its breach had no adverse legal consequences.

1061. [167] Finally, Telkom submitted that the italicised part of para 4 of the arbitrator's award (quoted in para [160] above) G constituted a finding that the 12/00 software release in fact complied with the FSDs applicable to it; and that as there had been no evidence on this point, the arbitrator's finding that it had repudiated the Integrated Agreement fell to be set aside on review. Paragraph 4 of the award must, however, be read in context. The fundamental issue between the parties was, as I have said, whether Telcordia's contractual H obligations were to be determined with reference to the FSDs (Telcordia's case) or the SOC's (Telkom's case). The arbitrator, in his detailed reasons which preceded the formal award, decided this issue in favour of Telcordia and embodied that decision in paras 1 and 2 of his formal award (also quoted in para [160] above). Once he I had made this decision, and since it was not pleaded or argued by Telkom that the 12/00 software release did not in fact comply with the FSDs (as the arbitrator expressly noted), it followed that Telkom's rejection of the 12/00 software release was a repudiation of

1062. 2007 (3) SA p325

1063. CLOETE JA

1064. the Integrated Agreement. That was the finding embodied in para 4 of the A arbitrator's formal award. In that paragraph the arbitrator did not intend additionally to decide that the December software release as a matter of fact accorded with the FSDs nor must that paragraph be interpreted as embodying such a finding; the arbitrator clearly intended merely to articulate the conclusion already reached by him, namely, that Telkom had repudiated the Integrated Agreement by B rejecting software developed in accordance with the FSDs (as opposed to the SOC's). In the absence of a challenge by Telkom that the software did not in fact comply with the FSDs, it is not surprising that the arbitrator expressed himself as he did. If Telkom subsequently seeks to make out a case, in relation to the remaining issues relating to quantum not decided by the arbitrator's interim award, C that the 12/00 software release did not comply in fact with the FSDs applicable to it, it is entitled to do so - but its right to do so does not affect in any way the arbitrator's conclusion that it repudiated the Integrated Agreement.

1065. [168] I therefore conclude that Telkom's attack on the arbitrator's finding that it repudiated the Integrated Agreement, is D without merit. It follows that the arbitrator's dismissal of Telkom's counterclaim must stand. On the other issues raised in the appeal I respectfully agree with the reasoning and conclusions reached by Harms JA, and concur in the order made. E

1066. Conradie JA, Lewis JA and Ponnann JA concurred.

1067. Appellant's Attorneys: Lennard Cowzan Attorneys in association with LeBoeuf Lamb Greene & MacRae, Sandton; Lovius Block, Bloemfontein. Respondent's attorneys: Werksmans Inc, Sandton; Israel & Sackstein Inc, Bloemfontein. F
- 1068.
- 1069.
1070. 1 See the article series by R H Christie beginning with 'Arbitration: party autonomy or curial intervention: the historical background' (1994) 111 SALJ 143; CBI NZ Ltd v Badger Chiyoda [1989] 2 NZR 669..
1071. 2 Eg Dutch Reformed Church v Town Council of Cape Town (1898) 15 SC 14 at 21; Dickenson & Brown v Fisher's Executors 1915 AD 166 at 174; Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd 1994 (1) SA 162 (A). The Roman-Dutch approach mentioned in Theron en Andere v Ring van Wellington van die NG Sendingkerk in SA en Andere 1976 (2) SA 1 (A) is of historical interest only..
1072. 3 United Mexican States v Feldman Karpa 2005 CanLII 249 (ON CA) in para [37]. For the current English approach: Lesotho Highlands Development Authority v Impregilo SpA [2005] UKHL 43. The New Zealand approach is set out in Trustees of Rotoaira Trust v Attorney-General [1998] 3 NZLR 89 (HC) at 101 - 102..
1073. 4 Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc 473 50 US 614 (1985) per Blackmun J at 629..
1074. 5 Re The International Commercial Arbitration Act, SBC (Quintette Coal Ltd v Nippon Steel Corp) 1986 C 14 1990 CanLII 304 (BC SC) quoted in United Mexican States (supra) in para 36. A special-deference approach does not arise on the facts of this case. It should be noted that South Africa has not adopted the 1985 UNCITRAL Model Law, which strictly limits the involvement of courts in the arbitral process. .
1075. 6 Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc (supra)..
1076. 7 SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A)..
1077. 8 2002 (4) SA 1 (SCA) (2002 (12) BCLR 1229; [2002] 3 All SA 363)..
1078. 9 Emphasis in the original..
1079. 10 1954 (3) SA 932 (O)..
1080. 11 The arbitrator found that no such variations had taken place..
1081. 12
1082. Contractual Delivery Date
1083. The Contractual Delivery Dates specified in the Project Plan are of the utmost importance. Non-compliance with said dates will constitute a material breach of this Agreement. Partial delivery will not constitute Delivery.
1084. The Licenced Software will be delivered in accordance with this Agreement and the Project Plan set forth as Exhibit F to the Integrated Agreement. The true intention and meaning of this Agreement is that the Supplier will, in all respects, supply, deliver, install, commission, render and complete the Licenced Software in a workman-like manner to the satisfaction of Telkom as mutually agreed in the Proposal and the acceptance criteria mutually agreed upon by the Parties.'.
1085. 13 It is not necessary to quote paras 4 and 5..
1086. 14 Uniform Rule 53..
1087. 15 The allegation relating to bias and partiality was also linked to the common law but nothing turns on this..

1088. 16 A phrase used by Wade & Forsyth Administrative Law 8 ed at 270..
1089. 17 Du Toit v Minister of Transport 2006 (1) SA 297 (CC) (2005 (11) BCLR 1053) in para [29]..
1090. 18 Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another 2002 (4) SA 661 (SCA)..
1091. 19 Cf Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) (2000 (3) BCLR 241) in para [45]: 'Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their interrelationship and the boundaries between them.' .
1092. 20 The position with statutory arbitrations is different: Rustenburg Platinum Mines Ltd v CCMA [2006] SCA 115 (RSA). [Now reported as Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration 2007 (1) SA 576 (SCA) - Eds.] .
1093. 21 Suovaniemi v Finland ECHR case No 31737/96 (23 February 1999). .
1094. 22 2006 (4) SA 1 (SCA) ([2006] 2 All SA 469). See also Marlin v Durban Turf Club 1942 AD 112 at 130 in fine..
1095. 23 2002 (4) SA 1 (SCA) (2002 (12) BCLR 1229; [2002] 3 All SA 363) in paras [94] and [95]..
1096. 24 First Options of Chicago Inc v Kaplan 115 SCt 1920 (514 US 938) per Breyer J: ' . . . a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances.' .
1097. 25 This is not possible under the ICC rules although it has always been possible under our legal system: Johannes Voet 4.8.9; The Rhodesian Railways Ltd v Mackintosh 1932 AD 359 at 373; Marlin v Durban Turf Club (supra)..
1098. 26 CBI NZ Ltd v Badger Chiyoda [1989] 2 NZR 669..
1099. 27 They may even reduce the level of procedural fairness by, eg agreeing that the arbitrator may decide the matter without hearing them..
1100. 28 Without a special provision there is in any event no appeal possible because appeals are only possible from lower courts to higher courts. .
1101. 29 Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd 1994 (1) SA 162 (A) at 169F - G; CBI NZ Ltd v Badger Chiyoda [1989] 2 NZR 669. This is also possible in ordinary litigation and is specifically provided for in the Magistrates' Courts Act 32 of 1944, s 82..
1102. 30 Lesotho Highlands Development Authority v Impregilo SpA [2005] UKHL 43 in para [24]. Emphasis added. Cf Bull HN Information Systems Inc v Hutson 229 F 3d (1st Cir 2000) 321 at 330: 'To determine whether an arbitrator has exceeded his authority . . . courts "do not sit to hear claims of factual or legal error . . ." . . . and "(e)ven where such error is painfully clear, courts are not authorised to reconsider the merits of arbitration awards" . . .'..
1103. 31 Supreme Court Act 59 of 1959, s 24(1):
1104. 'The grounds upon which the proceedings of any inferior court may be brought under review before a High Court, are -
1105. (a) absence of jurisdiction on the part of the court;

1106. (b) interest in the cause, bias, malice or the commission of an offence referred to in Part 1 to 4, or s 17, 20 or 21 (in so far as it relates to the aforementioned offences) of ch 2 of the Prevention and Combating of Corrupt Activities Act, 2004, on the part of the presiding judicial officer;
1107. (c) gross irregularity in the proceedings; and
1108. (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.'
1109. 32 One problem, which does not arise in this case, concerns the boundary between 'misconduct' and 'gross irregularity'. These two concepts may overlap, especially if regard is had to the fact that historically 'legal misconduct' was nothing other than a procedural lapse: *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 (QBD) per Bingham J..
1110. 33 *Dutch Reformed Church v Town Council of Cape Town* (1898) 15 SC 14 at 21; *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 174..
1111. 34 *Eg Arbitration Act 29 of 1898 (C), s 17..*
1112. 35 Above..
1113. 36 *Cf Crystal Springs Aerated Water Co v Kan* 1902 TH 21 at 27..
1114. 37 At 167 - 169. *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 223 (HL) ([1969] 1 All ER) 208..
1115. 38 At 177 - 178. English law at that stage provided that if a specific question of law was submitted to an arbitrator, as happened in this instance when the interpretation of the Integrated Agreement was submitted to the arbitrator for decision, an erroneous decision could not have been reviewed. 'Otherwise it would be futile ever to submit a question of law to an arbitrator': In *re King and Duveen* [1913] 2 KB 32 at 36. But if a question of law had not specifically been referred but was material to the decision, and he made a mistake, apparent on the face of the award, the award could be set aside: *Attorney-General for Manitoba v Kelly* [1922] 1 AC 268 (PC) at 283. To decide whether there was an error 'apparent on the face of the award' the court could only have regard to the terms of the award or some paper accompanying and forming part of the award. Also *FR Absalom Ltd v Great Western (London) Garden Village Society Ltd* [1933] AC 592 (HL). As to the artificiality surrounding the meaning of 'forming part' see *Giacomo Costa Fu Andrea v British Italian Trading Co Ltd* [1963] 1 QB 201 (CA) ([1962] 2 All ER 53). .
1116. 39 *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A); *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 (4) SA 661 (SCA)..
1117. 40 Above..
1118. 41 *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43 in para [25]..
1119. 42 *South African Jewish Board of Deputies v Sutherland NO and Others* 2004 (4) SA 368 (W) in para [27]..
1120. 43 Quoted by Malan J..
1121. 44 *Re Racal Communications Ltd* [1981] AC 374 (HL) ([1980] 2 All ER 634). Also in *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1980] 3 WLR 318 (HL) ([1980] 2 All ER 689) at 692f - j. .
1122. 45 *Page v Hull University Visitor* [1993] AC 682 (HL) ([1993] 1 All ER 97)..
1123. 46 Per Lord Browne-Wilkinson at 108j..
1124. 47 *FR Absalom Ltd v Great Western (London) Garden Village Society Ltd* [1933] AC 592 (HL)..

1125. 48 1992 (4) SA 69 (A)..
1126. 49 Eg at 83G - H, 85I - J, 87A, 89B - C. As Botha JA mentioned, the statutory grounds are narrower than the common-law grounds: *Paper, Printing, Wood and Allied Workers' Union v Pienaar NO and Others* 1993 (4) SA 621 (A) at 639E - F..
1127. 50 At 93A..
1128. 51 *Theron v Ring van Wellington van die NG Sendingkerk* in SA 1976 (2) SA 1 (A) at 21E - F. What Jansen JA had to say about arbitrations was put in perspective in *Hyperchemicals International (Pty) Ltd and Another v Maybaker Agrichem (Pty) Ltd and Another* 1992 (1) SA 89 (W) at 99 - 100. See also *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 (4) SA 661 (SCA) in paras [19] - [21]..
1129. 52 A much wider statement by Van Dijkhorst J in *Stocks Civil Engineering (Pty) Ltd v Rip NO* (2002) 23 ILJ 358 (LAC) ([2002] BLLR 189) para [38] is contrary to all authority. Obviously, the supposition underlying any arbitration agreement is that the arbitrator has to apply the law of the land; it does not follow that if he errs his award can be set aside. .
1130. 53 *Lamprecht and Another v McNeillie* 1994 (3) SA 665 (A) at 668. Also *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329 (CA) ([1952] 1 All ER 1175) at 1180D - 1181..
1131. 54 This does not apply to the repudiation issue but that is a separate matter..
1132. 55 *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 551..
1133. 56 *Ellis v Morgan; Ellis v Dessai* 1909 TS 576 at 581..
1134. 57 *Mabaso and Others v Native Commissioner, Ladysmith, and Another* 1958 (1) SA 130 (N) provides another example. For common-law review examples see *Local Road Transportation Board and Another v Durban City Council and Another* 1965 (1) SA 586 (A) esp at 598A - D..
1135. 58 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 223 (HL) ([1969] 1 All ER 208) at 234A - B..
1136. 59 At 560 - 561, emphasis added..
1137. 60 An expression used in *Anisminic Ltd v Foreign Compensation Commission* (n58) at 230C (All ER)..
1138. 61 *Primich v Additional Magistrate, Johannesburg, and Another* 1967 (3) SA 661 (T)..
1139. 62 *Page v Hull University Visitor* [1993] AC 682 (HL) ([1993] 1 All ER 97) at 101a (All ER)..
1140. 63 1952 (2) SA 546 (C)..
1141. 64 *Bester v Easigas (Pty) Ltd and Another* 1993 (1) SA 30 (C) at 42G - 43D..
1142. 65 *Doyle v Shenker & Co Ltd* 1915 AD 233..
1143. 66 *Administrator, South West Africa v Jooste Lithium Myne (Eiendoms) Bpk* 1955 (1) SA 557 (A)..
1144. 67 At 564G..
1145. 68 At 569B - G, emphasis added..
1146. 69 *Administrator, South West Africa v Jooste Lithium Myne (Eiendoms) Bpk* 1955 (1) SA 557 (A)..
1147. 70 *Armah v Government of Ghana* ([1968] AC 192 (PC); ([1966] 3 All ER 177 at 187 (All ER) quoted in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 223 (HL) ([1969] 1 All ER 208) at 223D - F (All ER)..
1148. 71 *Doyle v Shenker & Co Ltd* 1915 AD 233..

1149. 72 At 236 - 237..
1150. 73 At 238..
1151. 74 But not under the Arbitration Act..
1152. 75 Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd 1994 (1) SA 162 (A) where the English authorities are also mentioned. For the USA: First Options of Chicago Inc v Kaplan 115 SCt 1920 (514 US 938) at 943 per Breyer J..
1153. 76 The award is replete with references to this..
1154. 77 This is not the occasion to consider whether there is any discernible difference between background facts and surrounding circumstances..
1155. 78 R H Christie The Law of Contract in South Africa 5 ed at 218. The arbitrator relied on the fourth edition where the same statement appears..
1156. 79 Shill v Milner 1937 AD 101 at 110 - 111..
1157. 80 Briscoe v Deans 1989 (1) SA 100 (W) at 105B..
1158. 81 His findings relating to the repudiation issue will be dealt with separately..
1159. 82 The 'additional' reasons are a repetition of the main reasons..
1160. 83 Cf Dawahare v Spencer 210 F3d 666 (6th Cir 2000) at 670..
1161. 84 1915 AD 233..
1162. 85 The same happened in Theron v Ring van Wellington van die NG Sendingkerk in SA 1976 (2) SA 1 (A), concerning the constitution of a church..
1163. 86 The one sentence at the dying moments of the argument before the arbitrator on which the High Court relied did not say otherwise..
1164. 87 This was the position as late as 27 August 2000..
1165. 88 The best evidence of Telkom's understanding of the issues especially that Shifren does not arise in relation to the determination of the contractual baseline is Telkom's 'List of the Issues to be Decided' of 1 August 2002, the final day of the argument before the arbitrator..
1166. 89 Cf Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A) at 614E - G..
1167. 90 Emphasis added..
1168. 91 There may be some confusion in this regard. On the arbitrator's finding there had to be some or other non-Shifren agreement on the content of the FSDs and the content of the 12/00 FSDs may in that sense have been derived from the moratorium agreement. .
1169. 92 This disposes of the argument that reliance on the FSDs was a strategy which Telcordia dreamt up later..
1170. 93 Cf National Board (Pretoria) (Pty) Ltd and Another v Estate Swanepoel 1975 (3) SA 16 (A) at 26..
1171. 94 Cf Rand Rietfontein Estates Ltd v Cohn 1937 AD 317 at 326..
1172. 95 D T Zeffertt, A P Paizes, A St Q Skeen The South African Law of Evidence (2003) at 322..
1173. 96 Johnston v Leal 1980 (3) SA 927 (A) at 943B - D..
1174. 97 See also the provision in exhibit F of the Integrated Agreement..
1175. 98 The pleaded defence of payment under protest was according to the arbitrator not pursued..

- 99 See para [13] of this judgment..
- 100 Doyle v Shenker & Co Ltd 1915 AD 233 at 238..
- 101 This is apparent from the way the founding affidavit was formulated..
- 102 The later letter of 9 January 2001 on which Telkom relies also does not support the existence of a precondition. In fact, a request at that late stage of 'some means/evidence' of compliance before payment (not delivery) says the opposite. Record 7/554..
- 103 His statement that Morgan did not refute allegations made in a letter by Telcordia to Morgan was clearly a reference to the fact that Morgan did not respond at the time. This follows from the fact that he was at this stage only having regard to documents and not to affidavits. .
1176. 104 Relying on Czarnikow v Roth, Schmidt and Co [1922] 2 KB 478 (CA)..
1177. 105 Cf Dorman Long Swan Hunter (Pty) Ltd v Karibib Visserye Ltd 1984 (2) SA 462 (C) at 474E - F..
1178. 106 'Before signing any Award, the Arbitral Tribunal shall submit it in draft form to the (International Court of Arbitration). The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.'
1179. 107 Government of the Republic of South Africa v Midkon (Pty) Ltd and Another 1984 (3) SA 552 (T)..
1180. 108 At 562E - G, 563E - G..
1181. 109 Administrator, Transvaal v Kildrummy Holdings (Pty) Ltd and Another 1978 (2) SA 124 (T)..
1182. 110 Halfdan Grieg & Co A/S v Sterling Coal and Navigation Corporation and AC Neleman's Handel- en Transportonderneming (The Lysland [1973] 1 Lloyd's Rep 296 (CA) ([1973] 2 All ER 1073) at 1077c - g (All ER)..
1183. 111 Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 223 (HL) ([1969] 1 All ER 208). .
1184. 112 Government of the Republic of South Africa v Midkon (Pty) Ltd and Another 1984 (3) SA 552 (T) at 562G - I..
1185. 113 L C Steyn Uitleg van Wette 5 ed at 132..
1186. 114 Theron v Ring van Wellington van die NG Sendingkerk in SA 1976 (2) SA 1 (A)..
1187. 115 Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd 2002 (4) SA 661 (SCA) in paras [19] - [21]; Hyperchemicals International (Pty) Ltd v Maybaker Agrichem (Pty) Ltd 1992 (1) SA 89 (W) at 99 - 100..
1188. 116 Michael Kerr 'The Arbitration Act 1979' (1980) 43 MLR 45. .
1189. 117 In re King and Duveen [1913] 2 KB 32 at 36 in a different context..
1190. 118 Cf Pioneer Shipping Ltd v BTP Tioxide Ltd [1982] AC 724 at 740..
1191. 119 As authority for this latter proposition, the arbitrator referred to two decisions of this Court: Metalmil (Pty) Ltd v AECI Explosives and Chemicals Ltd 1994 (3) SA 673 (A); and Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd 2001 (2) SA 284 (SCA)..
1192. 120 The List of Issues, also referred to as the May issues, is set out in part H of the judgment of Harms JA..

1193. 121 Kannenberg v Gird 1966 (4) SA 173 (C) at 186G - 187E; Lukral Investments (Pty) Ltd v Rent Control Board, Pretoria, and Others 1969 (1) SA 496 (T) at 509C and 510F - 511A; Theron v Ring van Wellington, NG Sendingkerk in SA 1976 (2) SA 1 (A) at 29C - F; Steeledale Cladding (Pty) Ltd v Parsons NO and Another 2001 (2) SA 663 (D) at 672F - 673I..
1194. 122 Societe Franco-Tunisienne D'Armement-Tunis v The Government of Ceylon (The 'Massalia') [1959] 2 Lloyd's Rep 1 (CA) at 13 and 17 - 18; Montrose Canned Foods Ltd v Eric Wells (Merchants) Ltd [1965] 1 Lloyd's Rep 597 (QBD) at 601 - 2; Fox v Wellfair Ltd [1981] 2 Lloyd's Rep 514 (CA) at 517, 520, 522 and 528 - 530; Interbulk Ltd v Aiden Shipping Co Ltd (The Vimeira) [1984] 2 Lloyd's Rep 66 (CA) at 74 - 76.
1195. 123 H A Millard & Son (Pty) Ltd v Enzenhofer 1968 (1) SA 330 (T) at 332G - H.
1196. 124 Putco at 832C - D.

HOSMED MEDICAL AID SCHEME V THEBE YA BOPHELO HEALTHCARE MARKETING AND CONSULTING (PTY) LIMITED & OTHERS

2008(2) SA 608 (SCA)



**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

Reportable

CASE NO:015/07

In the matter between

HOS+MED MEDICAL AID SCHEME

APPELLANT

and

THEBE YA BOPHELO HEALTHCARE

MARKETING & CONSULTING (PTY) LTD 1ST RESPONDENT

P J VAN DER WALT NO 2ND RESPONDENT

K VAN DIJKHORST NO 3RD RESPONDENT

I W B DE VILLIERS NO 4TH RESPONDENT

CORAM: HOWIE P, CLOETE and LEWIS JJA, HURT and MHLANTLA AJJA

HEARD: 9 NOVEMBER 2007

DELIVERED: 29 NOVEMBER 2007

SUMMARY: *Order of High Court, Pretoria setting aside an arbitration appeal tribunal's award confirmed on basis that tribunal had exceeded its powers. Dispute referred to new appeal tribunal in terms of s 33(4) of the Arbitration Act 42 of 1965.*

JUDGMENT

LEWIS JA

[1] This is an appeal against an order of the High Court, Pretoria (per Seriti J), setting aside an award made by an arbitration appeal tribunal. The appellant, Hos+Med Medical Aid Scheme ('Hosmed') is, as its name suggests, a medical aid scheme registered in terms of the Medical Schemes Act 131 of 1998. The first respondent, Thebe Ya Bophelo Health Care Marketing and Consulting (Pty) Ltd ('Thebe'), is a company that acts as a broker to Hosmed, and is accredited under the Medical Schemes Act. A dispute between the parties as to fees payable by Hosmed to Thebe was referred to arbitration.

[2] The arbitration agreement provides for an appeal against the award to an arbitration appeal tribunal. Hosmed appealed against the award of the arbitrator, who held that Hosmed was liable to pay the fees claimed. The quantum was to be determined subsequently, the issue of liability having been separated by agreement. Hosmed succeeded in its appeal. Thebe successfully brought an application to have the appeal award set aside. The members of the appeal tribunal, all retired judges, are cited as respondents, but none opposed the application to set aside the award, and they are not party to this appeal. The appeal is with the leave of the high court.

[3] The only issue before the court below, and in this appeal, was whether the appeal tribunal exceeded its powers, or was guilty of gross misconduct, such that a court should set aside its award. There were two issues before the appeal tribunal itself, one of which was decided in favour of Thebe, and the other against it. Hosmed seeks to have the decision of the court below set aside in terms of s 33 of the Arbitration Act 42 of 1965, on the basis that the court erred in finding that the appeal tribunal's award was vitiated, but only in respect of the second issue decided by it. 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 Act must apply to an appeal tribunal, and its award, in the same way as they do to an arbitration and an arbitral award.

[4] Some background is necessary, but I shall be brief since many of the issues are not relevant to this appeal. In order to facilitate the conduct of the medical aid scheme run by Hosmed, it uses the services of brokers and administrators. In November 1999 Hosmed entered into a contract with Thebe,¹ part of the 'Thebe Group of Companies', engaging Thebe to introduce new members for the scheme, for which an introduction fee was payable, and requiring it to provide ongoing services to members of the scheme, for which another fee was payable.

¹ Thebe underwent several name changes, and changes of shareholders and directors over the years, but none is of any significance in this appeal.

[5] Both types of fee were regulated by regulations promulgated in 1999 under the Medical Schemes Act and the contract between the parties complied with the regulations. However, in June 2000 the regulations were amended. The parties believed that as a result of the amendment it was no longer permissible for Thebe to charge fees for ongoing services. This was apparently a general perception among people working in the medical aid field.

[6] As a result of that perception the parties concluded an agreement in March 2001 varying the 1999 agreement so as to delete the clause providing for the payment to Thebe for ongoing services. In August of the same year the parties concluded a second amending agreement, which retained much of the first agreement and of the amending agreement concluded in March, but also gave Thebe certain exclusive rights as a broker.

[7] The regulations under the Medical Schemes Act were amended again with effect from 1 January 2003. The amended regulations made provision for brokers to charge fees for ongoing services. Accordingly, yet another agreement was concluded by the parties in August 2003, again making provision for Thebe to charge fees for ongoing services to Hosmed members. Between March 2001 and August 2003 Thebe claimed no fees for such services, presumably having forgone them in the 2001 amendments to their original agreement.

[8] In February 2003 Mr R D Laird became the chief executive officer of Thebe: he was unaware of the existence of the amending agreements of 2001, and, on discovering that no fees had been paid for ongoing services between 2001 and 2003, sent invoices to Hosmed claiming a substantial sum of money. Hosmed denied liability for payment and Thebe sued in the Johannesburg High Court. Hosmed pleaded that the agreement provided for the resolution of disputes by arbitration. The parties accordingly concluded a written arbitration agreement and appointed Mr R T van Schalkwyk as the arbitrator. The terms of the arbitration agreement are significant to the issue on appeal.

[9] These are the most important:

‘4 The issues to be determined by the arbitrator are the issues contained in the pleadings referred to at clause 8 below.’

‘7.1 The arbitration shall be conducted in accordance with the rules of the High Court, subject to any specific directions that the arbitrator may give in regard to the conduct of the arbitration;

7.2 The arbitrator shall have full powers in connection with the arbitration, and in particular, without limitation, the arbitrator:

7.2.1 Shall have the power set forth in the Arbitration Act, as amended, or any replacement Act;

7.2.2 May make such award or awards, whether interim, provisional or final, as he may consider appropriate.’

8.1 The parties have agreed that the pleadings filed in the High Court action . . . will serve as the pleadings in this matter; . . .’

The clause then sets out, for the sake of clarity, which pleadings had been filed and what their status in the arbitration would be, and continued:

‘8.3 All further pleadings and notices may be exchanged between the parties on their due dates by E-mail (confirmed by telefax) or by telefax’

[10] In so far as the right of appeal is concerned, the agreement provides:

‘16 The award made by the arbitrator shall be final and binding on the parties, subject to the right of appeal contained at clause 17 below.’

‘17.1 The final award made by the arbitrator shall be subject to a right of appeal;

...

17.4 Such appeal shall be heard by a panel as agreed to within ten court days [after notices of appeal and cross appeal had been lodged] failing which three arbitrators shall be nominated and appointed by the Arbitration Foundation of South Africa. . . .’

[11] The pleadings were indeed amended: the existence of the amending agreements of 2001 to the broking contract were introduced in an amendment to Hosmed’s plea, and Thebe responded, in a replication, by averring that these agreements were void because they were in contravention of s 228 of the Companies Act 61 of 1973. The basis of this defence was that the amending agreements, by which Thebe gave up its right to claim fees for ongoing services to Hosmed’s members, constituted a disposal of the greater part of Thebe’s assets, yet had not been approved by a general meeting of Thebe’s shareholders.

[12] Section 228 provides that:

‘(1) Notwithstanding anything contained in its memorandum or articles, the directors of a company shall not have the power, save with the approval of a general meeting of the company, to dispose of –

- (a) the whole or substantially the whole of the undertaking of the company; or
- (b) the whole or the greater part of the assets of the company.

(2) No resolution of the company approving any such disposal shall have effect unless it authorizes or ratifies in terms the specific transaction.’

[13] Hosmed’s rejoinder denied that s 228 had not been complied with, and relied in the alternative on estoppel or the Turquand rule. In essence, Hosmed alleged that Thebe had represented that its managing director, Mr Frank Bartlett, had authority to conclude the amending agreements, and that Hosmed had relied on such representations; and that, further, it had entered into the amending agreements in good faith and on the assumption that the internal requirements of Thebe had been complied with – the Turquand defence.²

[14] The parties agreed that the arbitrator should assume that Thebe’s agreement not to claim fees for ongoing services did constitute a disposal of the greater part of its assets. Thus, when the arbitration commenced, the disputes to be determined were whether the amendment to the regulations in 2001 precluded Thebe from claiming fees for ongoing services, and whether the amendments to the parties’ agreement in 2001 were in contravention of s 228 of the Companies Act. This entailed also a determination of the defences based

² The ‘rule’ takes its name from *Royal British Bank v Turquand* (1856) 6 E & B 327; 119 ER 886, and is to the effect that a person entering into a contract is not required to ascertain whether the company’s internal requirements have been met.

on estoppel and the Turquand rule. It was agreed that the quantum of Thebe's claim would be determined after these issues had been decided.

[15] The evidence of two witnesses was led for Thebe at the arbitration hearing: Mr J Alderslade, the financial director of Thebe's holding company, and Laird, the chief executive officer of Thebe, referred to earlier. A director of Thebe, Mr P McCulloch, who was involved in the negotiations with Hosmed, did not testify. Hosmed called the evidence of Mr M Brown. The evidence of Thebe's witnesses was of limited value since they had not participated in the negotiations leading to any of the agreements. Indeed, Laird had joined Thebe only in 2003, two years after the broking agreement had been amended by the parties.

[16] When the arbitration was adjourned for the arbitrator to consider his award, Thebe realized that it had not led evidence to substantiate its contention that the amending agreements had not been authorized as contemplated in s 228 of the Companies Act. It was granted leave to recall Laird. Laird testified that he could not find in Thebe's documents any record of a resolution of the company's members authorizing the disposal of a major part of its assets or undertaking. He was cross-examined by Hosmed's counsel on the existence of such a document. The evidence adduced, according to Hosmed, was designed to show that Thebe's sole shareholder, the Thebe Hosken Group (Pty) Ltd, of which McCulloch was a director, as well as being a director of Thebe, had agreed to the disposal of Thebe's right to fees for ongoing services to Hosmed's members. There was thus, it was argued before the appeal tribunal, unanimous assent to the disposal and no contravention of s 228. The principle of unanimous assent is that where all the shareholders of a company agree on a matter that ordinarily requires a resolution of a general meeting of the company, the need for the formal resolution falls away.

[17] Much store is placed by Hosmed on Laird's evidence when he was recalled. Counsel argued before us that his questioning was directed to the issue of unanimous assent, even though it had not been pleaded. The gist of Laird's evidence on recall was that, despite a careful search, he could not find any resolution authorizing the amendments of the broking agreement and thus no evidence that the disposal was authorized under s 228. He testified that the Thebe Hosken Group was indeed the only shareholder in Thebe and confirmed that McCulloch had been a member of the boards of both Thebe and the Thebe Hosken Group.

[18] In support of the contention that there was unanimous assent, and that this was raised as an issue in the arbitration, Hosmed points to the following passage:

'Mr Swart [counsel for Hosmed]: . . . I put it to you the shareholder must have been aware of this [the disposal] through Mr McCulloch.

Mr Laird: If Mr McCulloch disclosed it. But as I've said to you, I've looked through all of the minutes, etcetera, and I haven't found anything in there that would say that this is what happened.

Mr Swart: But we've already agreed that there was only one shareholder. It would be senseless to have a formal meeting with yourself. Not so?

Mr Laird: Well, I think something as important as this I think it would have been important for it to have been documented and I found no documentation whatsoever.

. . . .

Mr Swart: . . . And I put it to you that on a reading of this the only inference to be drawn is that the shareholder, through McCulloch, was aware of this and consented to it.'

[19] No objection was made to these questions and submissions and Thebe did not re-examine Laird. Counsel for Hosmed contends both in his heads of argument and before this court that it was clear that he was placing before the arbitrator the issue of unanimous assent. He also asserts that he argued the point before the arbitrator, and there was no objection to his argument. Counsel for Hosmed have no recollection of this aspect of the argument before the arbitrator, and indeed it does not appear from the written heads of argument submitted to the arbitrator and which form part of the appeal record. The arbitrator did not deal with the issue of unanimous assent in making his award which was that portion of Thebe's claim, plus interest, and costs was payable by Hosmed (the balance having prescribed). The arbitration was postponed sine die to deal with the quantification of the claim.

[20] Hosmed appealed against the award to the appeal tribunal constituted in accordance with the arbitration agreement. The issues on appeal were whether Thebe could, despite the amendment to the regulation in 2000, claim for fees for ongoing services between 2001 and 2003 when the regulations were again amended; and whether Thebe had complied with s 228 of the Companies Act. The appeal tribunal found that Thebe was entitled to claim the fees in issue (there was in fact no legal impediment to doing so, despite the perception about the effect of the 2000 amendment), thus confirming the arbitrator's award in this respect. But it also considered that the amendments to the original agreements, which had the effect (assumed for the purpose of the question of liability) of disposing of its business within the meaning of s 228 of the Companies Act, were valid. It held that there was unanimous assent to the disposal, and that the amending agreements were thus enforceable. Accordingly Thebe had disposed of its right to claim fees for ongoing services.

[21] The application by Thebe for the setting aside of the award is based on the appeal tribunal's finding on unanimous assent since, it argued, it had not been pleaded, nor canvassed in evidence. The arbitration appeal tribunal, Thebe contended, had thus both exceeded its powers and committed a gross irregularity in terms of s 33 of the Arbitration Act, in not observing the audi alteram partem rule.

[22] The appeal tribunal accepted Hosmed's argument that although unanimous assent had not been pleaded – despite the numerous amendments to the pleadings by both parties, including an amendment made during the course of the appeal proceedings – the 'issues were . . . substantially broadened during the hearing before the arbitrator (cf *Shill v Milner* 1937 AD 101 at 105) to include a defence of unanimous assent.' It analysed the evidence of Hosmed's witness, Brown, to the effect that no payments had been made to Thebe for ongoing services after the amending agreements were concluded, and no claims had been made. The arbitrator had found that there was no evidence of an agreement, alleged by Hosmed, that this loss of income would be made up by increased administrative charges levied by Thebe.

[23] The appeal tribunal adopted a different approach. It said:

'In terms of s 228 the directors of a company have no power to dispose of the greater part of the assets of a company without the approval of a general meeting of the company. On a proper interpretation of s 228, it matters not whether the company is getting something in return for such disposal or not. Even if the company were to receive the market value of the assets disposed of in return for the disposal, the directors would not

have the power to dispose of such assets without the approval of the general meeting of the company. In our view it is, therefore, irrelevant whether there was a “credible or enforceable contract” in terms of which the claimant was entitled to be remunerated for the ongoing services it was providing to the respondent. On the assumption that the claimant [Thebe] disposed of the greater part of its assets . . . [by virtue of the amending agreements] s 228 would in principle be applicable.’

[24] The appeal tribunal considered that the lack of a formal resolution was no bar to the disposal if there were unanimous assent, which could be inferred from the circumstances.³ The appeal tribunal had regard to a number of factors in concluding that it was a probable inference that ‘all the directors’ of the sole shareholder in Thebe, the Thebe Hosken Group, assented to the disposal of the right to claim fees for ongoing services. These included the fact that prior to the amendments Thebe had claimed fees for ongoing services, and Hosmed had paid, whereas no claims were made or paid after the amendments; the view of the medical aid industry that such fees were contrary to the amended regulations; amendments to the original broking agreement had been discussed at a meeting of the board of trustees of Hosmed; and the directors of Thebe were aware of the new regulations and the problems that they apparently posed to claiming fees for ongoing services. Since there was only one shareholder in Thebe, the assent of the directors of the holding company would be the assent of the holding company itself and a formal meeting would be redundant. The disposal was thus with the unanimous assent of the shareholder in the company, and Thebe’s claim had to be dismissed.

[25] I shall set out the award in full since, although setting aside the award, the court below substituted its own order for that of the appeal tribunal.

‘1 The appeal is upheld with costs and the award of the arbitrator is set aside.

2 The following award is substituted therefor:

2.1 The claimant’s first claim is dismissed.

2.2 The claimant is ordered to pay Hosmed’s costs pertaining to this part of the arbitration, which costs are to include the costs consequent upon the employment of two counsel.

2.3 The arbitration is postponed *sine die* in respect of the issue of quantification as set out in the separation order.

3 The costs referred to above include the costs of the arbitrator/appeal tribunal, the costs of two counsel, the recording and record, the venue, witnesses and all ancillary costs. In the absence of agreement between the parties these costs will be taxed on the High Court scale by the Taxing Master of the High Court, Johannesburg.’

[26] The Pretoria High Court, as I have said, set aside the appeal tribunal’s award in terms of s 33 of the Arbitration Act 42 of 1965, apparently on the basis that the tribunal exceeded its powers. I shall revert to the order made by the court.

³ It referred in this regard, inter alia, to *Gohlke & Schneider v Westies Minerale (Edms) Bpk* 1970 (2) SA 685 (A) and *De Villiers NO v BOE Bank Ltd* 2004 (3) SA 1 SCA para 52.

[27] Section 33 of the Arbitration Act provides for the setting aside of an arbitration award (and this applies also to an appeal tribunal's award) –

- (1) Where-
 - (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
 - (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded his powers; or
 - (c) an award has been improperly obtained,
- the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.'

[28] Thebe argues that the appeal tribunal both exceeded its powers and was guilty of a gross irregularity. The same conduct, however, was relied on as giving rise to both grounds for the setting aside of the award. The gravamen of the complaint is that the issues before the arbitrator, and thus before the appeal tribunal, were defined by the pleadings. The arbitration agreement said so expressly. The agreement also made provision for amendments, and both parties amended and added to their pleadings during the course of the proceedings. Hosmed even introduced an amendment at the stage of appeal. The arbitration appeal tribunal could not, it was argued, go beyond the pleadings and decide an issue not pleaded. Unlike a court, which has the inherent jurisdiction to decide a matter even where it has not been pleaded, an arbitrator has no such power. It was common cause that the issue of unanimous assent was not pleaded at any stage.

[29] Hosmed, on the other hand, argues that the arbitration agreement expressly confers on the arbitrator, and therefore also on the appeal tribunal, the powers of a high court and of the Supreme Court of Appeal, respectively. Thebe's response is that these are procedural powers and do not confer jurisdiction to determine matters on which the parties have not agreed.

[30] In my view it is clear that the only source of an arbitrator's power is the arbitration agreement between the parties and an arbitrator cannot stray beyond their submission where the parties have expressly defined and limited the issues, as the parties have done in this case to the matters pleaded.⁴ Thus the arbitrator, and therefore also the appeal tribunal, had no jurisdiction to decide a matter not pleaded.⁵ Hosmed's rejoinder⁶ put in issue Thebe's allegation that there had been compliance with s 228. Had Hosmed intended to rely on the principle of unanimous assent it would have had to plead it specifically because it amounts to a classic confession and avoidance. There is a fundamental difference between a denial (where allegations of the other party are put in issue) and a confession and avoidance where an allegation is accepted, but the other party makes an allegation which neutralises its effect – which is what the raising of unanimous assent would seek to achieve.⁷ It is of course possible for parties in an arbitration to amend the terms of the reference by agreement, even possibly by one concluded tacitly, or by conduct, but no such agreement that the pleadings were not the only basis of the

4 See LAWSA 2 ed vol 1 para 607 and the authorities there cited.

5 The arbitration agreement in *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA), on which Hosmed relied, was completely different in its ambit.

6 Referred to in para 13 above.

7 The Uniform Rules of Court make this plain: Rule 18(4) provides that 'Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading . . . with sufficient particularity to enable the opposite party to reply thereto' (my emphasis).

submission can be found in the record in this case, and Thebe strenuously denied any agreement to depart from the pleadings.

[31] The appeal tribunal held, however, that it was entitled to go beyond the pleadings where the issue had been traversed in evidence. It relied, as I have said, on *Shill v Milner*⁸ where De Villiers JA said:

‘The importance of pleadings should not be unduly magnified. “The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full inquiry. But within those limits the Court has wide discretion. For pleadings are made for the Court, not the Court for pleadings. Where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal merely because the pleading of the opponent has not been as explicit as it might have been.” *Robinson v Randfontein Estates GM Co Ltd* (1925 AD 198).’

Relying on these dicta in *Shill v Milner* and in *Robinson v Randfontein Estates* the appeal tribunal held, as mentioned in para 22, that the issues were ‘substantially broadened during the hearing before the arbitrator . . . to include a defence of unanimous assent’.

[32] I have already said that the appeal tribunal was not entitled to take this approach: its powers were conferred by the arbitration agreement and it did not have the power to go beyond that. But even if, for the sake of argument, it were accepted that the appeal tribunal did have jurisdiction, it can hardly be contended that the question whether there was unanimous assent was properly canvassed before the arbitrator. Counsel for Hosmed said that that was the issue on his mind when he cross-examined Laird on recall. But he conceded that he did not communicate this expressly to the witness or to Thebe’s counsel. I have set out the relevant evidence above. It is far from clear that what counsel was attempting to elicit from Laird was whether the sole shareholder in Thebe had assented to the disposal of the right to claim fees for ongoing services. At its highest, Laird conceded that it would have been pointless for McCulloch to call a meeting with himself to pass a resolution. But Laird could not testify on what had in fact happened since he had not been part of Thebe when the amending agreements were concluded.

[33] Hosmed contends that Thebe did not object to the questions asked of Laird. It is not clear why they should have done so: it was not obvious that a new issue was being raised, and even if counsel for Thebe had realized what was on Hosmed’s counsel’s mind, he was entitled to remain silent knowing that the issue had not been pleaded. But there is no point in examining this issue further. On any basis, the question whether there had been unanimous assent, obviating the need for a meeting and a special resolution, was not really, let alone fully, canvassed in the evidence. It was first raised in the oral argument before the arbitrator, and did not feature even in counsel’s heads of argument which form part of the record.

[34] The facts on which the *Shill v Milner* principle can be applied, even if it had been open to the appeal tribunal to rely on it, were not traversed in evidence. There was thus no basis for the appeal tribunal to find that there was unanimous assent to the disposal of the right to claim fees for ongoing services.

⁸ 1937 AD 101 at 105.

[35] In the circumstances the appeal tribunal exceeded its powers: it went beyond the terms of the arbitration agreement. This is a clear case where the arbitration appeal tribunal exercised a power that it did not have. This court recently referred with approval⁹ to the decision of the House of Lords in *Lesotho Highlands Development Authority v Impreglio SpA*¹⁰ where Lord Steyn distinguished between cases where a tribunal mistakenly exercises a power that it does have, and those where a tribunal exercises a power that it does not have. In the latter type of case the tribunal exceeds its power, and, under our Arbitration Act, that warrants the setting aside of the order. This is the position stated earlier in *Dickenson & Brown v Fisher's Executors*¹¹ applied by the court in *Telcordia*.¹² The judgment of Harms JA in *Telcordia* embodies a comprehensive account of the bases on which an arbitrator's award may be set aside and there is no need to repeat what is said in that case.

[36] In view of the finding that I make that the appeal tribunal exceeded its powers, it is not necessary to consider whether its decision on unanimous assent constituted a gross irregularity.

[37] The appeal against the decision of the court below to set aside the award in terms of s 33(1)(b) must accordingly be dismissed. It remains to determine what consequences follow. Hosmed has argued that the matter should be remitted to the appeal tribunal so that it can apply to reopen its case and amend its pleadings so as to include the issue of unanimous assent. Thebe's response is, naturally, that it had had that opportunity when the appeal tribunal hearing commenced, and declined to take it. Seriti J in the court below refused to remit the matter on the basis that Hosmed should have sought to reopen its case when the appeal tribunal was convened. The learned judge considered that he should substitute the court's order for that of the appeal tribunal.

[38] The order reads:

'(1) The award or order of the arbitration appeal tribunal is set aside and is substituted by the following:

“(a) The appeal is dismissed with costs and the award of the arbitrator [Mr] Van Schalkwyk is upheld.

(b) Hosmed is ordered to pay the claimant's costs pertaining to this part of the arbitration, which costs are to include the costs consequent upon the employment of two counsel in the appeal proceedings.

(c) The costs referred to above include the costs of the arbitrator, appeal tribunal, the costs of two counsel, the recording and record, the venue, witnesses and all ancillary costs. In the absence of agreement between the parties these costs will be taxed on the High Court scale by the Taxing Master of the High Court, Johannesburg.

(d) The arbitration is to continue before the arbitrator [Mr] Van Schalkwyk for arbitration of the issue of quantification as set out in the separation order agreed to between the parties in December 2005.”

(2) The fourth respondent [Hosmed] is ordered to pay the costs of the applicant on a party and party scale, which costs will include costs consequent upon the employment of two counsel.'

⁹ *Telcordia Technologies Inc* above para 52.

¹⁰ [2005] UKHL 43 para 24.

¹¹ 1915 AD 166.

¹² Above paras 56ff.

[39] Hosmed contends that it was not open to the court to substitute its own order for that of the appeal tribunal. This court, it argues, should remit the dispute to an appeal tribunal to consider the matter having regard to this court's finding, and to give Hosmed the opportunity to apply to reopen its case and to amend its pleadings.

[40] Counsel for Thebe, on the other hand, argues that if the court has the power to remit a matter to an arbitrator it must also have the power to substitute its own order. But even if that is not the case, Thebe argues, the order of the arbitrator should stand, and that takes care of the costs and other orders made by the court below. There is no purpose served in remitting the matter to the appeal tribunal, it argues, since it could make no award other than to refuse or allow Hosmed to reopen its case and amend its pleadings. If an appeal tribunal refused Hosmed's application, that in turn would require remittal by the appeal tribunal to the arbitrator to deal with the quantification of Thebe's claim. If, on the other hand, Hosmed can show that there had been unanimous assent, then the arbitrator will have to determine whether the amending agreements did have the effect of disposing of Thebe's assets as contemplated in s 228 of the Companies Act. Either way, Thebe contends, the arbitrator will be required to consider the dispute again: it should thus be remitted directly to the arbitrator if the appeal is not simply dismissed.

[41] The difficulty with Thebe's approach is that it is the award of the appeal tribunal, and not the arbitrator, that is to be set aside. What power does this court have to remit the matter directly to the arbitrator? If such a course were open to us it would no doubt obviate the time and expense entailed in referring the matter back to the appeal tribunal, when it is likely that it would have still to go back to the arbitrator irrespective of the appeal tribunal's conclusion. It is important to note, however, that the award of the appeal tribunal is not a foregone conclusion.

[42] It is not apparent that the court below was referred to s 33(4) of the Arbitration Act or that either party requested submission to a new appeal tribunal. In any event, in my view it is not possible to refer the matter directly to the arbitrator. It is the appeal tribunal's award that has been set aside, and s 33(4) of the Arbitration Act requires 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' (my emphasis). The section, which is peremptory, must refer also to an appeal tribunal's award.

[43] Where neither party requests that the matter be referred back to the arbitrator, or appeal tribunal, then an award made in excess of its powers should simply be set aside by the court in terms of s 33 of the Arbitration Act. And, presumably, if both parties wished to refer the matter back to the same arbitrator or appeal tribunal, the court would be entitled to make such an order.¹³ Hosmed submitted that it had no difficulty with a reference back to the same appeal tribunal. But Thebe asserted that it had lost confidence in the appeal tribunal. Irrespective of Hosmed's views, however, the section is clear: if either party requests it the dispute must be referred to a new tribunal. The court is not, in my view, given a discretion in this regard.¹⁴ Equally, because of the

13 Contrast s 32(2) of the Arbitration Act which permits a referral back within six weeks of the publication of the award only on 'good cause shown'.

14 See *Benjamin v Sobac South African Building & Construction (Pty) Ltd* 1989 (4) SA 940 (C) at 961J-962B and *Steeledale Cladding (Pty) Ltd v Parsons* NO 2001 (2) SA 663 (D) at 674A.

peremptory wording of s 33(4), a court does not have the discretion to substitute its own order for that of the appeal tribunal.

[44] I consider that the only order appropriate is to refer the matter to a new arbitration appeal tribunal, to be constituted in accordance with clause 17.4 of the arbitration agreement between the parties (cited above), save that the composition of the tribunal should be agreed within ten court days of the date of the handing down of this judgment, failing which a new tribunal should be constituted in terms of the arbitration agreement.¹⁵

[45] Thebe has been substantially successful in this appeal in having prevailed on the primary issue: that the appeal tribunal exceeded its powers, with the consequence that its order must be set aside. Hosmed, on the other hand, is successful in so far as the dispute has to be remitted, and the order of the court below set aside. Hosmed has not succeeded, however, in its request for the dispute to be referred back to the same appeal tribunal. And if the new appeal tribunal refuses Hosmed the opportunity to reopen its case and amend its pleadings, then its success in this court may turn out to be hollow. But it does gain the opportunity to canvas the merits in the new appeal tribunal, and that, in my view, also constitutes substantial success. In the circumstances I conclude that there should be no order as to costs.

[46]

(a) The appeal succeeds in part and fails in part.

(b) The order of the court below is set aside.

(c) The order of the court below is replaced with:

‘1 The application succeeds with costs including those occasioned by the employment of two counsel.

2 The award of the arbitration appeal tribunal is set aside.

3 The dispute between the parties is referred to a new arbitration appeal tribunal to be constituted in terms of clause 17.4 of the arbitration agreement between the parties.

4 The appeal procedures shall be those prescribed in clause 17 of the agreement, save that the parties must agree the composition of the arbitration appeal tribunal within ten court days of this order, failing which they shall request the Arbitration Foundation of South Africa to nominate three arbitrators, as envisaged in terms of clause 17.4 of the arbitration agreement.’

(e) No order is made as to costs.

C H Lewis

Judge of Appeal

Concur:

¹⁵ The arbitration agreement remains binding on the parties unless they agree to terminate it or it is set aside by an order of court: s 3 of the Arbitration Act.

Howie P

Cloete JA

Hurt AJA

Mthlantla AJA

SERA v DE WET

1974 (2) SA 645 (T)

Citation	1974 (2) SA 645 (T)
Court	Transvaal Provincial Division
Judge	Viljoen J
Heard	June 8, 1973
Judgment	December 27, 1973
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

1197. Arbitration - Arbitration clause contained in a building contract - Such wide enough to cover disputes arising from E termination thereof - Space for arbitrator's name not filled in - When clause not rendered inoperative - Alternative provision made therein - "Good cause" for declaring that the clause should cease to have effect in relation to a particular dispute - Act 42 of 1965, sec. 3 (2) (c).
1198. [zHNz]Headnote : Kopnota
1199. Applicant had in terms of a written building contract F undertaken to erect certain additions and alterations in respect of respondent's existing dwelling house. Applicant now applied for the granting of one of three alternative prayers with costs, viz. (1) an order declaring that certain action for damages to be brought by the applicant against the respondent based on the cancellation of the contract fell outside the scope of the arbitration clause in the contract; (2) an order in terms of section 3 (2) (a) of the Arbitration Act, 42 of 1965, setting aside the arbitration clause in the contract; or G (3) an order in terms of section 3 (2) (c) of the Act declaring that the clause should cease to have effect in respect of the action for damages.
1200. Held, as to (1), that, as the arbitration clause was couched in very wide terms, that it could not be said that only a dispute which arose during the continuance of the contract, and not one arising from the termination thereof, fell within its scope; prayer (a) could accordingly not succeed.
1201. Held, further, as to (1), that the fact that the space for the H name of the arbitrator had not been filled in the arbitration clause did not render it inoperative, because alternative provision had been made in the clause for the election of an arbitrator nominated by the president of the Institute of Architects.
1202. Held, as to (2) and (3), however, that, as the dispute had already been referred to arbitration in terms of the agreement, even though it had not commenced, that applicant was entitled to invoke section 3 (2) (c) of the Act on showing "good cause".
1203. Held, further, as there were a number of legal problems at stake in the dispute, as credibility would play an important part in resolving the factual issues,
1204. 1974 (2) SA p646
1205. VILJOEN J
1206. and as technical matters which had been raised after the so-called cancellation of the contract were easily resolvable by a Court of law, that the application should be granted in terms of section 3 (2) (c) of the Act.

1207. [zClz]Case Information
1208. Application for a declaratory order. Facts not material to this A report have been omitted.
1209. L. T. C. Harms, for the applicant.
1210. J. P. Roux, for the respondent.
1211. Cur. adv. vult.
1212. B Postea (December 27th).
1213. [zJDz]Judgment
1214. VILJOEN, J.: The applicant prays for an order declaring that:
1215. 1. Certain action for damages to be brought by applicant against respondent based on the cancellation of C certain written building contract, dated 20th July, 1972, falls outside the scope of the arbitration clause contained in the said building contract.
1216. Alternatively to 1 above:
1217. 2. (a) An order in terms of sec. 3 (2) of the Arbitration Act, 42 of 1965, setting aside D the arbitration clause (being clause 26 contained in certain written building contract, entered into by the parties on 26th July, 1972.
1218. Alternatively:
1219. 2. (b) An order declaring that the said arbitration clause shall cease to have effect in respect of certain action for damages, to be instituted by applicant against respondent, E as a result of the cancellation of the said building contract.
1220. 3. An order compelling respondent to pay the costs of this application.
1221. The applicant alleges in his affidavit that on or about 20th July, 1972, he and the respondent entered into a building F contract, in terms whereof he undertook to erect certain additions and alterations in respect of the respondent's existing dwelling house, at erf 293, Lynnwood Manor, Pretoria. He annexes portion of the agreement referred to by him, to his affidavit. He states that in terms of the contract, one Johann Smith, a registered architect of Pretoria, was appointed architect to supervise the building operations.
1222. G [The learned Judge then proceeded to deal with the averments in the affidavits and proceeded.]
1223. Clause 18 of the contract provides that the building premises are to be handed over to the contractor on or before 12th August, 1972, after which date the contractor shall immediately H commence with the work, proceed therewith continuously and complete it (save for certain specified work which the architect may instruct him to delay) on or before 12th December, 1972, subject to certain provisions relating to extensions. If the contractor fails to complete the work on or before the said date or any extended date in terms of clause 20 and the architect certifies in writing that in his opinion the work should thus reasonably have been completed, the contractor shall pay the owner the amount of R8 per day as liquidated and pre-estimated damages in respect of the period
1224. 1974 (2) SA p647
1225. VILJOEN J
1226. during which the work remains or remained incomplete and the owner may deduct any such amount of damages from moneys due and owing to the contractor (clause 19). In terms of clause 20 the architect shall allow a fair and reasonable extension of time if the work is delayed as a result of certain causes, inter A alia, because if the architect's instructions in terms of clause 1 (which provides for building plans and specifications) or because the contractor does not at the appropriate time receive necessary instructions from the architect, which he has specifically

requested in writing; or delays due to causes which the architect may regard as sufficient. If, after written notice from the architect calling upon the contractor to do so, B the contractor fails or refuses to commence with the execution of any instruction or order which the architect might have given him or which may be given him in such notice, or if he thereafter should fail to carry out such order or instruction with reasonable skill, diligence and speed, the owner may, without prejudice to any right he may have to C terminate the contract, employ other persons to do the work, pay such persons and recover the amount from the contractor or deduct such moneys from any amount due to the contractor.

1227. Clause 22 (a) provides:

1228. "22 (a) Wanoptrede. As die aannemer in gebreke bly D in enige van die volgende opsigte,

1229. (i) die werk voor voltooiing sonder redelike oorsaak geheel-en-al staak;

1230. (ii) versuim om met redelike ywer met die werk voort te gaan;

1231. (iii) na skriftelike kennisgewing van die argitek weier, of tot 'n aansienlike mate aanhoudend nalaat, om gebrekkige werk of onbehoorlike materiaal te verwyder;

1232. dan, indien sodanige wanoptrede aanhou vir E veertien dae na 'n skriftelike en geregistreerde kennisgewing van die argitek aan die aannemer waarin dit gespesifiseer word, mag die bouheer, sonder benadeling van enige ander regte hierin vervat, hierdie kontrak deur skriftelike en geregistreerde kennisgewing beëindig; met dien verstande dat kennisgewing ingevolge hiervan nie onredelik of ergerlik gegee mag word nie en sodanige kennisgewing ongeldig sal wees indien die bouheer ten tye daarvan F kontrakbreuk ten aansien van hierdie kontrak gepleeg het."

1233. In terms of sub-clause (b) the owner may terminate the agreement in the event of the sequestration of the contractor's estate, or its liquidation, if it is a company.

1234. Clause 25 (a) makes provision for the issue by the architect of a certificate in favour of the contractor and for payment to G the contractor by the owner within a period of seven days after the issue. In default of payment within that period the contractor is entitled to interest at the rate of 10 per cent per annum, without prejudice to any right the contractor may have to terminate the contract. Clause 23 specifies the circumstances under which the contractor may terminate the contract.

1235. H Clause 26 is the arbitration clause. It provides:

1236. "Met dien verstande altyd dat ingeval enige geskil of meningsverskil ontstaan tussen die bouheer of die argitek namens hom en die aannemer, hetsy gedurende die vordering of na voltooiing van die werk, of na die beëindiging, verlating of verbreking van die kontrak, wat betref die vertolking van die kontrak, of wat betref enige saak of ding wat daaruit voortspruit, of wat betref die terughouding deur die argitek van enige sertifikaat waarop die aannemer mag eis dat hy geregtig is, dan moet die argitek sodanige geskil of meningsgeskil beslis deur 'n skriftelike besluit aan die aannemer te gee. Die gemelde besluit is finaal

1237. 1974 (2) SA p648

1238. VILJOEN J

1239. en bindend op die partye, tensy die aannemer dit binne vertien dae vanaf ontvangs daarvan deur skriftelike kennisgewing aan die argitek betwis, in welke geval, of ingeval die argitek vir veertien dae na 'n skriftelike versoek aan hom deur die bouheer of die aannemer versuim om 'n besluit soos voormeld te gee, sodanige geskil of meningsverskil verwys moet word en hiermee verwys word na die arbitrasie en finale besluit van... of in A die geval van sy dood of onbereidwilligheid of onvermoë om op te tree, 'n arbiter deur die aannemer gekies uit twee persone wat op versoek van een van die partye deur die fungerende hoofpresident van die Instituut van Suid-Afrikaanse Argitekte benoem word, en die uitspraak van sodanige arbiter is finaal en

bindend op die partye. Sodanige verwysing, behalwe wanneer dit gaan oor sertifikate of oor vraagstukke wat ontstaan uit klousule 3 van die ooreenkoms, mag nie mee aangegaan word nie. B tot na die voltooiing van die werk, behalwe met die skriftelike toestemming van die argitek en die aannemer.

1240. Die arbiter het die mag om enige sertifikaat, opinie, besluit, rekwisisie of kennisgewing oop te maak, te hersien en te wysig, en om alle sake in geskil wat na hom verwys word en waarvan kennis gegee is soos voormeld, te beslis op dieselfde manier asof geen sodanige sertifikaat, opinie, besluit, rekwisisie of kennisgewing gegee was nie. By elke of enige sodanige verwysing moet die koste daarvan en koste wat bykomstig is by die C verwysing en uitspraak in die diskresie van die arbiter berus, wat die bedrag daarvan mag vasstel, of mag opdra dat dit getakseer moet word soos tussen prokureur en kliënt, of soos tussen party en party, en moet aanwys deur wie en aan wie en op welke wyse dit gedra en betaal moet word."

1241. The first prayer, praying for a declaration that the action for damages proposed by the applicant to be brought by him against the respondent based on the cancellation of the contract, falls D outside the scope of the arbitration clause, cannot succeed. The only ground which, according to the correspondence, is relied on for the proposition that the dispute between the parties falls outside the scope of the arbitration clause, is that the contract which subsisted between the parties has come to an end by virtue of the respondent's wrongful and unlawful E repudiation thereof, and the applicant's acceptance of such repudiation. The implication is clear, namely, that a dispute which arose while the contract still stood, falls within the scope of the arbitration clause but not any dispute arising from the termination thereof. But the arbitration clause is couched in very wide terms. Compare the words

1242. "... of (hetsy) na die beëindiging, verlating of verbreking F van die kontrak,... wat betref enige saak of ding wat daaruit voortspruit".

1243. The parties have not inserted the name of an arbitrator in the blank space provided therefor in clause 26, but, in my view, this omission does not render the arbitration clause inoperative, because alternative provision is made for the G election by the contractor of an arbitrator out of two persons nominated by the president of the Institute of Architects. Although this alternative is expressed to apply only in the case of the death or unwillingness or inability of the specified architect to act it is my view that in the absence of any such specification it will accord with the spirit of the provision as well as the intention of the parties if effect H were given to the alternative method of appointment of an arbitrator. Clause 26 was not, like other clauses in this standard form of contract, deleted by the parties, and effect must be given thereto. It seems to me that effect can only be given thereto in the manner suggested by me.

1244. For the purposes of the alternative prayers, sec. 3 (2) of the Arbitration Act, 42 of 1965, is invoked. This enactment provides:

1245. "The court may at any time on the application of any party to an arbitration agreement, on good cause shown -

1246. 1974 (2) SA p649

1247. VILJOEN J

1248. (a) set aside the arbitration agreement; or

1249. (b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or

1250. (c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred."

1251. The alternative prayers have, as will be observed, been couched A in terms of paras. (a) and (c) of sec. 3 (2) above. Reliance on para. (a) was perhaps not a very happy choice because, as I appreciate the applicant's case, he does not pray in the alternative for the setting aside of the arbitration clause, but merely for an order to be made in the exercise of my discretion that the

dispute now existing between the parties shall not be referred to arbitration. However, this erroneous B election is not fatal to the applicant's case, because the applicant prays for alternative relief and, in my view, the relief sought is in any event covered by the second alternative prayer which is couched in the wording of para (c) above which clearly relates to a dispute which has already been referred C and I point out that clause 26 contains the words

1252. "... sodanige geskil verwys moet word en hiermee verwys word na die arbitrasie..."

1253. Although, therefore, the arbitration has not commenced, the dispute has in terms of the agreement already been referred, and sec. 3 (2) (c) is, therefore, applicable and may be invoked.

1254. As the sub-section referred to above requires, "good cause" D must be shown. In the judgment in the matter of Metallurgical and Commercial Consultants (Pty.) Ltd. v Metal Sales Co. (Pty.) Ltd., 1971 (2) SA 388 (T), COLMAN, J., in the course of discussing this requirement, says at p. 391E - H:

1255. "The question, it seems to me, is whether the respondent has shown good cause, within the meaning of the sub-section.

1256. E Such an onus is not easily discharged. There are certain advantages, such as finality, which a claimant in an arbitration enjoys over one who has to pursue his rights in the Courts; and one who has contracted to allow his opponent those advantages will not readily be absolved from his undertaking. In *Rhodesian Railways v Mackintosh*, 1932 AD 359, WESSELS, A.C.J. (as he then was), held that the discretion of the Court to refuse arbitration under a submission was to be exercised F judicially, and only when a 'very strong case' for its exercise had been made out (see p. 375). The Court was acting under a different statute from the one before me. But the observation of WESSELS, A.C.J., is none the less apposite here, because it was based upon general principles. Similarly, in *Halifax Overseas Freighters, Ltd. v Rasno Export; Technopromimport and Polskie Linie Oceaniczne P.P.W. ("The Pine Hill")*, 1958 (2) Lloyds List Law Reports 146, MCNAIR, J., held that there should be 'compelling reasons' for refusing to hold a party to his G contract to have a dispute resolved by arbitration. JESSEL, M.R., in *Russel v Russel*, (1880) 14 Ch. D. 411, said that the cases in which the discretion against arbitration should be exercised were 'few and exceptional'."

1257. It is true that in the *Rhodesian Railways v Mackintosh* case the Court was acting under a different statute, viz. Act 8 of 1928 (Southern Rhodesia), but the section which the Court considered in that matter has a very similar counterpart in our H current Arbitration Act. Sec. 6 (1) of the Rhodesian Act is quoted at the foot of p. 367 of the 1932 AD reports. Cf. sec. 6 (1) and (2) of our current Arbitration Act, 42 of 1965. Both enactments provide that, on application by the defendant, the Court may stay legal proceedings instituted in that Court in respect of any matter which the litigants had agreed to refer to arbitration, and that if on such application the Court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration, the

1258. 1974 (2) SA p650

1259. VIJJOEN J

1260. Court may make an order staying such proceedings subject to such terms and conditions as it may consider just. The remarks of WESSELS, A.C.J., that the Court has a discretion, but that this discretion must be judicially exercised and a very strong A case for this exercise must be made out, relate to such an application for the stay of proceedings. In considering whether the Court

1261. "is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration",

1262. the same considerations should apply as in the case where the Court considers whether "good cause" has been shown why the B agreement shall cease to have effect with reference to any dispute referred, has not been argued before me. I shall assume, without deciding, that the onus is equally heavy on an applicant who applies under sec. 3 for a matter not to be referred to arbitration as it is on a plaintiff who resists a plea in bar in terms of sec. 6 that the proceedings should be C stayed and the matter be referred to arbitration.

1263. Mr. Harms, for the plaintiff, submits that good cause has been shown by the applicant why the matter should not go to arbitration. He points out that serious allegations have been made against the architect involving his honesty and integrity, in respect of which allegations Mr. Harms submits that a strong D prima facie case has been made out on the papers. A Court of law is much better equipped, says Mr. Harms, to decide upon matters of credibility. Furthermore, he argues, however unbiassed the architect who is appointed as arbitrator may be, it would be most embarrassing for such an architect to decide upon the credibility of a fellow architect and, considering E that he is not a legally trained man, this factor may tend to influence him, if not consciously then at least subconsciously, which influence may adversely affect the interests of the applicant. As a second ground why the matter is not a proper one to be dealt with by an arbitrator, Mr. Harms submits that the main issue between the parties is predominantly a legal F one. He points out that the architect purported to cancel the contract, not because the work was badly done, but because the applicant caused undue delays by stubbornly refusing to carry out instructions given him by the architect. Apart from the factual aspect on which the evidence of the architect will be important, and which may be subject to the strictures adverted to above, it is solely a legal matter as to whether the G contract had been lawfully cancelled, or not, the argument proceeds. A further matter, it is argued, is whether the certificate issued by the architect entitled the applicant to payment. This, says Mr. Harms, is a matter which can only be properly adjudicated upon by a Court of law. The factual issue relating to the certificate, namely whether a certificate had H in fact been issued or not, once again involves the credibility of the architect concerned. While Mr. Harms concedes that an architect may be the proper person to decide upon disputes the resolution of which requires technical and expert knowledge, he submits that the disputes in the present matter are not of such a nature.

1264. I agree with Mr. Harms. Judging by the allegations in the papers at least, the respondent, acting in an arrogant and dictatorial manner, completely took matters into his own hands, manipulated them as he

1265. 1974 (2) SA p651

1266. VILJOEN J

1267. wished and in the process not only absolutely usurped the powers of the architect, but also rendered him a servile instrument for his own purposes.

1268. As appears from the applicant's affidavit, he contends that the respondent wrongfully and unlawfully repudiated the contract, A which repudiation he has accepted. He now proposes to claim damages from the respondent. These damages consist of the amount of R2 795 being the balance owing in terms of the certificate which was withdrawn by the architect plus his loss of profits on the uncompleted work. The first issue which arises is whether the respondent has, through the architect, lawfully cancelled the contract. In this respect clause 22 (a) B of the contract between the parties is relevant. If the contractor should without reasonable cause altogether cease with the work before completion thereof, this will afford a ground for cancellation in terms of clause 22 (a) (i) of the contract. The architect does appear to rely on this ground as C one of two grounds upon which he purported to cancel, because he says in his letter of cancellation:

1269. "As you have removed your tools and material from the site we take it that you have resiled from the contract and this is accepted by us."

1270. But the impression cannot be escaped that this ground was merely thrown in for good measure and amounts virtually to an afterthought, because the entire letter deals with the obduracy D on the part of the contractor to carry out instructions given by the architect and his failure to proceed with the work with the necessary diligence. It is a fair inference that these latter complaints were intended by the architect, acting on the respondent's instructions, to constitute the real ground upon which he purported to cancel. This would be a valid ground E under clause 22 (a) (i) but only provided written and registered notice had been given to the contractor to remedy the default which should be specified in such notice and provided, further, that the contractor had failed to do so for a period of 14 days. The architect's letter dated 4th December, 1972 cannot be regarded as such notice because no default is F specified therein. The letter is nothing more than a courteous

request to the contractor to make every effort to fulfil the wish of the building owner to take occupation of the new master bedroom. Neither can the architect's letter of 13th December, 1972 be held to be a notice as contemplated because the default is not specified and it is merely stated generally that the G building contractor was not proceeding diligently with the project. In any event, even if this letter could be held to be such notice, a period of 14 days had not elapsed before the purported cancellation on 20th December, 1972. In view of the nature of the claim proposed to be instituted by the applicant, another issue may arise, and that is that, even if the letter H dated 13th could be regarded as a notice in terms of sec. 22, there is a further proviso that the notice should not, in terms of the proviso, be given unreasonably and vexatiously ("nie onredelik of ergerlik gegee mag word nie"), and prima facie this appears to me to be the case. As appears from the allegations in his affidavit the applicant says that the delay in completing the master bedroom was occasioned by the owner who required Italian pattern tiles instead of the specified Johnson tiles to be fixed in

1271. 1974 (2) SA p652

1272. VILJOEN J

1273. the bathroom. This was an extra and the delay was caused by the failure of the architect to give specific instructions as to where the pattern should be broken, he alleges. On the papers the respondent's denial that this was the cause of the delay A and his and the architect's assertion that, although the Italian tiles were considered, the specification which prescribed Johnson tiles was never deviated from, does not sound very convincing. As the applicant has proved by attaching the affidavit of Senatore, Italian tiles were eventually used, and the point made by the applicant in his papers that if the specifications in connection with the laying of the tiles B remained unaltered, the contractor would himself have ordered the tiles and it would not have been necessary for the architect to call upon him to advise the number of square yards of glazed tiles required, so that the owner could purchase them, seems to me to be a weighty one. It is significant that the respondent and the architect do not complain about the C applicant's failure to advise the number of square yards. The complaint is about the applicant's failure to do the tiling. As the applicant points out it was the architect's work to determine and/or specify the area which had to be tiled and if the respondent had to provide the tiles, he could easily have purchased the Johnson tiles, if these were to be laid, and D supplied them to the applicant to proceed with the work. In my view a strong prima facie case has been made out that in this respect neither the respondent nor the architect has been truthful.

1274. This is purely a matter of credibility and if the tribunal hearing the matter were to find that the owner and the architect lied in order to try and justify the cancellation of E the contract, it would amount to deliberate fraud. If, on the other hand, the tribunal were to find that they told the truth, it would still have to be decided whether, in view of the fact that the architect himself could determine the area to be tiled, notice to proceed with the vigour with which the applicant started the job, was not unreasonably and vexatiously F given. The applicant convincingly alleges that the main cause of the delay was the failure of the architect to instruct him on the Italian tiles, and that the other delays, e.g. the failure to brick in the bath, the wash stand and the flower box, and to finish the cupboards in the bedroom, were all caused by his inability to proceed with the tiling work. This G also is a matter of credibility and not a technical matter.

1275. The proviso to clause 22 (a) of the contract moreover provides that any such notice contemplated will be invalid if the building owner is himself in breach of contract. The applicant, although not specifically invoking the proviso in this respect, H does allege that the building owner was at that stage in breach of contract because he refused to pay out to the applicant the full amount to which he was entitled in terms of a certificate issued to him by the architect. As appears from the allegations above, the facts are that this certificate was issued on 9th December, 1972, that on 11th December, 1972 the respondent himself wrote a letter to the applicant, which letter contains the respondent's own calculations of the amount which was due to the applicant, which calculations were not consistent with the certificate; that the applicant accepted

1276. 1974 (2) SA p653

1277. VILJOEN J

1278. the lesser amount (R1 705) on account; that by letter dated 15th December, 1972, the applicant's attorneys claimed the balance which amounted to R2 295; that by letter which bears the date 15th December, 1972 (Friday), but which was posted on 18th December, 1972, the architect purported to "cancel" the A certificate; that it is now alleged by both the respondent and the architect that a certificate was never issued, but that what the applicant claims to be a certificate was merely a calculation preliminary to issuing a certificate. The applicant maintains that the letter purporting to cancel the certificate was not written on 15th but on 18th and he suggests that by the pretence that the letter was written on 15th, the architect, in B a fraudulent manner, sought to gain some advantage. It is not clear what the architect could have gained. If he did deliberately predate the letter, his motive for doing so is obscure. But he might have had a motive. He might, on receiving the demand from the applicant's attorneys, have thought that the demand was good and the respondent liable if such C certificate was not cancelled before the demand, or before receipt thereof. But whatever his motive might have been, the circumstances are very suspicious. That both the respondent and the architect wish to destroy the effect of the certificate, is abundantly apparent from their inept attempt to classify the certificate as a document which merely contains preliminary D figures - inept because it is amazing that this attitude is now taken up in the face of the architect's own letter that the letter serves "as a cancellation of certificate no. 3 issued in your favour for R4 000." Apart from the credibility aspect which arises in relation to this issue, the tribunal who hears this matter will also have to decide whether any notice claimed to have been given under clause 22 (a) of the contract was not E a nullity because the respondent as building owner was himself in breach of the contract in not paying the applicant the amount reflected in the certificate as being due to him, or in interfering with the issue of the certificate. Compare the words

1279. "... of as die bouheer hom bemoei met of die uitreiking van F enige sodanige sertifikaat verhinder,..."

1280. in clause 23.

1281. In my view, a Court of law is far better equipped to adjudicate upon the matters raised by the applicant. The outcome of the action proposed to be instituted by the applicant will hinge mainly upon the issue as to whether the contract was properly G cancelled by the architect or not. The main ground for cancellation, as I have pointed out, was the alleged failure on the part of the applicant to proceed with the work diligently and expeditiously. On this issue the respondent will necessarily have to rely to a large extent on the evidence of the architect. Mr. Roux, for the respondent, has suggested that H it is not certain that the architect will be called by the respondent if this matter goes to arbitration. I fail, however, to see how the respondent can do without the architect. The hearing, whether it be before an arbitrator or a Court, will not largely, if at all, involve expert evidence on technical matters peculiar to the building trade. I am of this view because the faulty workmanship now complained of was not, according to the architect's letter of cancellation, a ground for cancellation of the contract. It was only

1282. 1974 (2) SA p654

1283. VILJOEN J

1284. adverted to at a later stage. In the letter dated 20th December, 1972, from the respondent's attorneys, there is a brief reference to "work which is not of a proper standard." The letter does not specify what this work is. In the A respondent's papers the only unacceptable work complained of was the cupboards in the master bedroom, the cornices in the master bedroom, the waterproofing and plastering in the garage. It is true that reference is also made to "certain other defects in the house", but these are not detailed. I do not agree with the respondent who states in his affidavit that the crux of the dispute between himself and the applicant are technical points based, firstly, on the quality of the B applicant's work and, secondly, whether he was entitled to do no work on the site whatsoever from before 4th December, 1972, until the builders' holiday in December, 1972. The first dispute is of a technical nature, but an issue which is virtually, as I have endeavoured to show, an afterthought. The C second dispute is not a technical matter. It is a

simple factual dispute which will have to be resolved by the evidence of the architect and the respondent on the one side and the applicant on the other.

1285. Mr. Roux, on behalf of the respondent, submits that the applicant has not shown good cause. Relying upon *Elebelle D (Pty.) Ltd. v Szyrkowski*, 1966 (1) SA 592 (W), he argues that the possibility of a legal point arising, affords no reason for refusing a party his contractual right to go to arbitration. In *Elebelle's case DE WET, J.P.*, referred to *East Rand Proprietary Mines Ltd. v Cinderella Consolidated Gold Mining Co. Ltd.*, 1922 W.L.D. 122, the head-note of which reads:

1286. "Where there is a submission to arbitration, the Court has a E discretion to refuse to stay an action in a case where the issue between the parties is merely a question of law; but the Court will be guided in each case by all the circumstances, and the mere fact that there is a point of law to be determined, if there are other matters to be decided, is not sufficient."

1287. I have pointed out that in my view there are a number of legal problems at stake in the dispute between the parties. In resolving the factual issues credibility will play an important F role. The technical matters which were raised after the so-called cancellation are easily resolvable by a Court of law. The first two circumstances are more properly, in my view, dealt with by a Court of law.

1288. In substantiation of Mr. Roux's argument that arbitrators are frequently required to decide legal points and that the G necessity for a legal point to be decided is no reason for a Court to prevent the matter from going to arbitration, I was referred to the decision in the matter of *Kathmer Investments Ltd. v Woolworths (Pty.) Ltd.*, 1970 (2) SA 498 (AD), in which the Appellate Division held that a dispute as to whether H a contract between the parties should be rectified or not, was one which, in terms of the arbitration clause, could be decided upon by the arbitrator. But in that case the Appellate Division was concerned merely with the construction of the arbitration clause. The Court a quo was not requested to exercise any discretion and the Appellate Division declined to do so. Whether the legal issue was a matter more properly to be heard by a Court of law was, therefore, not decided.

1289. Mr. Roux has also pointed out that in the present case the party accused of fraud, namely the respondent, upon whom fraud has been

1290. 1974 (2) SA p655

1291. VILJOEN J

1292. grafted through the architect, is perfectly content to submit to arbitration proceedings. In this respect he has referred me to the following dictum appearing in the *Metallurgical and Commercial Consultants case*, supra at p. 393A - F:

1293. "A distinction must be drawn between the case where it is the A person charged with fraud who seeks a hearing in open Court, rather than in the arbitration for which he has contracted, and the case where it is the person charging fraud who claims that relief. In the former case it seems to have been accepted that the claim for a hearing in Court will ordinarily be acceded to (see *Russell v Russell*, (1880) 14 Ch. D. 471; *Pennant v Kelly*, 1908 T.H. 97). It is not difficult to see why that should be. If a man who has been charged with fraud wishes an opportunity to demonstrate his innocence in open Court, he should not lightly be denied the publicity which he seeks, or B the benefit of having an adjudication by a judicial tribunal, rather than by an arbitrator who, unlike the proposed arbitrator here, may be untrained in law and inexperienced in the evaluation of evidence. And what is perhaps even more important is this: a finding by an arbitrator that fraud has been committed is final, whereas from such a finding in a Court there is a right of appeal.

1294. In the case where it is the person charging another with fraud who seeks to be relieved of his contractual undertaking to C submit the dispute to arbitration, these considerations are of far less weight. There is something to be said, it is true, for the proposition that an enquiry into an alleged fraud is always, to some degree, a matter of public concern, and should therefore be conducted in public (see *Willesford v Watson*, L.R. 14 Eq. 572 at pp. 577 - 8). But there are strong counteracting considerations in the case where the person to be charged with fraud claims his rights

under a submission to arbitration. They were trenchantly expressed by JESSEL, M.R., D in Russell, v Russell, supra at pp. 476 - 7, approved by INNES, C.J., in Pennant v Kelly, supra, and applied by JONES, J., in Blotnick v Turecki, 1944 CPD 100. The weight of authority would therefore seem to be against the respondent on this point."

1295. In Russell's case, referred to by COLMAN, J., in the above-quoted passage, JESSEL, M.R., deemed it to be most desirable for the reputation, comfort and happiness of both the E litigating parties, who were brothers and partners in business, that the dispute between them should be investigated by some impartial friend in the capacity of an arbitrator rather than before a Judge in Court. He did not agree with Vice - Chancellor WICKERS who said in Willesford v Watson, L.R. 14 Ep. 572, that in cases of actual fraud the Court refuses to interfere with an action commenced in Court for two reasons: F first, because when personal fraud is in issue the case is properly one of publicity, and for a jury; and secondly, because the parties to a contract can hardly be supposed to have endeavoured to refer to a conventional tribunal any attempt by one of them to cheat the other.

1296. What JESSEL, M.R., therefore, expressed so trenchantly in G Russell's case were considerations peculiar to the circumstances prevailing in that case, the most decisive of which was his conviction that the two brothers were well advised to shun publicity. To avoid publicity was, in my view, not one of the motives operating in the present case when the parties agreed on the terms of the contract. This building H contract is a standardised one and very obviously the arbitration clause was inserted because experience in the building trade had taught the members of the trade that an architect was, by reason of his training, the best person to decide upon technical matters relating to the building trade.

1297. A further consideration which weighs heavily with me, is the fear which the applicant has that he will not be dealt by fairly by an arbitration tribunal consisting of an architect, in view of the fact that the respondent

1298. 1974 (2) SA p656

1299. VILJOEN J

1300. will have to rely greatly on his own architect, a member of the same profession as the arbitrator. The architect may be completely fair and impartial in his conduct of the proceedings, but sight must not be lost of the finality of A arbitration proceedings. It is conceivable that a layman as far as legal matters are concerned, as the applicant is, may have certain misgivings regarding the outcome in a matter where credibility will play a very important role, and where the main witness opposing him is an architect, and the arbitrator is also an architect. In a situation such as the present, the principle that justice must not only be done, but must also be seen to be done should, in my view, apply.

1301. B The applicant has made out a strong prima facie case and for the reasons stated I have decided to exercise my discretion in his favour and to grant him the relief prayed for in prayer 2 (b). I accordingly declare that the arbitration clause, namely clause 26, in the building contract entered into between C the parties on 20th July, 1972, shall cease to have effect in respect of the action for damages to be instituted by the applicant against the respondent as a result of the cancellation of the said contract.

1302. Mr. Roux has asked me, in the event of relief being granted as prayed, to order costs to be costs in the action to be D instituted. I have considered this request, but have decided against it. It is true that the Court, in a matter such as the present, exercises a discretion, but it is a judicial discretion. The respondent was requested before this application was launched to forego his rights under the arbitration clause. He would not. He forced the applicant to come to Court. The applicant has made out a strong prima facie E case, and I am not prepared to order costs to be costs in the cause. The respondent is ordered to pay applicant's costs, excluding the wasted costs which I have ordered the applicant to pay.

1303. Applicant's Attorneys: Laubscher, du Buisson & Brummer. Respondent's Attorney: Stegmanns.

RADON PROJECTS (PTY) LTD v NV PROPERTIES (PTY) LTD AND ANOTHER

2013 (6) SA 345 (SCA)

Citation	2013 (6) SA 345 (SCA)
Case No	528/12
	[2013] ZASCA 83
Court	Supreme Court Of Appeal
Judge	Nugent JA, Leach JA, Pillay JA, Erasmus AJA and Saldulker AJA
Heard	May 14, 2013
Judgment	May 31, 2013
Counsel	JG Wasserman SC (with CJ McAslin) for the appellant.
	EAS Ford SC (with DJ Taljaard) for the respondents.
Annotations	Link to Case Annotations

1304. G

1305. [zFNz]Flynote : Sleutelwoorde

1306. Engineering and construction — Building contract — Dispute resolution — Adjudication or arbitration — Whether adjudication or arbitration appropriate depending on whether dispute submitted for resolution before or after date of practical completion — Date of genesis of dispute irrelevant — JBCC H Principal Building Contract 2004 (4 ed), clause 40.

1307. Engineering and construction — Building contract — Dispute resolution — Arbitration — Jurisdiction of arbitrator — Fact that dispute arose before date of practical completion of works no bar to its resolution by arbitration — Nor is fact that party might have good defence to claim being made — JBCC Principal Building Contract 2004 (4 ed), clause 40. I

1308. Arbitration — Arbitrator — Jurisdiction — Challenge to jurisdiction — Duty of arbitrator — Not ipso facto obliged to withdraw from matter — Arbitrators entitled to enquire into scope of their jurisdiction to satisfy themselves that arbitration may continue — Must exercise sound judgment based on view of strength of objection and circumstances of case. J

1309. 2013 (6) SA p346

1310. [zHNz]Headnote : Kopnota

1311. A NV (the employer) and Radon (the contractor) had entered into a JBCC Principal Building Contract 2004 (4 ed). An arbitrator was appointed when disagreements arose regarding NV's liability for various claims lodged by Radon. NV objected to the arbitrator's jurisdiction on two grounds: because (1) the dispute arose before practical completion of the works; and (2) Radon was B purporting to revive claims that had been finally disposed of by the principal agent * during the course of construction. The high court granted the order sought by NV and Radon appealed to the SCA.

1312. Held: Under clause 40 + of the JBCC contract the question whether a dispute should be resolved by adjudication or arbitration depended on whether it was submitted for resolution before or after practical completion of the C works, not on when it arose. If a party wanted a dispute resolved before practical completion, adjudication was the way to go. After practical completion it had to be resolved by arbitration. Also, an adjudicator's decision was not exhaustive of the dispute, so that it might again be submitted for arbitration after practical completion. Thus, if the present dispute indeed arose before practical completion, this was no bar to D its resolution by arbitration. But NV's objection to the arbitrator's jurisdiction had to fail for the simple reason that the question whether Radon was entitled to submit revised claims was one 'arising out of or concerning the agreement', and thus subject to resolution by arbitration by virtue of JBCC clause 40.1. Whether Radon was indeed entitled to submit the revised claims went to the merits and had no bearing on the arbitrator's jurisdiction. As to the duty of arbitrators when confronted with jurisdictional E challenges: they were not obliged to forthwith withdraw from the matter, but were entitled to enquire into the scope of their jurisdiction for the purpose of satisfying themselves as a preliminary matter whether they ought to continue with the arbitration. They should exercise sound judgment based on their view of the strength of the objection and the circumstances that presented themselves in the particular case. Appeal upheld. F (Paragraphs [9], [21] – [25] and [27] – [32] at 350B – D, 352D – 353H and 354A – 355E.)
1313. [zCAz]Cases Considered
1314. Annotations
1315. Case law
1316. G Southern Africa
1317. Chirwa v Transnet Ltd and Others 2008 (4) SA 367 (CC) ((2008) 29 ILJ 73; 2008 (3) BCLR 251; [2008] 2 BLLR 97; [2007] ZACC 23): dictum in para [155] applied
1318. Makhanya v University of Zululand 2010 (1) SA 62 (SCA) ([2009] 4 All SA 146; [2009] 8 BLLR 721): dictum in paras [51] – [54] applied.
1319. H England
1320. Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbertriebe Registrierte Genossenschaft mit Beschränkter Haftung [1953] 2 All ER 1039 (QB): dictum at 1042C – F applied
1321. Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] BLR 93 (CA): dictum at 97 applied.
1322. 2013 (6) SA p347
1323. New Zealand A
1324. Concrete Structures (NZ) Ltd v Palmer and Another [2006] NZHC 342: referred to.
1325. [zClz]Case Information
1326. JG Wasserman SC (with CJ McAslin) for the appellant.
1327. EAS Ford SC (with DJ Taljaard) for the respondents. B
1328. An appeal against a decision in the Eastern Cape High Court, Grahamstown (Da Silva AJ).
1329. Order
1330. The appeal is upheld with costs. The order of the court below is set aside C and substituted with an order dismissing the application with costs. The costs in each case are to include the costs of two counsel where two counsel were employed.
1331. [zJDz]Judgment
1332. Nugent JA (Leach JA, Pillay JA, Erasmus AJA and Saldulker AJA concurring): D

1333. [1] Large construction projects provide considerable scope for disputes of various kinds to arise, both in the course of executing the works and after the works have been completed. Most construction contracts make provision for their resolution. This appeal concerns the manner in which disputes are to be resolved under the Principal Building Agreement of E the Joint Building Contracts Committee (JBCC) 4 ed (March 2004).
1334. [2] It arises from a contract concluded in that form between NV Properties (Pty) Ltd (the first respondent, which I will refer to as the employer) and Radon Projects (Pty) Ltd (the appellant, which I will refer to as the contractor) under which the contractor undertook to construct F for the employer what was to be known as the East London Convention Centre. The contractor has asserted various claims against the employer. The employer disputes liability for the claims. At the instance of the contractor an arbitrator was appointed to resolve the disputes. Contending that the arbitrator had no jurisdiction to consider and rule upon the bulk of the claims the employer applied to the Eastern Cape High Court G for an order to that effect. Da Silva AJ granted the order and the contractor now appeals with the leave of that court.
1335. [3] Construction contracts most often require disputes to be resolved by arbitration, but at the same time postpone arbitration until the works H have been completed so as to avoid interruption. Earlier contracts in common use made an exception in certain limited circumstances. That was the case in Britain under the JCT 1 Standard Form of Building Agreement (1980 ed), 2 and in this country under the General Conditions of Contract, 1982, for use in connection with Works of Civil Engineering Construction (5 ed). 3 In both cases an arbitration could not I
1336. 2013 (6) SA p348
1337. Nugent JA (Leach JA, Pillay JA, Erasmus AJA and Saldulker AJA concurring)
1338. A be opened until after completion of the works, except on limited issues that, by their nature, demanded earlier resolution, in particular disputes concerning payment certificates.
1339. [4] It has now become common internationally — in some countries by B legislation 4 — for disputes to be resolved provisionally by adjudication. In Macob Civil Engineering Ltd v Morrison Construction Ltd 5 adjudication was described, in the context of English legislation, as —
1340. 'a speedy mechanism for settling disputes [under] construction contracts on a provisional interim basis, and requiring the decision of adjudicators to be enforced pending the final determination of disputes C by arbitration, litigation or agreement. . . . But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process.'
1341. [5] The authors of Hudson's Building and Construction Contracts 6 observe D that under New Zealand construction legislation 7 adjudication —
1342. 'is regarded as essentially a cash flow measure implementing what has been colloquially described as a quick and dirty exercise to avoid delays in payment pending definitive determination of litigation'. 8
1343. [6] In the present contract the resolution of disputes is provided for in E clause 40 as follows:
1344. '40.1 Should there be any disagreement between the employer or his agents on the one hand and the contractor on the other arising out of or concerning this agreement, the contractor may request the principal agent to determine such disagreement by a written F decision to both parties. On submission of such a request a disagreement in respect of the issues detailed therein shall be deemed to exist.
1345. 40.2 The principal agent shall give a decision specifically in terms of 40.1 to the employer and the contractor within ten (10) working days of receipt of such a request. Such decision shall be final and G binding on the parties unless either party disputes the same in terms of [40.3].
1346. 40.3 Where there is no principal agent or should the principal agent fail to give a written decision within ten (10) working days or either party disputes the decision in terms of 40.2

- by notice to the other and the principal agent within twenty (20) working days of receipt H thereof a dispute shall be deemed to exist.
1347. 2013 (6) SA p349
1348. Nugent JA (Leach JA, Pillay JA, Erasmus AJA and Saldulker AJA concurring)
1349. 40.4 A dispute in terms of 40.2 or 40.3 shall be submitted to: A
1350. 40.4.1 Mediation where the parties so agree
1351. 40.4.2 Adjudication where practical completion in terms of 24.0 or practical completion of the last section in terms of 28.2.2 has not been achieved
1352. 40.4.3 Arbitration where practical completion in terms of this n/s B agreement has been achieved or where expressly stated in terms of the n/s schedule. . . .
1353. 40.5 The dispute referred to mediation in terms of 40.4.1, adjudication in terms of 40.4.2 or arbitration in terms of 40.4.3 shall be:
1354. 40.5.1 Dealt with in terms of the JBCC Dispute Resolution Procedures
1355. 40.5.2 Held in abeyance over an annual holiday period where C such period is noted in the schedule
1356. 40.6 Reference of the dispute for resolution in terms of 40.4 shall not relieve the parties from liability for the due and timeous performance of their obligations
1357. 40.7 The cancellation of this agreement shall not affect the validity of this clause 40.0.' D
1358. [7] The adjudication rules issued by the JBCC for use with the contract describe adjudication as —
1359. 'an accelerated form of dispute resolution in which a neutral third party determines the dispute as an expert and not as an arbitrator and whose determination is binding unless and until varied or overturned by an E arbitration award'.
1360. An adjudicator is given wide inquisitorial powers that enable disputes to be resolved summarily and expeditiously. He is empowered, for example, to determine the dispute on the basis alone of the documents submitted to him by the parties, or on the basis alone of an inspection of F the works. He may make use of his own specialist knowledge, he may open up and review any determination or certificate or valuation related to the dispute, and generally, he may 'adopt the most cost- and time-effective procedure consistent with fairness to determine the dispute'. A determination by the adjudicator is — G
1361. 'binding upon the parties unless and until such determination is overturned or varied in whole or in part by arbitration in terms of clause 40.5 of the Agreement'.
1362. [8] When read together with the rules, I think it is plain that, in keeping with modern practice internationally, adjudication under clause 40 is H designed as a measure for the summary and interim resolution of disputes, subject to their final resolution by arbitration where appropriate. The effect of clause 40, properly construed, is that the first port of call for a contractor where disagreement arises with the employer, is the principal agent. 9 The clause does not purport to limit the time within which the principal agent may be called upon to do so. But once he has I been called upon he must resolve the disagreement within ten days. If he
1363. 2013 (6) SA p350
1364. Nugent JA (Leach JA, Pillay JA, Erasmus AJA and Saldulker AJA concurring)
1365. A fails to do so, or if either party disputes his decision within 20 days, a dispute is deemed to exist. If he gives a decision, and it is not disputed within that time, then his decision becomes final and binding.

1366. [9] Once a dispute is deemed to exist either party may (but not must) submit the dispute for independent resolution. Once again the clause B does not purport to prescribe a time within which that must be done. But if a party wants it resolved before practical completion, it must be submitted to adjudication. After practical completion it must be resolved by arbitration. (I leave aside the opportunity for mediation by agreement. Needless to say, it is also open to the parties, after practical completion, C to agree to adjudication.) An adjudicator's determination is clearly not exhaustive of the dispute. After practical completion the dispute might be submitted again to arbitration for final resolution. Whether a dispute is to be resolved by adjudication or by arbitration, in other words, depends upon when the dispute is submitted for resolution, and not D upon the nature or genesis of the dispute.
1367. [10] The contract defines 'practical completion' of the works as —
1368. 'the stage of completion where, in the opinion of the principal agent, completion of the works has substantially been reached and can effectively be used for the purposes intended'.
1369. E It is a significant event because failure to reach practical completion by the agreed date renders the contractor liable to penalties.
1370. [11] The contract recognises that delays might occur in the course of construction for any number of reasons. Where the delay occurs through F no fault of the contractor then generally the contractor will be entitled to revision of the date for practical completion, and in some cases also to adjustment of the contract value. Delays that give rise to those entitlements are listed in clauses 29.1 to 29.3 of the contract but need no elaboration for present purposes.
1371. G [12] If the contractor anticipates such a delay occurring he is required by clauses 29.4 to 29.6 to give the principal agent reasonable and timeous notice of the anticipated delay, to take steps to avoid or reduce the delay, and to give notice to the principal agent, within a stipulated time, of his intention to claim a revision, failing which the principal agent need not H consider the claim. The contractor must also submit any such claim to the principal agent, incorporating certain specified information, within 60 days of the delay ceasing, failing which the claim is forfeited.
1372. [13] Within 20 working days of receiving such a claim the principal agent I is required by clause 29.7 to —
1373. 2013 (6) SA p351
1374. Nugent JA (Leach JA, Pillay JA, Erasmus AJA and Saldulker AJA concurring)
1375. '29.7.1 Grant, reduce or refuse the period claimed. A
1376. 29.7.2 Determine the revised date for practical completion in relation to the working days granted.
1377. 29.7.3 Identify each circumstance and relevant subclause for each revision granted or give reasons for amending or refusing such claim.' B
1378. If the principal agent fails to act in accordance with that clause the claim is deemed to have been refused (clause 29.8).
1379. [14] The agreed date for practical completion in this case was 17 October 2008 and the contractor was liable to a penalty of R35 000 for every day thereafter until practical completion was reached.
1380. [15] The present dispute concerns claims by the contractor for revisions C to the date for practical completion (and related revisions) in consequence of delay. During the course of construction a number of such claims were submitted to the principal agent under clause 29. Those that were granted, in whole or in part, extended the date for practical completion to 9 March 2009. The project was brought to practical D completion only on 14 December 2009, in consequence of which the contractor incurred penalties amounting to a little more than R6 million.

1381. [16] After practical completion the contractor submitted to the principal agent what was called a 'consolidated claim' — a consolidation of a number of individual claims — for revisions of the contract on account of delay. According to the contractor these were claims made in the course of construction, but revised in the light of information that subsequently came to hand. The principal agent failed to respond to the consolidated claim and, says the contractor, it was therefore deemed to have been refused, as contemplated by clause 29.8. On 4 August 2010 the contractor called upon the principal agent to 'determine the disagreement' (with regard to the validity of the claims) under clause 40.1, which the principal agent failed to do. At the request of the contractor the second respondent (who has played no role in the proceedings) was then appointed by the Association of Arbitrators to resolve the dispute.
1382. [17] The contractor subsequently abandoned some of the claims. Those that it pursues were pleaded in a statement of claim. In addition to claims for revision in consequence of delay, the contractor pleaded three other claims. It has given notice of its intention to abandon one of those claims, and the other two, which are claims for interest, are of no consequence for present purposes.
1383. [18] I have found the formulation of the objections to the jurisdiction of the arbitrator in the founding affidavit to be rather confusing but on close analysis the objections really come down to two. Both are founded upon the employer's contention that the contractor is purporting to revive claims that were disposed of finally in the course of construction.
1384. [19] The employer alleges that most of the claims now being advanced are claims that were submitted to the principal agent in the course of construction and were refused, whereupon the contractor called upon the principal agent to resolve the disagreement under clause 40.1. It is alleged that the principal agent did so, and the contractor failed to
1385. 2013 (6) SA p352
1386. Nugent JA (Leach JA, Pillay JA, Erasmus AJA and Saldulker AJA concurring)
1387. A dispute his decision within 20 days, in consequence of which his decisions became final and binding, and no dispute came into existence. On that basis, so it was submitted, there is no dispute between the parties capable of being submitted to arbitration.
1388. [20] The employer went on to allege that even if a dispute came into existence it is not competent to submit it to arbitration, because the dispute arose before practical completion, and is thus required to be resolved by adjudication. As the objection was expressed in the founding affidavit:
1389. C '[The contractor] was obliged to have submitted the disputes to adjudication and . . . it is not entitled to now attempt to refer disputes, which should have been adjudicated, to arbitration. . . .'
1390. And later:
1391. '(W)here a dispute, properly established in terms of the relevant procedural requirements manifests prior to practical completion it falls D to be dealt with in accordance with the adjudication procedures.'
1392. [21] The latter objection can be disposed of at once. I have already explained at some length that the question whether a dispute is to be resolved by adjudication, or whether it is to be resolved by arbitration, E depends upon when it is submitted for resolution, and not upon when the dispute arises. A contractor is not obliged to submit a dispute to adjudication. He may choose instead to complete the works and submit it then to arbitration. If the present disputes can indeed be said to have arisen before practical completion that would be no bar to their F resolution by arbitration.
1393. [22] But both objections founder on more fundamental grounds because they misconceive the nature of the claims that are now being advanced. The case made out by the contractor in its answering affidavit is that it was entitled to revise and update its earlier claims in the light of G information that came to hand after completion of the works, and that the principal agent was

obliged to consider the revised claims, and allow those that qualified for extensions of time. The contractor has advanced various reasons for that alleged entitlement to submit revised claims but I need not go into them. It is those revised claims that are now sought to be pursued before the arbitrator, and not the initial claims that were H refused in the course of construction.

1394. [23] Whether or not the contractor was indeed entitled to submit revised claims is not a matter that we need to consider. It might well be that there is no merit in its contention that it was entitled to do so but that is not I material for present purposes. If the contention has no merit then the claims will fail but that is no reason why the arbitrator has no jurisdiction to consider them. It means merely that the employer might have a good defence to the claims. It ought to be trite that the question whether a tribunal has jurisdiction to consider a claim is not dependent upon its merit or otherwise. The question is only whether the claim as formulated J in the pleadings falls within the scope of his jurisdiction to consider.

1395. 2013 (6) SA p353

1396. Nugent JA (Leach JA, Pillay JA, Erasmus AJA and Saldulker AJA concurring)

1397. [24] That was made clear by this court when rejecting a similar A jurisdictional objection in *Makhanya v University of Zululand*. 10 That case concerned the jurisdiction of a court, but the principle applies as much to the jurisdiction of an arbitrator. This court said the following:

1398. '[51] The submissions that were made before us by counsel for the B University, when examined, came down to asserting that [the court had no jurisdiction because the claim is a bad claim]. . . . Her submission, in short, was that the court had no power in the matter because the University had a good defence to the claim.

1399. [52] I have pointed out that the term jurisdiction . . . describes the power of a court to consider and to either uphold or dismiss a claim. And I have also pointed out that it is sometimes overlooked that to dismiss a claim C (other than for lack of jurisdiction) calls for the exercise of judicial power as much as it does to uphold the claim.

1400. [53] The submission that was advanced by counsel invites the question how a court would be capable of upholding the defence (and thus dismissing the claim) if it had no power in the matter at all. Counsel could provide no answer — because there is none. D

1401. [54] There is no answer because the submission offends an immutable rule of logic, which is that the power of a court to answer a question (the question whether a claim is good or bad) cannot be dependent upon the answer to the question. To express it another way, its power to consider E a claim cannot be dependent upon whether the claim is a good claim or a bad claim. The Chief Justice, writing for the minority in *Chirwa*, 11 expressed it as follows: 12

1402. "It seems to me axiomatic that the substantive merits of a claim cannot determine whether a court has jurisdiction to hear it."

1403. [25] I will accept for present purposes that decisions made by the F principal agent under clause 40.1 in relation to the initial claims that were refused in the course of construction became final and binding, and no dispute capable of being submitted to arbitration came into existence in relation to those claims. But those are not the claims that are now in issue. I have said that the contractor alleges an entitlement to submit revised claims to the principal agent, which it did when submitting its G 'consolidated claim'. Those are the claims that became disputed once the principal agent failed to respond to the contractor's request for a decision under clause 40.1 in August 2010. A dispute thereupon arose as to the validity of those claims, which was one 'arising out of or concerning the agreement' — it is only because the agreement exists that H the dispute has arisen — that is subject to resolution by arbitration. The application ought thus to have failed and the appeal must succeed.

1404. [26] There is a further issue that I think I ought to deal with lest further jurisdictional objections arise in the course of the proposed arbitration. I

1405. 2013 (6) SA p354

1406. Nugent JA (Leach JA, Pillay JA, Erasmus AJA and Saldulker AJA concurring)
1407. A [27] When confronted with the employer's objection the arbitrator's response was that he was bound to enter upon the arbitration nonetheless, and that the objection should properly be raised in the pleadings and dealt with accordingly, but the matter was taken out of his hands, because it was said he had no power to 'determine his own jurisdiction'.
1408. B [28] The response of the arbitrator cannot be faulted. When confronted with a jurisdictional objection an arbitrator is not obliged forthwith to throw up his hands and withdraw from the matter until a court has clarified his jurisdiction. While an arbitrator is not competent to determine his own jurisdiction that means only that he has no power to C fix the scope of his jurisdiction. The scope of his jurisdiction is fixed by his terms of reference and he has no power to alter its scope by his own decision (in the absence of agreement to the contrary).
1409. [29] But that does not preclude him from enquiring into the scope of his jurisdiction, and even ruling upon it, when a jurisdictional objection is D raised. He does so at the risk that he might be wrong — in which case an award he makes will be invalid — but in some cases it might be convenient to enter upon the arbitration nonetheless. As it is expressed in the fifth edition of Keating on Building Contracts 13 (before the Arbitration Act, 1996), in reliance on Christopher Brown Ltd v Genossenschaft Oesterreichischer E etc: 14
1410. 'If the arbitrator's jurisdiction is challenged he should not refuse to act until it has been determined by some court which has power to determine it finally. He should inquire into the merits of the issue to satisfy himself as a preliminary matter whether he ought to get on with the arbitration or not, and if it becomes abundantly clear to him that he F has no jurisdiction then he might well take the view that he should not go on with the hearing at all.'
1411. [30] The position was fully explained by Devlin J in that case as follows: 15
1412. 'I think that the answer to that question becomes clear if one bears in G mind the fundamental principles which govern the acts of arbitrators in these matters. It is clear that at the beginning of any arbitration one side or the other may challenge the jurisdiction of the arbitrator. It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to cease to act, and to refuse to act, until their jurisdiction has been determined by some court which has power to H determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and determine the matter in dispute leaving the question of their jurisdiction to be held over until it is determined by some court which had power to determine it. They might then be merely wasting their time and everybody else's. I They are not obliged to take either of those courses. They are entitled
1413. 2013 (6) SA p355
1414. Nugent JA (Leach JA, Pillay JA, Erasmus AJA and Saldulker AJA concurring)
1415. to inquire into the merits of the issue whether they have jurisdiction or A not, not for the purpose of reaching any conclusion which will be binding on the parties, because that they cannot do, but for the purpose of satisfying themselves, as a preliminary matter, whether they ought to go on with the arbitration or not. If it became abundantly clear to them that they had no jurisdiction as, for example, it would be if the submission which was produced was not signed, or not properly B executed, or something of that sort, then they might well decide not to proceed with the hearing. They are entitled, in short, to make their own inquiries in order to determine their own course of action, but the result of that inquiry has no effect whatsoever on the rights of the parties.'
1416. [31] In short, what is called for when confronted with a jurisdictional C objection, is sound judgment by the arbitrator on the course that should be followed, based on his view of the strength of the objection, and the circumstances that present themselves in the particular case. Mustill & Boyd The Law and Practice of Commercial Arbitration in England 16 and Russel on Arbitration 17 provide helpful assistance as to the manner in which an arbitrator should exercise his judgment. D

1417. [32] The appeal is upheld with costs. The order of the court below is set aside and substituted with an order dismissing the application with costs. The costs in each case are to include the costs of two counsel where two counsel were employed. E
1418. Appellant's Attorneys: Ooteman Attorneys, Johannesburg; Webbers, Bloemfontein.
1419. Respondents' Attorneys: Nettletons, Grahamstown; Lovius Block, Bloemfontein. F
- 1420.
1421. * The party named in the contract data and/or appointed by the employer with full authority and obligation to act in terms of the agreement.
1422. † Clause 40 governs dispute resolution. See para [6] of the judgment for its text.
1423. 1 Joint Contracts Tribunal.
1424. 2 Clause 41 in Furst & Ramsey Keating on Building Contracts 5 ed (1991) by Sir Anthony May at 673 – 5.
1425. 3 Clause 69(3) in Loots Engineering and Construction Law (1985) at 338.
1426. 4 It is also provided for in the 2011 edition of the JCT Standard Form of Building Agreement. See clause 9 in Keating on Building Contracts 9 ed (2012) para 20 – 398.
1427. 5 Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] BLR 93 (CA) at 97, cited in Keating on Building Contracts 9 ed para 18 – 018.
1428. 6 Dennys et al (eds) Hudson's Building and Construction Contracts 12 ed (2010).
1429. 7 Construction Contracts Act 2002.
1430. 8 At 1375, citing Concrete Structures (NZ) Ltd v Palmer and Another [2006] NZHC 342.
1431. 9 The JCT Standard Form of Building Agreement does not require that preliminary step. As pointed out by Loots above at 341 in relation to the comparable requirement in the General Conditions of Contract 1982 —
1432. 'in the great majority of cases the reference to the engineer [now the principal agent] is little more than an irritating and time-wasting formality, since his decision is likely to be a foregone conclusion, having previously been indicated to the contractor or employer when the claim was first advanced and the dispute arose'.
1433. 10 Makhanya v University of Zululand 2010 (1) SA 62 (SCA) ([2009] 4 All SA 146; [2009] 8 BLLR 721).
1434. 11 Chirwa v Transnet Ltd and Others 2008 (4) SA 367 (CC) ((2008) 29 ILJ 73; 2008 (3) BCLR 251; [2008] 2 BLLR 97; [2007] ZACC 23).
1435. 12 Paragraph 155.
1436. 13 Above n2, at 392 – 3.
1437. 14 Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbertriebe Registrierte Genossenschaft mit Beschränkter Haftung [1953] 2 All ER 1039 (QB).
1438. 15 At 1042C – F.
1439. 16 Mustill & Boyd The Law and Practice of Commercial Arbitration in England 2 ed (1989) at 574 – 6.
1440. 17 Sutton & Gill Russell on Arbitration 22 ed (2003) paras 5 – 075 to 5 – 089.
1441. **Van Zyk v Von Haeblier**, 1993(3) SA654 (SECLD)

VAN ZIJL v VON HAEBLER

1993 (3) SA 654 (SE)

Citation	1993 (3) SA 654 (SE)
Court	South-Eastern Cape Local Division G
Judge	Kroon J
Heard	October 26, 1992
Judgment	February 3, 1993
Annotations	Link to Case Annotations

1442. [zFNz]Flynote : Sleutelwoorde

1443. Arbitration - Arbitration proceedings - Failure to attend - Proceedings H postponed after one day's hearing by agreement between parties and at one party's behest - Such party at resumed hearing handing arbitrator memorandum embodying request for postponement and request that arbitrator state case for opinion of Supreme Court, whereafter, despite protestations of arbitrator and other party's counsel, party summarily absented himself I from hearing and leaving premises - Such conduct falling squarely within ambit of provisions of s 15(2) of Arbitration Act 42 of 1965 and arbitrator therefore quite entitled to proceed with arbitration in that party's absence.

1444. Arbitration - The award - Application to have award made order of Court J - Award in fact a nullity - Failure by one party to arbitration

1445. 1993 (3) SA p655

1446. KROON J

1447. A timeously to invoke provisions of s 33 of Arbitration Act 42 of 1965 to have award set aside not disentitling that party from resisting application by other party to have award made order of Court.

1448. Arbitration - The award - Time for making - Interpretation of phrase 'entered on the reference' occurring in s 23(a) of Arbitration Act 42 of B 1965 - Semble: Date on which arbitrator enters upon reference is date on which arbitrator commences hearing evidence or entertains submissions of parties as to conduct of matter, other than mere determination of date on which arbitration proceedings will commence.

1449. [zHNz]Headnote : Kopnota

1450. Where an arbitrator's award is in fact a nullity, the failure by one party C to the arbitration to timeously invoke the provisions of s 33 of the Arbitration Act 42 of 1965 to have the award set aside would not disentitle that party from resisting an application by the other party to have the award made an order of Court.

1451. The respondent, a party to arbitration proceedings, had, on the day to which the matter had by agreement between the parties but at the respondent's behest been postponed, arrived at the hearing and had handed the arbitrator a memorandum which embodied a request for a postponement, D in order to enable the respondent to seek certain relief in the Supreme Court, and a request that the arbitrator state a case for the opinion of the Supreme Court, and had thereafter, despite the protestations of the arbitrator and the applicant's counsel, summarily absented himself from the hearing and left the premises. The Court held that the respondent's conduct in failing to remain in attendance at the proceedings fell squarely within the ambit of the

provisions of s 15(2) of the Arbitration Act and that the arbitrator had therefore been quite entitled to proceed with the arbitration in the absence of the respondent.

1452. Semble: Concerning the correct interpretation of the phrase 'entered on the reference', occurring in s 23(a) of the Arbitration Act, it would seem, particularly if regard is had to the Afrikaans version of the section, where the phrase 'op die verwysing begin ingaan het' appears, that the date on which an arbitrator enters upon the reference is the date on which he commences hearing evidence or entertains submissions from the parties as to the conduct of the matter, other than the mere determination of a date on which the arbitration proceedings will commence.

1453. [zClz]Case Information

1454. Application for an order that an arbitration award be made an order of Court. The facts appear from the reasons for judgment.

1455. G R P van Rooyen SC for the applicant.

1456. R E S Charsley for the respondent.

1457. Cur adv vult.

1458. H Postea (February 3).

1459. [zJDz]Judgment

1460. Kroon J: The relief sought by the applicant in his notice of motion was an order that an award, dated 31 July 1991, made by one De Villiers, who sat as arbitrator in a dispute between the applicant and the respondent, be made an order of Court, together with a further order that the costs of the application be paid by the respondent. As will appear later, counsel for the applicant at the hearing applied for certain additional relief.

1461. The essential history of the matter, as extracted from the papers and the oral evidence tendered, may be stated as follows: The parties concluded an agreement in terms of which the respondent purchased from the applicant a farm in the Thornhill area. According to the applicant, the J respondent

1462. 1993 (3) SA p656

1463. KROON J

1464. A breached the said agreement and the applicant instituted action against the respondent for the recovery of damages arising out of the aforesaid breach. At all times the applicant's attorney was Dr Beyleveld of Port Elizabeth and the respondent was represented by one Kruger, an attorney of Johannesburg. When the matter was ripe for hearing, Beyleveld and Kruger reached agreement that the matter be referred to arbitration. As will B appear later, precisely what issues had to be decided at the arbitration was in dispute in the present application. According to Beyleveld, he and Kruger had agreed that the respondent had no defence on the merits and that the only issue to be resolved at the arbitration was the extent of the damage, if any, suffered by the applicant consequent upon the C respondent's breach of contract. This was denied by Kruger, who contended that the merits of the action had also been an issue to be decided at the arbitration. In the result the arbitrator held that in terms of the submission placed before him he was called upon to decide only whether the applicant had suffered any damage by reason of the respondent's breach of D contract and, if so, the extent thereof, and he disallowed any canvassing of the merits of the action at the arbitration. The award made by him read as follows:

1465. '(1) That the defendant (ie the respondent) pay the plaintiff (ie the applicant) damages in the sum of R50 000 together with interest thereon from date hereof at the same rate as a judgment debt as E provided in s 29 of the Arbitration Act 42 of 1965.

1466. (2) That the defendant pay the costs of suit of the defendant (sic - this should obviously read "plaintiff") as between party and party on the Supreme Court scale, such costs to include

1467. (i) the costs of the action instituted by the plaintiff against the F defendant under case No 3327/85 in the Supreme Court of South Africa, South Eastern Cape Local Division;
1468. (ii) the costs and charges of the arbitrator, including the costs of mechanically recording and transcribing the oral evidence by the arbitrator, including the costs of the eleven tapes used;
1469. (iii) the costs of the translators who were present on 27 May 1991.
1470. G (3) That the original signed copies of this ruling and award shall only be released to the parties on payment of the arbitrator's costs referred to in para (2)(ii) above.'
1471. The relief sought by the applicant was resisted by the respondent on a number of grounds, the validity of which will be discussed during the H course of this judgment. A further issue between the parties is the question which of them is to be saddled with responsibility for the costs of the applicant's application for condonation of the late filing of a replying affidavit by Beyleveld. Such condonation had been previously granted by my brother Ludorf, who reserved the costs of the application.
1472. The papers disclosed a number of factual disputes and accordingly, by I agreement between the parties, the following order was made by me on 24 June 1992, viz:
1473. '1. That the matter is referred for the hearing of oral evidence on the following disputes raised in the papers:
1474. 1.1 The respondent contends that no proper record was kept of the J proceedings, as more fully set out in paras 1(a) and (b) of
1475. 1993 (3) SA p657
1476. KROON J
1477. A annexure "H" to the answering affidavit. The applicant contends that the record which was kept was a proper record in terms of s 17 of the Arbitration Act and that it was kept specifically as requested by the respondent.
1478. 1.2 The respondent contends that the arbitrator's terms of B reference required him to determine the merits as well as the quantum of the damages in issue, as more fully set out in paras 2(a), (b) and (c) of annexure "H" to the answering affidavit. The applicant contends that it was agreed that the arbitrator's terms of reference would encompass only the determination of the damages, if any, suffered by the applicant.
1479. C 1.3 The respondent contends that the arbitrator did not make his award within the period prescribed by s 23(a) of the Arbitration Act. The applicant contends that he did so make his award and that if he did not so make his award, an extension of time should be granted in terms of the provisions of s 23 of the Arbitration Act, read with s 38 of the Arbitration Act, and D that the date for delivery of the award should be extended to 31 July 1991.
1480. 1.4 The respondent contends that on 26 June 1991 he made the applications set forth in annexure "H" to the answering affidavit. The respondent's contentions are set forth in para 3 of the supplementary answering affidavit. The applicant E contends that on that date the respondent deliberately absented himself from the arbitration hearing in the face of warnings not to do so.
1481. 1.5 The respondent contends that no decision was given on the F issues raised in annexure "H" to the answering affidavit until 31 July 1991, whereas the applicant contends that the arbitrator ruled on 26 June 1991 that he would not grant a postponement.
1482. 1.6 The respondent contends that on 26 June 1991 the applicant was permitted to close his case and to apply for default judgment G before there was a ruling on the application by the respondent as embodied in annexure "H" to the answering affidavit, whereas the

applicant contends that the arbitrator did in fact give a ruling on 26 June 1991 and was entitled to proceed in the absence of the respondent.

1483. H 1.7 The respondent contends that the arbitrator did not apply his mind to the issues raised in para 1(c) and 2(f) of annexure "H" to the answering affidavit, whereas the applicant contends that the arbitrator did so apply his mind.

1484. 1.8 What caused the delay in filing the replying affidavit and who is responsible for paying the costs of the application for I condonation for the late filing of the replying affidavit.

1485. 2. The evidence shall be that of any witness whom the parties or either of them may elect to call, subject to para 3 hereof.

1486. 3. Save in the case of deponents to affidavits in this application, neither party shall be entitled to call any witness unless, in the case of the applicant, after giving the respondent a written J summary of

1487. 1993 (3) SA p658

1488. KROON J

1489. A the evidence of such witness 15 days before the date of the hearing, and in the case of the respondent, giving the applicant a written summary of the proposed evidence of such a witness not later than 10 days before the date of the proposed hearing, provided that the Court may on application allow the evidence of a witness to be led despite the failure to give a summary as required in this paragraph. B

1490. 4. Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.

1491. 5. The fact that the party has served a statement in terms of para 3 hereof or has subpoenaed a witness, shall not oblige such party to C call the witness concerned.

1492. 6. Within 21 days of the making of this order, each of the parties shall make discovery, on oath, of all documents relating to the issues referred to in para 1 thereof, which are or have at any time been in the possession or under the control of such party. D Such discovery shall be made in accordance with Rule 35 of the Rules of the above honourable Court and the provisions of that Rule with regard to the inspection and production of documents discovered shall be operative.

1493. 7. The provisions of Rules 36, 37, 38 and 39 will apply mutatis mutandis to the further conduct of these proceedings.

1494. E 8. The costs of this application shall be reserved for decision and determination after the hearing of oral evidence.'

1495. The founding affidavits filed in the main application on behalf of the applicant were deposed to by Beyleveld and De Villiers. The answering affidavits filed on behalf of the respondent were deposed to by the F respondent's wife, Kruger and the respondent himself. As indicated earlier, the replying affidavit filed on behalf of the applicant was deposed to by Beyleveld. In the application for condonation the founding and replying affidavits were deposed to by Beyleveld, while the answering affidavit was deposed to by the respondent. At the hearing of oral evidence the following witnesses testified on behalf of the applicant, viz G one Hardy, the president of the Law Society of the Cape of Good Hope, De Villiers and Beyleveld. No witnesses were called to testify on behalf of the respondent.

1496. Two interlocutory applications filed in the main application on behalf of the respondent, viz an application to strike out certain passages in H the replying affidavit of Beyleveld, and an application for an order that the applicant make better discovery and for the postponement of the matter, were not proceeded with at the hearing. In the application for condonation the respondent similarly filed two applications for certain passages in the founding and replying

affidavits of Beyleveld to be struck out. The inclusion of these passages formed part of the foundation of the I argument of Mr Charsley, who appeared for the respondent, that the costs of the application for condonation be paid by the applicant.

1497. One legal dispute canvassed by counsel requires to be disposed of at the outset. Mr Van Rooyen, who appeared for the applicant, referred to the terms of s 33 of the Arbitration Act 42 of 1965 ('the Act') which provide, J on proof of certain requisites, for a party to an arbitration to make

1498. 1993 (3) SA p659

1499. KROON J

1500. A application to Court within certain specified time periods for the setting aside of the arbitrator's award, and he submitted that if the respondent concluded that the award made by De Villiers was invalid, the respondent ought to have made application in terms of s 33 for the setting aside of the award and that failure on the part of the respondent to do so disentitled the respondent from resisting the applicant's prayer that the B award be made an order of Court. On analysis, the argument was that failure by the respondent to invoke the provisions of s 33 has the effect that the applicant's application for the award made by De Villiers to be made an order of Court is a mere formality. In support of his submission Mr Van Rooyen placed reliance on the decision in M M Fernandes (Pty) Ltd v C Mahomed 1986 (4) SA 383 (W). At 388H-389C Zulman AJ (as he then was) is reported as follows:

1501. 'I now turn to consider the question of the "disputed" acts of misconduct which are relied upon by the respondent as relieving him from the liability from the consequences of the determination made by the architect. It seems to me that, unless the award of the architect is set D aside in terms of s 33 of the Arbitration Act 42 of 1965, it remains valid and enforceable. In terms of s 33(2) of the Act, an application to set aside the award "shall be made within six weeks after publication of the award to the parties". The award in the instant matter was published to the applicant on 4 March 1985 and to the respondent on 28 March 1985. The respondent took no steps whatsoever to set the award aside but merely contented himself with resisting the claims made by the applicant in its E notice of motion. The answering affidavit of the respondent was deposed to in the application on 29 April 1985 and no application was made to set aside the award. Clause 26 of the contract, being the clause pursuant to which the award was made, is in my view an arbitration agreement as defined in s 1 of the Arbitration Act. I am accordingly of the view that it is not permissible for a respondent, faced with an award with which he is not satisfied by reason of alleged misconduct on the part of an F arbitrator, not to apply to set aside the award but merely seek to raise such alleged misconduct without joining the architect when an attempt is made to enforce the award.'

1502. I will proceed on the basis, but without deciding, that the approach set out in the extract quoted above is in general correct. With respect, however, it must be subject to the qualification appearing from the G following passage in the judgment of MacArthur J in Fassler, Kamstra & Holmes v Stallion Group of Companies (Pty) Ltd 1992 (3) SA 825 (W) at 829A, viz:

1503. 'Mr Badenhorst, for the applicant, submitted that it was not necessary for me to resolve the dispute as the respondent was out of Court in any event, as it had not sought to set aside the recommendations within six weeks of their publication as required in terms of s 33(2) of the Act. H This is an over-simplification of the problem, because, if the contention advanced by the respondent is correct and, for example, there was never an agreement by the parties to dispense with an evaluation by the appointed quantity surveyor, namely Mr Jacks, the award by Mr Cruickshank is a nullity as he went outside the terms of the arbitration agreement. This means it was void ab initio because it was no award at all, with the result that it gives rise to no legal consequences. It follows that s I 33(2) would be of no assistance to the applicant. (McKenzie NO v Basha 1951 (3) SA 783 (N) at 786.)'

1504. Accordingly, where an arbitrator's award is in fact a nullity, failure by one party to the arbitration to timeously invoke the provisions of s 33 to have the award set aside would not

disentitle that party from resisting an J application by the other party to have the award made an order of Court.

1505. 1993 (3) SA p660

1506. KROON J

1507. A It would be convenient to consider first the contention of the respondent that the award made by De Villiers was a nullity in that it in fact does not constitute an award in terms of the reference submitted to him. The essence of the contention was that in terms of his reference De Villiers had been obliged to first decide the merits of the applicant's cause of action, seen in the light of the respondent's defences thereto B and, only in the event of his resolving that issue in favour of the applicant, was he to consider the issue of the quantum of damages. He had, however, proceeded on the basis that the merits of the dispute had been conceded and had only decided the issue of damages. I have little difficulty in dismissing the respondent's allegations. In support of the C allegations made in his affidavits Beyleveld gave oral evidence and he referred to three telephonic conversations which he had had with Kruger on 17 October 1990, during which the latter had unequivocally adopted the attitude that the respondent conceded the merits of the action and abandoned his defence on the merits; hence the terms of the reference D submitted to De Villiers, to which I will advert presently. No contrary oral evidence was tendered on behalf of the respondent and, indeed, Beyleveld's evidence was not disputed under cross-examination. The evidence of Hardy and De Villiers, read with the documentation to which they referred, corroborated the evidence of Beyleveld and served only to underline that the contentions of the respondent were untenable. Hardy E testified that in his capacity as president of the Law Society of the Cape of Good Hope he was approached by the parties' attorneys to appoint an arbitrator in the dispute between the parties. For this purpose he was favoured with copies of various communications which had passed between the parties' attorneys. Included amongst these communications was a F facsimile transmission, dated 18 October 1990, sent by Kruger to Beyleveld which read as follows:

1508. '1. The action will be removed from the Roll on the 22nd instant. The costs of the action, save for orders already granted, will be reserved for decision by the arbitrator.

1509. 2. The plaintiff will by not later than the 30th instant deliver expert summaries as provided for in the Rules of Court. Such summaries will be faxed to us.

1510. G 3. The defendant will similarly fax his expert summaries by not later than 23 November 1990.

1511. 4. If the matter is not thereafter settled by 30 November 1990 then a referral to arbitration will take place by consent. Failing agreement as to the identity of the arbitrator, then the President of the Law Society of the Cape of Good Hope will be approached to nominate a suitable attorney as arbitrator.

1512. H 5. The issues to be referred for arbitration are:

1513. (a) has the plaintiff suffered damages as alleged or at all?

1514. (b) has the plaintiff mitigated any damages suffered by him as aforesaid?

1515. (c) in what amount, if any, is the defendant liable to the plaintiff by way of damages?

1516. 6. The arbitrator will be requested to endeavour to dispose of the I matter before the end of 1990.'

1517. After receipt of these communications he contacted both Kruger and Beyleveld telephonically in order to ascertain precisely what had been agreed between the parties and what issues had to be referred to the arbitrator, explaining that the nature of the issues would have a bearing on his choice of who should act as arbitrator. Although he was unable in J the

1518. 1993 (3) SA p661

1519. KROON J

1520. A witness box to recall the actual conversations which he had had with the attorneys, he was quite satisfied that both had accepted that the merits were not in dispute and that the only issue outstanding was that of the quantum of damages. On 21 February 1991 he addressed a letter to both attorneys in the following terms:

1521. 'I have been called upon to appoint an arbitrator to determine the B dispute to which the abovementioned correspondence relates. From telephonic discussions which I have had with attorneys Arthur Kruger and Dr Beyleveld respectively, I understand that it is common cause that a sale agreement concluded between the parties in respect of the sale of a farm in the Port Elizabeth/Humansdorp area was breached by the defendant and that such agreement has since been terminated. The dispute apparently C relates to the claimant's claim for damages arising out of such breach and termination and my understanding is that the arbitrator's role will be to determine -

1522. (1) whether the claimant sustained any damages;

1523. (2) if the answer to the first query is in the affirmative, the quantum of the damages sustained.

1524. D I hereby appoint Mr G P Steyn de Villiers of the firm Goldberg & De Villiers, attorneys of PO Box 1282, Port Elizabeth, as arbitrator. Mr de Villiers is a senior practising attorney and a former senior partner of the firm of C W Malan & Co, Humansdorp. I understand that Mr de Villiers has considerable expertise in dealing with property disputes.

1525. I have approached Mr de Villiers who has indicated that he is willing to accept the appointment and an approach should now be made to Mr de E Villiers on behalf of the respective parties to the dispute, to make the necessary arrangements for the hearing and determination of the dispute, including the remuneration and basis of payment required by Mr de Villiers for acting as arbitrator.'

1526. In response thereto he received a communication from Kruger dated 28 March 1991 reading as follows: F

1527. 'We acknowledge with thanks your letter of the 21st instant together with annexure thereto. As far as we are concerned the issues to be referred for arbitration are as set forth in para 5 of our fax to Loon & Connellan dated 18 October 1990.'

1528. Under cross-examination it was suggested to Hardy that Kruger had advised G him during their telephonic conversation that the issues to be decided at the arbitration were as defined in the latter's letter of 18 October 1990, the possibility of which was conceded by Hardy. Conspicuous by its absence, however, was any suggestion to Hardy that Kruger had in any way intimated that the merits of the applicant's claim were still in dispute. In my judgment, the interpretation to be placed on the letter of 18 H October 1990 is that it was only the issue of the damages which was to be the subject of the reference to the arbitrator and this is made the more clear by Kruger's response to Hardy's understanding, as conveyed to Kruger, that it was common cause between the parties that the agreement between them had been terminated by reason of the respondent's breach thereof and that the arbitrator was only to decide the issue of damages. I Had this understanding been incorrect, Kruger would undoubtedly have pertinently adverted thereto when he responded to Hardy's letter.

1529. De Villiers testified that his interpretation of the reference was that he was to decide the issue of damages only. He confirmed telephonically with both attorneys that that was his understanding of the position and at J the

1530. 1993 (3) SA p662

1531. KROON J

1532. A commencement of the arbitration proceedings (at which, it should be recorded, the respondent was unrepresented and appeared in person) he drew the attention of the parties to the terms of reference set out in Hardy's letter of 21 February 1991 and no objection thereto was raised. Again, none of his oral testimony to this effect was disputed under B cross-examination.
1533. In my judgment, the assertion of the respondent that the arbitrator had misconstrued the reference to him and that the award was a nullity on the basis that the arbitrator had not decided what had been referred to him is without any foundation and falls to be rejected as having no merit.
1534. The second basis on which the respondent sought to contend that the C award made by De Villiers was a nullity was the contention that the award had not been made within the time period prescribed by s 23(a) of the Act. That section reads as follows:
1535. 'The arbitration tribunal shall, unless the arbitration agreement otherwise provides, make its award -
1536. D (a) in the case of an award by an arbitrator or arbitrators, within four months after the date on which such arbitrator or arbitrators entered on the reference or the date on which such arbitrator was or such arbitrators were called on to act by notice in writing from any party to the reference, whichever date be the earlier date; and
1537. E (b) . . .
1538. or in either case on or before any later date to which the parties by any writing signed by them may from time to time extend the time for making the award: Provided that the Court may, on good cause shown, from time to time extend the time for making any award, whether that time has expired or not.'
1539. The relevant facts are the following. De Villiers was appointed by Hardy F as arbitrator in terms of the latter's letter dated 21 February 1991. On 22 February 1991 Beyleveld addressed a letter to De Villiers in the following terms:
1540. 'We have been informed by the Law Society of the Cape of Good Hope that you have been appointed arbitrator in the above dispute. We have further G been informed that certain documentation emanating from our offices and addressed to attorney Arthur Kruger on behalf of the respondent in the above matter, has been forwarded to you. It was initially agreed between the parties that the arbitration proceedings would be completed as soon as possible, preferably during December of last year. This of course has not transpired and, without imposing too much upon your services, we enquire H whether you are in a position to let us have an early date for the hearing of the arbitration.
1541. Subject to what our colleague, Mr Kruger from Johannesburg, says, but we believe that he will be in accord with this, the arbitration will in all probability be conducted by the writer and Mr Kruger and the only evidence led would be that relative to the question of damages.'
1542. I Thereafter various communications passed between De Villiers and the parties' attorneys in regard to the former's fees and the payment thereof and in regard to the date of the hearing. After what De Villiers referred to as 'considerable delays and correspondence' due, it would seem, to Kruger's unavailability, the matter was eventually set down by agreement for hearing on 27 and 28 May 1991. Evidence tendered on behalf of the J applicant was heard on the first day. At the conclusion of the day's
1543. 1993 (3) SA p663
1544. KROON J
1545. A proceedings the matter was postponed by agreement, but at the behest of the respondent, to 26 June 1991, the earliest date on which the respondent would be available by reason of an overseas trip. The agreement relating to the postponement was in writing and was signed by the respondent and by Beyleveld on behalf of the applicant. On 26 June 1991 the respondent B arrived at the hearing and handed De Villiers a memorandum (which embodied a request for a

postponement in order to enable the respondent to seek certain relief in the Supreme Court and a request that De Villiers state a case for the opinion of the Supreme Court) whereafter, despite the protestations of De Villiers and the applicant's counsel, the respondent summarily absented himself from the hearing and left the premises. In the C absence of the respondent De Villiers, at the request of the applicant's counsel, allowed the matter to stand down to enable counsel to make submissions on the memorandum handed in by the respondent. When the hearing was resumed counsel handed in heads of argument and, after advising De Villiers that he was closing his case, argued that the D requests set out in the memorandum be refused and that the applicant be granted default judgment on the grounds set forth in the heads of argument. De Villiers reserved judgment on all issues. The events which occurred on 26 June 1991 were detailed in a communication addressed by De Villiers to Kruger dated 1 July 1991. In a reply dated 2 July 1991, Kruger queried the validity of the applicant's seeking an award by default in the E light of the two requests set out in the memorandum tabled by the respondent, referred to the fact that he had not been favoured with a copy of the heads of argument submitted by the applicant and sought confirmation that De Villiers had reserved his ruling on the relief sought in the memorandum tabled by the respondent. In response thereto De F Villiers confirmed that he had reserved his ruling on both the relief sought in the memorandum and the applicant's application for an award by default. On 4 July 1991 Kruger addressed a further communication to De Villiers in which he made reference to certain alleged defects or irregularities in the arbitration proceedings. On 8 July 1991 Beyleveld favoured Kruger with a copy of the applicant's heads of argument which had G been handed in at the hearing. On 9 July 1991 Kruger advised Beyleveld, inter alia, that any adverse ruling by De Villiers on the respondent's applications as set out in the memorandum would be taken on review. On 17 July 1991 De Villiers advised Kruger, inter alia, that he had finalised his ruling and would advise the parties in due course when same would be H delivered. On 26 July 1991 De Villiers advised both attorneys that despite his telephonic request on 19 July 1991, Kruger had not advised him of a suitable date for the publication of the award and that subject to any objection by the parties he would hand down the award on 29 July 1991. On 29 July 1991 Kruger sent a facsimile transmission to De Villiers stating that he had no objection to the award being published on 30 July 1991. On

1546. I the same date De Villiers advised both attorneys that in terms of an arrangement reached with both parties, he would publish the award on 31 July 1991 by transmitting same by telefax and he sought Kruger's confirmation of that arrangement. Such confirmation was forthcoming on 30 July 1991 in terms of a telefax transmitted by Kruger to De Villiers in J which the former stated:

1547. 1993 (3) SA p664

1548. KROON J

1549. A 'We have no objection to the publication of your rulings on 31 July 1991 at 9 am on the basis that such ruling will be transmitted to us by way of telefax.'

1550. The award was duly published on 31 July 1991 in the manner agreed upon. On 29 August 1991 Kruger addressed a communication to Beyleveld in the following terms:

1551. B '... it is manifest that the arbitrator was, in terms of s 23(a) of the Arbitration Act, functus officio at the time when he purported to publish his award and rulings. In the event the said award and rulings constitute a nullity and do not require to be set aside.'

1552. Three questions arise for decision: firstly, was the award in fact C published after the time periods referred to in s 23(a)? Secondly, if the award was not published within those time periods, was the time for publication extended by the parties as provided for in s 23 so as to embrace a publication on 31 July 1991? Thirdly, if the answer to both of the above questions is in the negative, should I come to the applicant's D assistance by granting an extension of time for the publication of the award to 31 July 1991? By way of explanation I would record that Mr Van Rooyen, for the applicant, sought leave, in the event of my deciding against the applicant on the first two questions, to amend the applicant's notice of motion by the inclusion of a prayer for the grant of such an extension.

1553. Counsel did not address me on the correct interpretation of the phrase E 'entered on the reference' in s 23(a). It seems to me, however, particularly if regard is had to the Afrikaans

version of the section, where the phrase 'op die verwysing begin ingaan het' appears, that the date on which an arbitrator enters upon the reference is the date on which he commences hearing evidence or entertains submissions from the parties. F as to the conduct of the matter, other than the mere determination of a date on which the arbitration proceedings will commence: *Bhoola v Bhoola* 1945 NPD 109 at 113, where reference was made to the date on which the arbitrator commences judicially to enquire into the case. In casu that date was 27 May 1991 and the award was made within four months of that date. The question arises whether in terms of s 23(a), and by reason of G the parties or one of them having on a date earlier than 27 May 1991 requested the arbitrator in writing to act, the prescribed four-month period commenced on such earlier date. There was some debate at the Bar as to whether the communications, or any of them, which passed between the parties' attorneys and De Villiers constituted a notice to the latter to H act. For present purposes I propose to accept that the letter addressed by Beyleveld to De Villiers on 22 February 1991, the contents of which have been quoted above, in fact constituted a notice to De Villiers to act. The award made by De Villiers was published more than four months after that date. However, I find on the facts that the time for publication of the award was extended as envisaged in s 23. The first extension was the I written agreement signed by the respondent and on behalf of the applicant on 27 May 1991 that the matter be postponed to 26 June 1991. That, of course, cannot be construed as an extension to 31 July 1991 but, as set out earlier, it was thereafter agreed that De Villiers could publish his award on 31 July 1991. Kruger in fact sent a telefax to De Villiers to that effect. The sending of that telefax further constituted a waiver on J behalf of the

1554. 1993 (3) SA p665

1555. KROON J

1556. A respondent of any right which he had to object to the award being out of time. *Naidoo v Estate Mahomed and Others* 1951 (1) SA 915 (N) at 920H. In any event, and proceeding on the basis that the award was in fact published out of time, I hold that the applicant has made out a good case for an order extending the time for the publication of the award up to 31 B July 1991. That I am empowered to make such an order notwithstanding that the four-month period has expired is clear from the wording of the section and it is also clear that such an order may be made in respect of an award that has already been published. *Naidoo's* case supra. In the present matter both parties were desirous and intended that the arbitrator give an award and that was their attitude up to the publication itself. This is C clearly a proper case for the grant of an extension of time. Compare *Naidoo's* case supra. In seeking to resist the application that the applicant's notice of motion be amended by the inclusion of a prayer for an extension of time, Mr Charsley made the following submissions. He contended, firstly, that until the Court was approached for, and was persuaded to grant, an order for an extension of time in respect of an D arbitrator's award given out of time, a party to the arbitration could not seek an order making the award an order of Court, in that unless and until an extension of time was granted the award had no effect and was a nullity. He sought to draw a parallel in this regard with the situation which obtained in *Moraliswani v Mamili* 1989 (4) SA 1 (A).

1557. E Accordingly, so he argued, the prayer for an extension of time should have been included initially in the notice of motion and the grounds for the grant of such a prayer should have been contained in the founding papers. The applicant had, however, only adverted to this aspect in the replying papers and Mr Charsley objected to relief being granted on a case F which had not been made out in the founding papers. I agree that where an arbitrator's award has been published out of time the award is of no effect and cannot be made an order of Court unless and until an extension of time for the publication of the award has been granted by the Court. An order that an arbitrator's award published out of time be made an order of Court must therefore be preceded by an order extending the time for the G publication of the award. It is also so that there is a wealth of authority for the proposition that an applicant's case for the relief he seeks should be made out in his founding papers and that he should not be permitted to make out the case for the first time in his replying papers. I do not perceive this rule of practice to be an immutable one, however, and I consider that in appropriate cases the Court may come to the aid of H an applicant who has not followed the rule of practice. I have not lost sight of the fact that shortly after De Villiers had published his award, viz on 29 August 1991, the respondent, through his attorney, had made known

his contention that the award was a nullity by reason of its having been published out of time. In the light thereof the applicant ought to have, even if only in the alternative and against the event of the Court I holding that the award had in fact been published out of time, included a prayer for an extension of time in his notice of motion and made out a case therefor in his founding affidavits. As against that, however, as set out earlier, the parties agreed that one of the issues which should be referred for the hearing of oral evidence was the applicant's contention J that if the award had been made

1558. 1993 (3) SA p666

1559. KROON J

1560. A out of time, an extension of time to 31 July 1991 for the publication of the award should be granted. Evidence relevant to this issue was led on behalf of the applicant. It was open to the respondent to do likewise. In these circumstances I do not consider that it lies within the respondent's mouth to now voice the objection that the case for an extension of time had not been made out in the applicant's founding papers. Despite the fact B that my finding that the applicant is entitled to the order sought for an extension of time is an alternative one, I consider that such an order should in fact be made.

1561. The statements made to me from the Bar by counsel did not make it clear whether the question referred to in para 1.1 of the order referring the C matter for the hearing of oral evidence was still an issue between the parties or whether it had fallen away. I will assume that it remained an issue and, further, that the respondent is entitled to rely thereon to resist the application, notwithstanding that he made no counter-application for the setting aside of the arbitrator's award. The D issue does not, however, require detailed discussion and Mr Charsley acted properly in not advancing any argument thereon. The record of the proceedings kept by De Villiers was a mechanical recording on a tape recorder, the tapes of which De Villiers subsequently caused to be transcribed. The evidence clearly established that it was at the specific insistence of the respondent that the proceedings were mechanically E recorded and De Villiers' decision to accede to that request was concurred in by the applicant. In the circumstances there is no substance in the objection that no proper record was kept of the proceedings. See in this regard s 17 of the Act which reads as follows:

1562. 'If not recorded by the arbitration tribunal itself, the oral evidence F of witnesses shall be recorded in such manner and to such extent as the parties to the reference may agree or, failing such agreement, as the arbitration tribunal may from time to time direct after consultation with the parties.'

1563. The remaining objection of the respondent to the validity of the arbitration proceedings related to De Villiers' conduct in relation to, G and subsequent to the handing in by the respondent on 26 June 1991 of, the memorandum, annexure 'H' to the answering affidavit. Again, I will proceed on the basis that the respondent may invoke this objection notwithstanding that he has filed no counter-application for the setting aside of the award. It would be convenient to set out the terms of the memorandum. It read as follows: H

1564. '1 (a) The proceedings on 27 May 1991 were irregular and invalid in that the arbitration tribunal did not itself record the proceedings, and furthermore did not direct the manner in which the said proceedings were to be recorded as is required in terms of the Arbitration Act of 1965.

1565. (b) As appears from annexures "A" and "B" it is contended both by the arbitrator and by the attorney for the claimant that a I private record was prepared at the sole instance of the defendant. It follows that proceedings were not officially recorded.

1566. (c) The defendant seeks a postponement to enable him to review such proceedings in the Supreme Court where an order will be sought declaring the proceedings in question to be invalid.

1567. J 2 (a) The issues referred for arbitration are set forth in annexure "C" hereto

1568. 1993 (3) SA p667
1569. KROON J
1570. A being a fax from attorney Arthur Kruger to attorneys Loon & Connellan dated 18 October 1990.
1571. (b) It is implicit therein that the arbitrator is required to determine the merits as well as the damages issue.
1572. (c) The arbitrator ruled on 27 May 1991 that the hearing was confined to the damages issue and cross-examination on the merits refused.
1573. B (d) The defendant requires the arbitrator to state such question of law in the form of a special case for the opinion of the Supreme Court in terms of s 20(1) of the Arbitration Act of 1965.
1574. (e) The defendant refers to the decision in *Administrasie van Transvaal v Oosthuizen en 'n Ander* 1990 (3) SA 387 (W), wherein it was held that the arbitrator should, if he is asked, refer a C point of law arising in arbitration proceedings to the Court. The underlying reason is because it is an essential element of arbitration proceedings that the Court should retain the final say in respect of legal issues. If the arbitration tribunal refuses to refer the matter to the Court an application can be made to Court compelling him to do so.
1575. D (f) If the arbitrator refuses to refer the relevant question of law to the Supreme Court then the defendant seeks a postponement to enable him to make application to Court for an order compelling the arbitrator so to do.
1576. 3. This deed is formally tabled for decision by the arbitrator and constitutes a material step in the proceedings.'
1577. E In amplification of what has already been set out in this judgment as to what occurred on 26 June 1991, it may be recorded that the evidence establishes the following. On his arrival the respondent handed the memorandum to De Villiers. While the latter was perusing same the German interpreter, who was to assist the respondent at the hearing, arrived. The F respondent sought to dismiss her, saying that he had not arranged for her to be present. De Villiers objected and said that she should remain as he wished the memorandum, which contained, inter alia, an application for a postponement, to be canvassed by the parties. The respondent responded by stating that on the instructions of his attorney he would not attend the hearing any further and was leaving. He remained adamant in this attitude, G notwithstanding a further entreaty by De Villiers that he remain and a similar exhortation and warning by the applicant's counsel that he would leave at his peril, as the matter would proceed. The respondent then summarily absented himself from the proceedings. Counsel for the applicant thereupon sought and was granted an adjournment to 11 am to enable him to H respond to the memorandum. At the resumption of the hearing counsel handed in heads of argument in which he replied to the memorandum, advised De Villiers that he was closing his case and applied for an award by default in favour of the applicant. De Villiers thereupon reserved his judgment. Contrary to the contentions of the applicant as reflected in the order referring the matter for the hearing of oral evidence, it was common cause I at the hearing that De Villiers made no ruling on 26 June 1991 on the applications set out in the memorandum, but the reservation of his judgment related to those applications as well as the application by the applicant that an award by default be made in his favour. In the result De Villiers dismissed the applications contained in the memorandum and made J an award in favour of the applicant. This
1578. 1993 (3) SA p668
1579. KROON J
1580. A award was founded, correctly, not on the respondent's absence from the proceedings, which did not amount to an abandonment of his defence, but on the evidence which had been led on behalf of the applicant. *Irish & Co Inc (now Irish & Menell Rosenberg Inc) v Kritzas* 1992 (2) SA 623 (W).

1581. If I understand the stance of the respondent correctly, it was his B contention that De Villiers had misdirected himself in entertaining any application for an award by default until such time as he had made a ruling on the matters raised in the memorandum, conveyed that ruling to the parties and allowed the respondent to proceed, however he was advised, with the matter in the light of that ruling. In my judgment there is no C substance in the contention.
1582. It was argued by Mr Van Rooyen that the respondent's conduct in merely handing his memorandum to De Villiers and then absenting himself from the proceedings, without addressing argument to De Villiers on the relief sought in the memorandum and allowing the applicant to oppose same, D amounted to an abandonment of that relief and was in fact no more than an attempt to force a postponement by improper means. The argument is not without some merit. The matter may, however, be disposed of on another basis. Section 15(2) of the Act provides as follows:
1583. 'If any party to the reference at any time fails, after having received reasonable notice of the time when and place where the arbitration E proceedings will be held, to attend such proceedings without having shown previously to the arbitration tribunal good and sufficient cause for such failure, the arbitration tribunal may proceed in the absence of such party.'
1584. The conduct of the respondent in failing to remain in attendance at the proceedings fell squarely within the ambit of the provisions of this F section and De Villiers was therefore quite entitled to proceed with the arbitration in the absence of the respondent. Kritzas' case supra. He could accordingly have ruled on the applications contained in the memorandum on 26 June 1991 and, after having dismissed same, entertained the applicant's application that an award be made by default on the strength of the evidence which had been tendered on behalf of the G applicant. Even if it were correct to say that technically he should have ruled that the applications set out in the memorandum should first be disposed of before any question of the applicant's closing his case and seeking an award by default could arise, the procedure he followed was substantially the same and certainly did not constitute any irregularity H vitiating the proceedings. Mr Charsley, correctly, did not seek to attack the validity of De Villiers' ruling on the matters raised in the respondent's memorandum. They were correctly dismissed by De Villiers as being without substance and may be said to have been frivolous. I would add, as far as para 2 of the memorandum is concerned, that the question referred to was at least a mixed question of law and fact and such I questions do not properly form the subject of a statement of a special case for the opinion of the Court or counsel in terms of s 20(1) of the Act. Strutt v Chalmers and Another 1959 (2) SA 536 (D) at 539.
1585. I conclude therefore that the applicant is entitled to the relief he seeks. Included in the costs to which the applicant is entitled are the costs of the application for the hearing of oral evidence, which costs J were reserved.
1586. 1993 (3) SA p669
1587. KROON J
1588. A I turn now to consider the question of which party is to be liable for the costs of the application by the applicant for condonation of the late filing of the replying affidavit. Paragraph 2 of that affidavit stated, somewhat cryptically, as follows:
1589. 'I seek condonation for the late filing of this affidavit which was delayed because it took a considerable time to obtain a full copy of the B record of the arbitration proceedings. I now annex hereto marked "AB1"- "AB51" a copy of the said record.'
1590. The respondent was not satisfied therewith and, quite properly, required the applicant to make a substantive application for condonation which C would be dealt with on its merits. The application for condonation was duly launched and in addition the applicant sought an order that the costs of the application be paid by the respondent on the scale as between attorney and own client. The founding affidavit was deposed to by Beyleveld, the answering affidavit by the respondent, and the replying affidavit by Beyleveld. In addition, as mentioned earlier, the respondent D filed two notices to strike out with reference to certain passages in both the founding and replying affidavits. The respondent further intimated his intention to seek an order

that the applicant pay the costs on the scale as between attorney and client. In that the condonation sought was previously granted, I do not consider it necessary to deal with the merits of the application in any great detail. Suffice it to say that Beyleveld E elaborated on his allegations as to the unavailability of the record of the arbitration proceedings and added averments relating to the unavailability of counsel to attend immediately to the settling of the replying affidavit in the main application and the absence of prejudice to the respondent. The respondent replied thereto. In respect of the question F now at issue, viz that of costs, I will content myself with recording that, on an analysis of the papers, I am satisfied that the respondent did not act unreasonably in opposing the application. The counter-averments and contentions he raised in answer to Beyleveld's averments were in my judgment properly relied upon by him. Ordinarily, therefore, the applicant, who sought an indulgence, should be saddled with the costs of G the application, including the costs of the opposition thereto. As indicated earlier, however, the papers of each party sought a special order of costs against the other. (I would record, however, that at the hearing Mr Van Rooyen, for the applicant, restricted his claim to one for costs on the scale as between party and party.) In his founding affidavit Beyleveld alleged that the respondent's insistence on a substantive H application for condonation being brought was born of his 'once again' trying to delay and frustrate the applicant's claims. He then proceeded to set out, in some considerable detail, inter alia, certain of the history of the matter preceding the arbitration, designed to demonstrate that the respondent had in the past been guilty of non-observance of time limits I and delaying tactics which had necessitated, inter alia, a number of interlocutory applications by the applicant, the awarded costs of which had not been paid by the respondent. The affidavit concluded as follows:

1591. 'Taking into account all the circumstances as set out above I humbly pray that a specific order be made that the costs of this application be J paid by the

1592. 1993 (3) SA p670

1593. KROON J

1594. A respondent, due regard being had to his conduct not only in this application but also in the previous proceedings as sketched above. As a mark of disapproval against the respondent for ignoring various costs orders made against him in the past by the above honourable Court I further request that the award made against the respondent be made on the scale as between attorney and own client.'

1595. B In response thereto the respondent's affidavit contended that the earlier conduct referred to by Beyleveld had no bearing on the present application and referred to his application for the striking out of the allegations on the grounds that they were scandalous and/or vexatious and/or irrelevant. It was further contended that the scandalous attack made on him by Beyleveld, together with the application for an order of costs on the C scale as between attorney and client against him, was so vexatious as to justify an order for costs on that scale against the applicant. Undaunted by this response Beyleveld, in reply, persisted in his attack on the respondent, during which he used phrases such as '(the respondent's) cavalier attitude towards litigation' and 'it cannot be said that (the respondent) has come to Court with clean hands' (language of the same ilk D as that used in the founding affidavit and, incidentally, also in Beyleveld's affidavits in the main application). Beyleveld further contended that the attack on the respondent was fully justified in that the respondent had done everything in his power to frustrate and delay the applicant's rightful claim since the institution of the action in 1985. E These averments evoked a further notice to strike out which, in addition, referred to certain other matter as being new matter.

1596. In the light of the ruling which I intend to make concerning the costs of the application for condonation, I do not deem it necessary to deal with the merits of the two applications to strike out, save for the one F comment to be made presently. In my judgment the respondent was quite correct in applying the epithets which he did to the contents of Beyleveld's affidavit. Clearly the allegations in question did not, and could not, have had any bearing on either the merits of the application or on the costs of the application which concerned an indulgence sought by the applicant, and they were entirely irrelevant. Their inclusion G constituted a gratuitous, unwarranted and intemperate attack on the respondent sufficiently demonstrating a vexatious intention such as to warrant an award of costs on the attorney and client scale. Hyperchemicals

International (Pty) Ltd and Another v Maybaker Agrichem (Pty) Ltd and Another 1992 (1) SA 89 (W) at 89. In the circumstances the two H applications to strike out were fully justified and the respondent is entitled to the costs thereof on the same scale. In the result the following order is made:

1597. (1) The applicant's application to amend his notice of motion to include a prayer that the time for publication of the arbitrator's award be extended to 31 July 1991 is granted.
1598. (2) The time for the making of the award is extended to 31 July 1991.
1599. I (3) The award made by the arbitrator on 31 July 1991, as set out earlier in this judgment (subject thereto that the patently erroneous reference to 'defendant' where this word appears for the second time in para 2 of the award is, in terms of s 31(2) of Act 42 of 1965, amended to read 'plaintiff'), is made an order of Court and judgment is granted in favour of the applicant in terms J thereof.
1600. 1993 (3) SA p671
1601. A (4) The costs of the application, together with the costs of the application for the matter to be referred for the hearing of oral evidence, will be paid by the respondent. Such costs will include the costs of the respondent's notice to strike out dated 18 June 1992 and the interlocutory application of the respondent dated 12 B October 1992.
1602. (5) The costs of the application for condonation of the late filing of the applicant's replying affidavit, together with the costs of the respondent's applications to strike out dated 5 May 1992 and 21 May 1992, which costs are to be taxed on the scale as between attorney and client, will be paid by the applicant. For the C guidance of the Taxing Master I record my estimate that at most 10% of the hearing on 26 October 1992 was devoted to the application for condonation.
1603. Applicant's Attorneys: Loon & Connellan. Respondent's Attorneys: Burman, D Katz, Saks & Schady.

MURRAY & ROBERTS CONSTRUCTION (CAPE) (PTY) LTD v UPINGTON MUNICIPALITY 1984 (1) SA 571 (A)

Citation	1984 (1) SA 571 (A)
Court	Appellate Division
Judge	Wessels JA, Trengove JA, Botha JA, Howard AJA and Grosskopf AJA
Heard	November 17, 1983
Judgment	November 29, 1983
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

1604. Prescription - Extinctive prescription - Delaying completion of in terms of s 13 (1) (f) of Act 68 of 1969 - B Subjection of dispute to arbitration - What amounts to - Procedure prescribed in engineering contract requiring dispute first to be submitted to engineer for decision, then to a mediator and finally to arbitration - Whole procedure to be considered one of arbitration - Accordingly, submission of dispute to engineer amounting to subjection of dispute to arbitration - Completion of prescription of action for C damages arising out of breach of engineering contract delayed in terms of s 13 (1) (f) of the Act.

1605. [zHNz]Headnote : Kopnota

1606. The appellant had sought an order in a Provincial Division declaring that a claim for damages by the respondent against D the appellant arising out of the alleged breach by the appellant of an engineering contract concluded between the respondent (as employer) and the appellant (as contractor) had become prescribed in terms of the provisions of the Prescription Act 68 of 1969. The respondent, in opposing the grant of the order, had alleged that the completion of the running of prescription has been delayed in terms of s 13 (1) (f) of the Act by the submission of the dispute between the E parties to the engineer for his decision in terms of clause 69 of the engineering contract. Clause 69 of the contract prescribed a procedure for the subjection of disputes to arbitration which required the dispute to be first submitted to the engineer for decision. His decision was prima facie final and binding on both parties. However, if the engineer did not give a decision within 45 days of being requested to do so or if either party was dissatisfied with his decision, the dispute F could be submitted within a further 45 days to a mediator. No legal representation was allowed before the mediator who had to determine whether the parties' submissions were to be presented in writing or orally. The mediator's decision was final and binding upon the parties unless, within 28 days, one of them took the final step allowed by clause 69 of requiring the matter, upon completion of the works, to be referred to arbitration before a single arbitrator. The Provincial Division G had held that the referral of the dispute to the engineer amounted to the subjecting of the dispute to arbitration as envisaged in s 13 (1) (f) of the Act and had refused the appellant's application for the declaratory order. In an appeal,

1607. Held, having regard to the wording of s 13 (1) (f) of the Act as well as its scope and purpose, that the procedure laid down by clause 69 (of the contract) taken as a whole had to be H considered one of arbitration and that the dispute in the present case had been subjected to arbitration when it was submitted to the engineer.

1608. Held, further, that it followed that the completion of prescription had been delayed until one year after the impediment (to the institution of legal proceedings) ceased to exist (ie when the arbitration proceedings came to an end).

1609. Held, accordingly, that as the arbitration proceedings had not yet come to an end, the Court a quo had been correct in making the order which it had made. Appeal dismissed.
1610. 1984 (1) SA p572
1611. The decision in the Northern Cape Division in *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Munisipaliteit* 1982 (3) SA 385 confirmed.
1612. [zClz]Case Information
1613. Appeal from a decision in the Northern Cape Division (BASSON A J). The facts appear from the report of the decision of the Court a quo (1982 (3) SA 385) and from the judgment of GROSSKOPF AJA.
1614. H Snitcher QC (with him D G Scott) for the appellant: The running of prescription in respect of respondent's claim commenced in June 1976 upon cancellation of the contract or, at the very latest, in December 1976 when the remedial work was B completed. *Oslo Land Co Ltd v Union Government* 1938 AD 584; *Hawken v Olympic Pools (Pty) Ltd* 1979 (3) SA at 227; *Western Bank Ltd v S J van Vuuren Transport* 1980 (2) SA at 351; *Pohl v Prinsloo* 1980 (3) SA 365; *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906; *Escom v Stewarts and Lloyds* of SA 1981 (3) SA 340. It follows that, in the absence of any delay in the running of prescription in terms of s 13 (1) of the C Prescription Act 68 of 1969, respondent's claim became prescribed in June 1979 or at the latest in December 1979. The settlement of a dispute by the engineer in terms of clause 69 of the general conditions of contract does not amount to an "arbitration" within the meaning of s 13 (1) (f) of the Prescription Act. In this regard the word "arbitration" is essentially a legal term. In other words, it has acquired a D technical meaning in legal nomenclature. In the absence of "the strongest compulsion of other words" to the contrary it must be assumed therefore to have been employed by the Legislature in that technical sense rather than in any popular sense in which it may otherwise be used. *Beedle & Co v Bowley* E 12 SC at 402; *Uitenhage Divisional Council v Port Elizabeth Municipality* 1944 EDL at 10; *Chequers Outfitters (Bloemfontein) v Sussman* 1959 (3) SA at 57; *Webb and Ross v Gey van Pittius* 1951 (2) SA at 481 - 482; *S v Botha* 1966 (4) SA at 640; *S v Roos* 1967 (4) SA at 322; *Lonrho Ltd v Salisbury Municipality* 1970 (4) SA 1; *Kinekor Films (Pty) Ltd v Drive-in Home Movies* 1976 (2) SA at 91 - 2; *Willis NO v Registrateur van Aktes, F Bloemfontein* 1979 (1) SA at 725 - 6. The technical meaning of the term "arbitration" is well established in our law, namely the process whereby a dispute between two or more parties is determined by a person or persons other than a court of competent jurisdiction after hearing both sides in a judicial manner. In this sense the term does not extend to, and indeed G excludes, the process whereby a dispute is settled by a person exercising his own skill, knowledge and judgment rather than conducting an enquiry in the nature of a judicial enquiry, or the process whereby an issue not amounting to a dispute is similarly determined by a person using his own skill, knowledge and judgment. Voet 4.8.2; *Stein v Otto* 1917 WLD at 4 - 5; *H Reitz Ko-operatiewe Landbouwe Vereeniging v Botha* 1923 OPD at 52; *Heymann's Estate v Featherstone* 1930 EDL at 107 - 108; *Divisional Council of Caledon v Divisional Council of Bredasdorp* (1886) 4 SC at 447; *Graaff-Reinett Municipality v Jansen* 1917 CPD at 607; *Dunbar & Son (Pty) Ltd v SA Railways* 1943 AD at 32, 34; *Hoffman v Meyer* 1956 (2) SA at 758; *Kollberg v Cape Town Municipality* 1967 (3) SA 472; *Schuldes v Compressor Valves Pension Fund* 1980 (4) SA 576; *Halsbury* vol 2 para 501. The word "arbitration" in s 13 (1) (f) must
1615. 1984 (1) SA p573
1616. therefore be given the above technical meaning. The function of the engineer in terms of clause 69 (1) of the general conditions of contract is clearly not that of an arbitrator in the above sense. *Kollberg v Municipality of Cape Town* 1967 (3) SA 472; *Schuldes v Compressor Valves Pension Fund and Others* A 1980 (4) SA 576. Indeed, the function of the engineer under clause 69 (1) in terms of which any dispute is to be "referred to and settled" by him is in reality no different from that performed by him when deciding various other matters in terms of the general conditions of contract. It follows that the settlement of disputes by the engineer in terms of clause 69 B (1) does not amount to an "arbitration" within the meaning of s 13 (1) (f) of the Prescription Act.
1617. Clause 69 of the general conditions of contract makes provision for three stages in the settlement of disputes "between the employer or the engineer and the contractor in connection

with or arising out of the contract or the carrying out of the contract or the carrying out of the works", namely: (a) reference to the engineer; (b) reference to a mediator; and (c) reference to a single arbitrator. Once it is accepted that the settlement of a dispute by the engineer in terms of clause 69 (1) is not an arbitration, the reference of a dispute to the engineer does not render the dispute "subjected to" arbitration within the meaning of s 13 (1) (f) of the Prescription Act. The mere existence of an arbitration agreement at the time a dispute arises would clearly be insufficient to render that dispute "subjected to arbitration". If this were not so it would mean that a debt which was the object of a dispute and which arose out of an agreement containing an arbitration clause would never become prescribed as the running of prescription would always be delayed in terms of s 13 (1) (f) of the Prescription Act. This could clearly not have been intended by the Legislature. The phrase "subjected to arbitration" was, moreover, introduced for the first time in 1969 and replaced the phrase "submission to arbitration" which appeared in the 1943 Prescription Act. As the words "submission to arbitration" are frequently employed to refer to an arbitration agreement, it would seem that the likely object of introducing the new phrase was to make it quite clear that the mere existence of an arbitration agreement was insufficient to interrupt the running of prescription and that something more was required. Cf *Cone Textile (Pvt) Ltd v Ayres and Another* 1980 (4) SA 728; *Ueckerman v Martens* 1920 TPD at 276. See *The Shorter Oxford Dictionary*, sv "subjected"; *Verklarende Handwoordeboek van die Afrikaanse Taal*, sv "onderwerp". Having regard to the foregoing, s 13 (1) (f) of the Prescription Act contemplates that some step, having the effect of unequivocally initiating the arbitration process, must first be taken before the dispute becomes "subjected to arbitration" within the meaning of the section so that the running of prescription is delayed. The earliest possible step having that effect would generally be a request by one of the parties to a dispute requiring the other to appoint or agree to the appointment of an arbitrator. The reference of the dispute to the engineer in terms of clause 69 (1) does not have the effect of unequivocally initiating the arbitration process because either the decision of the engineer could be accepted by both parties or the party dissatisfied with the

1618. 1984 (1) SA p574

1619. decision could fail to require the dispute to be referred to a mediator within the time limits laid down. In either event there would be no arbitration. The same applies to the reference of the dispute to a mediator in terms of clause 69 A (2). Similarly, earlier correspondence in which the parties intimated an intention to adhere to the provisions of the contract relating to mediation and arbitration would not have the effect of rendering the dispute "subjected to arbitration". Indeed, the statements in question are no more than expression of an intent to have recourse to the procedures laid down in the contract if and when the occasion arose. Clause 69 (3) provides that either the employer or the contractor may within 28 days after receiving the mediator's decision "require that, upon completion of the works, the latter shall be referred to a single arbitrator to be agreed upon by the parties or failing agreement, to be nominated on the application of either party by the president for the time being of the South African Institute of Civil Engineers..." In the instant case the request by a party in terms of clause 69 (3) to have the matter referred to a single arbitrator is the step contemplated in s 13 (1) (f) of the Prescription Act and it is accordingly only at this stage that the dispute becomes "subjected to arbitration". On the basis of the foregoing, respondent's claim against appellant was not delayed in terms of s 13 (1) (f) of the Prescription Act as found by the Court a quo, but became prescribed in June 1979 or, at the latest, in December 1979.

1620. J P Roux SC (with him A C le Roux) for the respondent: The respondent's submissions can be summarised as follows: Firstly, (a) no debt was due to the respondent until the engineer made his determination in April 1980. (b) in the premises and by virtue of the provisions of s 12 (1) of the Prescription Act 68 of 1969 ("the Act"), extinctive prescription began to run from that date only. Secondly, (a) the submission of the dispute to the engineer for determination, in the context of the contract in question, constituted subjection of the dispute to arbitration within the meaning of s 13 (1) (f) of the Act. (b) In the premises and by virtue of the provisions of the last-mentioned subsection read with s 13 (1) (i), completion of extinctive prescription was delayed until a date not earlier than one year after the engineer's determination. Alternatively, (a) the submission of the dispute to the engineer was a step in the arbitration procedure contemplated by clause 69. (b) In the premises and by virtue of the provisions of s 13 (1) (f) and (i) extinctive prescription of the

respondent's claim forming the subject-matter of the dispute would have supervened, at the earliest, within one year after the impediment created by clause 69 had ceased to exist.

1621. H The régime laid down by the general conditions of contract and the rationale underlying such régime are clear: (a) *Stante contractu* the parties are not to resort to litigation. (b) Even after completion of the works "and whether before or after the determination, abandonment or breach of the contract... any dispute or difference of any kind whatsoever... arising out of the contract or the carrying out of the works..." was to be "referred to and settled by the engineer" whose "decision in respect of every matter so referred shall be final and

1622. 1984 (1) SA p575

1623. binding upon the employer and the contractor..." (clause 69 (1)). (c) If the engineer should fail to give such decision within "a period of 45 days after being requested to do so, or if either the employer or the contractor are dissatisfied with any such decision" either of them was entitled, within 45 days A after receiving notice of such decision, to require that the matter be referred to a mediator. (Clause 69 (2).) (d) The mediator would "within reasonable period thereafter express in writing an opinion on the matter" which would be "final and binding upon the employer and the contractor unless and until otherwise ordered in arbitration proceedings..." (Clause 69 B (2) in fine.) (e) "If either the employer or the contractor be dissatisfied with or unwilling to accept the opinion expressed by the mediator" either of them was entitled within 28 days after receiving notice of the mediator's decision, to require that "upon completion of the works, the matter shall be referred to a single arbitrator..." (Clause 69 (3).) It is therefore clear that the parties agreed C (apparently in the interests of proper and smooth performance of the works) to submit all disputes between them arising out of the contract or the performance of the works to a prescribed three-tiered resolution mechanism. Hence, all of their reciprocal rights and obligations arising out of the contract or the performance of the works in terms thereof were confined D to such resolution procedure. Neither party retained any of its common law rights to enforce any claim arising out of the performance or non-performance or mal-performance of any terms of the contract. Such rights were excluded save and except within the four corners of the contract and the resolution procedure therein prescribed. *Electricity Supply Commission v Stewarts & Lloyds* of SA 1981 (3) SA at 347B - G, The E respondent's "claim" was therefore limited to enforcement of one - and, if necessary, more - of the steps prescribed in clause 69 of the general conditions of contract. Whilst the resolution mechanism was in operation (and unless and until it resulted in a determination at any one of the three levels of F the three-tiered procedure), the parties' reciprocal "debts" were those prescribed in clause 69. It follows that extinctive prescription of such "debt" would only commence to run upon the date when the one or the other of the determinations under clause 69 became final and binding.

1624. Alternatively: As to the meaning of "a debt", see *Escom v G Stewarts & Lloyds* of SA (supra at 344F). By virtue of the provisions of clause 69 of the general conditions of contract the respondent was not entitled to pursue its common law rights and remedies and, correlatively, the appellant was not indebted to the respondent in respect of any such obligations. Hence extinctive prescription of the appellant's common law debt for H damages for breach of contract could not - and did not - arise. Even if it be held that a "debt" had arisen, it was not due. See *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA at 909B. In consequence of the provisions of clause 69, no debt was immediately claimable by the respondent and respondent was not able to sue for its recovery. Indeed, when respondent did sue for its recovery, the appellant intimated that it wished "to adhere to the provisions of the contract relating to mediation and arbitration" and called upon

1625. 1984 (1) SA p576

1626. respondent to withdraw the action "so as to avoid (appellant) having to enter an appearance to defend the action and to raise the provisions of the contract by way of a special plea". As long as the respondent's claim could not be enforced by way of A action, appellant's correlative "debt" was not "due" within the meaning of s 12 (1) of the Act. See *HMBMP Properties (Pty) Ltd v King* (supra); cf *Whatmore v Murray* 1908 TS at 970; *Van Rensburg & Geldenhuys Deep Ltd v Superior Trading Company* 1933 TPD at 424 - 5 and final paragraph on 427. It is settled law that there is a distinction between a debt arising and that B debt becoming due. See *List v Jungers* 1979 (3) SA

at 121B - D. Inasmuch as the respondent's claim was not recoverable in consequence of the existence of clause 69 and/or the appellant's reliance thereon, no debt can be said to have been due.

1627. As to the engineer's determination and s 13 (1) (f) of the Act: In terms of s 13 (1) (f) of the Act completion of prescription C is delayed if "the debt is the object of a dispute subjected to arbitration..." The word "arbitration" is not defined in the Act nor have we been able to trace any reported case in which the meaning of the word was judicially interpreted in the context of the Act or any comparable enactment. The contention D advanced on behalf of the appellants results in an anomaly which the Legislature could not have contemplated. Although the parties are contractually precluded from pursuing their reciprocal rights in a court of law, extinctive prescription continues to run during the stage of determination by the engineer and the subsequent stage of mediation but not once the third stage of arbitration had been resorted to. In this regard E it is significant to note that in terms of clause 69 (3) arbitration proceedings as such are to commence only after completion of the works. It follows that the Legislature, in using the word "arbitration" in s 13 (1) (f) of the Act, did not envisage only "arbitration" in the narrow technical sense of that word but all processes by which disputes have to be F determined extra-judicially. The mandatory submission of a dispute to the engineer introduced by the provisions of clause 69 (1) of the general conditions of contract therefore falls within the meaning of the word "arbitration" as contained in s 13 (1) (f) of the Act. Alternatively, if it be held that the word "arbitration" within the meaning of s 13 (1) (f) of the Act should be afforded a narrow meaning, then, upon a proper G construction of clause 69 of the general conditions of contract, submission to the engineer for determination of a dispute arising out of the contract nevertheless renders such dispute "subjected to arbitration" within the meaning of the subsection. In terms of clause 69 a party is not entitled to H resort to his common law remedies in relation to a dispute arising out of the contract. Such a party is obliged to commence the resolution of such dispute by submitting it, first, to the engineer for determination. If neither party objects timeously to such determination, cadit quaestio. Similarly, if objection is raised timeously the parties are obliged to submit to mediation and, if no objection is raised timeously to the mediator's decision, cadit quaestio. Although the parties therefore do not proceed to formal arbitration in the narrow sense of the word until the previous two steps have been

1628. 1984 (1) SA p577

1629. GROSSKOPF AJA

1630. exhausted, neither party is entitled (save, of course, by honouring the engineer's determination or the mediator's opinion) to halt the resolution procedure once the dispute has arisen. It follows that clause 69, which falls to be interpreted as a whole, envisages an arbitration procedure A commencing with the submission of a dispute to the engineer and continuing inevitably to final resolution by arbitration unless it is short-circuited by bilateral acceptance of the one or the other of the preliminary procedures. In this regard it is significant to note that clause 69 contemplates three inter-related, conjoined and successive stages of one and the B same resolution procedure. Therefore, submission to the engineer for determination of a dispute arising out of the contract renders such dispute "subjected to arbitration" within the meaning of s 13 (1) (f) of the Act. In this respect we are in agreement with counsel for the appellant's submission "that s 13 (1) (f) of the Prescription Act contemplates that some step having the effect of unequivocally initiating the C arbitration process must first be taken before the dispute becomes 'subjected to arbitration' within the meaning of the section..." Submission of the dispute to the engineer is such a step.

1631. Snitcher QC in reply.

1632. D Cur adv vult.

1633. Postea (November 29).

1634. [zJDz]Judgment

1635. GROSSKOPF AJA: This is an appeal against an order granted by BASSON J sitting in the Northern Cape Division. The judgment of the Court a quo, which contains a full account of the E background to the case with extensive quotations from the pleadings and other relevant documents, has been reported (see *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Munisipaliteit* 1982 (3) SA 385 (NC)). Accordingly I propose confining myself in this judgment to a brief summary of those F aspects of the case which are of direct relevance to the issues on appeal. Where I find it necessary to refer to the judgment of the Court a quo I shall do so by citing the relevant pages of the published report.
1636. The appellant and the respondent were the contractor and employer respectively under a contract for the construction of G sewage purification works at Upington. During 1976 the contract was terminated with each party blaming the other for committing a breach thereof. The respondent then employed another contractor to execute certain remedial work. This was completed in December 1976. The respondent contended (and still contends) that the appellant is obliged to pay the cost of the H remedial work as damages for the appellant's breach of contract. The appellant denies all liability.
1637. The contract between the parties contained, by way of the incorporation of standard conditions of contract commonly used in the engineering field, a clause relating to the settlement of disputes. This clause, to which I shall refer as clause 69 and which will be considered in more detail later, required, as a first step, that the dispute be referred for decision to the engineer who was appointed pursuant to the
1638. 1984 (1) SA p578
1639. GROSSKOPF AJA
1640. contract. This the respondent did on 7 June 1978. The engineer's decision was, however, made and communicated only in April 1980. It went in favour of the respondent. The appellant thereupon instituted proceedings for an order declaring that A the respondent's claim arising out of the appellant's alleged breach of contract had become prescribed. The Court a quo rejected this claim and, pursuant to a claim-in-reconvention, granted an order declaring that the appellant was bound by the award of the engineer subject to its rights under clause 69. It is against these orders that the present appeal is directed. B The decision of the appeal turns largely on some of the provisions of the Prescription Act 68 of 1969 ("the Act").
1641. Section 10 of the Act provides that, with certain exceptions, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt. In the present case C it is common cause that the relevant period is three years (s 11 (d) of the Act) and that prescription commenced to run as soon as the debt was due (s 12 (1) of the Act). The appellant contended that the respondent's claim for damages (which is the "debt" now in issue) became due at the latest in December 1976 when the remedial work was completed. I shall assume that this D contention is correct. The debt was therefore prima facie prescribed in December 1979. This was prior to the institution of the present proceedings, and the appellant was accordingly entitled, prima facie, to the declaratory order which it claimed. The Court a quo nevertheless found in favour of the respondent on the basis that the submission of the dispute to E the engineer amounted to the subjection thereof to arbitration within the meaning of s 13 (1) (f) of the Act, and thus delayed the completion of prescription. In order to decide whether the Court a quo was correct in its finding, it is necessary first to examine the broad general principles embodied in the Act.
1642. Although many philosophical explanations have been suggested F for the principles of extinctive prescription (see, for instance, the passage from Pothier quoted in the judgment a quo at 398F - H), its main practical purpose is to promote certainty in the ordinary affairs of people. Where a creditor lays claim to a debt which has been due for a long period, doubts may exist as to whether a valid debt ever arose, or, if G it did, whether it has been discharged. (See *De Wet and Yeats Kontraktereg en Handelsreg* 4th ed at 255.) The alleged debtor may have come to assume that no claim would be made, witnesses may have died, memories would have faded, documents or receipts may have been lost, etc. These sources of uncertainty are reduced by imposing a time

limit on the existence of a debt, H and the relevant time limits reflect, to some extent, the degree of uncertainty to which a particular type of debt is ordinarily subject (s 11 of the Act).

1643. The same considerations which provide a justification for extinctive prescription also suggest that the time limits should not be immutable. Where the creditor takes judicial steps to recover the debt, and thereby to remove all uncertainty about its existence, prescription should obviously not continue running while the law takes its course (s 15 of the Act). Moreover, s 14 of the Act provides that the running of

1644. 1984 (1) SA p579

1645. GROSSKOPF AJA

1646. prescription is interrupted by an express or tacit acknowledgement of liability by the debtor. The reason is clear - if the debtor acknowledges liability there is no uncertainty about the debt. No purpose would accordingly be served by requiring the creditor to interrupt prescription by A instituting legal proceedings for the recovery of the debt (see, eg, De Wet Opuscula Miscellanea at 127; Cape Town Municipality v Allie NO 1981 (2) SA 1 (C) at 5H).

1647. The Act, however, also embodies a principle which is inconsistent with the promotion of certainty. It is accepted in the Act that there are circumstances in which it would be B unfair to require of the creditor that he institute proceedings within the time normally allowed. This unfairness arises in the main where it is impossible or difficult for a creditor to enforce his rights within the time limit. (See De Wet (op cit at 122 - 126).) For present purposes s 13 (1) of the Act is the provision which gives effect to this principle. It lays down that prescription is delayed in certain C circumstances, eg where the creditor is a minor or is insane, or is a person under curatorship, etc. Where an "impediment" of the type mentioned in s 13 exists a year or less before prescription would otherwise have been completed, the completion of prescription is delayed until a year after the impediment has ceased to exist.

1648. It will thus be seen that there are two general principles D which protect a creditor against the effects of extinctive prescription. The first is the basic requirement of certainty which underlies extinctive prescription. Where the debtor removes all uncertainty by acknowledging liability, or the creditor does so by instituting and prosecuting legal E proceedings, the running of prescription is suitably adapted.

1649. The second principle is that it may sometimes be impossible or difficult for the creditor to recover his debt. Here also the Act comes to his aid.

1650. I have stated above that it is s 13 (1) of the Act which, for present purposes, gives effect to the second principle. At the same time this section also embodies elements of the first F principle. Thus, for instance, s 13 (1) (g) applies if

1651. "the debt is the object of a claim filed against the estate of a debtor who is deceased or against the insolvent estate of the debtor or against a company in liquidation or against an applicant under the Agricultural Credit Act 28 of 1966..."

1652. There may be greater or lesser difficulty in suing debtors of G the type mentioned in this subsection. It seems clear, however, that a part of its underlying ratio is also that, in the circumstances mentioned, the creditor is already taking appropriate steps to recover his debt and should not be required to institute legal proceedings merely to interrupt the H running of prescription.

1653. The same duality of purpose can be seen, in my view, in s 13 (1) (f) of the Act, which is of direct relevance to the present case. The subsection applies "if... the debt is the object of a dispute subjected to arbitration". An arbitration agreement does not necessarily oust the jurisdiction of the court. Despite the existence of such an agreement, the creditor may elect to institute legal proceedings, although he might be met by an application for a stay of proceedings or a special

1654. 1984 (1) SA p580

1655. GROSSKOPF AJA

1656. plea to the same effect (see s 6 of the Arbitration Act 42 of 1965; *Universiteit van Stellenbosch v J A Louw* (Edms) Bpk 1983 (4) SA 321 (A) at 333G - H and authorities there cited). The court would in practice normally order a stay if requested to A do so (ibid at 333H - 334C). An arbitration agreement is therefore in a sense an impediment to the recovery of a debt by means of legal proceedings, but it is one because it provides an alternative means of resolving disputes which carries the approval of the law. This applies a fortiori where a dispute has actually been subjected to arbitration. The creditor is B protected against the running of prescription because there exists an impediment to his approaching the ordinary courts, and the impediment exists because he is taking appropriate alternative steps to recover his debt. It is against this background that s 13 (1) (f) of the Act should in my view be interpreted and applied.
1657. In the present case the question for decision is whether the C submission of the parties' dispute to the engineer pursuant to clause 69 fell within the terms of s 13 (1) (f). I turn accordingly to a consideration of clause 69. It is quoted in full at 392G - 394C of the trial Court's judgment. I propose doing little more than to summarise it, quoting only a few pertinent passages.
1658. D The clause is headed "Settlement of disputes". It commences by defining its ambit as follows:
1659. "If any dispute of any kind whatsoever shall arise between the employer or the engineer and the contractor in connection with or arising out of the contract or the carrying out of the works (whether during the progress of the works or after their completion and whether before or after the determination, abandonment or breach of the contract)..."
1660. E The procedure laid down in respect of such a dispute is the following. It is first referred to the engineer, who must take a decision. This decision is prima facie final and binding on both parties. However, if the engineer has not given a decision within 45 days after being requested to do so, or if either F party is dissatisfied with his decision, the dispute may be submitted within a further 45 days to a mediator. In proceedings before the mediator no legal representation is allowed, and the mediator may determine whether the parties' submissions should be presented in writing or orally. The mediator must furnish the parties with a written opinion within G a reasonable time. This opinion is final and binding upon the parties unless, within 28 days, one of them takes the final step allowed by clause 69, viz to require that, upon completion of the works, the matter be referred to a single arbitrator. If this is done, a formal arbitration ensues and the arbitrator's award is the final word on the matter.
1661. Clause 69 accordingly provides an extra-judicial means of H resolving a dispute between the parties. Once the parties have entered upon the procedures which it lays down, they will achieve certainty about the debt (or alleged debt) which forms the subject-matter of their dispute. Such certainty will arise from the decision of the engineer, the opinion of the mediator or the award of the arbitrator.
1662. At the same time clause 69 places as much of an impediment in the way of a creditor who wishes to institute legal proceedings as would any ordinary arbitration agreement. In *Universiteit van Stellenbosch v*
1663. 1984 (1) SA p581
1664. GROSSKOPF AJA
1665. J A Louw (Edms) Bpk (supra) the building contract in question contained a clause (clause 26) which provided that a dispute should first be referred for decision to the architect and that, if the contractor were dissatisfied with his decision, he could have the dispute referred to arbitration proper (ubi sup A at 330A - B; 337H - 338A). The building owner sued various parties, including the contractor, for damages arising from or associated with the building operations. The contractor filed a special plea asking for a stay of proceedings to enable the dispute to be determined in accordance with clause 26. This Court treated clause 26 like any other arbitration agreement B and, applying s 6 of the Arbitration Act, came to the conclusion on the merits that no stay should have been granted. At no stage was it suggested that the requirement of a preliminary decision by the architect affected the nature of the clause so as to make an application for a stay of proceedings

inappropriate. Nor did the Court per incuriam fail C to advert to the architect's role. On the contrary, the fact that the architect had to give a decision was very prominent in the Court's reasoning when deciding whether a stay was warranted on the merits of the particular case. (Ubi sup at 336E - 341C.) In clause 69 in the present case a mediator is interposed between the engineer and the arbitrator, but this D cannot, in my view, make any difference. On the authority of the Universiteit van Stellenbosch case I consider that, if the respondent in the present case had issued a summons instead of invoking the procedures laid down by clause 69, it could have been met by an application for a stay of proceedings or an equivalent special plea (in fact this is more or less what happened - see the judgment of the Court a quo at 394 paras E 36).

1666. I revert now to the question in issue, viz whether the submission of the dispute to the engineer for decision pursuant to clause 69 amounted to a subjection thereof to arbitration F within the meaning of s 13 (1) (f) of the Act. In deciding this issue the Court a quo referred to a number of dictionary definitions which attach a very wide meaning to the words "arbitration", "arbitrasie" "arbiter" and "arbitrator" (at 399D - H). I would be loath to accept these definitions as being literally applicable to s 13 (1) (f). It seems to me that the "arbitration" contemplated by the Legislature does not G necessarily encompass all procedures whereby disputes are settled extra-judicially by some person or persons agreed to by the parties. I do not, however, have to decide this question. In my view it is unnecessary and undesirable to attempt any universally applicable definition of "arbitration" in the context of s 13 (1) (f) of the Act, and I propose limiting H myself to the facts of the present case.

1667. Mr Snitcher, who appeared for the appellant, contended that the word "arbitration" in s 13 (1) (f) should be interpreted in a technical sense, and that in a case like the present a dispute would not be "subjected to arbitration" before the last stage of clause 69 had been reached. It seems to me that this argument is based on a false premise. Mr Snitcher concentrated his argument on the role of the engineer

1668. 1984 (1) SA p582

1669. GROSSKOPF AJA

1670. considered in isolation and in this regard relied heavily on Kollberg v Cape Town Municipality 1967 (3) SA 472 (A). Kollberg's case concerned the question whether the engineer, in a case like the present, was required to give notice of his A intention to determine a dispute, and was further required to afford the other party an opportunity of being heard on the merits of the dispute. This Court held that the engineer was not an arbitrator or quasi-arbitrator, and was accordingly not required to give notice or afford a hearing.

1671. The decision has been the subject of some criticism (see the B Universiteit van Stellenbosch case supra at 337A - H) but in any event does not seem to cast light on the real question to be decided in the present case. The engineer may not himself be an arbitrator in the sense that he has to hear both parties. Non constat, however, that the whole procedure which is initiated by the submission of a dispute to the engineer is not C one of arbitration for the purposes of the Act. As I have already indicated, this Court accepted in the Universiteit van Stellenbosch case that a clause of the same type as clause 69 constitutes an arbitration agreement for the purposes of the Arbitration Act 42 of 1965, and the ordinary meaning of "arbitration" is certainly wide enough to cover a procedure D such as that laid down in this clause. This procedure entails three levels at which the parties' dispute may be determined by the decision of a third person, each successive level affording the parties a greater opportunity to be heard until they reach a formal arbitration, if either party wishes it. At one or another stage of the proceedings the dispute will be finally resolved, thereby creating certainty about the existence of the E alleged debt. In the meantime recourse to the ordinary courts would be difficult if not impossible. Having regard to the wording of s 13 (1) (f) of the Act as well as its scope and purpose, I consider that the procedure laid down by clause 69 taken as a whole must be considered one of arbitration, and that the dispute in the present case was subjected to such F arbitration when it was submitted to the engineer. It follows that the completion of prescription was delayed until one year after the impediment ceases to exist (ie when the arbitration proceedings come to an end - see De Wet and Yeats (ubi sup at 269

footnote 76)). This has not yet occurred, and the Court a quo was accordingly correct, in my view, in making the order G which it did.

1672. In the result the appeal is dismissed with costs, including the costs of two counsel.

1673. WESSELS JA, TRENGOVE JA, BOTHA JA and HOWARD AJA concurred.

1674. H Appellant's Attorneys: Elliott, Maris, Wilmans & Hay, Kimberley; McIntyre & Van der Post, Bloemfontein. Respondent's Attorneys: Duncan & Rothman, Kimberley; Webber & Newdigate, Bloemfontein.

1675. Volume 1: 583 - 836 (March)

1676. Appellants' Attorneys: Van Zyl, Le Roux & Hurter Inc, Pretoria; McIntyre & Van der Post, Bloemfontein. First Respondent's Attorneys: Bell, Dewar & Hall, Pretoria; Webbers, Bloemfontein. Second Respondent's Attorneys: Deneys Reitz, Pretoria; Symington & De Kok, Bloemfontein. E

COOL IDEAS 1186 CC v HUBBARD AND ANOTHER

Case CCT 99/13

In the matter between:

COOL IDEAS 1186 CC Applicant

and

ANNE CHRISTINE HUBBARD First Respondent

**MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT** Second Respondent

Neutral citation: *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16

Coram: Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J

Heard on: 5 February 2014

Decided on: 5 June 2014

Summary:

Housing Consumers Protection Measures Act 95 of 1998 – section 10(1) – requires registration of home builder to receive consideration for work done – no infringement of unregistered home builder’s rights to property and to access to courts.

Application to have arbitration award made an order of court – statutory prohibition precluding court from making arbitral award an order of court – would amount to a court sanctioning an illegality.

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the South Gauteng High Court, Johannesburg):

1. The applications for condonation are granted.
2. The application for leave to appeal is granted.
3. The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

MAJIEDT AJ (Moseneke ACJ, Skweyiya ADCJ, Khampepe J and Madlanga J concurring):

Introduction

[1] In most instances a home is the most valuable asset in a person's estate. The Legislature sought to protect housing consumers by enacting the Housing Consumers Protection Measures Act (Housing Protection Act). This matter concerns the interpretation of section 10(1)(b) of the Act. Related thereto, it questions whether that provision infringes Cool Ideas' right not to be arbitrarily deprived of property in terms of section 25 of the Constitution and its right to have access to courts in terms of section 34 of the Constitution. I must at the outset record that no relief was sought either in the courts below or in this Court to have the section struck down as constitutionally invalid.

[2] The applicant, Cool Ideas 1186 CC (Cool Ideas), a duly registered close corporation primarily engaged in property development, seeks leave to appeal against a judgment of the Supreme Court of Appeal. The majority in that Court upheld an appeal against a judgment of the South Gauteng High Court, Johannesburg (High Court) which granted Cool Ideas' application to have an arbitration award in its favour against the first respondent, Ms Anne Christine Hubbard, a home owner, made an order of court in terms of section 31 of the Arbitration Act. The second respondent is the Minister of Justice and Constitutional Development (Minister), cited because the relief sought might implicate the constitutionality of legislation. The Minister took no part in the proceedings in the High Court, the Supreme Court of Appeal or in this Court.

Condonation

[3] Cool Ideas applies for condonation of the late filing of its application for leave to appeal in this Court as well as for the late lodging of its summary of substantial facts. There was opposition only to the first application, but this was abandoned at the hearing.

[4] The explanation proffered for the failure to comply with the time limits is satisfactory and no prejudice has ensued. It is consequently in the interests of justice to grant both applications.

Background

[5] On 13 February 2006 Cool Ideas and Ms Hubbard entered into a building contract. Cool Ideas undertook to construct a residence for Ms Hubbard for consideration of R2 695 600. Cool Ideas enlisted the services of Velvori Construction CC (Velvori) to execute the building project. At the time that it entered into the building contract, Cool Ideas was not registered as a home builder in terms of section 10 of the Housing Protection Act. However, Velvori was duly registered as a home builder with the capacity to undertake the construction of a home. The building project was also enrolled by Velvori as required by section 14 of the Housing Protection Act.

[6] The project commenced, payments were made and received and the building works achieved practical completion in October 2008. Ms Hubbard then raised certain issues regarding the quality of elements of the building works, refused to make the final payment due on the building project and claimed payment of R1 200 000 as the cost of remedial work. Ms Hubbard invoked the arbitration clause contained in the building contract and initiated arbitration proceedings to seek payment for contractual damages from Cool Ideas.

[7] On 12 February 2010 the parties agreed to the appointment of an arbitrator, Mr Charles Cook, an architect, to determine the dispute. Ms Hubbard claimed compensation on the basis of defective workmanship, relocation costs, penalties and certain compliance-type certificates. Cool Ideas counterclaimed for the portion of the contract sum which remained outstanding, namely an amount of approximately R550 000. The arbitration agreement, among other things, recorded that:

“The arbitration will be held in terms of the Arbitration Act 42 of 1965. The arbitrator’s award shall be final and binding. There shall be no appeal against the arbitrator’s award”.

[8] The arbitration proceedings culminated on 15 April 2010 in an award in favour of Cool Ideas. The relevant part of the award reads that “[Ms Hubbard] is to pay the Respondent [Cool Ideas] the sum of R550 211 inclusive of VAT”.

[9] Ms Hubbard failed to satisfy the arbitration award. On 16 November 2010 she wrote to Cool Ideas contending that it was not entitled to claim remuneration under the building contract because it was not registered as a home builder in terms of the Housing Protection Act. She contended that Cool Ideas was not entitled to apply to have the award of the arbitrator made an order of court, since it would receive remuneration in direct conflict with the provisions of the Housing Protection Act.

[10] Cool Ideas was of the view that it was not necessary to register as a home builder in terms of the Housing Protection Act because that Act required both the enrolment of a building project that was subject to its provisions and the registration of a home builder. Cool Ideas contended that, in doing so, it distinguishes between two categories of home builders. The first is where the home builder has the capacity to undertake the physical construction of the home, as did Velvori. The second is where the home builder does not have this capacity and has to appoint a subcontractor. Cool Ideas argued that it falls into this latter category. It also averred that, upon enquiry to the National Home Builders’ Registration Council (NHBRC), Cool Ideas was informed that it was not necessary for it to register as a home builder before commencing construction.

[11] Subsequently, Cool Ideas applied to the High Court to make the arbitral award an order of court in terms of section 31 of the Arbitration Act.

High Court

[12] Ms Hubbard opposed the application and averred that, in terms of section 10(1) of the Housing Protection Act, Cool Ideas was not entitled to carry on the business of a home builder or to receive any consideration in terms of any agreement with a person defined as a housing consumer. Section 10(1) reads as follows:

“No person shall—

- (a) carry on the business of a home builder; or
 - (b) receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home,
- unless that person is a registered home builder.”

[13] Between the delivery of the answering affidavit and the replying affidavit during the High Court proceedings, Cool Ideas applied for and was registered as a home builder in terms of section 10(6)(b) of the Housing Protection Act.

[14] During the High Court proceedings, Ms Hubbard submitted that the arbitral award was incapable of enforcement and that it was void from the outset. She made neither a case for a remittal of the dispute to the arbitrator in terms of section 32(2) of the Arbitration Act, nor for setting aside of the arbitrator’s decision in terms of section 33. The High Court was of the view that Ms Hubbard raised her defence in a manner which had the effect of an appeal in that the arbitrator erred on a point of law.

[15] Cool Ideas submitted that Ms Hubbard was precluded from raising new issues for the first time. In this regard counsel placed reliance on *York Timbers* and *Lufuno Mphaphuli*. The High Court upheld this submission and stated that, had the issue been raised as an exception at the arbitration stage, Cool Ideas would have been afforded the opportunity to deal with the point and the arbitrator may well have allowed an amendment. The question of non-registration could then have been traversed during the arbitration.

[16] The High Court held that there is no authority for the proposition that section 31(1) of the Arbitration Act confers a discretion on the court to refuse the application if it finds the award to be incorrect.

[17] The High Court held further that a significant feature of this case was that by the time Cool Ideas wished to make the arbitral award an order of court, it had registered as a home builder in terms of the Housing Protection Act. In this regard the High Court cited section 14A(1) which is headed “Late enrolment and non-declared late enrolment”. It reads:

“Where a home builder—

- (a) in contravention of section 14 submits an application for the enrolment of a home to the Council after construction has started; or
- (b) does not declare the fact that construction has commenced at the time of enrolment and the Council becomes aware of that fact,

the Council shall require the home builder to satisfy the Council that the construction undertaken at the time is in accordance with the NHBRC Technical Requirements and shall take prudent measures, contemplated in section 16(1), to manage the risks pertaining to the fund.”

[18] The High Court held that the Housing Protection Act envisions a situation where late registration is permissible after the building has commenced and therefore the peremptory provisions of section 10 are to be read with those in section 14A.

[19] The High Court further held that the work was done by Velvori, a registered home builder as required by the Housing Protection Act. To preclude Cool Ideas from its claim at that stage would be giving effect to form over substance. The substance of its claim at that stage was that it was a registered home builder and that at the time it executed the building work it did so in cooperation with the subcontractor, Velvori.

[20] The High Court made the arbitral award an order of court in accordance with section 31 of the Arbitration Act. Ms Hubbard appealed to the Supreme Court of Appeal.

Supreme Court of Appeal

[21] The majority in the Supreme Court of Appeal held that the purpose of section 10 was to protect consumers. It held that section 10(7) required that both Cool Ideas and the subcontractor had to be registered as home builders in terms of the Housing Protection Act. That section reads as follows:

“A home builder registered in terms of subsection (6)(b) shall be obliged, for the purposes of the physical construction of homes, to appoint a home builder registered in terms of subsection (6)(a)”.

[22] While section 10 did not nullify the contract between Ms Hubbard and Cool Ideas, it nevertheless disentitled unregistered home builders from receiving consideration. Importantly, section 21 creates an offence for non-compliance with section 10(1) and (2) of the Housing Protection Act. Enforcing the arbitral award, in the majority’s view, would be to give effect to an unlawful situation and provide legal sanction to the mischief the Housing Protection Act seeks to prevent. The majority rejected the High Court’s finding that the Housing Protection Act envisioned a situation where late registration is permissible after the building has commenced in terms of section 14A. In respect of the arbitration award, the majority rejected the proposition on behalf of Cool Ideas that due deference should be shown to arbitration awards by our courts. In doing so, the majority emphasised that it was not seized with the question whether an arbitration award should be set aside, but rather with the enquiry whether it is legally tenable to make an arbitration award an order of court where to do so would amount to sanctioning the breach of a clear statutory prohibition. The appeal was upheld with costs. Willis JA, dissenting, took the contrary view that a refusal to make the arbitral award an order of court would lead to an unjust result.

Issues for determination

[23] The issues for determination in this Court are:

- (a) the interpretation of section 10(1)(b) of the Housing Protection Act;
- (b) whether Cool Ideas has been arbitrarily deprived of its property;
- (c) whether the building contract remains valid;

- (d) whether equity considerations are applicable; and
- (e) whether a refusal to make the arbitral award an order of court constitutes a denial of the right of access to courts.

In this Court

Jurisdiction and leave to appeal

[24] Cool Ideas predicated its application initially on this Court's jurisdiction as it existed prior to the Constitution Seventeenth Amendment Act (Amendment Act), which commenced on 23 August 2013. Later it changed tack and amended its notice of motion to seek a determination of a non-constitutional issue in terms of the extended general jurisdiction brought about by section 167(3)(b)(ii) of the Amendment Act. The primary issue for determination is the correct interpretation of section 10(1)(b) of the Housing Protection Act. However, two constitutional issues were raised in the original application to deal with this issue, namely: (a) that section 10(1)(b) of the Housing Protection Act amounts to an arbitrary deprivation of property as envisaged in section 25(1) of the Constitution; and (b) that the Supreme Court of Appeal's refusal to make the arbitration award an order of court infringed Cool Ideas' right of access to courts in terms of section 34 of the Constitution.

[25] Apart from the fact that the original application for leave to appeal had been filed in this Court on 30 July 2013, almost one month prior to the commencement of the amended section 167(3)(b)(ii), there is no need for this Court to exercise its extended general jurisdiction (assuming it could do so), since constitutional issues plainly arise here. It is therefore not necessary to decide whether this Court has extended jurisdiction in terms of the amended section.

[26] It is furthermore in the interests of justice to decide these constitutional issues, since they arise as a consequence of the Supreme Court of Appeal's majority judgment. This matter requires us to interpret section 10(1)(b) of the Housing Protection Act and to subject it to scrutiny through the lens of the rights contained in sections 25(1) and 34 of the Constitution. These issues were not directly raised in the Supreme Court of Appeal. There are reasonable prospects of success and leave to appeal should consequently be granted.

The merits

[27] The interpretation of section 10(1)(b) of the Housing Protection Act requires a careful consideration of the scheme of the Act and its objects measured against the rights embodied in sections 25 and 34 of the Constitution. The nub of the dispute concerns the question whether section 10(1)(b) should be interpreted, as Cool Ideas contends, to mean that an unregistered home builder can receive payment for work done as long as registration has been effected by the time that payment is sought. Put differently, Cool Ideas contends that registration is not a prerequisite for a home builder to commence (and complete) construction, as long as registration has been effected by the time the home builder seeks payment.

Proper meaning of section 10(1)(b) of the Housing Protection Act

[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).

I turn to an analysis of the legislative scheme of the Housing Protection Act, against the backdrop of these principles.

The scheme of the statute

[29] The purpose of the Housing Protection Act is to protect housing consumers. This appears from the name and preamble of the statute. Unsurprisingly, this aspect was not in issue before us. The entire legislative scheme is predicated upon a building contract between a registered home builder and a housing consumer being concluded. The statute is not capable of being construed as permitting after-the-fact registration of a home builder when construction has already commenced (or may even have been completed) when it seeks payment from the housing consumer. It is necessary to discuss in some detail the various provisions of the Housing Protection Act which support this conclusion.

[30] Section 3 sets out the objects of the NHBRC. The ultimate objective is the regulation of the building industry through, amongst other things, the protection of the housing consumer and maintaining minimum standards for home builders. The protection is optimally achieved in requiring the registration of home builders upfront and not during the course of or at the end of construction. The impugned provision must therefore be interpreted thus. To hold otherwise would be to defeat the primary objective of the statute. The contrary argument would in effect leave a housing consumer who is faced with defective workmanship on his or her house unprotected in respect of a civil remedy in terms of the Housing Protection Act until such time as the home builder registers with a view to recovering payment for its services rendered, should such a home builder ever choose to do so.

[31] Section 5 sets out the wide-ranging powers of the NHBRC. Section 13 contains important safeguards in favour of the housing consumer. Unless there has been compliance with certain provisions, a home builder is prohibited from demanding or receiving from a housing consumer a deposit for the construction of a home. I deal with these sections in more detail below.

[32] Chapter V deals with legal enforcement and, in a similar vein, affords housing consumers extensive protection through the imposition of the requirement on home builders to register with the NHBRC. Lastly, section 21 creates statutory offences for contravention of section 10(1) and (2). It provides for sentences of a fine not exceeding R25 000 or imprisonment for a period not exceeding one year, on each charge.

[33] These provisions lead one to the ineluctable conclusion that the statute envisions registration of a home builder before construction commences. Moreover, the relevant section itself says so in plain language. These prohibitions are stark and explicit. Equally clear is the purpose of these provisions (as is the case with the statute as a whole), namely to protect housing consumers.

[34] The possibility of belated registration, advanced by Cool Ideas, would be inimical to the clear objective of the legislation. It would also violate the clear language and meaning of section 10(1)(b). Much emphasis was laid on behalf of Cool Ideas on the use of the word “receive” in section 10(1)(b) in support of this converse proposition. That emphasis is misplaced. Section 10(1)(a) and (b) and 10(2) must be read together and, as stated, contextually and purposively with regard to the statute as a whole. This section requires the registration of persons or entities that carry on the business of a home builder, and those that have entered into an agreement with a housing consumer in respect of the sale or construction of a house. In this instance, it is not permissible to extract one word from the section and then to rely upon it as support for the interpretation which Cool Ideas contends for in circumstances where it plainly controverts not only the plain, unambiguous text of section 10(1) and (2), but also the clear purpose of that section and of the statute as a whole.

[35] The further submission that Cool Ideas’ non-registration was in any event cured by the fact that Velvori – which did the actual construction work – had been duly registered as a home builder, is devoid of merit. This is so given the plain and unequivocal requirement in section 10(7).

[36] It is of some significance that while, as the majority in the Supreme Court of Appeal correctly observed, section 14A allows for the late enrolment of a home after construction has commenced, there is no corresponding relaxation of the registration requirement to be found in section 10(1)(b). This too evinces a clear intention by the Legislature that registration should occur prior to and not during or at the end of construction.

[37] Accordingly, the interpretation given by the Supreme Court of Appeal to section 10(1)(b) of the Housing Protection Act, namely that registration is a prerequisite for building works to be undertaken by a home builder, must be upheld. Failure to register would result in the home builder being ineligible to seek consideration for work done in terms of a building agreement. It is convenient to discuss whether this interpretation amounts to an arbitrary deprivation of Cool Ideas’ property. I think not.

Arbitrary deprivation of property

[38] The starting point of this enquiry must be whether there has been a deprivation of Cool Ideas’ property. It is common cause that there has been deprivation – Cool Ideas would not be able to enforce a claim based on unjustified enrichment, for the reasons mentioned below. The outstanding balance of R550 000 would thus remain unpaid. This Court held in *Opperman* that the right to restitution of money paid based on unjustified enrichment constitutes property for purposes of section 25(1) of the Constitution.

[39] The next question is whether the deprivation of Cool Ideas’ right to sue on unjustified enrichment is arbitrary. The answer to this question is inextricably linked to the discussion of the purpose of the Housing Protection Act, the legislative scheme as a whole and the interpretation of section 10(1)(b), set out above.

[40] In *FNB v CSARS*, this Court set out the test for arbitrariness. It held that there will be an arbitrary deprivation of property if the law referred to in section 25(1) lacks adequate reason for the deprivation in question or is procedurally unfair. Ackermann J then laid down guidelines for determining the requirement of sufficient reason for the deprivation. In essence they entail an analysis of the means employed and the ends sought to be achieved as well as a consideration of the nature of the property and the extent of the deprivation.

[41] This approach was referred to with approval in *Opperman*. As was the case in *Opperman*, the deprivation in this matter is not merely partial in nature. It deprives the unregistered home builder, Cool Ideas, of its right to payment and there must consequently be compelling reasons for it. Proportionality between the means and the end would therefore have to feature prominently in this enquiry. But, unlike *Opperman*’s factual

matrix and ultimate findings, here the means justify the end, that is, there is a rational connection between the depriving statutory provision and its purpose. The purpose of the legislation has been set out above and is not in issue.

[42] There can be no doubt that the protection of housing consumers is a necessary and legitimate legislative objective. The means of protection is through the establishment of a fund to compensate housing consumers for defective work by home builders. Registration is a prerequisite for the construction of a home. Registration, quite apart from its protection objective, is also aimed at bringing home builders into the statutory fold of the NHBRC with all its wide-ranging powers and, secondly, to contribute towards the funding of the NHBRC through registration fees.

[43] The crisp issue is whether the penalisation for failure to register, namely the deprivation of consideration for services rendered by the home builder, is proportionate to the purpose of protecting housing consumers, that is, do the means of deprivation justify the ends of protection? I think they do. The purpose for deprivation is compelling. Moreover, it is a simple process of registration which is required. There is nothing overly complicated or onerous. The important consequences brought about by registration have been dealt with above. It is not necessary to regurgitate them. It would suffice to reiterate their importance by demonstrating the invidious position a housing consumer who has unwittingly contracted with an unregistered home builder would find herself in. There would be no safeguards under section 13, which places certain important obligations on the home builder and which also provides evidentiary aid to the housing consumer by way of the deeming provisions in section 13(2)(a). Most importantly, the housing consumer would have no recourse to the NHBRC Fund and no claim for restitution against the unregistered home builder. The deprivation effected by section 10(1)(b) is aimed at a limited target, namely those home builders who fail to register.

[44] I am satisfied that section 10(1)(b) is aimed at achieving a legitimate and important statutory purpose and that there is a rational, proportional connection between the statutory prohibition and its purpose. There is accordingly no arbitrariness in the deprivation and thus no violation of section 25 of the Constitution. I turn next to a discussion of whether the underlying building contract remains valid.

The continued validity of the building contract

[45] By invoking the arbitration clause in terms of the building contract, the parties entered into a separate arbitration agreement on 3 April 2009 (it will be recalled that the building contract had been concluded on 13 February 2006). This fell outside of the ambit of the building contract. My Colleague Jafta J does not draw this distinction. The arbitrator derives his powers not from the building contract (as Jafta J appears to suggest), but from the arbitration agreement. The arbitrator himself acknowledged this fact. It is noteworthy that at the time of the commencement of the arbitration agreement on 12 February 2010, Cool Ideas was still not registered as a home builder for the purposes of section 10 of the Housing Protection Act.

[46] Although I find below that the building contract remained valid, a distinction needs to be drawn between the building contract and the arbitration agreement. It is the contents of the arbitration agreement that are before this Court. The arbitration agreement required the arbitrator to arbitrate on alleged defective work by Cool Ideas which occurred whilst Cool Ideas was engaged in the construction of a home for Ms Hubbard. Both the arbitration agreement and the building contract are subject to the legislative framework of the Housing Protection Act.

[47] The Supreme Court of Appeal correctly found that the underlying building contract remains valid, notwithstanding its finding that Cool Ideas was not entitled to payment due to its failure to register as required by section 10(1)(b). It reasoned, correctly so, that the prohibitions in section 10(1) and (2) are not directed at the validity of construction contracts, but at the unregistered home builder who is barred from receiving any consideration for work done absent any prior registration as a home builder. There is nothing in the legislative scheme which suggests that the building contract is invalidated by these statutory prohibitions.

[48] I have already set out the main provisions of the Housing Protection Act. The legislative scheme rests upon a written building contract between a registered home builder and a housing consumer. Section 13(1) places a statutory obligation upon the home builder to ensure that a written agreement is concluded and that the formalities in that regard are met. Section 13(2)(a) lends further assistance to the housing consumer as against the home builder by importing deeming provisions into the written agreement against the latter, enforceable in a court. And, of some significance is the fact that these provisions in section 13 may not be waived. It is difficult to conceive how, given this importance of the written building contract in the legislative scheme, the entire agreement must be invalidated by the conclusion that an unregistered home builder is not entitled to seek payment for work done in terms of section 10(1)(b). It would be tantamount to a futile exercise if the Legislature were to enact a statutory prohibition against the remuneration of an unregistered home builder when the entire legislative scheme renders the building contract between the housing consumer and the home builder void from the outset. For this reason I find myself in respectful disagreement with Jafta J where he states that there is “nothing in the text of section 10(1), or other sections of the Act, which indicates that the underlying contract should remain unaffected.” It is inconceivable that the Legislature would specifically enact a provision such as section 13 to protect consumers but then render their contract invalid – a provision which stipulates various protective measures for the benefit of housing consumers. These include enforceable warranties by way of the deeming provision in section 13(2). These may not be waived. The Legislature is not likely to have provided for their inclusion in a building contract if the very same enactment renders the building contract invalid.

[49] The Housing Protection Act is, for good reasons, nuanced in its purpose and scheme. The underlying building contract must remain extant in order to render protection to the housing consumer in respect of what has already been erected and to the home builder for what has already been received. The parties are therefore entitled to retain what has been done or given, as the case may be. No restitution is legally tenable in these circumstances, as would have been the case with an invalid agreement. Thus, Cool Ideas would not be entitled to file suit against Ms Hubbard for unjustified enrichment, since the material element of performance without legal basis (*sine causa*) is lacking – the building agreement remains a valid *causa*.

[50] It is of considerable importance to note that both parties approached the matter in this Court and in the courts below on the basis that the underlying building contract remained valid. The statements by Jafta J that Ms Hubbard had challenged the arbitral award on the basis that it is invalid because the building contract itself is invalid are, with respect, not borne out by the extract quoted by Jafta J in his judgment, or by any other part of the record. On the contrary, in response to the averment by Cool Ideas in its founding affidavit in this Court that the Supreme Court of Appeal correctly found that the building contract remains valid, Ms Hubbard stated as follows in her opposing affidavit:

“I do not dispute that the failure on the part of Cool Ideas to have registered as a home builder in terms of the Housing [Protection] Act did not in itself render our building agreement void.”

Counsel for both parties argued the matter before us on this basis, and correctly so.

[51] In summary: the underlying building contract remains valid and extant. This is so even though Cool Ideas is in law precluded from seeking consideration for the work done, due to its failure to register as a home builder prior to the commencement of the building works.

Equity considerations

[52] Cool Ideas contended that it would be inequitable for Ms Hubbard to be absolved from complying with the arbitrator's award and from paying the outstanding approximately R550 000 due to Cool Ideas. I am of the view that equity considerations do not apply. But even if they do, as my Colleague Froneman J suggests, the law cannot countenance a situation where, on a case by case basis, equity and fairness considerations are invoked to circumvent and subvert the plain meaning of a statutory provision which is rationally connected to the legitimate purpose it seeks to achieve, as is the case here. To do so would be to undermine one of the essential fundamentals of the rule of law, namely the principle of legality. The following dictum by Kentridge AJ in *S v Zuma* is apposite:

"[I]f the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."

It is for this reason that I am in respectful disagreement with Froneman J in his interpretation of section 10(1)(b) and the reasoning behind it. The plain import of section 10(1)(b) is that regardless of how much work has been done by the unregistered home builder, no consideration is payable by the housing consumer.

Does the refusal to make the arbitral award an order of court infringe Cool Ideas' right of access to courts?

[53] The majority in the Supreme Court of Appeal refused to make the arbitral award an order of court on the basis that to do so would amount to sanctioning an illegality and would subvert the legitimate purpose of the section by lending the court's imprimatur to the very mischief which the statute seeks to prevent. Our law has long recognised that any act performed contrary to the direct and express prohibition of the law is void and of no force and effect. Making the arbitral award an order of court would undoubtedly amount to the court sanctioning the illegality which section 10(1)(b) imposes.

[54] Moreover, section 21 of the Housing Protection Act provides that non-compliance with the particular section constitutes a criminal offence. It is imperative to take cognisance of the fact that we are not concerned here with the setting aside of the arbitrator's award on one of the three grounds listed in section 33 of the Arbitration Act, namely: misconduct by the arbitrator, gross irregularity in the proceedings, or where an arbitral award has been improperly obtained. Nor are we concerned with a remittal to the arbitrator in terms of section 32. This matter concerns the provisions of section 31 of the Arbitration Act in terms whereof an arbitral award may be made an order of court.

[55] What we are seized with here is therefore not the correctness or otherwise of the arbitral award, but with the question whether the award ought to be made an order of court if the court order would be contrary to a plain statutory prohibition. What is more, as stated at the outset, there is no challenge to the section's constitutional validity. It cannot be expected of a court of law in such circumstances to disregard a clear

statutory prohibition – that would be inimical to the principle of legality and the rule of law. To do so would amount to undermining the purpose of the legislation.

[56] That is not to say that a court can never enforce an arbitral award that is at odds with a statutory prohibition. The reason is that constitutional values require courts to “be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently.” Courts should respect the parties’ choice to have their dispute resolved expeditiously in proceedings outside formal court structures. If a court refuses too freely to enforce an arbitration award, thereby rendering it largely ineffectual, because of a defence that was raised only after the arbitrator gave judgment, that self-evidently erodes the utility of arbitration as an expeditious, out-of-court means of finally resolving the dispute.

[57] So it will often be contrary to public policy for a court to enforce an arbitral award that is at odds with a statutory prohibition. But it will not always be so. The force of the prohibition must be weighed against the important goals of private arbitration that this Court has recognised.

[58] Against this backdrop I turn to consider whether this particular arbitral award is contrary to public policy. In my view it is. Courts are themselves subject to the fundamental principle of legality as they are bound to uphold the Constitution and, as stated, to make the arbitral award an order of court in the present instance would undermine that very principle. Cool Ideas has placed extensive reliance on *Lufuno Mphaphuli* and the principle of party autonomy in voluntary arbitrations. While these are important considerations, I fail to see how they assist Cool Ideas here. Generally speaking, party autonomy in voluntary arbitrations will not trump the principle of legality where the enforcement of the arbitral award would constitute a criminal offence, as is the case here. I turn next to a brief discussion of *Lufuno Mphaphuli* to demonstrate why – although its reasoning is not irrelevant here – it is distinguishable from the present case.

[59] *Lufuno Mphaphuli* concerned a private arbitration between Lufuno Mphaphuli & Associates (Pty) Ltd (Mphaphuli), an electrical infrastructure contractor company, and Bopanang Construction CC (Bopanang), a close corporation engaged in similar business. Differences arose between the parties in respect of performance in terms of a written agreement in terms whereof Mphaphuli had engaged the services of Bopanang as a subcontractor to undertake certain work on its behalf for Eskom in rural Limpopo. The dispute was referred to arbitration before Mr Andrews, the respondent, a quantity surveyor and project manager. The arbitrator found for Bopanang, who sought to have the award made an order of court in terms of section 31(1) of the Arbitration Act. Mphaphuli opposed this application and launched a separate application in terms of section 32(2) of the Arbitration Act for the review and setting aside of the award and for remittal to the arbitrator. Bopanang succeeded in the High Court, but Mphaphuli did not; its applications for condonation failing for, inter alia, lack of merits in the main action. Mphaphuli met with the same fate in the Supreme Court of Appeal. In this Court the central issues were the interaction between the section 34 right of access to courts and private arbitrations as well as the question whether, and to what extent, parties who enter into an arbitration agreement are to be taken to have waived their constitutional right to a fair and impartial hearing and, lastly, the role of courts in confirming or setting aside arbitration awards. The statements in *Lufuno Mphaphuli* must be seen in their proper perspective. This is so because *Lufuno Mphaphuli* concerned the setting aside of an arbitration award in terms of section 33(2) of the Arbitration Act. As the majority in the Supreme Court of Appeal correctly held, it is important to remind oneself that this is not the case before us. We are concerned with whether making an arbitration award an order of court is permissible in circumstances where to do so would be to sanction a clear statutory prohibition. Some of the same considerations apply in this context. A court’s refusal to enforce an arbitration award will also erode, to some extent, the utility of the arbitration process. But where a court is called upon actively to facilitate an illegality there is a need for greater caution.

[60] The refusal to make the arbitral award an order of court for the strongly persuasive reasons advanced by the majority in the Supreme Court of Appeal is required by public policy in this case. The court would otherwise be contravening a clear statutory criminal prohibition enacted for a particularly laudable and important purpose: the protection of housing consumers.

[61] At common law an arbitral award should not be executed if the particular matter is repugnant to arbitration. Furthermore, Cool Ideas sought to draw an analogy with the Recognition and Enforcement of Foreign Arbitral Awards Act and the UNCITRAL Model Law on International Commercial Arbitration. But, to the extent that those instruments have any applicability here, they tell against Cool Ideas. Both empower a court to refuse to enforce an arbitral award if to do so “would be contrary to public policy” in South Africa. For the reasons I have given, enforcing this arbitral award in violation of a statutory prohibition backed by a criminal sanction would be contrary to public policy. This is also the approach adopted by academic writers. Thus, for instance, Butler and Finsen argue that if an arbitral award is “illegal or contrary to public policy” a court may not enforce it.

[62] In the premises, Cool Ideas’ reliance on the infringement of its section-34 right is misconceived. Its access to courts was not denied by the Supreme Court of Appeal majority but, in truth and in fact, the principle of legality, so fundamental to our constitutional project, was correctly upheld. Cool Ideas has been afforded a full and proper opportunity to have all the issues ventilated in the High Court and in the Supreme Court of Appeal. The section-34 challenge must consequently fail.

Costs

[63] In this instance I see no reason to deviate from the standard rule that costs should follow the result. Accordingly, Ms Hubbard is entitled to the costs of this application, including the costs consequent upon the employment of two counsel.

Order

[64] The following order is made:

1. The applications for condonation are granted.
2. The application for leave to appeal is granted.
3. The appeal is dismissed with costs, including the costs of two counsel.

JAFTA J (Zondo J concurring):

[65] I have read the judgment of my Colleague Majiedt AJ (main judgment). While I agree with the order proposed and some of the reasons underpinning it, I am unable to agree with some of the findings made. I do not agree that on 3 April 2009, Cool Ideas and Ms Hubbard concluded a separate arbitration agreement.

[66] I also disagree with the finding that the contract between the parties remains valid. In my view, properly construed, the prohibitions in section 10(1)(a) and (b) read with section 21(1)(b), nullify the contract

even though no specific reference is made to it in those provisions. Flowing from this finding, my approach to the matter differs from the main judgment.

Background

[67] The primary question is whether the arbitration award should have been made an order of court for purposes of enforcement. The award arose from a building contract concluded by the parties in February 2006. In terms of that contract, Cool Ideas undertook to build a residential house for Ms Hubbard, who undertook to pay R2 695 600 for the construction. Furthermore, the parties agreed that any dispute arising from the contract would be submitted to arbitration. Clause 14 of the contract provided:

“Arbitration

14.1 Any dispute arising between the parties out of and during the currency of the contract or upon termination thereof may be referred to arbitration.

14.2 The arbitrator shall be appointed at the request of either party by the president for the time being of the Master Builders Association having jurisdiction in the area or by the president of the Building Industries Federation (SA), whose decision will be final and binding on both parties”.

[68] Cool Ideas did not carry out the construction itself, but subcontracted Velvori Construction CC to build the house. At the relevant time, Velvori Construction was registered in terms of the Housing Protection Act but Cool Ideas was not.

[69] As is usual in contracts of this kind, disputes arose that led to claims being made by each party against the other. Ms Hubbard claimed the sum of R1 231 300.50 which she said was the cost of remedial work as she complained that there were defects in the building. Cool Ideas counterclaimed the balance of the contract price which was in the amount of R550 211, plus VAT and interest at an agreed rate.

[70] Mr Charles Cook, an architect and valuer, was appointed as the arbitrator. The disputes were submitted to the arbitrator for determination. In October 2010, the arbitrator issued an award in favour of Cool Ideas. In terms of the award, Ms Hubbard was ordered to pay the amount claimed by Cool Ideas. She was also directed to pay the costs occasioned by the arbitration.

[71] But Ms Hubbard failed to pay. In order to enforce the award, Cool Ideas approached the High Court requesting that the award be made an order of court. In opposing the application, Ms Hubbard contended that enforcing the award would effectively be enforcing a criminal act because, when she and Cool Ideas concluded the building contract, Cool Ideas was prohibited from carrying on the business of a home builder or receiving any consideration in terms of an agreement with a housing consumer like her.

[72] Ms Hubbard’s defence was pleaded in these terms:

“[I]t was discovered . . . that [Cool Ideas], whom I contracted to construct my home, was not registered as a home builder in terms of the [Housing Protection Act].

The effect of the above, so I am advised, is that [Cool Ideas] is not entitled to carry on the business of a home builder, or to receive any consideration in terms of any agreement with a person, defined as a

housing consumer in terms of the [Housing Protection Act], in respect of the sale or construction of a home.

...

The result of the above is, so I am advised, that [Cool Ideas] was not entitled to claim any payment from me, let alone an amount totalling R1 228 522.09 (one million two hundred and twenty eight thousand five hundred and twenty two rand and nine cents) which consists of an amount of R1 064 746 (one million and sixty four thousand seven hundred and forty six rand) for 'work done' and the remainder consisting of interest charged upon such an amount.

...

I confirm, as I have alluded to hereinbefore, that the award of the arbitrator effectively seeks to order the performance of a prohibited or criminal act, in that it purports to order me to make payment to an entity who carries on the business of a home builder, as defined in the [Housing Protection Act], in relation to an agreement in respect of the construction/sale of a home, while such an entity is not registered in terms of the [Housing Protection Act] as required by such an Act." (Emphasis added.)

[73] It is apparent from Ms Hubbard's plea that she challenged the validity of the award on the basis that the building contract she had entered into with Cool Ideas was, itself, invalid because Cool Ideas carried on the business of a home builder and demanded to be paid consideration under the contract whilst it was not registered in terms of the Housing Protection Act. Thus the building contract was impugned on the ground that two prohibitions in section 10(1) of the Housing Protection Act were violated.

[74] The High Court rejected the defence raised by Ms Hubbard and made the arbitration award an order of court. However, the Supreme Court of Appeal overturned the High Court's order and replaced it with an order dismissing the application with costs.

Order of court

[75] As mentioned, the main issue here is whether the arbitration award should be made an order of court. Making it an order of court is a prelude to enforcing it in the manner that a judgment of a civil court is enforced. Section 31 of the Arbitration Act regulates the process of making an arbitration award an order of court. It provides:

"(1) An award may, on application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.

(2) The court to which application is so made, may, before making the award an order of court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.

(3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect."

[76] But converting an award into a court order does not follow as a matter of course. A court is entitled to refuse to make an award an order of court if the award is defective. Section 33 of the Arbitration Act sets out the defects which would justify the refusal. Section 33(1) provides:

“Where—

- (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
- (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
- (c) an award has been improperly obtained,

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.”

[77] It is apparent from section 33(1) that an award which has been improperly obtained cannot be made an order of court. Impropriety may arise from a number of circumstances, including illegality. If an award is tainted by illegality, it may not be made an order of court and may not be enforced in our courts. It is a basic principle of our law that a court can never lend its aid to the enforcement of an illegal act. An act that has been performed in violation of a statutory prohibition may, generally, have no legal consequences. In *Schierhout*, Innes CJ observed:

“It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect.”

[78] Here, Ms Hubbard resisted the request to make the award an order of court on the basis that it was tainted by illegality. She contended that the building contract, in terms of which the arbitrator was appointed and the arbitration process was undertaken, was itself void because, at the time of its conclusion, Cool Ideas was not registered. It is common cause that Cool Ideas was not registered at the time that the building contract was concluded.

[79] In her plea, Ms Hubbard submitted that two prohibitions in section 10(1) of the Housing Protection Act were breached when the building contract was concluded. The first prohibition is to the effect that no person shall carry on the business of a home builder. The second is to the effect that no person shall receive consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home.

Issues

[80] Owing to the defence advanced by Ms Hubbard, the following issues arise:

- (a) whether in concluding the building agreement with her, Cool Ideas violated section 10(1) of the Housing Protection Act;

- (b) if so, whether the breach nullified the agreement;
- (c) if the contract remained valid, whether, despite the breach, Cool Ideas was entitled to payment for the work done on Ms Hubbard's house; and
- (d) if it was entitled to payment, whether the arbitration award ought to be made an order of court.

Illegality

[81] The illegality which is the bedrock of Ms Hubbard's defence depends mainly on the interpretation of section 10(1) of the Housing Protection Act. I agree with the main judgment that the purpose of the Housing Protection Act, including section 10, is to protect housing consumers like Ms Hubbard. It achieves this purpose through a scheme that requires every home builder, such as Cool Ideas, to be registered in terms of the Act before it can carry on the business of a home builder. In addition, prior registration is necessary for a home builder before receipt of any consideration in terms of a building contract. And a home builder who subcontracts another home builder to carry out the construction of a home must be registered before the subcontract is concluded.

[82] Section 10(1) provides:

"No person shall—

- (a) carry on the business of a home builder; or
- (b) receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home,

unless that person is a registered home builder."

[83] A careful reading of the subsection reveals that it stipulates two prohibitions. First, it forbids any person from carrying on the business of a home builder unless that person is a registered home builder. The use of the word "unless" in the context of the section makes plain that registration as a home builder must precede carrying on the business and receipt of consideration. The phrase "carry on the business of a home builder" requires a little more elaboration. It is not in dispute that Cool Ideas is a home builder envisaged in the Housing Protection Act. Nor can it be gainsaid that Ms Hubbard is a housing consumer in terms of the same Act.

[84] The Housing Protection Act defines "business of a home builder" as—

- (a) constructing or undertaking to construct a home or causing a home to be constructed for any person;
- (b) constructing a home for the purposes of sale, leasing, renting out or otherwise disposing of such home;
- (c) selling or otherwise disposing of a home contemplated in paragraph (a) or (b) as a principal; or
- (d) conducting any other activity that may be prescribed by the Minister for the purposes of this definition.

[85] It is clear from this wide definition that, when Cool Ideas entered into a building contract and undertook to construct a house for Ms Hubbard, Cool Ideas carried on the business of a home builder. Even when it later subcontracted Velvori Construction to build the home, Cool Ideas was still carrying on the business of a home builder.

[86] The facts of the case also show that Cool Ideas received payment for the construction of Ms Hubbard's house and what it claimed at the arbitration was the balance of the contract price. At the time Cool Ideas received part of the payment, it was not registered. It was registered after the arbitration award was issued.

[87] Therefore, both prohibitions on which Ms Hubbard relied for her defence were violated. The first violation occurred when the building contract was concluded. The second violation of the first prohibition happened at the time when Cool Ideas subcontracted Velvori Construction. The infringement of the second prohibition arose when Cool Ideas received payment for work done on Ms Hubbard's home. However, in respect of the balance that is the subject matter of the arbitration award, receipt of the money has not occurred and Cool Ideas has now been registered.

[88] In terms of section 21 of the Housing Protection Act, these breaches constitute criminal offences. Each contravention carries a penalty of a fine not exceeding R25 000 or imprisonment for a period not more than one year.

[89] The answer to the question whether the arbitration award should be made an order of court depends on whether, despite non-compliance with section 10(1), Cool Ideas should derive benefit from the building contract. This in turn requires us to examine the effect of acting contrary to the prohibitions in section 10(1) when the contract was concluded. Put differently, whether the validity of the contract was not affected by the non-compliance.

Validity of the building contract

[90] The general principle of our law is that an act performed contrary to a statutory prohibition is invalid and has no legal effect. In explaining the principle in *Schierhout*, Innes CJ said:

"[W]hat is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done – and that whether the lawgiver has expressly so decreed or not; the mere prohibition operates to nullify the act."

[91] However, the question whether non-compliance with a statutory prohibition would nullify an act is determined with reference to the language of the statute concerned. But it is important to note that where a statutory provision under consideration amounts to a prohibition such as the ones contained in section 10(1) of the Housing Protection Act, an act performed contrary to it would be invalid, unless it is clear from the statute that, in the light of its scope and object, invalidity was not intended. In other words, it is the prohibition which "operates to nullify the act" performed contrary to it.

[92] In *Lupacchini*, the Supreme Court of Appeal rejected a view of academic writers to the effect that a trustee who is still to receive authorisation from the Master has capacity to sue or to be sued on behalf of the trust, despite the provision that such trustee "shall act in that capacity only if authorised thereto in writing by the Master." The Supreme Court of Appeal held that legal proceedings which were instituted by a trustee before authorisation were invalid. The Court reasoned:

“I regret that I can find no indications that legal proceedings commenced by unauthorised trustees were intended to be valid. On the contrary, the indications seem to me all to point the other way. Unless it were to be the case that all transactions performed in conflict with the section are to be treated as valid – which clearly cannot be the case, because otherwise the Act would be altogether ineffective – then I find nothing to distinguish its effect on legal proceedings. Indeed, it would seem to me that the case is even stronger for finding legal proceedings to be a nullity.”

[93] The authorities referred to suggest that the building contract concluded by Cool Ideas and Ms Hubbard, in contravention of section 10(1)(a) of the Housing Protection Act, was invalid. But the Supreme Court of Appeal here held that the contract remained valid. That Court stated:

“Sections 10(1) and (2) do not in terms invalidate the agreement between the home builder and the housing consumer. Quite the contrary – I think it is clear that, consistent with the overall purpose of the Act, the validity of that agreement is unaffected by an act of the home builder in breach of those sections. The prohibition in those sections is not directed at the validity of particular agreements but at the person who carries on the business of a home builder without a registration. They thus do no more than disentitle a home builder from receiving any consideration. That being so a home builder who claims consideration in conflict with those sections might expose himself or herself to criminal sanction (section 21) and will be prevented from enforcing his or her claim.”

[94] The first flaw in the reasoning advanced for the finding that the building contract is not affected by the breach is that the prohibition is directed at the home builder and not the agreement. While this is true, it does not shed light on whether non-compliance nullifies the contract. Indeed, in *Lupacchini* the prohibition was directed at the trustee and not the act he or she performed. Yet, the Court held that the act was invalid owing to the trustee acting contrary to the prohibition.

[95] The second flaw in the reasoning of the Supreme Court of Appeal in the present case lies in the fact that it approached the matter on an unduly narrow footing. The Court erroneously confined itself to the prohibition in section 10(1)(b) and reasoned that this prohibition does no more than disentitle Cool Ideas from receiving consideration. In this regard, the Supreme Court of Appeal was mistaken. It is apparent from Ms Hubbard’s plea, quoted in the judgment of the Supreme Court of Appeal, that she relied on the prohibitions in both section 10(1)(a) and (b). The prohibition in section 10(1)(a) directly affects the contract because it prohibited Cool Ideas from undertaking to build a house for Ms Hubbard.

[96] It was this narrow approach that influenced the Supreme Court of Appeal to conclude that an unregistered home builder who claims consideration contrary to section 10 exposes himself or herself to criminal sanction and would be prevented from enforcing his or her rights. I find nothing in the text of section 10(1), or other sections of the Act, that indicates that the underlying contract should remain unaffected. It will be recalled that the present contract embodies the undertaking by Cool Ideas to build a home for Ms Hubbard. It was the same undertaking that constituted a contravention of section 10(1)(a) and amounted to a criminal offence in terms of section 21.

[97] As the main judgment observes, section 10 must be read as a whole. More importantly, section 10(1)(b) cannot be interpreted separately. It must be construed together with section 10(1)(a) because they are integral parts of one provision. They share features. Both lay down prohibitions which forbid unregistered home builders from performing certain acts. The key feature in both sections is the registration of a home builder.

[98] A contract concluded in contravention of the prohibition in section 10(1)(a) cannot be regarded as valid. The fact that the unregistered home builder may not enforce his or her rights is irrelevant. An illegal contract cannot confer rights on the home consumer privy to it. Allowing the home consumer to enforce his or her rights under such a contract would amount to giving legal effect to a prohibited act. In *Pottie*, Fagan JA pointed out that—

“[t]he usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the Legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the Court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent.”

[99] In our democratic order, it is the duty of courts to apply and enforce legislation like the Housing Protection Act. If the validity of legislation is not impugned, there can be no justification for not enforcing it, let alone giving legal effect to prohibited conduct.

[100] In *Taljaard*, the Supreme Court of Appeal held that a contract of mandate concluded with an estate agent who had no fidelity fund certificate was valid because section 34A of the Estate Agency Affairs Act does not in terms invalidate the contract of mandate of an estate agent who acts in conflict with section 26 of that Act. Bearing in mind that section 34A was introduced in 1998 in response to the High Court judgment in *Noragent* which held that non-compliance with section 26 did not invalidate the contract of mandate, the Supreme Court of Appeal in *Taljaard* held that, if the Legislature intended the contravention to invalidate the contract, it could expressly have said so in the amendment.

[101] The finding in *Taljaard* was based on two reasons. First, the provision itself does not invalidate the contract. Second, if invalidity were contemplated and in view of *Noragent*, the amendment would have expressly provided for that. In *Taljaard*, the Supreme Court of Appeal did not explain why that Court adopted an approach that was at variance with its earlier decisions. A court is bound to follow its earlier decisions unless it is convinced that they are clearly wrong. As illustrated earlier, that Court in 1926 laid down the principle that “a thing done contrary to the direct prohibition of the law is void and of no effect.” This principle was affirmed in later decisions of that Court in *Pottie*, and recently in *Lupacchini*, which was written by the same Judge who wrote *Taljaard*.

[102] The invalidity of an act performed contrary to a statutory provision does not flow from the express terms of the prohibition but from the fact that the impugned act was performed contrary to a prohibition in a statute. When the Legislature wants to put an end to a particular conduct, it prohibits it. As was observed in *Pottie*, a court cannot give legal sanction to an act prohibited by the Legislature. Therefore, in *Taljaard*, the Supreme Court of Appeal erred in holding that the contract of mandate concluded contrary to the prohibition in section 34A was valid. The principle that what is done in breach of a statutory prohibition is invalid may be departed from only if it is clear from the language of the relevant legislation that invalidity was not envisaged. It is not necessary for the prohibition to say non-compliance with it would lead to invalidity.

[103] In *Metro Western Cape*, the Appellate Division reaffirmed the principle in these terms:

“It is a principle of our law that a thing done contrary to the direct prohibition of the law is generally void and of no effect; the mere prohibition operates to nullify the act. . . . If therefore on a true construction of section 3 the contracts in question are rendered illegal, it can make no real difference in point of law what the other objects of the ordinance are. They are then void *ab initio* and a complete nullity under which neither party can acquire rights whether there is intention to break the law or not.”

[104] Unlike in *Metro Western Cape* where the underlying contracts were regarded as valid because they did not regulate the business between the trader and his customer, here the building contract governed the prohibited business of a home builder. The prohibitions in section 10(1) are the tools chosen by the Legislature to protect housing consumers. To hold that the building contract is valid would seriously undermine this purpose. Furthermore, to hold the contract valid but enforceable only at the instance of the consumer would result in an injustice and unequal treatment of the parties. While Ms Hubbard may notionally enforce her rights under the contract, Cool Ideas may not. This may lead to the deprivation of property under section 25 of the Constitution, alluded to by Froneman J in his judgment. I can find nothing in the language of the Housing Protection Act that suggests this sort of injustice was intended.

[105] The principle that a thing done contrary to the direct prohibition of the law is void admits of one exception. This exception applies where it is clear from the language of the law in which the prohibition is contained that invalidity of the act performed contrary to the prohibition was not envisaged. Consistent with this principle, the main judgment holds that section 13 of the Housing Protection Act reveals that non-compliance with the prohibition in section 10(1)(b) was not intended to invalidate the building agreement between the home builder and the housing consumer.

[106] I disagree. Section 13 does not address the consequences of acting contrary to the prohibitions in section 10(1). Instead, section 13 introduces implied terms into building contracts and prescribes the requirements of a valid building contract. These requirements are set out in section 13(1). They are:

- (a) the building contract must be in writing and signed by the parties;
- (b) it must set out all material terms, including the financial obligations of the housing consumer; and
- (c) the specifications pertaining to the material to be used in the construction and the plans approved by a local authority must be annexed to the contract.

[107] Importantly, section 13(3) tells us the consequences of not complying with these requirements. It provides:

“The failure to comply with a provision of subsection (1)(a) and (c) shall not render an agreement referred to in that subsection invalid.”

[108] This section makes it plain that non-compliance with requirements (a) and (c) does not invalidate the agreement. On the approach of the main judgment, section 13(3) is superfluous because the scheme of the Housing Protection Act indicates that non-compliance with the Act does not invalidate the building contract. An interpretation that says the contract is invalid owing to non-compliance would be at odds with the legislative scheme.

[109] Notably, in saving the contract from invalidity, section 13(3) makes no reference to requirement (b). This suggests that a contract which does not set out all material terms, including the financial obligations of the consumer, is invalid. This is implicit from section 13(3) which deliberately excludes requirement (b). The express terms of section 13 are at odds with the legislative scheme determined by the main judgment. It is apparent from section 13 that the Housing Protection Act envisaged that non-compliance with some of its provisions would render the building contract invalid.

[110] The main judgment holds that the extract quoted in [72] does not support the assertion that Ms Hubbard pleaded both prohibitions in section 10(1) as the bases for contending that Cool Ideas was not entitled to claim payment from her. In the first place, that extract is taken from paragraph 6 of the judgment of the Supreme Court of Appeal which records expressly that the extract is taken from the affidavit of Ms Hubbard, filed in the High Court in opposing the arbitration award being made an order of court.

[111] Secondly, the plain reading of the extract shows that Ms Hubbard states that Cool Ideas was not registered as a home builder. And in the italicised words, she contends that the effect of non-registration was that Cool Ideas was not entitled to carry on the business of a home builder or to receive any consideration in terms of any agreement with a person, defined as a housing consumer in terms of the Housing Protection Act. As a result of this, she concludes that Cool Ideas was not entitled to claim any payments from her. It is difficult to appreciate how it can be said that the extract does not rely on both prohibitions in section 10(1)(a) and (b) when Ms Hubbard's affidavit uses the words of section 10(1)(a) and (b). The fact that, in the affidavit filed by her in this Court, she says that she does not dispute the validity of the building contract is irrelevant.

[112] Even if what she says in her affidavit in this Court were to be treated as a concession, it would change nothing. This is because a concession wrongly made by one of the parties is not binding on a court, if it relates to a point of law.

[113] Furthermore, the main judgment holds that the parties concluded a separate and new arbitration agreement on 3 April 2009. I cannot agree. The question whether Cool Ideas and Ms Hubbard have concluded a separate agreement entails a factual enquiry. That has not been established. On the contrary, it is apparent from the judgment of the Supreme Court of Appeal that in referring their disputes to arbitration, the parties acted in terms of clause 14 of the building agreement.

[114] The arbitration agreement was not self-standing. Instead, it was an integral part of the building contract. Clause 14.1 expressly says that disputes arising from the building agreement would be referred to arbitration. It does not say that the parties would enter into a further agreement but stipulates that disputes arising from the building agreement, during its currency and after its termination, would be referred to arbitration.

[115] Although the word "may" is used in the clause, it does not signify that the parties were not bound by the terms of the clause. As part of a contract intended to be binding, clause 14 obliged the parties to act in accordance with its terms. Once there were disputes which the parties could not resolve, clause 14 precluded them from approaching a court. Instead, the clause obliged them to take such disputes to arbitration. Acting in terms of the clause, Cool Ideas and Ms Hubbard referred their disputes to arbitration. That much is clear from the judgment of the Supreme Court of Appeal.

[116] To facilitate arbitration, clause 14.2 obliged the parties to request that an arbitrator be appointed, not by them, but by the person identified in the clause. Clause 14.2 stipulates that the arbitrator would be appointed by the president of the Master Builders Association, where there is one, or by the president of the Building Industries Federation (SA). His or her decision would be final and binding on both parties. Therefore, there was absolutely no need to conclude a separate arbitration agreement.

[117] In the circumstances, I hold that the building contract that was concluded in contravention of section 10(1)(a) is invalid.

[1] *Effect of the invalid contract on the arbitration award*

[118] The process of taking the dispute to arbitration was rooted in the building contract. When the parties appointed the arbitrator and submitted their disputes to him, they acted in terms of the arbitration clause in the contract. The arbitrator too derived his power to determine those disputes from the building contract. Therefore, the invalidity of that contract vitiates the entire arbitration process. Consequently, the arbitration award was invalid because it was made in terms of an invalid contract.

[119] It is not necessary to address the other submissions advanced by Cool Ideas because they were premised on the mistaken assumption that the building contract was valid.

[120] It is for these reasons that I support the order proposed in the main judgment.

FRONEMAN J (Cameron J, Dambuza AJ and Van der Westhuizen J concurring):

Introduction

[121] I have had the privilege of reading the judgments of my Colleagues Majiedt AJ (main judgment) and Jafta J (concurring judgment). I cannot agree with their conclusion that the appeal must be dismissed. I would allow the appeal.

[122] My central difference with the main judgment lies in the constitutional issue that needs to be determined. The main judgment reaches the constitutional aspect relating to the enforcement of private arbitration awards by courts only towards the end, and then only in the narrow form of whether a refusal to make the arbitral award an order of court violates section 34 of the Constitution. It also finds equity considerations not to be applicable.

[123] In *Lufuno Mphaphuli*, this Court held that section 34 does not apply directly to private arbitrations. I thus agree with the main judgment that the applicant's right of access to courts has not been infringed.

[124] But that is not all that *Lufuno Mphaphuli* decided. It also dealt with the relevance of the Constitution to the terms and enforcement of arbitration agreements. It held that in determining whether a provision of an arbitration agreement is contrary to public policy the spirit, purport and objects of the Bill of Rights will be of importance, and it emphasised the importance of fairness in the arbitration process. Importantly too, *Lufuno Mphaphuli* dealt with the relevance of the Constitution to the judicial scrutiny of arbitration awards. It held that "the values of our Constitution will not necessarily best be served by interpreting section 33 [of the Arbitration Act] in a manner that enhances the power of courts to set aside private arbitration awards".

[125] When parties enter into private arbitration agreements they make value choices about how they want to exercise their rights under the Constitution and the extent of interference or control they wish courts to have over the private process. These choices are material and relevant in determining what public policy in the enforcement of a particular private arbitration award should be. The Arbitration Act also recognises these choices and accepts their legitimacy in seeking to give effect to arbitration awards.

[126] Public policy in the interpretation, application and enforcement of contracts embraces issues of fairness. Fairness "is one of the core values of our constitutional order". When the enforcement of arbitration awards on the basis of public policy is at stake, fairness lies at the heart of the enquiry, not at its periphery.

[127] The primary issue at stake is whether a private arbitration award may be enforced contrary to a statutory provision. The main judgment says, No, not in this case, and fairness plays little or no role in determining whether it may. I disagree. *Lufuno Mphaphuli* tells us that public policy in accordance with the spirit, purport and objects of the Bill of Rights, fairness in the arbitration process, and the personal choices of the parties play a material and relevant part in determining the issue. When due weight is given to these considerations, nothing stands in the way of enforcement of the award here, even on an acceptance of the correctness of the main judgment's interpretation of the Housing Consumers Protection Measures Act (Housing Protection Act or the Act).

[128] I am in any event not convinced that this interpretation is correct. The inevitable result of the reasoning of the main judgment is that Cool Ideas will be deprived of its right to payment for work fairly and properly done. That will amount to deprivation of property under section 25 of the Constitution. The provisions of the Housing Protection Act should be interpreted in a manner that avoids that result. It can properly and reasonably be interpreted in that way.

[129] The concurring judgment of Jafta J avoids engagement with the central issue of enforcement of a private arbitration award in the face of a statutory provision by finding that the building contract, which includes the arbitration clause, is invalid and can, for that reason, not be enforced at all. This nevertheless has the effect that a court can never enforce an arbitral award if that would be contrary to a statutory provision. For the reasons already summarised, I do not agree. In addition, this was not the basis upon which the parties approached the Court. Had this approach been raised, the question of severability of the arbitration clause from the rest of the building contract would have been at the forefront of the enquiry. To the extent, however, that the concurring judgment finds that to hold the building contract valid but enforceable only at the instance of the consumer would result in an injustice and unequal treatment of the parties, I agree. Our disagreement is in what must be done to avoid that injustice and unequal treatment. I consider the injustice and unequal treatment to be a compelling reason for enforcing the arbitration award.

[130] In the first part of the reasoning that follows I accept, as a starting point, the correctness of the interpretation of the Housing Protection Act in the main judgment. The next step in determining whether enforcement will be against public policy, is to weigh that interpretation against the parties' choice of private arbitration and the fairness to them individually in its effect. Viewed from this perspective public policy is not undermined by the enforcement of the arbitration award. For convenience I refer to this part as the arbitration approach.

[131] In the second part I assess whether section 10(1)(b) of the Housing Protection Act should not, in any event, be interpreted in a manner that is less restrictive of Cool Ideas' right to property. That can, I hope to demonstrate, properly and reasonably be done. I will refer to this part as the interpretation approach.

[132] Would the outcome, on either perspective, deprive Ms Hubbard of any of the protections that she should enjoy under the Housing Protection Act? The answer is No.

[133] It is time to substantiate these assertions. I will do so in the following order. First some brief reference to the facts needs to be made in order to give proper context to the question of fairness between the parties and the potential prejudice to Ms Hubbard if the arbitration award is enforced. I will then move to the discussion of the arbitration approach and the interpretation approach before concluding.

Fairness or prejudice to Ms Hubbard?

[134] When building started on Ms Hubbard's home it was being done by a registered builder, Velvori. The only reason why Cool Ideas did not itself register earlier was because it understood from a letter by the National Home Builders Registration Council (Council) that it was not necessary to do so. Ms Hubbard herself invoked the arbitration clause in the building contract and thereby triggered the arbitration proceedings. She did so in order to claim money back from Cool Ideas. Instead, the arbitrator found that she actually owed Cool Ideas more money. The award of the arbitrator amounted to an award for Cool Ideas to be reimbursed for the balance of the contract price, for items it had bought for Ms Hubbard. She does not allege that the arbitration process was unfair, nor does she allege that the actual findings of the arbitrator in relation to the building disputes were unfair or wrong. When she learnt that Cool Ideas had not registered as a home builder, she sought to avoid payment of what she owed. Registration occurred before judgment was granted in the High Court. What Ms Hubbard sought in those proceedings was not the Act's protection to attain proper building or correction of building works by Cool Ideas, but to escape payment of what she had been fairly found to owe to Cool Ideas.

The arbitration approach

[135] *Lufuno Mphaphuli* was the first and, until now, the only case where this Court has dealt with the Constitution's applicability to private arbitrations. The judgment expressly endorsed "the value of arbitration as a speedy and cost-effective process". It saw its task as follows:

"The Court has had to consider the relationship between private arbitration and the Constitution, the proper scope of section 34 of the Constitution and the approach to the interpretation of section 33(1) of the Arbitration Act in the light of the Constitution. All these are constitutional matters of substance falling within the jurisdiction of this Court and which, given the need to provide guidance in this regard, it is in the interests of justice for this Court to entertain. The application of these principles to the facts of this case, even if arguably not concerning a constitutional issue itself, concerns a matter connected to a decision on a constitutional issue which it is in the interests of justice to decide."

[136] The Court further enumerated the virtues of private arbitration in its flexibility, cost-effectiveness, privacy and speed. In determining the proper constitutional approach to the arbitration process, the Court bore in mind that litigation before ordinary courts "can be a rigid, costly and time-consuming process". This led it to conclude that "it is not inconsistent with our constitutional values to permit parties to seek a quicker and cheaper mechanism for the resolution of disputes." It also found, generally, that "courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently."

[137] In this judgment, I accept the logical and necessary corollary of the approach in *Lufuno Mphaphuli*. I hold that where parties choose private arbitration as the means of resolving disputes between them, courts should respect and encourage that choice. In practical terms, here, that means that the Court should, for powerful reasons of fairness, license and enforce the outcome of Ms Hubbard's private arbitration with Cool Ideas.

[138] In *Lufuno Mphaphuli* the Court viewed its discussion and application of the principles regulating the interaction between the Constitution and private arbitration awards as properly within its jurisdictional remit. Due regard must be given to the precedential force of the decision. It is for this reason that I disagree with the

finding in the main judgment that the issues in *Lufuno Mphaphuli* have little bearing on the central issue in this case and that it is distinguishable on the facts and the law.

[139] *Lufuno Mphaphuli* laid down the following principles about the applicability of the Constitution to private arbitration awards:

- (a) Section 34 of the Constitution does not apply directly to private arbitrations, primarily because they do not require public hearings.
- (b) Indirect application of section 34 was not finally considered but it was stated that “mindful of the role courts have in giving effect to arbitration agreements . . . section 34 may have some relevance to the interpretation of legislation or the development of the common law.”
- (c) Arbitration agreements that contain provisions that are contrary to public policy in the light of the values of the Constitution will be null and void to that extent. In determining whether a provision is contra bonos mores, the spirit, purport and objects of the Bill of Rights will be of importance.
- (d) In interpreting an arbitration agreement it should ordinarily be accepted that when parties submit to arbitration, they submit to a process they intend to be fair. The arbitration agreement “should thus be interpreted, unless its terms expressly suggest otherwise, on the basis that the parties intended the arbitration proceedings to be conducted fairly. Indeed, it may well be that an arbitration agreement that provides expressly for a procedure that is unfair will be contra bonos mores.”
- (e) Insofar as the interpretation of section 33(1) of the Arbitration Act, which permits an arbitration award to be set aside, is concerned—

“the values of our Constitution will not necessarily best be served by interpreting section 33(1) in a manner that enhances the power of courts to set aside private arbitration awards. Indeed, the contrary seems to be the case. The international and comparative law considered in this judgment suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. Section 33(1) provides three grounds for setting aside an arbitration award: misconduct by an arbitrator; gross irregularity in the conduct of the proceedings; and the fact that an award has been improperly obtained. In my view . . . the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration.”

[140] The majority judgment of the Supreme Court of Appeal and the main judgment proceed from the basis that the building contract and the arbitration agreement between the parties are valid, but that Cool Ideas may nevertheless not claim or enforce payment for any work done, be it in any ordinary court or by way of arbitration. That result is, on any standard, prejudicial and unfair to Cool Ideas.

[141] From *Lufuno Mphaphuli* we know that the determination of public policy in deciding whether an arbitration award should be enforced should be done in accordance with the spirit, purport and objects of the Bill of Rights. We also know that it requires courts to ensure fairness in the arbitration process, and that the personal choices of the parties in opting for arbitration must be given proper regard.

[142] The loss of the right to claim performance under the contract amounts, in terms of this Court’s decision in *Opperman*, to the deprivation of property under section 25 of the Constitution. If the building contract was held to be invalid, Cool Ideas may, in terms of the common law, have an enrichment claim: the *condictio ob turpem vel iniustam causam* (enrichment arising from a transfer made for an illegal or immoral purpose). By

clothing the contract with validity, this result is avoided, but at some cost. Even if one accepts, as the main judgment does, that the deprivation is not arbitrary in terms of statutory and constitutional interpretation, it does not mean that this consideration automatically determines the issue as far as the enforcement of the arbitration award is concerned. The choice of arbitration as a dispute-resolution mechanism indicates the contrary, namely that the parties elected to protect their respective rights to property under the Constitution through that process. If one determines public policy in accordance with the spirit, purport and objects of the Bill of Rights then the potential deprivation of Cool Ideas' property must count as a reason for not finding the enforcement of the award to be contrary to public policy, rather than the opposite.

[143] On the premise that fairness plays no role in determining public policy when deciding whether private arbitration awards should be enforced by courts, both the majority judgment in the Supreme Court of Appeal and the main judgment fail to give further consideration to other factors that may be material and relevant when stricter control of private arbitration awards is envisaged. To reiterate: public policy in the interpretation, application and enforcement of contracts generally invokes the notion of fairness. The fairness of the terms of an arbitration agreement is an important factor in considering their enforcement.

[144] Material and relevant factors in this regard include that: the parties chose private arbitration instead of civil proceedings; Ms Hubbard initiated arbitration proceedings; the building was done by Velvori, which was registered from the start as a builder; the arbitration process was fair and not challenged as making wrong or unfair findings; the amount ordered by the arbitration award, payable to Cool Ideas, mainly related to compensation for additional personal choice items ordered by Ms Hubbard which were not included in the original contract price; Cool Ideas acted in good faith at all times by enquiring whether it should register; it did register before judgment when told it was necessary; and last, but not least, Ms Hubbard, not Cool Ideas, is the recalcitrant debtor.

[145] It must also be remembered that one of the arguments for the interpretation that the Housing Protection Act did not render the building contract and the arbitration agreement invalid was to ensure that the warranties in section 13(2) of the Act would not be lost to a building consumer. On the facts here, enforcement of the arbitration award would not have deprived Ms Hubbard of that protection. In addition, the threat of criminal prosecution for late registration still hangs over Cool Ideas. Enforcement of the arbitration award will not, on an acceptance of the main judgment's interpretation of the Housing Protection Act, undermine the protection afforded by the Act to building consumers and the criminal sanction for non-compliance will remain. The only effect non-enforcement will have is to allow Ms Hubbard to escape payment of what has been fairly found to be owed to Cool Ideas. That is an impermissible use of the provisions of the Act.

[146] The conclusion I reach is that there was no unfairness in the arbitration process, nor in its outcome. There is nothing substantive, in the sense of prejudice to Ms Hubbard, that would justify a court in finding that public policy should override the personal choice made by the parties to enforce their agreement by way of private arbitration.

[147] This is sufficient reason for the appeal to succeed. But even if this approach is not accepted, there is another basis for the same outcome.

Interpretation approach

[148] As noted, the loss of the right to claim performance under the contract may amount, in terms of this Court's decision in *Opperman*, to the deprivation of property under section 25 of the Constitution. But that deprivation, says the main judgment, is not arbitrary. Section 10(1)(b) of the Housing Protection Act is aimed at

achieving a legitimate and important statutory purpose and there is a rational, proportional connection between the statutory prohibition and its purpose. I disagree.

[149] An interpretation that the building contract is valid, but that its enforcement by one of the parties, Cool Ideas, is not, deprives that party of any redress at all for the work it has done. Under the common law it may have a claim for enrichment if the building contract was declared invalid for illegality. Counsel for Ms Hubbard sought to ameliorate this unjust and unequal result by suggesting that the common law could be developed to allow an enrichment claim, but fairly and properly conceded that as the law now stands there is none available to Cool Ideas.

[150] There are good reasons why it is necessary to favour an approach that may be less intrusive on Cool Ideas' rights. The first is that we are concerned with the fairness of depriving Cool Ideas of the power to enforce an arbitration award that has not been attacked as being a result of an unfair process or any substantively unfair findings. Second, and perhaps more important, is the accepted principle that the interpretation that best protects or enhances a fundamental right should, where reasonably possible, be preferred. Is that kind of interpretation of the provisions of the Housing Protection Act reasonably possible? The answer is Yes.

[151] There can be no doubt that the Housing Protection Act is intended to protect housing consumers. As pointed out in the main judgment, it employs various measures to do so. But what, in the end, is the performance it seeks to enable housing consumers to obtain? The best answer to that is to be found in the warranties that the Act seeks to be enforceable by the housing consumer against the home builder in terms of section 13(2):

"The agreement between a home builder and a housing consumer for the construction or sale of a home shall be deemed to include warranties enforceable by the housing consumer against the home builder in any court, that—

(a) the home, depending on whether it has been constructed or is to be constructed—

(i) is or shall be constructed in a workmanlike manner;

(ii) is or shall be fit for habitation; and

(iii) is or shall be constructed in accordance with—

(aa) the NHBRC Technical Requirements to the extent applicable to the home at the date of enrolment of the home with the Council; and

(bb) the terms, plans and specifications of the agreement concluded with the housing consumer as contemplated in subsection (1);

(b) the home builder shall—

(i) subject to the limitations and exclusions that may be prescribed by the Minister, at the cost of the home builder and upon demand by the housing consumer, rectify major structural defects in the home caused by the non-compliance with the NHBRC Technical Requirements and occurring within a period which shall be set out in the agreement and which shall not be less than five years as

from the occupation date, and notified to the home builder by the housing consumer within that period;

(ii) rectify non-compliance with or deviation from the terms, plans and specifications of the agreement or any deficiency related to design, workmanship or material notified to the home builder by the housing consumer within a period which shall be set out in the agreement and which shall not be less than three months as from the occupation date; and

(iii) repair roof leaks attributable to workmanship, design or materials occurring and notified to the home builder by the housing consumer within a period which shall be set out in the agreement and which shall not be less than 12 months as from the occupation date.”

[152] The registration of home builders – either those having the capacity to build or those who need to enter into agreements with other home builders to do so – and the various other requirements laid down in the Act are all geared to ensure the enforcement of proper performance in the building of their houses by housing consumers against home builders. That is the substantive, overall purpose of the Act.

[153] There are many ways of achieving this purpose, and of striking the correct balance between the interests of housing consumers and those who have performed construction work for them. The Housing Protection Act can be read to protect consumers without barring Cool Ideas’ claim for its performance.

[154] The starting point is that section 10(1)(a) and 10(2), read with section 21, indubitably make it a criminal offence for a home builder to have constructed a home while unregistered. This provides home builders with a very strong incentive, backed by the criminal law, to register *before* undertaking any building work.

[155] The central conundrum in this case arises from the finding that the contract (including the arbitration agreement) is valid. How can it be that Cool Ideas’ contract with Ms Hubbard is valid, but its claim is unenforceable? Could it be that section 10(1)(b) has a specific and narrow purpose only? That it was the Legislature’s targeted intervention to render unenforceable certain of the contract’s terms?

[156] Here, the presence of the other two very broadly defined prohibitions in section 10(1)(a) and 10(2) is significant. They do not make the contract invalid. Hence this third prohibition in section 10(1)(b) was necessary. The provisions read:

“(1) No person shall—

(a) carry on the business of a home builder; or

(b) receive any consideration in terms of any agreement with a housing consumer in respect of the sale or construction of a home,

unless that person is a registered home builder.

(2) No home builder shall construct a home unless that home builder is a registered home builder.”

[157] So seen, the prohibition in section 10(1)(b) should be understood in its own, narrowly expressed terms, rather than broadened by analogy with the two prohibitions flanking it. We should not, in other words, conclude that section 10(1)(b) embodies a similar, sweeping prohibition to section 10(1)(a) and 10(2). It is doing something separate, and narrower.

[158] Arising from this, an approach to the provision becomes possible in which it is clear that, while the first and the third prohibitions are absolute in relation to the activities proscribed (carrying on the business of a home builder and construction of homes), the prohibition on receiving consideration applies only *at the time of receipt*. In other words, you have to be registered to receive consideration, but you can register late.

[159] Weighing in favour of permitting late registration is, first, the simple fact that section 10(1)(b) uses the word “receive”. And it does not interpose any qualification to the registration requirement. For example, it does not say “unless the person is a registered home builder *at the time of undertaking the construction*”. Here it differs from the provisions of the Attorneys Act and the Estate Agency Affairs Act, which require possession of a fidelity fund certificate at the time of practising, for attorneys, and at the time of performance, for estate agents, to claim payment.

[160] Also in favour of this approach is the entire registration system the Housing Protection Act constructs. The Act gives the Minister the usual general power to make regulations. But, in addition, section 7(2)(b) specifically obliges the Minister to prescribe by regulation “the terms and conditions for the registration and renewal of registration of home builders”. Indeed, section 10(4) states that registration of a home builder “shall be subject to the terms and conditions prescribed by the Minister under section 7(2)”.

[161] These provisions give particular point to the detail of the General Regulations. Together with other provisions of the Act, they create a powerful supervisory body that is not only nominally present, but actively supervises the activities of home builders, and actively protects housing consumers through implied warranties and enrolment of housing projects.

[162] The Act itself says that the Council must register only home builders with the “appropriate financial, technical, construction and management capacity . . . to prevent housing consumers . . . from being exposed to unacceptable risks.” Closely allied to this, the Council can also impose conditions on registration and require a suretyship, guarantee, indemnity or other security in order to satisfy itself that consumers are adequately protected. And the General Regulations set out more detailed conditions that the Council may impose before registering a home builder.

[163] This expressly authorised system is fully consonant with the idea that late registration for the purposes of affording statutory sanction to receipt of consideration from a home-construction contract is feasible.

[164] On this approach, the Council, powerfully vested with authority under the legislation, will vet fly-by-night builders, denying them registration – but will permit good-faith builders like Cool Ideas, which omitted to register itself, but acted largely, if not exclusively, through a subcontractor that was registered.

[165] The upshot is that only carefully vetted builders with the necessary expertise and capacity to meet their financial obligations will ever be able to receive payment. Housing consumers are thus adequately protected.

[166] Can it be that a home builder, despite its skill and good faith, is deprived of any claim for payment, no matter how enormous its outlay, in perpetuity – without any way to remedy the mistake, even if it is carefully vetted and registered, subject to a range of conditions and suretyships imposed by the Council to ensure that its customers are adequately protected? Surely not.

[167] It is thus reasonable to interpret the provisions of the Housing Protection Act in a manner that is fair, does not deprive Cool Ideas of its property and does not necessitate the enhancement of the power of courts to interfere in private arbitration awards. Will this construction be detrimental to Ms Hubbard? That question has already been answered. It will not, because she has enjoyed all the substantive protections under the Act.

[168] This interpretation is in accordance with existing authority. The broad formulation in *Schierhout* that a thing done contrary to a statutory prohibition is always a nullity, has been qualified and flexibly applied in many later cases. An illustration of the flexibility is to be found in *Pottie*. There, as here, the conclusion of a contract in contravention of statutory requirements was criminalised without an express provision that the contract itself was invalid. In holding that this did not render the contract invalid Fagan JA stated:

“The usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the Legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the Court will bring about, or give legal sanction to, the very situation which the Legislature wishes to prevent.”

And in relation to rendering contracts invalid as a further penalty:

“A further compulsory penalty of invalidity would . . . have capricious effects the severity of which might be out of all proportion to that of the prescribed penalties, it would bring about inequitable results as between the parties concerned and it would upset transactions which, if . . . enforced . . . the Legislature could have had no reason to view with disfavour. To say that we are compelled to imply such consequences . . . seems to me to make us the slaves of maxims of interpretation which should serve as guides and not be allowed to tyrannise over us as masters.”

If this is good law in relation to the possibility of holding agreements valid in the face of statutory prohibition and criminal sanction, so much more it is for holding valid the enforcement of a valid arbitration agreement.

Conclusion

[169] For these reasons I would have granted leave and allowed the appeal, with costs.

For the Applicant:

For the First Respondent:

Advocate P Louw SC and Advocate H Cowley instructed by Chetty de Villiers & Mafokoane Inc.

Advocate W van der Linde SC and Advocate X Stylianou instructed by D.J. Greyling Inc.

HALLIBURTON COMPANY v CHUBB BERMUDA INSURANCE LTD

On November 27, 2020, the day after Thanksgiving was celebrated in the United States, the United Kingdom's Supreme Court issued the long-awaited decision in [*Halliburton Company v. Chubb Bermuda Insurance Ltd.*](#)¹ a decision that has been characterized as bringing clarity to an arbitrator's duty of disclosure where the arbitrator has received multiple appointments by the same party in different arbitrations involving the same subject matter.

The facts

This matter concerned an arbitrator well known in the London insurance-coverage arena, Kenneth Rokison QC. The case arose out of the Deepwater Horizon disaster in the Gulf of Mexico, which spawned (at least) three separate insurance-coverage arbitrations.

Arbitration number one was between Halliburton and Chubb. Halliburton had settled the claims against it and sought coverage from Chubb under a Bermuda Form insurance policy. Chubb denied the claim on the premise that the settlement was not reasonable, among other grounds. Mr. Rokison was appointed by the English High Court to chair that Tribunal due to the fact the parties were unable to reach agreement as to the chair. Prior to that appointment, Mr. Rokison disclosed to Halliburton and the High Court that he was presently acting as an arbitrator in two pending arbitrations involving Chubb and had served as an arbitrator in other prior arbitrations in which Chubb was a party, either as sole, chair or party-appointed. Halliburton made no objection to these disclosures.

Arbitration number two was between Transocean and Chubb. Transocean was the owner and operator of the Deepwater Horizon drilling rig. It also had settled the claims against it and Chubb also rejected its claim for coverage. Chubb appointed Mr. Rokison to that arbitration.

Arbitration number three was between Transocean and another insurer. That insurer also appointed Mr. Rokison to that panel when the arbitrator it had originally appointed withdrew due to a health issue.

In short, Mr. Rokison was appointed to three separate arbitrations which arose out of the Deepwater Horizon disaster, two of which involved Chubb, including one in which he was appointed by Chubb. The dispute before the Supreme Court arose out of the fact that Mr. Rokison did not subsequently disclose his appointments in Arbitrations numbers two and three to Halliburton in Arbitration one. His stated reason was that he already had made disclosure of other previous appointments to Halliburton and to the High Court at the time the High Court appointed him as chair in Arbitration number one. When Halliburton learned of Mr. Rokison's other two appointments, it requested that he resign his role as chair of that panel. Chubb opposed this request on the premise that it would result in delay and wasted costs. Accordingly, Halliburton asked the High Court to remove Mr. Rokison under Section 24(1)(a) of the English Arbitration Act of 1996: "that circumstances exist that give rise to justifiable doubts as to his impartiality."

The High Court dismissed Halliburton's application. It did, however, grant leave to appeal to the Court of Appeal on condition that the arbitral hearing would proceed as scheduled, and expressly not because the court believed Halliburton's position had a reasonable chance of success, but rather to seek guidance for the arbitral community. The Court of Appeal also dismissed Halliburton's application holding that, while Mr. Rokison was under a legal duty to disclose his appointments in Arbitration number two and three to Halliburton, his failure

to do so did not raise justifiable doubts as to his impartiality. Halliburton then took the issue to the Supreme Court, which granted leave.

Although Halliburton's appeal arose in the context of an *ad hoc* insurance-coverage arbitration, the Supreme Court thought that the question before it was of wider significance and could potentially have an impact on all English-seated arbitrations. The Supreme Court, therefore, allowed submissions from other potentially implicated arbitral bodies, specifically, the LCIA, ICC, CI Arb, GAFTA and LMAA.² These bodies divided into two competing views.

On the one hand, the LCIA, ICC and CI Arb, basically supported Halliburton's view. They believed that the appointment of the same arbitrator in multiple arbitrations concerning the same or similar subject matter and only one party in common in each, could give rise to a concern regarding potential bias. On the other hand, the LMAA and GAFTA, arbitral organizations involving maritime and agricultural commodities trading respectively, consider repeat arbitrator appointments not only to be commonplace, but also helpful, as a means of ensuring consistency in arbitral decisions. It should be noted that in *ad hoc* London insurance-coverage arbitrations, particularly those involving the Bermuda form, it is not uncommon for the policyholder to name the same arbitrator for all disputes arising out of the same loss throughout the coverage tower.

The Supreme Court, like the two courts beneath it, also ruled against Halliburton. While the Supreme Court, like the Court of Appeal, held that Mr. Rokison had a duty to disclose the other two appointments to Halliburton, the Supreme Court nevertheless purported to apply an objective test to determine whether a fair-minded and informed observer, having regard to the particular characteristics of international arbitration, would conclude that there was a real possibility that the arbitrator was biased. As far as Mr. Rokison was concerned, the Supreme Court ruled that, at the time of the hearing for removal in January 2017, an objective observer would not have concluded that Mr. Rokison was biased because (i) there had been a lack of clarity at the relevant time as to whether Mr. Rokison had a duty of disclosure; (ii) the appointments in Arbitrations two and three followed the appointment in Arbitration one, which might have been why Mr. Rokison failed to come back to Halliburton with that disclosure; (iii) it was not likely that there would be an overlap in evidence or legal submission among the three arbitrations; (iv) there was no suggestion that Mr. Rokison was deriving any secret financial benefit; and (v) there was nothing to support subconscious ill will on Mr. Rokison's part towards Halliburton in light of Halliburton's efforts to remove him.³

The legal principles

An objective test should be used when issues of impartiality arise

The English Arbitration Act makes clear in Section 33 that arbitrators must "act fairly and impartially between the parties." [49]⁴ In considering whether Mr. Rokison upheld that duty, the Supreme Court had to decide whether a subjective or objective test should be used. In that regard, the Supreme Court decided, following existing case law in England, that an objective test was appropriate: "whether a fair-minded and informed observer, having regard to the particular characteristics of international arbitration, would conclude that there was a real possibility that the tribunal was biased." [52]

The Supreme Court gave some insights into what it had in mind with respect to "the particular characteristics of international arbitration." Specifically, among other things, the Supreme Court mentioned (i) the private nature of arbitrations, which theoretically could give rise to misconduct that might not occur in public proceedings; (ii) the fact that arbitrators are paid and conceivably would want to continue to get paid through future appointments; and (iii) the fact that arbitral awards are generally not subject to appeal and thereby are insulated from scrutiny by another body. [55 - 59]

Arbitrators have a legal duty of disclosure

It has long been an accepted custom and practice for arbitrator candidates to make disclosures of matters that might be considered a conflict of interest or that might be construed as creating some bias on the arbitrator's part. These matters usually include such things prior engagements as counsel for or against a party and prior appointments as an arbitrator in disputes involving a party. Sometimes an arbitrator will disclose a personal or professional relationship with somebody associated with a party.

Interestingly, notwithstanding this common practice, prior to Halliburton there actually was no clear duty of disclosure established under English law.⁵ Indeed, the English Arbitration Act of 1996 does not expressly set forth a duty of disclosure. And, no such duty was clearly established under English common law either. The Supreme Court, however, found that such a duty was implied under Section 33 of the Act, which directs arbitrators to act fairly and impartially. [75 – 76, 78, 81]. The Supreme Court explained that an arbitrator's obligation to disclose matters that could give rise to questions of impartiality was "encompassed with the statutory obligation of fairness" and also was "an essential corollary of the statutory obligation of impartiality." [78] Accordingly, while not stated expressly, the Supreme Court found that the duty of disclosure was implied within the greater statutory obligations of fairness and impartiality, which Lord Hodge summarized as follows:

An arbitrator, like a judge, must always be alive to the possibility of apparent bias and of actual but unconscious bias. ...One way in which an arbitrator can avoid the appearance of bias is by disclosing matters which could arguably be said to give rise to a real possibility of bias. Such disclosure allows the parties to consider the disclosed circumstances, obtain necessary advice and decide whether there is a problem with the involvement of the arbitrator in the reference and, if so, whether to object or otherwise act to mitigate or remove the problem.... [70]

Stated differently, in order for an arbitrator to act fairly and impartially, an arbitrator must disclose matters which could be deemed to affect the arbitrator's ability to do either. The theory is, according to Lord Hodge, that once an arbitrator does so, the arbitrator has, in essence, put the matter in the hands of the parties and the chips can then fall where they may.

The times for assessing whether there is a duty of disclosure and whether there is possible bias may be different

While the duty of disclosure was deemed the underpinning of ensuring an arbitrator's impartiality, the duty of impartiality continues throughout the arbitration, such that the question of whether an arbitrator might be biased does not necessarily rise and fall based solely on whatever disclosure might have been made at the outset of an arbitration. Indeed, the Supreme Court made a distinction between assessing whether the arbitrator had a duty of disclosure and the time for assessing the question of whether the arbitrator could potentially be biased.

The distinction is as follows:

1. the assessment of an arbitrator's duty of disclosure must be made by reference to the fact and circumstances at the time the duty arose and during the time the duty subsists [119 – 120]; but
2. the assessment of whether there are legitimate doubts as to an arbitrator's impartiality must be made by reference to the facts and circumstances known at the time of the hearing to remove the arbitrator from the panel. [50, 121]

The Supreme Court's analysis of the first assessment point above involved its consideration of the submissions of the various arbitration organizations. Again, the Supreme Court noted that it was common practice in the world of GAFTA and the LMAA for arbitrators to be appointed to multiple arbitrations involving the same or

overlapping subject matters and parties as a means of achieving consistency in decisions. In those contexts, disclosure of multiple related appointments may not be required because the practice is known to any party engaged in such arbitrations. [128 – 129, 137]

In contrast, this practice is rare with respect to the other arbitral organizations. Given that Bermuda Form arbitrations are *ad hoc*, and do not fall under the auspices of either GAFTA or the LMAA, the Supreme Court determined that arbitrators are required to disclose other related appointments, both at the time of appointment as well as during the pendency of the arbitration, if other related appointments are made. [137]

Halliburton was an *ad hoc* Bermuda Form arbitration so, as far as Mr. Rokison was concerned, the Supreme Court found that he had a legal duty to disclose to Halliburton his subsequent appointments, even though he already had made disclosures regarding prior appointments by Chubb at the time he was appointed chair of the *Halliburton* panel. Because Mr. Rokison had not done so, the Supreme Court found that he had breached his duty of disclosure. [138 – 145]

Due to the Supreme Court's second assessment point above, the inquiry did not end there – the facts and circumstances known at the time of the hearing to remove Mr. Rokison in January 2017 also had to be considered. In that regard, the Supreme Court reviewed the state of affairs as of the time of the hearing and, applying the objective test of a "fair-minded and informed observer," considered the following:

- The extent to which there was a legal duty of disclosure under English law was not clear at the time of the hearing.
- Both of the Transocean arbitrations had commenced after the *Halliburton* arbitration had started.
- Both of the Transocean arbitrations were expected to be resolved on preliminary issues, which meant it was not likely that they would overlap with the *Halliburton* arbitration in terms of submissions or evidence.
- Mr. Rokison did not receive any "secret" financial benefit from his subsequent appointments; and
- There was otherwise no basis to assume that Mr. Rokison had any unconscious ill will.

Although the Supreme Court concluded that Mr. Rokison had breached his duty of disclosure by failing to disclose his subsequent appointments at the time of those appointments, it nevertheless concluded that that breach did not give rise to a real possibility of bias based on the other facts and circumstances known at the time of the hearing to remove him. [149 – 150]

The duty of confidentiality may give way to the duty of disclosure

Arbitrations are generally meant to be private and confidential. Some may even consider the fact of the arbitration's existence to be confidential, although that may be a somewhat extreme view. [88, 92] The Supreme Court, nevertheless, took an arbitrator's duty of confidentiality into consideration in defining the extent of an arbitrator's duty of disclosure.

The Supreme Court explained that, as far as English-seated arbitrations are concerned, there are two general rules regarding the duty of confidentiality. First, the duty of confidentiality does not prohibit all forms of disclosure with respect to the existence of a related arbitration. Second, at the same time, the duty of disclosure does not give an arbitrator carte blanche to disclose whatever is necessary to persuade a party that there should be no doubts about the arbitrator's impartiality. [101] In other words, some limited disclosure is allowed.

In particular, as far as ad hoc Bermuda Form arbitrations are concerned, the Supreme Court decided that an arbitrator may disclose his or her participation in a related arbitration and the identity of the common party, without obtaining the express consent of the relevant parties. The Supreme Court based this conclusion on the assumption that the common party consents to that disclosure by virtue of having appointed the arbitrator to more than one arbitration. And, the consent of the other party is not required for such a limited disclosure. [104]

Notwithstanding these general rules, if an arbitrator cannot make the necessary level of disclosure regarding an earlier appointment without breaching the duty of confidentiality, the arbitrator will have to decline the second appointment. [88] Needless to say, this would undoubtedly be a very fact-specific analysis and will turn on the amount of detail that the arbitrator would need to disclose.

The takeaways

1. An objective test – the perspective a "fair-minded and informed" observer – should be applied to determining whether an arbitrator is potentially biased.
2. While the test is the same for any arbitration – the perspective a "fair-minded and informed" observer – the arbitral custom and practice of the relevant field of arbitration must be considered. Specifically, applying that test in an arbitration under the auspices of GAFTA or the LMAA, where multiple appointments in related matters is commonplace, should yield a different result than an arbitration in other contexts, such as under the ICC, LCIA or CIArb, or in the context of *ad hoc* Bermuda Form arbitrations.
3. Arbitrators in English-seated arbitrations have a legal duty to disclose matters that could give rise to questions regarding the arbitrator's impartiality.
4. The assessment of whether an arbitrator breached his or her duty of disclosure must be made based on facts and circumstances known at the time the duty arose and during the time the duty subsisted. [119–120; 156] In addition, the duty of disclosure is a continuing duty and circumstances may change before there is disclosure. [120]
5. The assessment of whether there is a real possibility that an arbitrator is biased must be made based on facts and circumstances known at the time of the hearing to remove the arbitrator.
6. Even though an arbitrator also has a duty to maintain the confidentiality of arbitrations, it should be assumed (absent a contract restricting or prohibiting disclosure or binding rules which have different effect) that parties to such arbitrations accept the notion that an arbitrator may disclose limited information about the arbitration without obtaining the express consent of the parties to the relevant arbitration if the arbitrator is asked to accept another appointment in a related arbitration, particularly if the relation between the arbitrations is a common party.

Needless to say, while the Supreme Court sought to reaffirm the duties of arbitrator fairness and impartiality, the decision in *Halliburton* has given rise to substantial debate and analysis. Opinions as to whether the Supreme Court got it right seem to vary depending on the point of view of parties that are "repeat customers" of the London arbitral circuit versus those that pass through just once, or rarely. Regardless, English law is now clear that an arbitrator is allowed to accept multiple appointments by the same party, even in the context of the same subject matter, as long as proper disclosure is made and a "fair-minded and informed" observer has no concerns.

Footnotes

¹ *Halliburton Company v Chubb Bermuda Insurance Ltd.* [2020] UKSC 48 (*Halliburton*).

² These institutions are, respectively, The London Court of International Arbitration (LCIA); The International Chamber of Commerce (ICC); The Chartered Institute of Arbitrators (CI Arb); The Grain and Feed Trade Association (GAFTA); and The London Maritime Arbitrators Association (LMAA).

³ It was common ground that Mr. Rokison's failure to disclose was inadvertent and innocent.

⁴ Numeric references are to the numbered paragraphs in the *Halliburton* decision.

⁵ To be clear, it was the Court of Appeal that established the legal duty to disclose, which the Supreme Court affirmed.

HORN AND ANOTHER v NEL AND OTHERS

Case no: 27388/2022

(The award application)

- (1) REPORTABLE: YES/NO**
- (2) OF INTEREST TO OTHER JUDGES: NO**
- (3) REVISED: NO**

Date: 21 August 2023

E van der Schyff

In the matter between:

ANDRE HORN	FIRST APPLICANT
MELLINS i-STYLE OPTOMETRISTS INC	SECOND APPLICANT

and

DEON MARIUS NEL	FIRST RESPONDENT
HENRY JACQUE MALAN	SECOND RESPONDENT
HERMAN JOHANNES JANSEN	THIRD RESPONDENT

Case no: 011316/2022

(The sec 3(2) application)

And in the matter between:

HERMAN JOHANNES JANSEN	FIRST APPLICANT
DEON MARIUS NEL	SECOND APPLICANT
HENRY JACQUES MALAN	THIRD APPLICANT

and

ANDRE HORN	FIRST RESPONDENT
MELLINS i-STYLE OPTOMETRISTS INC	SECOND RESPONDENT
LTC HARMS NO	THIRD RESPONDENT

Case no: 25568/2022

(The taxation review application)

And in the matter between:

DEON MARIUS NEL	FIRST APPLICANT
HENRY JACQUES MALAN	SECOND APPLICANT
HERMAN JOHANNES JANSEN	THIRD APPLICANT

and

LTC HARMS NO	FIRST RESPONDENT
WC WANDRAG NO	SECOND RESPONDENT
ANDRE HORN	THIRD RESPONDENT
MELLINS i-STYLE OPTOMETRISTS INC	FOURTH RESPONDENT

JUDGMENT

Van der Schyff J

Facts

[1] Several entities have an interest in what will collectively be referred to as the Mellins Group. The Mellins Group is comprised of Mellins i-Style Optometrists Inc., Mellins and Partners, the Mellin Trust, the MV Trust, and Mellins i-Style (Pty) Ltd (Mellins (Pty)). The trusts hold the interest in 'Mellins and Partners' and the shares in Mellins (Pty). The arbitrator appropriately stated that the affairs of the Mellins Group were organised in a manner only a tax adviser could conceive of.

[2] The current litigation arises out of arbitration proceedings. In these proceedings, I am called on to adjudicate an application in terms of s 3(2) of the Arbitration Act 42 of 1965 (the Arbitration Act), an application in terms of s 31 of the Arbitration Act, and an application in terms of s 33 of the Arbitration Act.

The s 3(2) application

[3] The applicants in the award application, Mr. Horn and Mellins i-Style Optometrist Inc. (MO), seek an order in terms of s 31(1) of the Arbitration Act 42 of 1965 (the Act) to make the following awards by the arbitrator orders of court:

- i. The arbitration award published on 20 May 2021;
- ii. The arbitration award published on 28 March 2022.

[4] Messrs. Jansen, Nel, and Malan are the respondents in the award application. They are also the applicants in the s 3(2) application. In the s 3(2) application, Messrs. Jansen, Nel, and Malan seek an order setting aside the written arbitration agreement, 'retracting' the disputes referred to in the arbitration agreement from arbitration, holding that the arbitration clause shall cease to have effect concerning the disputes concerning the correctness of Nico Pienaar's determination of the value of their interest in the Mellin Trust and the MV Trust and that the costs of the arbitration proceedings to date, save for the costs orders that the arbitrator has already issued, be costs in the cause of any High Court proceedings for the setting aside of Mr. Pienaar's determination of the value of their interests in the Mellin Trust and the MV Trust.

[5] The issues relevant to the award and s 3(2) applications are conflated and arise from the same facts.

[6] On 10 November 2001, the then-shareholders of MO concluded a written shareholders' agreement. In terms of the shareholders' agreement, the shareholders of MO agreed on a procedure for the exit of shareholders from MO, the Mellin Trust, and the MV Trust, which trusts hold the interests in the Mellins Group and a mechanism for the valuation of the interest held by them in the Mellins Group, and the price payable for the interest in the Mellins Group.

[7] The material aspects, insofar as this application is concerned, are the mechanism provided in the agreement for the determination of the value of Messrs. Jansen, Nel, and Malan's interest in the Mellins Group by Mr. Pienaar and the provisions for a referral to arbitration.

[8] Messrs. Jansen, Nel, and Malan, respectively, at different periods, became defaulting shareholders by reaching the age of 60 and consequently subject to the mandatory retirement regime as provided for in the shareholders' agreement. They were obliged to sell their respective interests in MO and related entities in the Mellins Group. In each instance, Mr. Horn agreed to and took over Messrs. Jansen, Nel, and Malan's respective shareholding in MO. They became entitled to payment of the purchase price in terms of the provisions of the agreement.

[9] In terms of the shareholders' agreement, Mr. Pienaar, a chartered accountant, was designated as the person who would determine the value of a shareholder's interest in the company at the relevant time of his/her retirement and to determine the purchase price payable to him/her in terms of the provisions of the shareholders' agreement. Mr. Pienaar is not a party to the shareholders' agreement.

[10] Mr. Pienaar determined Messrs. Jansen, Nel, and Malan's interests in the Mellins Group, respectively, as R3 473 883.81, R7 764 283.07, and R4 485 071.70. Messrs. Jansen, Nel, and Malan were dissatisfied with the valuations as determined by Mr. Pienaar and considered it be irregular, unreasonable, and/or so wrong that they were patently unjust.

[11] Messrs. Jansen, Nel, and Malan submit that their legal representatives advised them at the time that the shareholders' agreement contains an arbitration clause, and they were bound to proceed to arbitration to have the valuation and determination done by Mr. Pienaar set aside in arbitration proceedings. They were advised that since a challenge to Mr. Pienaar's valuation constitutes a dispute as defined in the arbitration clause, the parties contemplated that such a dispute may arise and that arbitration on such dispute can proceed in Mr. Pienaar's absence. As a result, arbitration proceedings commenced.

[12] Messrs. Jansen, Nel, and Malan state that it now appears that such advice was incorrect for the following reasons:

i. Messrs. Jansen, Nel, and Malan and Horn concluded a new written arbitration agreement 'which was to effectively replace the provisions of clause 11 in respect of the dispute concerning the determination of the said values as determined by Mr. Pienaar because the arbitration clause in the shareholders' agreement was 'tersely stated and outdated'.

ii. When the parties agreed to refer the dispute about the valuation to arbitration in terms of the new arbitration agreement, it effectively novated the terms of the arbitration clause in the shareholders' agreement. None of the parties raised any issue that it was not competent to arbitrate the issue of Mr. Pienaar's valuation, without Mr. Pienaar being a party to the shareholders' agreement or the new agreement.

iii. The third respondent was appointed as the arbitrator of the proceedings.

iv. Messrs. Jansen, Nel, Malan, and Horn, and MO delivered their respective pleadings, which were amended from time to time. Mr. Horn and MO pleaded that it is not competent to set aside Mr. Pienaar's valuation and determination without him being a party to the arbitration proceedings.

v. Mr. Horn and MO also raised issues akin to exceptions, as special pleas to the stated claim. Messrs. Jansen, Nel, and Malan contend that the parties agreed to separate the issues raised in the special pleas and requested the arbitrator to determine those issues first. As a result, they claim, the issue of whether it was competent to seek the setting aside of Mr. Pienaar's determination when he is not a party to the arbitration agreement was not fully canvassed and did not form part of the separated issues. Messrs. Jansen, Nel, and Malan inform the court that the separated issues were argued and subsequently upheld by the arbitrator, who allowed them to amend their statements of claim. A cost order was granted against Messrs. Jansen, Nel, and Malan. This costs order forms the subject of the application under case number 25568/2022, dealt with herein below.

vi. Messrs. Jansen, Nel, and Malan inform the court that they were recently advised that the position adopted by Mr. Horn and MO that Mr. Pienaar's determination cannot be set aside in arbitration proceedings to which he is not a party, is correct. As a result, and for them to obtain the relief of setting aside Mr. Pienaar's respective valuations, legal proceedings, to which Mr. Pienaar will be a party, must be launched in the High Court.

[13] Mr. Horn and MO oppose the s 3(2) application. They contend that commencing arbitration proceedings without Mr. Pienaar being a party thereto, was ill-conceived since no relief can be sought unless he is a party to the arbitration. As a result, Mr. Horn and MO pleaded that the relief sought by Messrs. Jansen, Nel, and Malan in arbitration proceedings could not be granted against Mr. Pienaar. Mr. Horn and MO, contrary to the position put forward by Messrs. Jansen, Nel, and Malan, contend that this issue was indeed canvassed before the arbitrator, and that he upheld the plea that the relief sought by Messrs. Jansen, Nel, and Malan could not be granted in Mr. Pienaar's absence.

[14] A reading of the arbitrator's interim award sheds light on the question as to whether the arbitrator dealt with the issue of whether Mr. Pienaar's valuation and determination can be set aside in light of him not being a party to the arbitration agreement, and, consequently the arbitration proceedings. I pause to point out that both parties misinterpreted the situation and the arbitrator's finding on this issue.

[15] The arbitrator held as follows:

'That brings me prayers 1 and 2. The second special plea also raises the question of Mr. Pienaar's non-joinder, where his valuation and determination are to be set aside and declared as not binding on the parties. I disagree. His interest in this part of the case is indirect if not tenuous.'

[16] The portion of the second special plea referred to above reads as follows:

' 17.2 The statement of claim lacks the necessary averments to sustain a cause of action for the review and setting aside of Mr. Pienaar's determination of the purchase price. In particular:

17.2.1 no case has been made out that Mr. Pienaar has an obligation to redo the valuation;

17.2.2 no case has been made out that Mr. Nel, Mellins Inc, or Mr. Horn has a right to compel Mr. Pienaar to redo the valuation by applying factors along a newly fashioned formula; and

17.2.3 no case has been made out that entitles Mr. Nel to ask the arbitrator to compel Mr. Pienaar to redo the valuation, or to do so without errors or by applying factors alongside a newly fashioned formula.

17.3 Mr. Pienaar has a direct and substantial interest in any relief sought that he must do the valuation in accordance with the shareholders' agreement and a newly fashioned formula.'

[17] The arbitrator definitively dealt with Mr. Pienaar's non-joinder. He held that he disagreed with the proposition that Mr. Pienaar needs to be a party to proceedings where the setting aside of his valuation is sought.

Section 3(2) of the Arbitration Act

[18] Section 3(2) of the Arbitration Act provides as follows:

'The court may at any time on the application of any party to an arbitration agreement, on good cause shown –

(a) set aside the arbitration agreement; or

(b) order that a particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or

(c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred.'

[19] The Supreme Court of Appeal, in *De Lange v Presiding Bishop for the time being of the Methodist Church of Southern Africa and another*, explained that it is evident from s 3(2) of the Act that a court has a discretion whether to enforce an arbitration agreement. The question is whether the applicant has shown good cause to set aside the arbitration agreement. 'Good cause', the court held, 'is a phrase of wide import that requires a court to consider each case on its merits in order to achieve a just and equitable result in the particular circumstances.'

[20] In *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd*, Colman J explained that the *onus* to show good cause is not easily discharged. He continues:

'There are certain advantages, such as finality, which a claimant in an arbitration enjoys over one who has to pursue his rights in the Courts; and one who has contracted to allow his opponent those advantages will not readily be absolved from his undertaking. In *Rhodesian Railways v Mackintosh*, 1932 AD 359, WESSELS, A.C.J. (as he then was), held that the discretion of the Court to refuse arbitration under a submission was to be exercised judicially, and only when a 'very strong case' for its exercise had been made out (see p. 375). The Court was acting under a different statute from the one before me. But the observation of WESSELS, A.C.J., is none the less apposite here, because it was based upon general principles. Similarly, in *Halifax Overseas Freighters, Ltd. v Rasno Export; Technoprominport and Polskie Linie Oceaniczne P.P.W. ("The Pine Hill")*, 1958 (2) Lloyds List Law Reports 146, MCNAIR, J., held that there should be 'compelling reasons' for refusing to hold a party to his contract to have a dispute resolved by arbitration. JESSEL, M.R., in *Russel v Russel*, (1880) 14 Ch. D. 411, said that the cases in which the discretion against arbitration should be exercised were 'few and exceptional'.'

[21] In *Rawstone and Another v Hodgen and Another*, the court held that the discretion to order that 'any particular dispute referred to in the arbitration agreement shall not be referred to arbitration' is limited. An applicant seeking to avoid an agreement to resolve a dispute by arbitration should show compelling reasons for the matter to be heard in court. In *Kmatt Properties (Pty) Ltd v Sandton Square Portion 8 (Pty) Ltd and Another*, the court held that an applicant must make out a 'very strong case' for the granting of an order in terms of s 3(2)(b).

Evaluation of the s 3(2) application

[22] Messrs. Jansen, Nel, and Malan's sole reason for seeking that the arbitration proceedings cease and that litigation commence in court, is founded on their view that because Mr. Pienaar is not a party to the shareholders' agreement, the arbitrator would not be empowered to compel him to provide a new and proper determination if the arbitrator sets aside his calculation and determination.

[23] In argument before this court, Messrs. Jansen, Nel, and Malan's counsel submitted that various findings, adverse to the professional capabilities or professional actions taken by Mr. Pienaar in conducting various valuations, may have to be made without Mr. Pienaar being a party to the arbitration proceedings. As such, counsel contended, Mr. Pienaar has a direct and substantial interest in the relief Messrs. Jansen, Nel, and Malan seek, namely the setting aside of his valuations. I disagree. The arbitrator will have to determine whether the value determination was done in accordance with the provisions of the shareholders' agreement. A finding that it was not, will not be adverse to Mr. Pienaar's professional capabilities.

[24] The arbitrator has already determined that Mr. Pienaar's interest in proceedings that might result in the calculation or valuation being set aside, is 'indirect if not tenuous'. It is only when a declarator is sought that Mr. Pienaar is disqualified from acting as an expert valuer under the agreement on the basis that he is not qualified to be the auditor of the company or that he was biased, that it can be said that he has a direct interest in the relief sought. The same cannot be said with the relief sought based on a contention that Mr. Pienaar incorrectly calculated the value of Messrs. Jansen, Nel, and Malan's respective interests or used the wrong formula in determining such value. He can be called as a witness to explain how he did the calculations or value determinations, and the arbitrator can decide whether this was done in accordance with the terms of the shareholders' agreement.

[25] In my view, both parties misinterpret Mr. Pienaar's role in these proceedings. The matter is distinguishable from *Welihockyj v Advtech Ltd*. In *Welihockyj*, the scheme that formed part of the subject matter, 'affected inappropriate savings and cost-cutting procedures (involving issues pertaining to third parties), all with

the sole purpose of short-term cost savings to achieve the profit warranties provided for ...'. The alleged fraudulent scheme involved the alleged fraudulent conduct not only of the applicants but also third parties. The third parties would, other than Mr. Pienaar in the current matter, be affected by findings made by the arbitrator, and the arbitrator did not have the power to make findings pertaining to the third parties who were not parties to the arbitration agreement. I agree with the arbitrator's finding that Mr. Pienaar's interest in the question as to whether his valuation and determination are to be set aside and declared as not binding on the parties, is indirect.

[26] If the arbitrator finds that the value determination was not done in accordance with the parties' agreement as contained in the shareholders' agreement, he will set aside the value determination for the determination to be done in accordance with the terms of the agreement. If the 'instrument' the parties crafted in the shareholders' agreement to determine the value of the retiring shareholders' interests 'malfunctions', the parties must turn to the agreement to resolve the issue. Mr. Pienaar not being a party to the shareholders' agreement did not prevent him from doing the value determinations and calculations when requested. One can ask oneself, what would the position have been if Mr. Pienaar refused to do the calculation in the first place? Could he be compelled to do so if he was not a party to the shareholders' agreement? The situation that will arise if his calculation is set aside in arbitration does not differ in any manner from the hypothetical position wherein the parties would have found themselves had Mr. Pienaar refused to do the valuation in the first instance. There is, in any event, no indication on the papers that Mr. Pienaar will refuse a request to redo the calculations if the arbitrator sets the current calculations aside.

[27] I pause to note that I find it difficult to discern between Mr. Pienaar's role in determining the value of the respective retired members' interests, and Mr. Wandrag's role as taxing consultant who drew up the bill of costs that was taken on review before the arbitrator.

[28] In light of the above, I do not agree with Messrs. Jansen, Nel, and Malan's contention that the relief sought in the arbitration proceedings is abortive and incompetent. This, in turn, leads to the finding that the application did not establish good cause on a balance of probabilities for the relief sought in terms of s 3(2) of the Arbitration Act. The application under case number 011316/2022 stands to be dismissed with costs.

The award application and the taxation review application

[29] As indicated above, Mr. Horn and MO seek an order in terms of s 31(1) of the Arbitration Act 42 of 1965 (the Act) to make the following awards by the arbitrator orders of court:

- i. The arbitration award published on 20 May 2021;
- ii. The arbitration award published on 28 March 2022.

[30] Pursuant to the referral of the disputes between the parties to arbitration, three special pleas were heard by the arbitrator. The arbitrator published his first award, the May 2021-award, and awarded costs in favour of the applicants.

[31] The parties could not agree on the amount of costs and appointed Mr. Wandrag, a taxing consultant, to tax the bill of costs. Messrs. Jansen, Nel, and Malan instituted review proceedings of Mr. Wandrag's *allocator*, which review proceedings served before the arbitrator, and is the subject matter of the third application dealt with herein below. The arbitrator published this award on 28 March 2022, the March 2022-award.

[32] Both awards were duly published, but Messrs. Jansen, Nel, and Malan failed and refused to pay the costs as awarded.

[33] Messrs. Jansen, Nel, and Malan contend that the court has a discretion whether to make awards orders of court and submit that it is not in the interest of justice that the award be made orders of court at this juncture. Messrs. Jansen, Nel, and Malan submit that the decision to make awards orders of court should only be made after the final determination of the entire arbitration. They aver that Mr. Horn and MO want to 'strangle us, as retirees who are dependent upon to be paid to us by the Second Applicant, financially so that we forego the continuation of the arbitration'.

[34] Messrs. Jansen, Nel, and Malan submit that the application to make this award an order of court is premature due to the fact that they seek the March 2022-award to be reviewed and set aside. To deal with the issues in a practical manner, I will consider the taxation review application first. Brand J also applied this methodology in *Kolber and Another v Sourcecom Solutions (Pty) Ltd and Others: Sourcecom Technology Solutions (Pty) Ltd v Kolber and Another*.

Section 33 of The Arbitration Act

[35] Section 33 of the Arbitration Act provides for the setting aside of an award. Section 33(1) provides that the court may, on application of any party to the reference, make an order setting the award aside where:

- i. Any member of the arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
- ii. An arbitration tribunal has committed a gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
- iii. An award has been improperly obtained.

[36] Section 33(2) prescribes that an application under s 33 shall be made within six weeks after the publication of the award to the parties. The court may stay the enforcement of the award decision if it considers that the circumstances so require.

[37] In *Kolber, supra*, Brand J agreed with the view postulated by Solomon JA in *Dickenson & Brown v Fisher's Executors*, that:

'It seems 'impossible to hold that a *bona fide* mistake either of law or of fact made by an arbitrator can be characterised as misconduct'; 'where an arbitrator has given fair consideration to the matter . . . it would be impossible to hold that he had been guilty of misconduct merely because he had made a *bona fide* mistake either of law or of fact.'

[38] It is established in case law that a court cannot upset an arbitrator's award on the basis of misconduct unless it finds the arbitrator guilty of 'misconduct' in the sense of moral turpitude or *mala fides*.

[39] In *OCA Testing and Certification South Africa (Pty) Ltd v KCEC Engineering Construction (Pty) Ltd and Another*, the Supreme Court of Appeal (SCA) clarified the requirements for reviewing an arbitration award. The SCA explained that gross irregularity in an arbitration award refers to a methodological flaw in the proceedings that deprives a party of a fair and full determination of their case, even if the arbitrator's intentions were good.

[40] In coming to this finding, the SCA 'crystalised the principles for the review of an arbitration award on the basis of a gross irregularity as follows':

- i. Irregularity does not mean an incorrect award;

- ii. The enquiry into whether an award should be reviewed is not concerned with the result of proceedings but rather the method of those proceedings (i.e., whether the aggrieved party was deprived of having their case fully and fairly determined);
- iii. If the arbitrator prevents a fair trial of the issues, there is gross irregularity rendering the award capable of review;
- iv. The arbitrator must engage in the correct enquiry. Misconceiving the nature of the enquiry renders the hearing unfair as the arbitrator fails to perform their mandate. Notwithstanding arbitrators' good intentions, their awards can be reviewed if they are mistaken about the inquiry.
- v. The court reiterated that- 'we are here not dealing with a situation where the arbitrator got it horribly wrong without more, in which event there would have been no basis to disturb the award. Rather, he simply overlooked some of the crucial issues that he was required to determine. Section 28 of the Act explicitly provides that absent an agreement between the parties to the contrary, an award shall, subject to the provisions of the Act, 'be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms.' And as Harms JA forcefully put it: '[A]n arbitrator "has the right to be wrong.' Consequently, where an arbitrator errs in his or her interpretation of the law or analysis of the evidence that would not constitute gross irregularity or misconduct or exceeding powers as contemplated in s 33(1) of the Act.' (Footnotes omitted)

Evaluation of the taxation review application

[41] Messrs. Jansen, Nel, and Malan seek that the taxation review done by the arbitrator be set aside, and remitted back to him, 'together with a Notice of Taxation Review that complies with Uniform Rule 48(2), for a reconducting of the taxation review', alternatively that this court substitutes the decision of the arbitrator in respect of specified items on the Bill of Costs. They claim that the arbitrator committed a gross irregularity in the conduct of the taxation review that is so unreasonable that no other arbitrator, acting reasonably, would have come to the same conclusion.

[42] Messrs. Jansen, Nel, and Malan explain in the founding affidavit, that pursuant to the costs award being granted, Mr. Horn and MO submitted a bill of costs for taxation by Mr. Wandrag in the aggregate sum of R2 041 497.50. This included the attorney's fees, disbursements, and the costs of two counsel. They claim this is 'surreal, amounts to overreaching, constitutes recovery of costs that should only be recoverable at the end of the arbitration in respect of a final costs award and is simply unreasonable.'

[43] Messrs. Jansen, Nel, and Malan explain that they filed a notice to oppose the taxation, wherein they opposed every item contained in the bill of costs. An amount of R576 536.06, more than 25% of the bill of costs, was subsequently taxed down. The bill of costs finally amounted to R621 531.36. This amount includes the drawing fee and the attendance costs.

[44] A Notice of Review of Taxation in terms of Uniform Rule 48(1) was served. Mr. Wandrag, issued a taxing master's report and took issue with the fact that the Notice of Review, did not comply with Uniform Rule 48(2)(b), (c), or (d). Mr. Wandrag issued a report to which Mr. Horn and MO responded. Written submissions were also made on behalf of Messrs. Jansen, Nel, and Malan. Mr. Wandrag issued a further report, and Mr. Horn and MO made further written submissions. The arbitrator proceeded to review the taxation. Messrs. Jansen, Nel, and Malan contend that the arbitrator just 'glossed over' the fact that Mr. Wandrag indicated that their notice to review did not comply with Rule 48(2)(b), (c), and (d). He did, however, state same.

[45] Messrs. Jansen, Nel, and Malan contend that it was grossly irregular for the arbitrator to continue with the review if he opined that Uniform Rule 48(2) had not been properly complied with. This procedural error, contend Messrs. Jansen, Nel, and Malan, made it 'simply impossible' for the arbitrator to determine whether Mr. Wandrag's decisions were rational. The arbitrator was precluded from acting in a judicial manner.

[46] The second ground of irrationality raised, lies therein that the arbitrator's powers of review in a taxation review, are much broader than a mere rationality review. He must determine whether the fees incurred are reasonable or have reasonably been incurred. Allowing overlapping costs to be taxed as part of the costs incurred in relation to the special pleas is unreasonable and constitutes an irregularity.

[47] Messrs. Jansen, Nel, and Malan contend that the arbitrator misdirected himself when he found that the VAT issue was not raised as an independent issue when it was. In addition, it is contended that the arbitrator misapplied the law relating to the VAT issues on 'speculation and conjecture', and that the arbitrator failed to consider all documentation in relation to the tax review.

[48] In their answering affidavit, Mr. Horn and MO contend that the nature of the hearing was not the only factor Mr. Wandrag and the arbitrator considered. Other factors include, amongst others:

- i. Messrs. Jansen, Nel, and Malan's election to triplicate the work had a material effect on the costs of the arbitration;
- ii. A contextual perusal of all the documents;
- iii. The complexity of the case;
- iv. The fact that a document was not used during the hearing or referred to in the award does not mean it need not be perused.

[49] Mr. Horn and MO deny that the arbitrator failed to deal adequately with Messrs. Jansen, Nel, and Malan's non-compliance with Rule 48(2)(b), (c), and (d). They make the point that there is no merit in the argument that since Messrs. Jansen, Nel, and Malan failed to comply with Rule 48(2)(b), (c), and (d), the arbitrator acted gross irregularly by determining the review application. Messrs. Jansen, Nel, and Malan can't approbate and reprobate by arguing on the one hand that compliance with the said subsections of Rule 48 is not required and, on the other hand, rely on their non-compliance as a ground for review.

[50] Regarding the VAT issue, Mr. Horn and MO contend that the VAT issue *per se* was not raised as an objection at the taxation but only in the submissions filed by Messrs. Jansen, Nel, and Malan. It was also not raised in the notice of review.

[51] It is evident from the arbitrator's award that:

- i. He was aware of the nature of the review;
- ii. He duly considered Messrs. Jansen, Nel, and Malan's failure to adhere to Rule 48(2)(b), (c), and (d). The arbitrator explained that 'because the rule was not followed, one does not have the advantage of the taxing master's reasons for the decisions under attack, which is the whole purpose of review; to consider the rationality of the reasons'. He considered all the information before him;
- iii. He considered the list of objections and explained that the VAT-related items listed were listed as a component of the objection against the fees charged, not as an independent issue, and that the term VAT does not appear in the notice. The arbitrator dealt with the VAT issue and dismissed this ground of review;

iv. The arbitrator dealt with the 'overlapping' argument, and other concerns raised.

[52] The record of the proceedings before the arbitrator indicates that Mr. Wandrag, despite holding the view that the taxation review in terms of Rule 48 was fatally defective because of Messrs. Jansen, Nel, and Malan's non-compliance with Rule 48(2)(b), (c), and (d), proceeded to provide the necessary information before the arbitrator.

[53] An application, in terms of s 33 of the Arbitration Act, is not a process where facts already established in the arbitration are being reassessed. It is a procedure to ascertain the existence and validity of the arbitral award itself. It is not a recourse against the award. Ramsden highlights that the appropriate standard of review of arbitral awards is one which preserves the autonomy of the forum chosen by the parties and minimises judicial intervention.

[54] By agreeing to arbitration, parties limit the grounds of interference in their contract to the procedural irregularities set out in the Arbitration Act. If the requirements as set out clearly in *OCA Testing and Certification South Africa (Pty) Ltd v KCEC Engineering Construction (Pty) Ltd and Another, supra*, are considered, the arbitrator did not commit a gross irregularity in the conduct of the arbitration proceedings or exceeded his powers. Once again, it must be stressed that the ground of review envisaged by the use of the phrase 'gross irregularity in the conduct of arbitration proceedings' in s 33 of the Arbitration Act, relates to the conduct of the proceedings and not the result thereof. The arbitrator expressly stated that the review is done in terms of rule 48(6)(a)(ii), which is indicative of the fact that he was well aware of the fact that a review of a taxation is not strictly 'a review' in the sense of the court interfering only with the exercise of an improper decision.

[55] I must add that it is challenging to understand how a party, who files a taxation review application without adhering to all the prescripts of rule 48(2), later complains if the review was dealt with and contends that '[t]he arbitrator has no power to condone non-compliance with the rules except insofar as the rules themselves expressly clothe the arbitrator with that power.'

[56] This application stands to be dismissed with costs.

Section 31(1) of the Arbitration Act

[57] Once an award is obtained through arbitration proceedings, the arbitration award is required to be made an order of court to enforce and execute the award if one party to the proceedings fails to honour the award. The award must, however, be final. For this to occur, an application for the award to be made an order of the court is made to the appropriate High Court, in terms of Section 31(1) of the Arbitration Act, Act 42 of 1965.

[58] Section 31(1) of the Arbitration Act provides as follows:

'(1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.

(2) The court to which application is so made, may, before making the award an order of court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.

(3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect.'

[59] When considering a s 31 application, the determination is only whether the award was made in accordance with the requisite arbitration agreement and in accordance with the Arbitration Act. When the order

of the High Court is delivered, the order is purely that the award, resultant from the arbitration proceedings, is made an order of court. The fact that a court may disagree with the arbitrator's findings, is not in itself a reason for refusing to enforce the award in terms of s 31(1) of the Arbitration Act.

[60] *In casu*, two disputes were referred to the arbitrator in accordance with an arbitration agreement. The arbitrator was appointed in accordance with the agreement between the parties. The arbitrator made two awards. The costs order has not been paid. The taxation review stands to be dismissed, and the s 3(2) application stands to be dismissed. Both awards are final awards, and Mr. Horn and MO can't execute the award as far as it pertains to the costs order granted, without it being made an order of court.

[61] The award application stands to be granted.

ORDER

In the result, the following order is granted:

Re case number 011316/22

1. The section 3(2) application is dismissed with costs;
2. The first, second, and third applicants are jointly and severally ordered to pay the respondents' costs, including the costs consequent upon the employment of two counsel.

Re case number 25568/2022

3. The taxation review is dismissed with costs.
4. The first, second, and third applicants are jointly and severally ordered to pay the respondents' costs, including the costs consequent upon the employment of two counsel.

Re: Case number 27388/22

5. The arbitration awards of retired Judge LTC Harms:
 - 5.1. Published on 20 May 2021 in which the applicant's special pleas were upheld with costs (attached as annexure 'A' through the founding affidavit); and
 - 5.2. Published on 28 March 2022 (attached as annexure 'B' to the founding affidavit) in which the respondent's taxation review application was dismissed with costs,are made orders of court in terms of section 31(1) of the Arbitration Act 42 of 1965.
6. The first, second, and third respondents are jointly and severally ordered to pay the applicants costs of this application, including the costs consequent upon the employment of two counsel.

E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For Messrs. Jansen, Nel, and Malan in the

s 3(2) application: Adv. G. Kairinos SC

Instructed by: HJ Van Rensburg Inc

For Messrs. Jansen, Nel, and Malan in the award and

Taxation review application: Adv. Q. du Plessis

Instructed by: HJ Van Rensburg Inc

For Mr. Horn and MO: Adv. E Van Vuuren SC

With: Adv. J Pretorius

Instructed by: Venter and Associates Inc

Date of the hearing: 25 May 2023

Date of judgment: 21 August 2023

CLOSE-UP MINING (PTY) LTD AND OTHERS v THE ARBITRATOR, JUDGE PHILLIP BORUCHOWITZ AND ANOTHER

Case no: 286/2022

In the matter between:

CLOSE-UP MINING (PTY) LTD	FIRST APPELLANT
WILLEM PIETER TENNER	SECOND APPELLANT
CLOSE-UP MACHINERY AND PLANT HIRE (PTY) LTD	THIRD APPELLANT

and

THE ARBITRATOR, JUDGE PHILLIP BORUCHOWITZ	FIRST RESPONDENT
LUTZKIE GROUP OF COMPANIES (PTY) LTD	SECOND RESPONDENT

Neutral citation: *Close-Up Mining (Pty) Ltd and Others v The Arbitrator, Judge Phillip Boruchowitz and Another* (286/2022) [2023] ZASCA 43 (31 March 2023)

Coram: VAN DER MERWE, MOCUMIE, MEYER and MATOJANE JJA and UNTERHALTER AJA

Heard: 7 March 2023

Delivered: 31 March 2023

Summary: Arbitration – grounds of review – arbitrator enjoyed no discretionary competence to decide a dispute not contained in the pleadings – Arbitration Foundation of Southern Africa (AFSA) rules applicable – gross irregularity not shown.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Raulinga J, sitting as the court of first instance):

- 1 The appeal is dismissed with costs, including the costs of two counsel, where so employed.
- 2 The second respondent is ordered to pay the costs of volumes 4-12 of the record.

JUDGMENT

Unterhalter AJA (Van der Merwe, Mocumie, Meyer and Matojane JJA concurring):

Introduction

[1] The second respondent, Lutzkie Group of Companies (Pty) Ltd (the Lutzkie Group), brought arbitral proceedings against the appellants, Close-Up Mining (Pty) Ltd, Willem Pieter Tenner and Close-Up Machinery and Plant Hire (Pty) Ltd, respectively (collectively, Close-Up Mining). The arbitrator, appointed by the parties, was the first respondent, retired Judge Phillip Boruchowitz (the Arbitrator). The dispute submitted to arbitration concerned two agreements, styled Binding Term Sheet 1 and 2. Having heard the matter, the Arbitrator made an award on 18 November 2020.

[2] In the award, the Arbitrator declined to consider a defence raised by Close-Up Mining to the effect that the Lutzkie Group had repudiated the agreements. The Arbitrator found that the defence had not been pleaded, and hence fell outside his jurisdiction. Close-Up Mining considered the Arbitrator to have fallen into error. Consequently, Close-Up Mining brought review proceedings in the Gauteng Division of the High Court, Pretoria (the high court), seeking to set aside the Arbitrator's award in terms of s 33(1) of the Arbitration Act 42 of 1965 (Arbitration Act).

[3] Its challenge was initially widely cast. In a supplementary founding affidavit, filed before the hearing in the high court, the grounds upon which Close-Up Mining sought to set aside the award were considerably pruned. In essence, Close-Up Mining contended that the Arbitrator had excluded from consideration its defence of repudiation on the basis that the defence had not been pleaded. The Arbitrator, said Close-Up Mining, had failed to recognise that he enjoyed a discretion to entertain the defence, even though it was not pleaded. The Arbitrator thereby misconceived the nature of the enquiry before him, and his associated duties, and thus committed a gross irregularity in terms of s 33(1)(b) of the Arbitration Act. In addition, Close-Up Mining complained that the Arbitrator had 'made' Mr Tenner a party to Binding Term Sheet 1, when he was not a party to this agreement. By so doing, claimed Close-Up Mining, the Arbitrator had exceeded his powers and committed a gross irregularity.

[4] The review came before Raulinga J. The Arbitrator abided the decision of the court. The high court found that the disputes raised in the arbitration proceedings are those raised on the pleadings. And since the repudiation defence had not been raised on the pleadings, the Arbitrator had correctly decided that he lacked the jurisdiction to entertain the defence. The review was accordingly dismissed with costs, including the costs of two counsel. With the leave of the high court, Close-Up Mining appeals to this Court.

Pleading and jurisdiction ground of review

[5] I turn, first, to the principal issue raised in the appeal: is an arbitrator precluded from deciding a defence that was not pleaded?

[6] The Arbitrator considered this to be so, and consequently determined that his competence was thus limited. The dispute referred to arbitration is framed by the pleadings. If a defence is not pleaded, he reasoned, the Arbitrator does not enjoy the competence to decide that matter. This reasoning, Close-Up Mining contended, is mistaken.

[7] The matter before us proceeded on the basis that the question to be determined is whether a party to arbitration proceedings that has failed to plead an issue may nevertheless seek to have the arbitrator decide this issue. It was thus somewhat unexpected that counsel for Close-Up Mining commenced his oral submissions with the contention that the pleadings in the arbitration could be understood to have raised the defence of repudiation. We do not need to engage this interpretative exercise. Close-Up Mining confined their challenge to the grounds set out in their supplementary founding affidavit. There, Close-Up Mining relied upon the proposition that the Arbitrator had come to the erroneous conclusion that he lacked jurisdiction to decide a matter not pleaded. That proposition has as its starting premise that Close-Up Mining did not plead the defence of repudiation. The contention that the opposite is true is at odds with the grounds upon which Close-Up Mining formulated their case to set aside the award. We decline to entertain a new case on appeal addressed before us in oral argument.

[8] Proceeding then, on the basis that Close-Up Mining did not plead the Lutzkie Group's repudiation of the agreements, Close-Up Mining did however raise the question of repudiation in its heads of argument before the Arbitrator. This, Close-Up Mining argued, rendered the principle in *Shill v Milner*, of application. There, the Appellate Division recognised that a court enjoys a discretion to give some latitude to a litigant to raise issues at the trial that were not explicitly pleaded, where to do so gives rise to no prejudice, and where all the facts have been placed before the trial court. Just as the *Shill v Milner* discretion is enjoyed by a trial court, so too, Close-Up Mining contended, an arbitrator is invested with the same competence. The Arbitrator however failed to recognise this competence, and hence committed a gross irregularity.

[9] What then of the Arbitrator's holding, affirmed by the high court, that he enjoyed no jurisdiction to decide matters that were not pleaded? As an invariable statement of the competence of an arbitrator, it is a proposition that cannot stand.

[10] It is well understood that parties may agree the matters to be referred to arbitration, and enjoy considerable autonomy in doing so. It is the arbitration agreement of the parties, taken together with acceptance by the parties of the conditions on which the arbitrator accepts appointment, that determine the jurisdiction of the arbitrator as to the matters referred to arbitration.

[11] Under the principle of party autonomy, there is no reason why parties cannot agree to confer upon an arbitrator the competence to decide matters that have not been pleaded, under a discretionary competence, the content of which is akin to the discretion recognised in *Shill v Milner*. It is important, however, to recognise the source of such a competence in arbitration proceedings. It does not derive, as with the courts, from an inherent power to protect and regulate their own process. It is to be found, rather, in the arbitration agreement of the parties. If the parties agree to confer upon the arbitrator a discretionary competence to decide a matter that has not been pleaded, but one that crystallises outside of the pleadings, there is no reason why the parties' agreement should not be honoured.

[12] It follows that there is no rule of law that an arbitrator cannot enjoy jurisdiction to decide matters not set out in the pleadings. What competence the arbitrator enjoys depends upon what is contained in the arbitration agreement. This holding is an application of the principle of party autonomy. It is also consistent with the Arbitration Act. An arbitration agreement is defined in the Arbitration Act to mean 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. That is expansive language, and it would include a dispute that arises in the course

of arbitration proceedings that the arbitrator is given a discretion to entertain. The only two matters that the Arbitration Act specifically excludes from a reference to arbitration are these: any matrimonial cause or any matter relating to status. Plainly, like any other agreement, a provision contrary to public policy or the Constitution would also not be enforceable. But there is no suggestion that confining an arbitrator's competence to the matters pleaded is a requirement of the Constitution or of public policy. On the contrary, our courts have recognised the value that attaches to party autonomy in the use of arbitration to resolve disputes.

[13] The holding in *Hos+Med* is entirely consistent with the position that I have taken. In *Hos+Med*, this Court affirmed that the only source of an arbitrator's power is the arbitration agreement. The assumption by the appeal tribunal, in that case, of a power to decide a matter outside of the pleadings, on the strength of *Shill v Milner*, was held by this Court to be incompetent because the submission to arbitration expressly limited the issues to the matters pleaded. Significantly, this holding says nothing as to whether parties can agree to submit issues to arbitration that are not pleaded. *Hos+Med* simply found that the parties did not do so.

[14] I am fortified in my opinion by the unreported decision of this Court in *Holford*. There, the arbitration agreement accorded the arbitrator 'such powers as are allowed by law to a High Court of the Republic of South Africa to ensure the just, expeditious, economical and final determination of the dispute'. This Court found that since a court would have been entitled to apply the principles set out in *Shill v Milner*, the arbitrator was likewise entitled to do so.

[15] In sum, the competence of an arbitrator to decide matters is determined by the arbitration agreement. The arbitration agreement may confine the submission to the issues that have been pleaded. But there is no rule of law that requires the parties to confine their agreement in this way. The arbitration agreement can therefore confer a competence upon an arbitrator to decide matters upon an exercise of a discretion of the kind recognised in *Shill v Milner*. All depends upon what the parties have agreed, and the proper interpretation of their agreement.

[16] I turn next to this question: did the arbitration agreement concluded between the parties in fact confer a discretionary competence upon the Arbitrator to entertain the defence of repudiation, raised by Close-Up Mining in its heads of argument?

[17] Close-Up Mining contended that the arbitration agreement did so. The Lutzkie Group resisted this contention.

[18] I should clarify that we are here concerned to determine what competence the Arbitrator in fact enjoyed in terms of the arbitration agreement. We are not called upon to decide how the Arbitrator should have exercised such competence, if he had it to exercise.

[19] The arbitration agreement is terse. It reads as follows:

'Save to the extent to the contrary provided for in this Term Sheet, any dispute arising out of or in connection with this Term Sheet shall be decided by arbitration to be held in Sandton and shall be dealt with by AFSA (the Arbitration Foundation of South Africa).'

[20] The following interpretation of the arbitration agreement was common ground between the parties. We should understand the reference in the arbitration agreement to the Arbitration Foundation of South Africa (AFSA) to be a reference to the AFSA commercial rules for domestic arbitration applicable at the time (the AFSA rules).

[21] Close-Up Mining relied upon article 11.1 of the AFSA rules. That rule reads as follows:

‘The arbitrator shall have the widest discretion and powers allowed by law to ensure the just, expeditious, economical, and final determination of all the disputes raised in the proceedings, including the matter of costs.’

[22] Counsel for Close-Up Mining emphasised three features of article 11.1. First, it conferred the widest discretion and powers allowed by law. That would include the kind of discretion recognised in *Shill v Miller*. Second, article 11.1 references the disputes raised in the proceedings. It does not refer to disputes raised in the pleadings. And the proceedings must connote the arbitration proceedings. Disputes raised in evidence or argument are disputes raised in the proceedings. Third, the provisions of article 11.2 that set out specific powers do not detract from the amplitude of the general power conferred in article 11.1. This is precisely what article 11.2 says. It reads as follows: ‘[w]ithout detracting from the generality of the foregoing [ie article 11.1], the arbitrator shall have the following powers: . . .’. Article 11.2’s tabulation of specific powers, including powers concerning pleadings, does not diminish the scope of the power conferred in article 11.1.

[23] Close-Up Mining argued that the wide terms in which the power conferred by article 11.1 is cast must include a discretionary competence of the kind recognised in *Shill v Milner*. Whether this is so, requires us to interpret the arbitration agreement. The arbitration agreement, the parties have agreed, must be taken to include the AFSA rules. Like any agreement, we interpret the agreement, and hence the AFSA rules, according to the now well understood triad of text, context, and purpose.

[24] True enough, article 11.1 is widely cast. It confers ‘the widest discretion and powers allowed by law’ for a particular purpose. That is, ‘to ensure the just, expeditious, economical, and final determination of all the disputes raised in the proceedings, including the question of costs’. However, if a dispute is not raised in the proceedings, then the powers conferred upon the arbitrator cannot be of application, no matter their breadth, because the power is conferred to determine a dispute raised in the proceedings.

[25] Thus, for the arbitrator to exercise the wide discretion and powers conferred by article 11.1, a dispute must have been raised in the proceedings. The question is then this: when can it be said that a dispute has been raised in the proceedings? A dispute is raised in the proceedings, under the AFSA rules, by following these rules. A party must make a written request for arbitration. The request must, *inter alia*, set out a statement that an award, in accordance with the claims, would fall within the terms of the arbitration agreement (article 4.2.3); a statement setting out the *locus standi* of each party, the nature of the dispute, all the material facts, the contentions relied upon by the claimant and the relief claimed (article 4.2.4). Provision is then made for the response of the defendant. That response includes a statement as to whether the defendant disputes the arbitration agreement and that it is still operative (article 6.1.4); whether the defendant disputes that the claim falls within the terms of the arbitration agreement (article 6.1.4); and, if not, by delivering a statement of defence, setting out the material facts and contentions relied upon by the defendant, indicating which of the claimant’s facts and contentions are disputed, and what relief is claimed (article 6.1.5.1). The defendant may deliver a counter-claim (article 6.1.5.2), and the claimant, a statement of defence to the counter-claim (article 6.4).

[26] Once a dispute has been raised on the pleadings, the arbitrator is invested with further powers granted under article 11 in respect of the pleadings. Those powers include the competence to permit of the amendment of any pleading (article 11.2.13); the competence to make any ruling or give any direction he considers necessary or advisable for the just, expeditious, economical and final determination of all the disputes raised in the pleadings (article 11.2.5); and an arbitrator may also require a party to amend its pleadings so that they are not evasive, and to strike out averments in pleadings that are embarrassingly vague, scandalous, vexatious or irrelevant (article 11.2.22).

[27] The AFSA rules define the term 'pleading' as follows. A pleading 'includes documents comprising a Request for Arbitration, a statement of defence, a counter-claim and a statement of defence to a counterclaim'. The pleadings thus form steps in the proceedings by recourse to which disputes are raised. The pleadings, however, do not exhaust the ways in which disputes may be raised in the proceedings.

[28] Article 11.2 provides examples of other types of disputes that may be raised in the proceedings in respect of which the arbitrator enjoys powers. The arbitrator may decide disputes as to the admissibility of evidence, any matter of onus, the production or preservation of property, the joinder of parties in the arbitration proceedings, and the furnishing of security for costs.

[29] It follows that under the AFSA rules, disputes may be raised in the proceedings, outside of the pleadings, that the arbitrator is empowered to decide. The pleadings form part of the proceedings, but the proceedings are wider than the pleadings.

[30] If that is so, then should we not conclude that the arbitrator has a discretionary power to permit a dispute raised outside of the pleadings to be treated as a dispute raised in the proceedings? Three reasons incline against that conclusion.

[31] The first is conceptual. One cannot confuse the power of the arbitrator with the subject matter over which the arbitrator exercises this power. Article 11.1 is a general description of the arbitrator's powers. Over what subject matter are those powers exercised? As I have said, the answer is the disputes raised in the proceedings in terms of the AFSA rules. Article 11.1 does not allow the arbitrator the *discretionary* power to decide that a dispute has been raised in the proceedings. It is for the parties to raise the dispute in terms of the AFSA rules. If they do so, the power conferred upon the arbitrator is to decide this dispute.

[32] Second, the AFSA rules set out a detailed procedure by which the parties raise disputes by way of pleadings. As I have recognised, the pleadings are not the only way in which the parties may raise disputes in the proceedings. But a reading of the AFSA rules, taken as a whole, reflects that the exchange of pleadings is the procedure that is to be followed by the parties to define their primary substantive disputes. Why else specify in such detail what the request for arbitration and the statement of defence must contain, and the permission that must be sought of the arbitrator to amend the pleadings. There are then disputes that the AFSA rules permit the parties to raise as a consequence of the primary disputes that have been pleaded. Discovery, joinder, separation of issues: to identify a few examples. These disputes also require resolution. They may be raised by the parties in the course of the arbitration proceedings. But, these disputes arise from, and are parasitic upon, the primary pleaded disputes. I shall call these 'dependent disputes'.

[33] Dependent disputes may be raised by the parties in the proceedings, but their hallmark is to facilitate the determination of the primary disputes. The dependent disputes do not constitute the decision by the arbitrator of the primary disputes that have been pleaded. The AFSA rules therefore do not contemplate that a party to the arbitration may raise a substantive dispute outside of the pleadings, and that such dispute may be adjudicated by the arbitrator if he decides, on a discretionary basis, to do so. That would subvert a central feature of the AFSA rules.

[34] The AFSA rules require the parties to raise their substantive disputes in the pleadings. If the pleadings fail to reflect the dispute adequately, then an amendment of the pleadings must be sought, and it is for the arbitrator to decide whether to permit the amendment. These rules are antithetical to the discretionary *Shill v Milner* power that Close-Up Mining would attribute to the Arbitrator.

[35] Third, the discretionary power for which Close-Up Mining contends is an incident of the inherent power of the courts. While the principle of party autonomy permits parties to include such a discretionary power in

their arbitration agreement (as I have found), it is an unusual provision to find in an arbitration agreement. Courts enjoy inherent power because they have a constitutional duty to secure justice. That extends beyond the interests of litigants. Arbitrators have no such power. It is the parties' agreement that determines what dispute must be decided and the powers conferred upon an arbitrator to do so. What makes the discretionary power of the type recognised in *Shill v Milner* unusual in an arbitration agreement is that it rests upon a paradox of party autonomy. The parties would confer the discretionary power contended for by Close-Up Mining to permit the arbitrator to extend the reach of his own jurisdiction, something that is ordinarily for the parties to determine. The parties may do so, but an arbitration agreement should ordinarily make it plain that that is what the parties intended. The AFSA rules do no such thing. Their cumulative provisions point to the opposite conclusion – that no such discretionary power was conferred upon the Arbitrator.

[36] For these reasons, I find that the AFSA rules do not confer a discretionary power upon the Arbitrator to decide whether to adjudicate the defence of repudiation. If the AFSA rules recognise no such power, then it is common ground that the arbitration agreement does not do so. Consequently, the Arbitrator made no error when he declined to entertain the defence of repudiation. And hence, Close-Up Mining has failed to establish that the Arbitrator committed a gross irregularity. The appeal on this ground must consequently fail.

The parties to the transaction ground of review

[37] The second ground of appeal relied upon by Close-Up Mining is this. The Lutzkie Group averred in their statement of claim that Mr Tenner was a party to Transaction 1 of Term Sheet 1. Counsel for the Lutzkie Group had, in his opening address in the arbitration, made it plain that the purchase price in respect of Transaction 1 was payable by the Lutzkie Group to Close-Up Mining. This, it was contended, was a recognition by the Lutzkie Group that Mr Tenner was not a party to Transaction 1. Yet, the Arbitrator, in his award, having identified the *merx* of the sale to include Mr Tenner's shares in Close-Up Mining, made Mr Tenner a party to the transaction, when he was not, as counsel for the Lutzkie Group had acknowledged. By so doing, the Arbitrator, Close-Up Mining contended, exceeded his powers and committed a gross irregularity.

[38] The opening address of counsel for the Lutzkie Group amounted to no withdrawal of the claim, so as to alter the dispute the Arbitrator was required to decide. That dispute included a claim by the Lutzkie Group for the following relief: that Mr Tenner be directed to do all such things and sign all such documents as may be necessary to effect transfer of his shares in Close-Up Mining, and of his right, interest, benefits and claims of whatsoever nature. That relief was pursued by the Lutzkie Group in the arbitration proceedings by seeking the specific performance of Transaction 1. The Arbitrator was required to decide upon the relief sought. He did so, and granted the relief. That Close-Up Mining considers the Arbitrator to have been in error, because Mr Tenner was not a party to Transaction 1, is of no account. The Arbitrator decided a live dispute concerning the remedy of specific performance. By so doing, he committed no gross irregularity.

[39] Accordingly, this second ground of appeal must also fail.

Costs

[40] Close-Up Mining has not prevailed in the appeal. They must therefore bear the costs of that outcome, including the costs of two counsel, where so employed. That conclusion is subject to one rider. The Lutzkie Group insisted that the record must include the transcript of the arbitration proceedings. This was no small inclusion, amounting to nine volumes (some 1 500 pages). That insistence was entirely unwarranted. The first three volumes of the record were all that was required to ventilate and decide the appeal.

[41] Where records contain unnecessary documentation or have not been properly prepared in other respects, this Court has limited the costs of preparation, perusal and copying that those responsible for

preparing the record would have otherwise been entitled to claim. This is particularly so where the record is voluminous. There is no reason why this principle should not be extended to require that a party responsible for the unnecessary inclusion of documents in the record should be rendered liable for the costs occasioned thereby. Accordingly, the costs occasioned by the inclusion of the record of the arbitration proceedings must be borne by the Lutzkie Group.

[42] In the result, the appeal fails, and the following order is made:

- 1 The appeal is dismissed with costs, including the costs of two counsel, where so employed.
- 2 The second respondent is ordered to pay the costs of volumes 4-12 of the record.

D N UNTERHALTER

ACTING JUDGE OF APPEAL

Appearances

For the appellants: B H Swart SC

Instructed by: Alice Swanepoel Attorneys, Pretoria
Symington De Kok Attorneys, Bloemfontein

For the respondents: J J Brett SC

Instructed by: Gothe Attorneys, Pretoria
McIntyre Van der Post, Bloemfontein