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# **AFSA ADVANCED PROGRAMME IN ALTERNATIVE DISPUTE RESOLUTION**

**ISSUED IN COLLABORATION WITH THE UNIVERSITY OF PRETORIA**

## **MODULE: ARBITRATION**

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# **FILE 2: COURSE NOTES**



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## COURSE OUTLINE

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# **SECTION 1**

## **PRIVATE ARBITRATION DEFINITION AND DICTIONARY**



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## ARBITRATION: A WORKING DEFINITION

### **Private arbitration is:**

- (i) a legally recognised process
  - (ii) which gives effect to
  - (iii) the agreement of the parties
  - (iv) to refer a dispute
  - (v) for final and binding resolution
  - (vi) to a third party
  - (vii) acting fairly
- 

### AN ALTERNATIVE DEFINITION

Arbitration is a procedure whereby the parties to a dispute refer that dispute to a third party, known as an arbitrator, for a final decision, after the arbitrator has first impartially received and considered evidence and submissions from the parties. The reference to the arbitrator takes place pursuant to an agreement between the parties.

The arbitrator, in resolving the dispute, is not an ordinary court of law, but a person chosen by the parties.

## ARBITRATION TERMS AND TERMINOLOGY

|                                  |                                                                                                                                                                                                                        |
|----------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Ad Hoc Arbitration:</b>       | One in which the parties and the arbitrator work out the procedural rules to be followed and the manner in which the arbitration is to be conducted without the assistance of an administering body such as AFSA.      |
| <b>Administered Arbitration:</b> | An arbitration in which the process is administrative, i.e., conducted according to the rules and practices and under the aegis of an administering authority.                                                         |
| <b>AFSA:</b>                     | The Arbitration Foundation of Southern Africa, an arbitral administering authority.                                                                                                                                    |
| <b>AFSA'S Commercial Rules:</b>  | The rules applied by AFSA in more complex commercial arbitrations.                                                                                                                                                     |
| <b>AFSA'S Expedited Rules:</b>   | The rules applied by AFSA in simpler commercial disputes.                                                                                                                                                              |
| <b>AFSA National Registrar:</b>  | The AFSA official responsible for ensuring that the arbitration is conducted in accordance with the AFSA rules.                                                                                                        |
| <b>Appeal:</b>                   | Applicable only where the parties agree to such a procedure and which involves a further reconsideration of the award by a Tribunal appointed for that purpose by or on behalf of the parties.                         |
| <b>Arbitrable Dispute:</b>       | A dispute between parties which may lawfully be decided by private arbitration if the disputants so agree.                                                                                                             |
| <b>Arbitration:</b>              | The reference of a dispute between two or more parties for determination, after an appropriate hearing, by a person or persons appointed by or on behalf of the parties.                                               |
| <b>Arbitration Act:</b>          | Act 42 of 1965.                                                                                                                                                                                                        |
| <b>Arbitration Agreement:</b>    | A written agreement which provides for the reference to an arbitration of any existing or future disputes relating to a matter specified in the Agreement whether an arbitrator is named or designated therein or not. |
| <b>Arbitration Proceedings:</b>  | This refers to all the steps in an arbitration from its commencement to finalisation.                                                                                                                                  |
| <b>Arbitrator:</b>               | The person who is mandated by the parties to an arbitrable dispute to resolve the dispute.                                                                                                                             |
| <b>Arbitrator's Indemnity:</b>   | The protection conferred by law on an arbitrator by the parties and which confers upon the arbitrator the power to determine the dispute so referred to him.                                                           |

|                                   |                                                                                                                                                                                                                                |
|-----------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Arbitrator's Jurisdiction:</b> | The mandate which has been given to the arbitrator by the parties and which confers upon the arbitrator the power to determine the dispute so referred to him.                                                                 |
| <b>Arbitrator's Lien:</b>         | The right to an arbitrator to withhold the award unless and until he has been paid his agreed or fair fees for the conduct of the arbitration.                                                                                 |
| <b>Arbitration Tribunal:</b>      | The arbitrator or arbitrators appointed to determine a dispute in terms of an arbitration agreement.                                                                                                                           |
| <b>Award:</b>                     | The decision of the arbitrator/s which determines the dispute submitted to them.                                                                                                                                               |
| <b>Claimant:</b>                  | The party initiating the arbitration and the equivalent of the <i>plaintiff</i> in litigation.                                                                                                                                 |
| <b>Confidentiality:</b>           | Arbitration proceedings are usually regarded as confidential, i.e., private between the parties and not intended for public knowledge.                                                                                         |
| <b>Defendant:</b>                 | The party against whom claims are brought in the arbitration, sometimes designated as the <i>respondent</i> .                                                                                                                  |
| <b>Disputants:</b>                | The parties to the dispute.                                                                                                                                                                                                    |
| <b>Dispute:</b>                   | A conflict of claims or rights; an assertion of a right, claim, or demand, on one side which is met with a denial or by contrary claims on the other side. A dispute, to be arbitrable, must be capable of a legal resolution. |
| <b>Domestic Arbitration:</b>      | An arbitration in which the disputing parties are citizens of the same country or residents in the same country or have their places of business in the same country.                                                          |
| <b>Expert Witness:</b>            | A witness who gives opinion evidence, usually on scientific or technical matters regarding an issue in the arbitration.                                                                                                        |
| <b>Gross Irregularity:</b>        | A substantial failure by the arbitrator in connection with the procedure followed in the arbitration giving rise to a ground for setting aside the award under section 33(1)(b) of the Arbitration Act.                        |
| <b>Interim Award:</b>             | Often used synonymously with part award but can also designate a preliminary or temporary decision of the arbitrator.                                                                                                          |
| <b>International Arbitration:</b> | Where the parties to a dispute are citizens or residents or have their place of business in different countries; often described as <i>cross-border disputes</i> .                                                             |
| <b>Joinder of Third Parties:</b>  | The process of bringing additional parties, other than the original claimant and defendant, into an arbitration which can only be done with the prior consent of third parties.                                                |

|                                 |                                                                                                                                                                                                                                                                                                            |
|---------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Misconduct:</b>              | Wrongful, dishonest or unlawful conduct by the arbitrator – typically instances of dishonesty, corruption or bias giving rise to a ground for the setting aside of an award under section 33(1)(a) of the Arbitration Act.                                                                                 |
| <b>Part Award:</b>              | A determination by the arbitrator/s of one or more but not all of the issues submitted for determination.                                                                                                                                                                                                  |
| <b>Party Autonomy:</b>          | The right of the parties, by their agreement, to dictate how the arbitration should be run; who should be chosen as arbitrator and what disputes the arbitrator must decide.                                                                                                                               |
| <b>Pleading:</b>                | The statement of claim and the statement of defence taken together as well as any further documents filed by the parties in elaboration or clarification of the claim of defence.                                                                                                                          |
| <b>Pre-arbitration Meeting:</b> | Meetings between the parties and the arbitrator to settle the procedure to be followed in the arbitration and any ancillary matters that may conveniently be dealt with in advance of the hearing.                                                                                                         |
| <b>Private Arbitration:</b>     | Arbitrations which are not compulsory by statute but which derive their binding force from the agreement between the parties.                                                                                                                                                                              |
| <b>Production of Documents:</b> | The documents which each party must produce and make available in the arbitration, the extend and nature of which is governed by the arbitration agreement and/or the rules by section 14 (1)(a)(i) of the Arbitration Act.                                                                                |
| <b>Publication:</b>             | An award is communicated to the parties and takes effect once <i>published</i> in accordance with the procedures in section 25 of the Arbitration Act.                                                                                                                                                     |
| <b>Recusal:</b>                 | A request made by one of the parties to the arbitrator by which the arbitrator is requested to relinquish his appointment as such by reason of some misconduct or conflict or like matter which prevents him from acting in an independent or impartial manner in the resolution of the dispute.           |
| <b>Reference:</b>               | Often used synonymously with submission but can be used to designate the document/s in which the arbitrator is told by the parties the precise ambit of the dispute which is to be determined.                                                                                                             |
| <b>Remittal:</b>                | In terms of Section 32 of the Act a party may within 6 weeks of publication of the award remit the award back to the arbitration tribunal for reconsideration provided good cause is shown.                                                                                                                |
| <b>Request to Arbitrate:</b>    | The first step in an AFSA administered arbitration in which the claimant refers the matter to the AFSA Secretariat and requests that it administer the arbitration in terms of the AFSA Rules – see the AFSA Request for Arbitration Form which is attached to the AFSA Rules for Commercial Arbitrations. |
| <b>Respondent:</b>              | The party against whom claims are brought in the arbitration, sometimes designated as the <i>defendant</i> .                                                                                                                                                                                               |

|                               |                                                                                                                                                                                                                                                                              |
|-------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Review:</b>                | The procedure mandated by section 33 of the Arbitration Act by which an arbitrator's award may be set aside by a Court. Can only be set aside in limited circumstances, such as arbitrator misconduct, gross irregularity in proceedings, or improper obtaining of the award |
| <b>Rules:</b>                 | The rules of an arbitration institution which the parties adopt and apply for the purpose of their arbitration. The parties may also decide to adopt and apply the rules of the High Court.                                                                                  |
| <b>Ruling or Direction:</b>   | Relates to a decision by the arbitrator/s regarding a procedural matter and not itself forming part of an award.                                                                                                                                                             |
| <b>Statement of Case:</b>     | A more general terms to describe the written statement of either party setting out its case for the arbitration.                                                                                                                                                             |
| <b>Statement of Claim:</b>    | The statement of case submitted by the claimant.                                                                                                                                                                                                                             |
| <b>Statement of Defence:</b>  | The statement of case submitted by the defendant.                                                                                                                                                                                                                            |
| <b>Statutory Arbitration:</b> | An arbitration which is made compulsory by a statute and hence differs from private arbitration which is voluntary and contractual.                                                                                                                                          |
| <b>Stay:</b>                  | An Order of Court made under section 6 of the Arbitration Act which prevents the arbitration from proceeding.                                                                                                                                                                |
| <b>Submission:</b>            | The arbitration agreement by which the parties bind themselves to submit present or future disputes to arbitration.                                                                                                                                                          |
| <b>Terms of Reference:</b>    | The list of issues which the arbitrator, in consultation with the parties, identifies as the matters which need to be determined in the arbitration as appears from the respective statements of case.                                                                       |
| <b>Umpire:</b>                | A person appointed to decide in arbitration proceedings where the arbitrators are unable to agree. To be distinguished from a third arbitrator or the Tribunal Chairman – see <i>Kannenberg v Gird</i> , 1966(4) SA 178 (C) and <i>Reitz v Katz</i> , 1926 SWA 50-51.        |
| <b>Venue:</b>                 | The place agreed by the parties, or designated by the arbitrator, as the place at which the hearing is to be conducted.                                                                                                                                                      |
| <b>Witness:</b>               | A person who gives testimony during the arbitration hearing and is examined and cross-examined.                                                                                                                                                                              |
| <b>Witness Statements:</b>    | A written statement indicating the nature of the evidence that a witness will give in the arbitration which is exchanged between the parties before the arbitration hearing commences.                                                                                       |

## **SECTION 2**

# **THE CONSTITUTION AND THE STATUS OF PRIVATE ARBITRATION**



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## **HOW DOES SECTION 34 OF THE CONSTITUTION AFFECT PRIVATE ARBITRATION?**

### **SECTION 34 OF THE CONSTITUTION**

**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**

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

|                 |                                                                                                                       |
|-----------------|-----------------------------------------------------------------------------------------------------------------------|
| <b>Citation</b> | <b>2009 (4) SA 529 (CC)</b>                                                                                           |
| <b>Court</b>    | <b>Constitutional Court</b>                                                                                           |
| <b>Judges</b>   | <b>Langa CJ, O'Regan ADCJ, Mokgoro J, Ngcobo J, Nkabinde J, Van Der Westhuizen J, Yacoob J, Jafta AJ and Kroon AJ</b> |

### **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 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.

## JUDGMENT OF THE MAJORITY

O'Regan ADCJ:

[188] I have had the opportunity of reading the judgment prepared in 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 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.**

[192] The arbitration process then followed. 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 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. Mphaphuli was unsuccessful in both the High Court and subsequently the Supreme Court of Appeal. 2 It now seeks leave to appeal to this court. [Constitutional Court]

[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 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 private arbitration agreements? and (c) what, if any, is the relevance of the Constitution to the judicial scrutiny of arbitration awards?**

## Private arbitration

[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 Systems (SA)(Pty) Ltd and Another* 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.'**

[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 Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) which provides for the enforcement of arbitration awards in contracting States and which has had a profound effect on arbitration law in many jurisdictions. It has also been served by the adoption of the Model Law on International Commercial Arbitration (the UNCITRAL 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.

[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 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). In determining the proper constitutional approach to private arbitration, we need to bear in 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.

## 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.'

[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:

'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 . . .'

[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. 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* the court grappled with the question as follows:

'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.'

[203] In *Telcordia Technologies Inc v Telkom SA Ltd* 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 on the basis that s 34, and particularly the requirement of 'fairness' within it, applies to private arbitration.

[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 European Convention on Human Rights is applicable to private arbitration. 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 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 prejudice the interests of justice.'

[205] In **Suovaniemi and Others v Finland** 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 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 principle acceptable. 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 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, *Hakansson and Stureson v Sweden* judgment of 21 February 1990, Series A No 171, 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.'

[206] The European Court then went on to consider whether the fact 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 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 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 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 their right to an impartial judge should be regarded as effective for Convention purposes.'

[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 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 drawing the attention of commentators.

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

[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 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.

### **Private arbitrator is not a Court**

[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 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 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 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. Private arbitrators are, of course, not provided by the State but are private agents employed by parties for the resolution of disputes.

[213] In considering whether private arbitration fits into the framework 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 arbitrator who may not be entirely independent. 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 'independent', then the language of s 34 does not seem to fit our conception of private arbitration.

[215] In concluding that s 34 does not have direct application to private arbitration, I do not finally consider what indirect application it may 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 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 resolution of a dispute is not that they have waived their rights under s 34. They have instead chosen not to exercise their right under s 34. 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, but that is a topic for another day.

[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 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.

[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 Kroon AJ. This conclusion, however, does not mean that the Constitution will have no relevance to private arbitration, as I shall now discuss.

### **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, 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 the values of the Constitution, the arbitration agreement will be null and void to that extent (and whether any valid provisions remain will 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. 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 arbitration was subject to an implied condition that the arbitrator should proceed fairly or, as it is sometimes described, according to law and justice. 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, they submit to a process they intend should be fair. 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 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 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'. 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.'

### **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. 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:

- '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 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
  - c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it 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
  - e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority . . .

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:

- 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 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'.

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 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.'

[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.'

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.

[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.'

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. 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

- 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.'

[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 of s 33 of the United Kingdom Arbitration Act), 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.

[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 (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 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, 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.

## Fairness

[36] 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 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 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), the goals of private arbitration may well be defeated.

## Should the arbitration award be set aside?

[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 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.

## 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 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 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).

[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 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 provided as follows:

'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 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 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.

## The proper interpretation of the arbitration agreement

[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'.

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.

[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 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 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.

[258] I conclude therefore that, on a proper interpretation of this 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 during arbitration proceedings.

[260] Another case relied upon by Kroon AJ is Shippel v Morkel and Another in which Van Winsen J relied on a passage from Voet and 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'.

In my view, this conclusion is incorrect. There is nothing in the 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 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 that should not be made.

## **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 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 suggested that a fair process would be to conduct a remeasurement on site to identify what work Bopanang had in fact undertaken.

[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 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 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 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 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 reasonable perception of bias. No more need be said on this score.

[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.

## **Ngcobo J gave a separate but concurring Judgment**

### **JUDGMENT OF THE MINORITY**

Kroon AJ:

He found that section 34 of the Consitution does apply to arbitrations.

## COOL IDEAS 1186 CC v HUBBARD AND ANOTHER

### 2014 (4) SA 474 (CC)

#### **Majiedt J**

Section 10(1)(b) Housing Consumers Protection Measures Act 95 of 1998 did not allow registration to take place during or at the end of construction; it was required at the beginning. Nor was Cool Ideas' non-registration cured by the fact that a subcontractor did the actual work. (Paragraphs [33] – [37] at 486B – 487A.)

The deprivation in s 10(1)(b) was aimed at a legitimate statutory purpose, namely the protection of home consumers against unscrupulous or unskilled builders. There was a rational, proportional connection between the penalty and the purpose, and hence no arbitrariness. (Paragraphs [38] – [44] at 487B – 488H.)

A distinction had to be drawn between the arbitration agreement and the underlying building contract. The latter remained valid in order to protect the consumer in respect of what was already erected and the home builder for what it had already received. (Paragraphs [45] – [51] at 488H – 491H.)

Fairness could not be invoked to circumvent the plain meaning of s 10(1)(b), regardless of how much work had been done. (Paragraph [52] at 491H – 492C.)

Arbitral awards that sanctioned illegalities or subverted the purpose of statutes were unenforceable. But this did not mean that courts would never enforce awards that were at odds with statutory prohibitions: it depended on public policy. In the present case the award violated a statutory prohibition backed by a criminal sanction and was therefore contrary to public policy and unenforceable. (Paragraphs [53] – [62] at 492D – 495C.)

In a dissenting judgment Froneman J (Cameron J, Dambuza J and Van der Westhuizen J concurring) held that the Act had to be interpreted in a manner less damaging to the right to property.

## PATCOR QUARRIES CC v ISSROFF AND OTHERS

**Citation** 1998 (4) SA 1069 (SE)  
**Court** South Eastern Cape Local Division  
**Judge** Mpati J

### Flynote:

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.

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.

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

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.

### Headnote:

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 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, 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 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 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.

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 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 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 could therefore not be set aside under s 33(1)(b) (gross irregularity in the conduct of the proceedings). (At 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 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.)

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.)

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.)

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

Mpati J

## **Attack on Arbitrator**

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 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.'

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 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 leads to only one conclusion ... namely that he was partial towards the first and second respondents in deciding the matter'.

**Section 28 of the Arbitration Act** provides that:

'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:

'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.'

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.

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. 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.'

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

'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 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 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.

In any event, I am not persuaded that the arbitrator ignored uncontroverted evidence on which he was obliged to reflect. ... In my view, it cannot be said that the arbitrator ignored uncontroverted evidence as was submitted by Mr Schubart.

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:

'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 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 favour of the respondents. 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 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 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 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 sought and obtained and that the applicant would not be liable for the payment of rental after date of the sale of the property.

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 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 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.'

Mr Van Rooyen argued that the relief sought by the applicant in terms of this section is out of time. Notice was not given 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 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.'

### **What constitutes Fresh Evidence**

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 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 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 in time. Thirdly, the evidence must be weighty and material. **It must be evidence which would be practically conclusive.** Fresh 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'.

It was accordingly submitted on behalf of the applicant that these developments 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.

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 arbitration proceedings and after the sale of the property, the third respondent might alter his award 'in the light of the 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.

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 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.

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:

Section 28 of the Arbitration Act provides that an arbitration award shall be final and binding and not subject to appeal '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 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 an appeal, then such party voluntarily abandons his right to appeal

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 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 cannot accept that his error was justus. . . In my view the respondent is bound by the agreement.'

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 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, 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 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

**IS PRIVATE ARBITRATION ADMINISTRATIVE ACTION?**

**IS IT SUBJECT TO THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT 3 OF 2000?**

**THE ANSWER TO BOTH QUESTIONS IS “NO”.**

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**ALWAYS REMEMBER THAT THERE ARE STATUTORY LIMITATIONS TO PRIVATE ARBITRATION – IT IS NOT PERMISSIBLE TO ARBITRATE ON ANY MATRIMONIAL CAUSE OR ANY MATTER INCIDENTAL TO ANY SUCH CLAUSE OR ANY MATTER RELATING TO STATUS (ARBITRATION ACT, SECTION 2**

## RESSELL v RESSELL

**Citation** 1976 (1) SA 289 (W)

**Judge** Davidson J

Flynote:

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 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 and client scale - Semble: Undesirability of too much litigation over a small child.

Headnote:

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 wish 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 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, 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.

Cur. adv. vult.

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 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 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 cannot avoid the conclusion that this agreement in this respect must have been made an order of Court per incuriam.

## **LAWFULNESS**

Any matter or matters in dispute between parties may be made the subject of a valid submission to arbitration, except such matters as are illegal, immoral or contrary to public policy.

Furthermore, the Courts will rarely enforce a private arbitration contrary to a plain statutory provision and never where enforcement would constitute a criminal offence.

## DE LANGE v PRESIDING BISHOP, METHODIST CHURCH OF SOUTHERN AFRICA AND ANOTHER

**2015 (1) SA 106 SCA**

**Judge Ponnann JA, Wallis JA, Pillay JA, Fourie AJA and Mathopo AJA**

Flynote:

Voluntary association — Disciplinary proceedings — Methodist minister announcing intention to enter same-sex marriage — Contravention of church's law — Church disciplinary tribunals terminating ministry — Minister 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 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).

Headnote:

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 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 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 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.)

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 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 122D – 123B, 127E – G and 127J – 128B.)

In a concurring judgment Wallis JA considered two issues. The first was whether 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.)

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 [47], [51], [56] – [57] and [67] at 129G – 130D, 131E, 133C – I and 138C – E.)

Order

The appeal is dismissed.

Ponan J

[1] 'People, as Kant said somewhere, are ungregariouly 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 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 . . .'

## AB v JB

### 2016 (5) SA 211 SCA

**Judges Maya AP, Swain JA, Tsoka AJA, Baartman AJA and Kathree-Setiloane AJA**

Flynote:

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)

Marriage — Divorce — Proprietary rights — Accrual system — Proof of accrual — When determined — Date of dissolution of marriage determinative (not of *litis contestatio*) — Matrimonial Property Act 88 of 1984, s 3(1).

Headnote:

This case concerned Mr AB's appeal to the Supreme Court of Appeal against a 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:

(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 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.

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

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 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 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 that the award falls to be set aside in terms of s 33(1) of the Act. 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 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.

[9] Dealing with the first issue, the court a quo held that the words any '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 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.

[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 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; the lis becomes res judicata (literally, a matter judged). It changes the terms of a settlement agreement to an enforceable court order.'

[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 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.

## V v V

### 1998 (4) SA 169 CPD

**Judge Foxcroft J**

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Flynote:

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 - 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. Court deciding that joint custody in best interests of children.

Headnote:

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 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.)

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.)

## **SECTION 3**

# **WHY ARBITRATE? THE ADVANTAGES AND DISADVANTAGES OF ARBITRATION**



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## THE ADVANTAGES OF ARBITRATION

The legal literature shows an understanding, over the centuries, of the advantages of arbitration over litigation.

So, for example, Johannes Voet, one of the foremost Roman-Dutch authorities, in his Commentary on the Pandects between 1698- 1700 said this:<sup>1</sup>

**“Reasons for going to arbitration** – “It often happens that disputes which have arisen are never brought before a judge owing to the intervention of .... Agreements ... it is a common thing for arbitrators to be approached with a view to the termination of a suit and the avoidance of a formal trial. The reason is that resort is commonly made to such persons by those who are frightened of the too heavy expenses of lawsuits, the din of legal proceedings, their harassing labours and pernicious delays, and finally the burdensome and weary waiting on the uncertainty of law.”

The then minister of Justice, Dr Dullah Omar, speaking at the launch of AFSA in 1996 spoke of the advantages of arbitration as being an alternative form of access to justice. He said:

Any objective assessment of our complex, industrialised and commercial society indicates that even where an effective, efficient and professional judicial system is in place, there is yet a need at every level of society for alternative dispute resolution mechanisms. This is so because even in the most advanced countries with the most sophisticated judicial systems, interest groups -business, labour, religious groups, cultural groups or community groups – continually look for a more speedy, more effective, more efficacious, less cumbersome, less expensive and often less abrasive ways of resolving disputes and problems, and our country is no exception in this regard.”

### He went on, with specific reference to AFSA:

“Business has the right to know that there are legitimate mechanisms in place through which disputes may be resolved effectively, efficiently, speedily and in the most economical way. AFSA will fill this void and I wish it every success...

We would devote our collective energy to ensure that the AFSA project is a success and becomes a component of a larger vision which ensures that all South Africa’s people enjoy access to justice.”

### Although written more than three centuries ago, Voet’s comments largely match the assessment of our Constitutional Court in the case of *Lufuno Mphaphuli & Associates (Pty) Limited v Andrews*<sup>2</sup> where the Constitutional Court noted at paragraph 197 the following:

“Some of the advantages of arbitration lie in its flexibility (as parties can determine the process to be followed by an arbitrator, including the manner in which evidence will be received, the exchange of pleadings and the like), its cross 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). In determining the proper constitutional approach to private arbitration, we need to bear in 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.”

<sup>1</sup> Pandects Book 4, Title 8, Section 1

<sup>2</sup> 2009(4) SA 529 (CC)

**Professor David Butler lists the main advantages of arbitration as follows:<sup>3</sup>**

#### **“1.4.1 *Specialised knowledge of the arbitrator***

Where the dispute relates to complex technical matters, as is often the case in the construction industry, the parties can drastically reduce the amount of expert evidence required to qualify a court to resolve that dispute, by using an arbitrator with specialised knowledge and experience in that field. An arbitrator with specialised knowledge regarding the matters in dispute may be able to provide the additional advantage of peer judgment, making his award more acceptable to the parties.

#### **1.4.2 *Reduced cost***

Arbitration may be a less expensive means of settling a dispute than litigation, but this is not necessarily the case. A judge or magistrate is paid by the state, whereas an arbitrator will usually require remuneration at his normal professional rates. In addition, it may be necessary to pay for the room where the arbitration is held and for secretarial and other facilities. If the proceedings take place under the auspices of an arbitral institution, or such institution is required to appoint an arbitrator, administrative charges are usually levied. As a result, arbitration will only be less expensive than litigation if the procedure used is less formal and time-consuming than that of a Supreme Court trial.

#### **1.4.3 *Convenience***

Whereas a trial in the Supreme Court will normally take place at the seat of the court on a date allocated by the registrar, arbitration may take place at a venue and time convenient for the parties and their advisers. However, because difficulties may be experienced in finding dates to suit the arbitrator, and all those involved in the arbitration, it is important to arrange a date for the hearing as soon as possible after the appointment of the arbitrator. Having a target date to work for provides a strong incentive to the parties and their advisers to make their preparations expeditiously and to fulfil their pre-hearing obligations to the other party timeously.

#### **1.4.4 *Saving in time***

A shortage of courts in relation to the number of cases hearing is partly responsible for the lengthy period of time between the institution of legal proceedings and the trial date. Abuse of pre-trial procedures involves further delays. Arbitration offers considerable advantages in this regard, if the terms of the arbitration agreement empower the arbitrator to ensure that there are no unnecessary delays before the hearing and to arrange for an expedited form of hearing compared to a Supreme Court trial. The arbitrator must then have the skill and strength of character to use these powers. The failure to achieve the advantage of the saving in time offered by arbitration ‘tends to reflect on the arbitrator and not on the arbitration process.’

#### **1.4.5 *Privacy***

Litigation takes place in open court. Both the public and the press have access to the proceedings. Arbitration proceedings are private and confidential. This advantage will be lost if either party approaches the court regarding some aspect of the arbitration proceedings. The confidentiality of arbitration is advantageous if both disputants have an interest in resolving their dispute privately without potentially damaging publicity. For example, if a dispute develops between members of a professional practice, they will probably prefer to resolve the dispute privately, because any publicity will have a damaging effect on clients’ confidence in the practice. However, where only one disputant has an interest in confidentiality, the other party may prefer to use litigation, in the hope that his opponent’s desire to avoid

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<sup>3</sup> See Arbitration in South Africa Law and Practice by David Butler and Eyvind Finsen (1993)

harmful publicity may offer tactical advantages leading to a negotiated settlement, particularly if the financially stronger party is the one wishing to avoid publicity. The danger that the privacy of arbitration could be abused by insurance companies, has led to statutory restrictions on the use of arbitration in disputes pertaining to insurance policies.

#### 1.4.6 *Flexibility*

Because of the consensual basis of arbitration, the arbitrator and the parties can determine by mutual agreement the procedure to be followed. They can adapt the procedure taking into account the nature and extent of the issues in dispute as well as the amount in dispute. By the time a dispute arises, one of the parties may perceive tactical advantages in delay. Therefore, an agreement to refer future disputes to arbitration should ideally give the arbitrator sufficient powers to follow the most appropriate procedure, even where one party is reluctant to comply. Only if the advantage of flexibility is used by the arbitrator and the parties' legal advisers, will arbitration result in a quicker and less expensive alternative to litigation, bearing in mind that the parties will usually have to pay the arbitrator his normal professional remuneration. Arbitration is more flexible than litigation as regards representation at the hearing. A party litigating in court must be represented by a lawyer unless the party appears in person. Moreover, a company litigating in the Supreme Court must be represented by an advocate. No such restrictions apply to arbitration proceedings, with the result that in an appropriate case, the parties could agree that they will be represented by law advocates with the necessary specialised knowledge in the relevant field.

#### 1.4.7 *Finality*

Whereas a judgment of a court may be taken on appeal to a higher court, an arbitrator's award is final and is not subject to appeal to the courts. The Supreme Court does, however, have statutory power to set aside or remit an arbitrator's award in certain circumstances.

#### 1.4.8 *Informality*

Particularly where disputants desire to go on doing business with each other, it is desirable to resolve their dispute with the minimum of damage to the relationship between the parties. Providing the arbitration is conducted in an informal manner, it will usually have a less destructive effect on this relationship than a formal Supreme Court trial. A more informal procedure produces greater party involvement and a more relaxed atmosphere and the dispute will be resolved more expeditiously. The more active involvement of the arbitrator in the stage prior to the hearing can also narrow the issues in dispute and reduce or prevent animosity between the parties."

### **Other Considerations**

#### 1.5 Easier to schedule

Choosing the "Judge"

Finality

## THE DISADVANTAGES OF ARBITRATION

### 1. Arbitration can be a fragile process

The policy of the law is to respect the freedom of the parties to design and follow their own process in the private arbitration of their disputes. This means they need to rely on each other to design and carry the process forward when they may already be in dispute with each other and that often makes the necessary cooperation impossible to achieve. Even where the process has been agreed upon, one of the parties may no longer wish to arbitrate and, therefore, undermines the process by obstruction and delay. Whilst an arbitrator can make rulings and give directions to keep the process alive, there is a limit to what the arbitrator can do and the result is that an arbitration process can break down very badly. It is to counter this fragility that arbitration institutions, such as AFSA, have been established in many countries with the main purpose of ensuring that the arbitration moves forward purposely and that the parties keep to their obligations and that the arbitrator performs his or her functions as required. Such arbitration institutions have the expertise to design an arbitral process which should perform optimally. Arbitration institutions which administer arbitrations, charge a fee for their services, but that fee should be seen as an insurance policy against the breakdown of the arbitration process.

### 2. Limited application of arbitration

An arbitration can only apply to the parties who have agreed to arbitrate and it may well happen that an important party necessary for the proper identification of the matter has not agreed to arbitrate in which case, litigation is the more effective mechanism to resolve the dispute.

### 3. Expense

Whereas the State bears the expense of the magistrate or judge and the expense of the use of the Courtroom and transcription services, in an arbitration, all these expenses have to be borne by the parties, as well as the cost of an administering authority if applicable. Only if the arbitration process moves quickly and efficiently, can these additional costs be justified, i.e. if the arbitration process is cost effective.

### 4. Misuse of the Rules of Court

It very often happens that lawyers who do not properly understand arbitration advise their clients to apply the Rules of Court to an arbitration process. This is a fundamental mistake because it sacrifices the advantages of arbitration by following an inappropriate procedure. As was noted by the Constitutional Court in *Lufuno's* case at paragraph 223.

“Of course, as this court has said on other occasions, what constitutes fairness in any proceedings will depend firmly on context. Lawyers in particular have a habit to equating fairness with the proceedings provided for in the Uniform Rules of Court. Where this approach is 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, and may dispense with pleadings, with oral evidence, and even oral argument.”

The use of Court rules in an arbitration has been compared to dropping an iron bar into moving machinery – it can have the same devastating effect on the arbitration process.

This is not only because the formalism and the time scale on which the Court Rules are based are inappropriate for arbitration, but also because those Rules incorporate what has been called “the three English diseases” – a reference to how the South Africa law in adopting the English law have adopted certain concepts of questionable value. These are:

- (1) The English principles applicable to pleadings, i.e the formal presentation of each party’s case.
- (2) The overboard ambit of discovery i.e. the production of documents relevant to the issues which each party is compelled to provide in advance of the oral hearing.
- (3) The oral hearing with its exhaustive procedure involving the leading of evidence, cross-examination of the witness and re-examination.

### **Re(1)**

The criticism of the English form of pleading is that it allows the defendant, in particular, to hide its true case by simply denying the allegations made by the plaintiff without being called upon to explain the basis of the denial until the defendant gives evidence. This can lead to “trial by ambush” and it is the opposite of which is required if the parties are to get to grips with the issues in a fair and straightforward manner and as quickly as possible.

### **Re(2)**

The English law, and the South African law, insist on an exhaustive production of documents which may be relevant by both parties. The requirement, generally, leads to a massive overproduction of documents which, in turn, increases the time required to prepare and the cost of the proceeding without delivering proper value in return. Where the High Court Rules relating to discovery are used in arbitrations, the general experience is that the bulk of the documentation produced is never actually used and that only 5% to 10% of the documents produced are vital to ensure a fair outcome.

### **Re(3)**

The English law, and the South African law, puts the oral hearing as the centrepiece of the trial process in the belief that the truth will emerge by subjecting the witnesses who give evidence to the full rigours of cross-examination. This is the culmination of what is called the adversarial process by which each party has the opportunity to test and discredit the other side’s case by oral confrontation.

The process is time-consuming and hugely expensive. The costs of litigation skyrocket the moment the case begins before the Judge.

There is a compelling reason to doubt the value – at least for the arbitration process – in following this adversarial format. All the evidence can be produced in written form and the arbitrator can proceed upon an investigative or inquisitorial basis in advance of any hearing. The time to spend in an oral hearing can be cut down by the arbitrator and be limited significantly. So long as both parties are given an equal opportunity to present their case (whether in writing or orally), the process will be fair and acceptable.

These fundamental differences in the way that litigation and arbitration should operate are key to understanding what constitutes a successful arbitration process. Ultimately, one of the greatest threats to a successful arbitration is the inexperience of some practitioners who are familiar only with litigation and who attempt to transplant litigation into arbitration. As noted by Sir Michael Kerr, a former Justice of Appeal:

*“For arbitration to maintain its advantages as an alternative to litigation, all those concerned in it – parties, solicitors, barristers, other professional representatives, expert witnesses and above all arbitrators – must therefore become familiar with the special features of the process, both good and bad. They need to be aware not only of the procedures usual in their own particular field of expertise, but also of the general range of procedures available. For example, many arbitrations are conducted so formally as to have been called ‘litigation without wigs’. This results more from an unthinking adherence to what has always been done by lawyers, than to a conscious decision that litigation procedure is the most appropriate to the needs of the case. Lawyers in arbitration do not follow litigation practice because they are determined because they are determined to do so. They tend to follow it because they are used to it and because any departure which may be suggested involves unfamiliarity, the need for inventiveness, and above all the risk of something going wrong for which they may be blamed. But they are not fundamentally obstructive; merely cautious. Admittedly, it may well be difficult for an arbitrator – particularly one who is not a lawyer – to bludgeon them into adopting a novel procedure. But they will respond to guidance from a firm tribunal which shows an understanding of their problems and the resulting synthesis in dealing flexibly with individual disputes will often produce great benefits in terms of time and costs.”<sup>4</sup>*

## 5. Other factors

- More costly;
- Discovery may be more limited;
- No automatic right of appeal unless agreed to from the outset;
- Mandatory arbitration;
- Unbalanced nature of the arbitration clause;
- Lack of transparency may make it easier to lead to bias;
- No automatic right of appeal;
- If one party feels the award is erroneous can't appeal unless agreement to appeal in the pre-arb stage;
- Can be more expensive;
- Getting to completion stage; and
- Lack of continuous hearing can be a problem.

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<sup>4</sup> **Handbook of Arbitration Practice**, Bernstein and Wood, 1993, p 5

# **SECTION 4**

## **KEY CONCEPTS IN PRIVATE ARBITRATION**



**AFSA**

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### **3.1 Party Autonomy**

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### **3.2 The contractual basis of arbitration**

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### **3.3 The arbitrator's duty of independence and impartiality**

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### **3.4 The promise of cooperation and good faith**

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### **3.5 The promise of fairness**

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### **3.6 Finality and the binding nature of the determination**

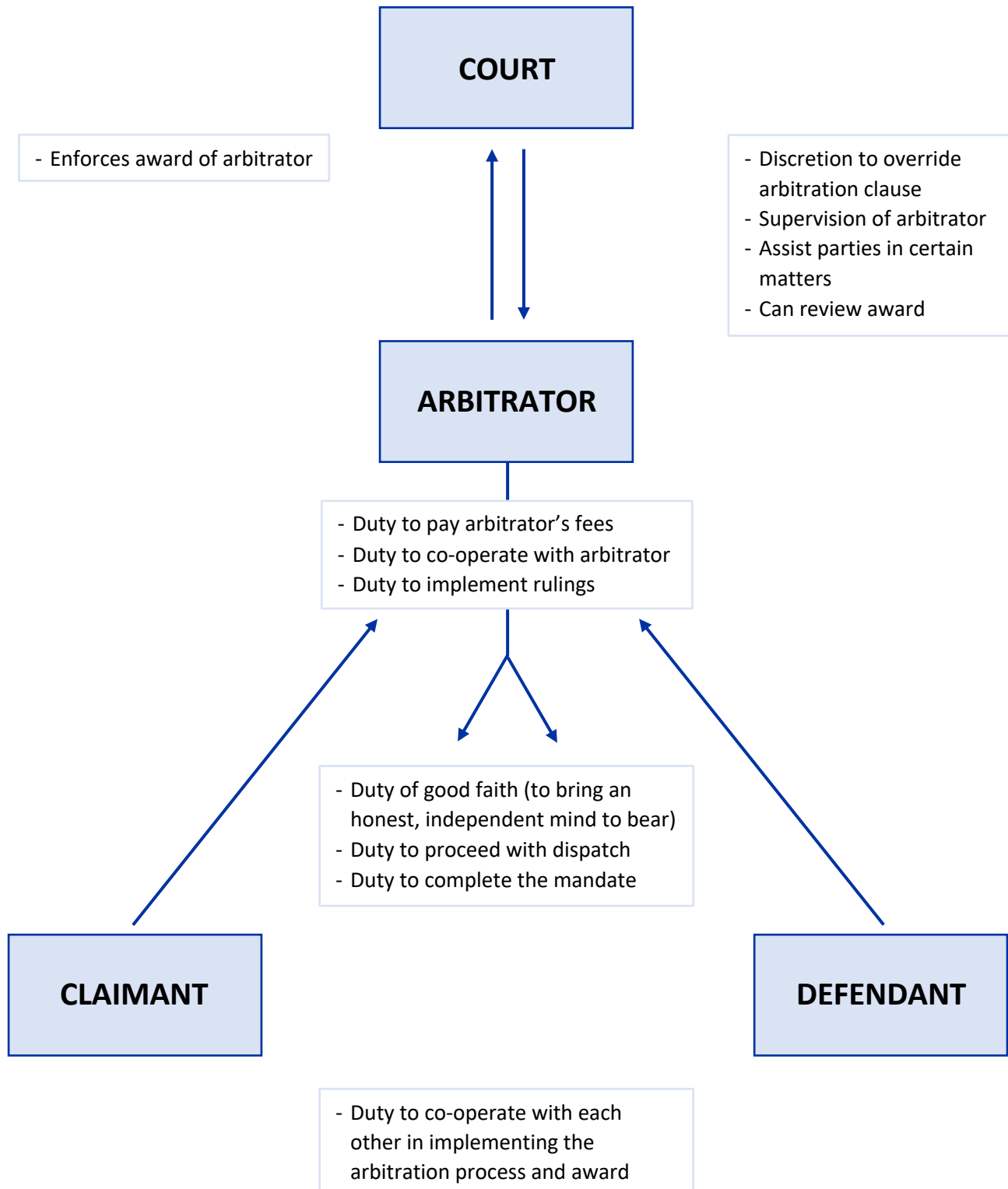
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### **3.7 Enforcement**

## **PARTY AUTONOMY**

The law recognises that parties have a right to resolve their disputes privately and not through the ordinary Courts (*Lufuno's* case at paragraph 197). Such a choice carries its own responsibilities. The parties are the master of their private process which will work as well or as badly as they deserve. They will have to make important and responsible choices in regard to that process but once they have made those choices, the law will respect and enforce those choices. That is what is meant by Party autonomy.

# THE STRUCTURE OF ARBITRATION



## THE LEGAL FOUNDATION OF THE ARBITRATOR'S RELATIONSHIP TO THE PARTIES

- **STATUTE**

The Arbitration Act confers powers on the Arbitrator and provides machinery for his appointment and removal (ss 14-16; 12-13), but this is subject to agreement in material respects and requires an Arbitration Agreement in order to apply.

- **CONTRACT**

The true foundation, but *sui generis*, since – powers of specific performance limited against Arbitrator:

- may be removed against his will and without breach.
- is difficult to apply in certain cases.

- **PUBLIC POLICY**

Common law recognition of Arbitrator's function and status.

### THE ARBITRATOR'S DUTIES TO THE PARTIES

- THE DUTY TO TAKE CARE
- THE DUTY TO PROCEED DILIGENTLY
- THE DUTY TO ACT IMPARTIALLY
- THE DUTY TO ACT FAIRLY

## THE DUTY TO TAKE CARE

- Whether or not he can be sued for negligence, the Arbitrator is bound to take due care.
- The proper working of the system and its ultimate fairness depends upon the Arbitrator.
- Specifically, it is his duty:
  - to see that the process moves forward with purpose.
  - to see that due procedure is observed.
  - to see that the law is properly applied.
  - to bring the dispute to an end by a competent award.

## THE DUTY TO PROCEED DILIGENTLY

- It is now regarded as an implied term of the contract that the Arbitrator will run the case with due speed because unnecessary delay erodes the quality of justice and increases costs.
- Speed is the hallmark of a good Arbitrator.
- Undue delay should be taken as a repudiation of the appointment and a ground for removal from office.
- Sections 13 and 23 of the Arbitration Act are intended to enforce the duty to proceed diligently.

## KELLY AND ANOTHER V LANE

The original judgment could not be found. Please find below a very helpful and concise summation by Mr Alastair Hay.

### REMOVAL OF AN ARBITRATOR

PUBLISHED 01 MARCH 2002 | CONSTRUCTION, ENGINEERING AND INFRASTRUCTURE LAW

If an arbitrator unreasonably delays the issue of an award, he may, upon application to the High Court, be removed as arbitrator and forfeit his remuneration.

To remove an arbitrator from office, a party is required to show good cause in terms of the Arbitration Act. The Act provides that good cause includes failure on the part of the arbitrator to use all reasonable despatch in making an award.

The court in the matter of Kelly and Another v Lane had to make a decision regarding the removal of an arbitrator on such grounds.

The chronology in the arbitration was as follows:

- From the appointment of the arbitrator to the first hearing – six months.
- From the first hearing to the next hearing – 11 months.
- From the date of the final submissions to the date of publishing of the award – one year three months.

The parties wrote to the arbitrator and expressed their dissatisfaction and gave fair notice of their intention to remove him as arbitrator if he failed to deliver his award. The arbitrator, unprofessionally, ignored this correspondence. It was only upon receipt of the application papers relating to a joint application by the parties for his removal that the arbitrator delivered his award.

The court indicated that what amounts to reasonable despatch will vary from case to case and should be determined with reference to inter alia:

- the nature of the arbitration;
- the complexity of the dispute;
- the interests of the parties; and
- the manner in which the parties, including the arbitrator, conducted themselves during the course of the arbitration proceedings.

The individual circumstances of the arbitrator causing the delay, such as illness, are irrelevant. The delay however must be culpable in that the arbitrator must be to blame for the delay.

In all cases the court has a discretion as to whether or not to remove an arbitrator in such circumstances. The court indicated that courts would not lightly intervene in order to remove an arbitrator and would be inclined to do so only if that was manifestly the right course to take.

In the case in question the court found that much of the delay in the arbitration had been caused by the parties themselves. However, it also found that the arbitrator had been guilty of an inexcusable delay of at least 11 months.

In the result, and because the arbitrator's award had not been final and there were outstanding issues still to be ruled upon, the court made an order removing the arbitrator and depriving him of any remuneration from the date when the inexcusable delay, in the court's view, had commenced. The court did not however order the arbitrator to pay the costs of the High Court proceedings for his removal as a mark of its displeasure at the unco-operative manner in which the parties themselves had conducted the arbitration proceedings and the delays which had been caused by them.

The court in its judgment offered the following useful guidance to arbitrators and parties engaged in arbitration proceedings:

- An arbitrator should not shirk from making a decision, irrespective of how difficult it might be.
- An arbitrator must be firm and must act without undue delay.
- An arbitrator should grasp the nettle and take control of the proceedings and not let cases drift.
- An arbitrator should not try and fit every case into the same procedural straitjacket.
- When parties agree to arbitration, they are under a duty to act in good faith towards one another.
- Parties should at all times be courteous towards each other and act professionally and avoid being drawn into unnecessary point-taking.
- The parties should be focused on resolving the disputes between them and their conduct to each other and the arbitrator must be consistent with the aim of seeking to resolve the dispute quickly, fairly and without an undue waste of costs.
- Practitioners representing parties should co-operate with each other and the arbitrator and maintain a professional and courteous relationship.

Notwithstanding having ordered the removal of the arbitrator, the court made it clear that this left the arbitrator's awards already made in the arbitration proceedings intact and unaffected.

## Costs

In the matter of South African Forestry Co Ltd v York Timbers Ltd the court reiterated the principle that, in making an award of costs, an arbitrator is required to observe the same principles as a court of law does in litigation.

Section 35 of the Arbitration Act provides that the arbitration tribunal has a discretion with respect to an award of costs and, in making an award, must give directions as to the scale and taxation of the costs.

The court confirmed that an arbitrator must exercise his discretion judicially – i.e. as would a judicial officer in a court of law – when awarding costs.

One of the issues before the court was whether or not the costs of expert witnesses were automatically recoverable where costs had been awarded in favour of a party.

The court held that the costs of expert witnesses did not as a matter of course form a component of an award of costs by an arbitrator (or for that matter by a court). Such costs had to be specially and specifically awarded by the arbitrator after consideration of whether those costs had been necessarily incurred and to what extent. The mere fact that an expert witness is called to give evidence does not automatically entitle the party calling him, if successful, to be awarded his qualifying fees as part of the costs award.

**ARTICLE BY**  
**ALASTAIR HAY**

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# PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS v SOUTH AFRICAN RUGBY FOOTBALL UNION AND OTHERS

**1999 (4) SA 147 (CC)**

**Judges** Chaskalson P; Langa DP; Ackermann J; Kriegler J; Goldstone J; Madala J; Mokgoro J; O' Regan J; Sachs J; Yacoob J

Flynote:

Constitutional practice - Courts - Constitutional Court - Jurisdiction - Application for recusal of members of Court - Judge sitting in case where she or he disqualified - Judge acting in manner inconsistent with s 34 of Constitution of the Republic of South Africa Act 108 of 1996 - Such raising constitutional issue.

Recusal - On grounds of appearance of bias - Test for - Test for recusal on grounds of perceived bias is whether there is apprehension of bias - Test objective - Onus on applicant to establish apprehended bias - Test to be applied on assumption that reasonable litigant will take into account presumption in favour of Judge's impartiality.

Recusal - On grounds of appearance of bias - Grounds for - Absolute neutrality on part of judicial officer hardly ever achieved - Appropriate for Judges to bring own life experience to adjudication process - Fact that Judges publicly articulated own propensities or politically active prior to appointment to Bench not by itself ground for disqualification - Ground for disqualification is reasonable apprehension that judicial officer will not decide case impartially or without prejudice, rather than that she or he will decide case adversely to one party - What is required of Judges is that they should decide cases that come before them without fear or favour according to facts and law, and not according to subjective personal views.

Recusal - On grounds of appearance of bias - Grounds for - Judge not disqualified from adjudicating dispute in which party a client prior to appointment to Bench - Judges disqualified only where in former capacity as advocates they either advised or acquired personal knowledge relevant to case before Court.

Headnote:

Prior to the hearing of an appeal by the Court the fourth respondent launched an application for the recusal of five members of the Court, including the President of the Court, on the basis of a 'reasonable apprehension' he had that the members of the Court would be biased against him. Amongst the grounds raised by the fourth respondent were that certain of the members of the Court had been members of the political party of which the first and second appellants were members and that the President of the Court had had a longstanding relationship of advocate and client with the first appellant.

Held, that a Judge who sat in a case in which she or he was disqualified from sitting because, seen objectively, there existed a reasonable apprehension that such Judge might have been biased, acted in a manner that was inconsistent with s 34 of the Constitution of the Republic of South Africa

Held, further, that the test for recusal on the ground of perceived bias was 'apprehension of bias' rather than 'suspicion of bias'. (Paragraphs [36] and [38] at 171D/E-E and 172B-C.)

Held, further, that the test should be applied on the assumption that a reasonable litigant would take into account that there is a presumption in favour of Judges' impartiality. This must therefore be taken into account in deciding whether

a reasonable litigant would have a reasonable apprehension that the judicial officer was or might be biased. (Paragraph [41] at 173B-C.)

Held, further, that absolute neutrality on the part of a judicial officer could hardly, if ever, be achieved. It was appropriate for Judges to bring their own life experience to the adjudication process. In a multicultural, multilingual and multiracial country such as South Africa, it could not reasonably be expected that judicial officers should share all the views and even the prejudices of those persons who appeared before them. In the case of a Judge of the highest Court of the land, other considerations may be taken into account. Justices in that Court were strong-minded people and, on the general subject-matters which came before them, they did have propensities; the course of decision could not be accounted for in any other way. The fact that some aspect of these propensities may have been publicly articulated prior to appointment to that Court could not be regarded as anything more than a random circumstance that should not by itself form a basis for disqualification. (Paragraphs [42], [43] and [44] at G 173C-C/D, 174C-C/D, 174G-175A/B.)

Held, further, that the test for apprehended bias was objective and that the onus of establishing it rested upon the applicant. (Paragraphs [45] and [48] at 175B-B/C and 177A/B-B.)

Held, further, that the question was whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the Judge had not or would not bring an impartial mind to bear on the adjudication of the case, that was a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension had to be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It had to be assumed that they could disabuse their minds of any irrelevant personal beliefs or predispositions. They had to take into account the fact that they had a duty to sit in any case in which they were not obliged to recuse themselves. At the same time, it could never be forgotten that an impartial Judge was a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there were reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or would not be impartial. (Paragraph [48] at 177B-E.)

Held, further, that an unfounded or unreasonable apprehension concerning a judicial officer was not a justifiable basis for such an application. The apprehension of the reasonable person had to be assessed in the light of the true facts as they emerged at the hearing of the application. It followed that incorrect facts which were taken into account by an applicant had to be ignored in applying the test. (Paragraph [45] at 175F-G.)

Held, further, that, although it was important that justice had to be seen to be done, it was equally important that judicial officers discharged their duty to sit and did not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a Judge, they would have their case tried by someone thought to be more likely to decide the case in their favour. The ground of disqualification was a reasonable apprehension that the judicial officer would not decide the case impartially or without prejudice, rather than that she or he would decide the case adversely to one party. (Paragraph [46] at 176B-D.)

Held, further, that the fact that a Judge may have engaged in political activity prior to appointment to the Bench was not uncommon in most, if not all, democracies, including South Africa. Nor should it have surprised anyone in this country. Upon appointment, Judges were frequently obliged to adjudicate disputes which had political consequences. It had never been seriously suggested that Judges did not have political preferences or views on law and society. Indeed, a Judge who was so remote from the world that she or he had no such views would hardly have been qualified to sit as a Judge. What was required of Judges was that they should decide cases that came before them without fear or favour according to the facts and the law, and not according to their subjective personal views. This was what the Constitution required. (Paragraph [70] at 185F/G-186A/B.)

Held, further, that all Judges were expected to put any party political loyalties behind them on their appointment and it was generally accepted that they did so. In South Africa, so soon after the transition to democracy, it would have been surprising if many candidates for appointment to the Bench had not been active in or publicly sympathetic towards the liberation struggle. It would have been ironic and a matter for regret if they were not eligible for appointment by reason of that kind of activity. It followed that a reasonable apprehension of bias could not be based upon political associations or activities of Judges prior to their appointment to the Bench unless the subject-matter of the litigation in question arose from such associations or activities. In this case that was not alleged by the fourth respondent. (Paragraphs [75] and [76] at 187F-188B.)

Held, further, that a recusal application founded upon a relationship of advocate and client prior to a Judge's appointment to the Bench in South Africa was unheard of. There had been countless cases where Judges had adjudicated disputes in which a party had been a client prior to their appointment. This was not surprising having regard to the nature of the relationship between advocate and client in the dual Bar system which prohibited a client from having direct access to an advocate without the intervention of an attorney. In the normal course the client did not select the advocate but left it to the attorney to do so. Of course, where Judges, in their former capacity as advocates, either had advised or acquired personal knowledge relevant to a case before the Court, it would not have been proper for them to have sat in such matter. Neither of these two circumstances was present in the present case. (Paragraph [79] at 188E/F-H.)

## THE DUTY TO ACT IMPARTIALLY

- The requirement is that the Arbitrator exercises an independent judgement and that he does not have any interest in the outcome or any bias.
- Actual bias is not required. It is enough that a reasonable person would regard a particular relationship or circumstance as objectionable.
- Unfairness or partiality in concluding the arbitration is a form of bias.
- Personal contacts with the parties are to be avoided lest they give rise to recriminations.
- It is fundamental that justice is seen to be done. An Arbitrator should be removed when a right-minded person might consider that a possibility of prejudice exists.

(Cases: **Appel v Leo**, 1947(4) SA 766(W); **Parys Municipality v Ahler**, 1991(2) SA 608; **Clark v Guarantee**, 1915 CPD 68)

## AFSA CODE OF CONDUCT FOR ARBITRATORS

By accepting appointment to the Panel of Arbitrators established and maintained by the **Arbitration Foundation of Southern Africa (AFSA)**, each Arbitrator undertakes to adhere to these principles and standards of conduct.<sup>5</sup>

- The Arbitrator will always discharge his/her duties in such manner as to ensure a fair administration of justice between the parties.
- An Arbitrator will not accept appointment unless he/she can act impartially and independently in that matter. He/she will disclose to the **AFSA** Secretariat before appointment any matter known to him/her which could impair, or which might reasonably be thought to impair his/her ability to act with due impartiality and independence.
- An Arbitrator will act diligently, and always with due courtesy to the parties and their witness.
- It is a condition of the appointment that the Arbitrator will devote sufficient time and proper attention to the matter.
- The Arbitrator will employ procedures which avoid unnecessary cost or delay and which promote the efficient despatch of his/her task.
- The Arbitrator will abide the rulings of the Ethics Committee of **AFSA** as published from time to time and accepts the duty to inform the Committee of any matter or thing which may be relevant to his/her appointment as an Arbitrator in any particular case or to the desirability of his/her continued appointment to an AFSA Panel of Arbitrators.

<sup>5</sup> See Arbitration Code of Conduct on the following page

- The Arbitrator undertakes to co-operate with the **AFSA** Secretariat in order to facilitate his/her work in administering any arbitration to which he/she is appointed as Arbitrator. The Arbitrator undertakes to remain at all times and **AFSA** Panellist in good standing.

## THE DUTY TO ACT FAIRLY

As was emphasised in the *Lufuno* case, it is an implied condition of any arbitration that the Arbitrator should proceed fairly, i.e. according to law and justice. The requirement of fairness is one of the core values of our constitutional order and so arbitration proceedings must be conducted fairly (*Lufuno's* case, paragraph 221). Fairness does not mean that the proceedings need to be equivalent to a Court case conducted under the Uniform Rules of Court. Arbitration is flexible and it may well be fair to conduct proceedings on either an adversarial or investigative basis and even to dispense with pleadings, oral evidence, and even oral argument (*Lufuno's* case, paragraph 223).

## ARBITRATION CODE OF CONDUCT

**By accepting appointment to the Panel of Arbitrators established and maintained by The Arbitration Foundation of Southern Africa each arbitrator undertakes to adhere to these principles and standards of conduct.**

- The arbitrator will always discharge his/her duties in such manner as to ensure a fair administration of justice between the parties.
- An arbitrator will not accept appointment unless he/she is satisfied that he/she can act impartially and independently in that matter. He/she will disclose to the AFSA Secretariat before appointment any matter known to him/her which could impair, or which might reasonably be thought to impair, his/her ability to act with due impartiality and independence.
- An arbitrator will act diligently and efficiently, and always with due courtesy to the parties and their witness.
- It is a condition of the appointment that the arbitrator will devote sufficient time and proper attention to the matter.
- The arbitrator will insist that the proceedings remain confidential unless the parties agree otherwise
- The arbitrator will employ procedures which avoid unnecessary cost or delay and which promote the efficient despatch of his/her task.
- The arbitrator will abide any rulings made by AFSA in regard to standards of conduct and accepts the duty to inform the AFSA Secretariat of any matter or thing which may be relevant to his/her appointment as an arbitrator in any particular case or to the desirability of his/her continued appointment to an AFSA Panel of Arbitrators.
- The arbitrator undertakes to co-operate with the AFSA Secretariat in order to facilitate the Secretariat's work in administering any arbitration to which he/she is appointed as arbitrator. The arbitrator undertakes to remain at all times an AFSA Panellist in good standing.

## **Other Factors as suggested by CIArb**

Not permit outside pressure to influence Arbitrator

Ethical conduct

Override rules or replace rules

Conflict of interest

Competence in the subject matter of the arbitration

Communication must be to both parties simultaneously

Relationship of Trust and confidence in Arbitrator must prevail

Arbitrator's fees should be agreed upfront.

## **SECTION 5**

# **THE STATUTORY DIMENSION TO ARBITRATION**

## **THE ARBITRATION ACT 42 OF 1965**



The Arbitration Foundation of Southern Africa  
NPC

## NOTE ON THE APPLICABILITY OF THE ARBITRATION ACT, 42 OF 1965

- Until December 2017, the Arbitration Act, 42 of 1965, governed every arbitration in South Africa, which was conducted in terms of written arbitration agreements, irrespective of whether the parties were South African or foreign.
- On 19 December 2017, the International Arbitration Act, 15 of 2017, came into force and this Act now applies to arbitrations which are conducted in terms of written arbitration agreements, but are of international origin, i.e. one or both parties are foreigners, or the business is not located in South Africa. The International Arbitration Act is dealt with in the **AFSA** International Arbitration Module.
- Note that the Arbitration Act 412 of 1965 applies also to statutory arbitrations under section 40.

**PLEASE NOTE THE ACT FOR THE PURPOSES OF THIS LECTURE HAS BEEN ABBREVIATED. THE FULL VERSION CAN BE FOUND IN FILE 3**

## **ARBITRATION ACT 42 OF 1965**

[Updated to 11 October 2024.\*\*]

\*\*Date of last changes incorporated into this Act.

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*(English text signed by the State President.)*

*(Assented to 5<sup>th</sup> April 1965.)*

### **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.

### **ARRANGEMENT OF SECTIONS**

#### **DEFINITIONS**

1. Definitions

#### **MATTERS NOT SUBJECT TO ARBITRATION**

2. Matters not subject to arbitration

#### **EFFECT OF ARBITRATION AGREEMENTS**

3. Binding effect on arbitration agreement and power of court in relation thereto
4. Death or removal from office of party to an arbitration agreement
5. Insolvency or winding-up of a party to an arbitration agreement
6. Stay of legal proceedings where there is an arbitration agreement
7. Power of court to order that dispute be determined by interpleader proceedings or that interpleader issues be determined by arbitration
8. Power of court to extend time fixed in arbitration agreement for commencing arbitration proceedings

#### **ARBITRATORS AND UMPIRES**

9. Reference to a single arbitrator
10. Power of parties to appoint arbitrators to fill vacancies
11. Power of parties or arbitrators to appoint umpire and to fill vacancy
12. Power of court to appoint an arbitrator or umpire
13. Termination or setting aside of appointment of arbitrator or umpire

## **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
15. Notice of proceedings to parties
16. Summoning of witnesses
17. Recording of evidence
18. Reference of particular points to umpire
19. Powers of umpire
20. Statement of case for opinion of court or counsel during arbitration proceedings
21. General powers of the court
22. Offences

## **PROVISIONS AS TO AWARDS**

23. Time for making award
24. Award to be in writing
25. Publication of award
26. Interim award
27. Specific performance
28. Award to be binding
29. Interest on amount awarded
30. Power of arbitration tribunal to correct errors in award
31. Award may be made an order of court
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## **REMUNERATION OF ARBITRATORS AND UMPIRE AND COSTS**

34. Remuneration of arbitrators and umpire
35. Costs of arbitration proceedings
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## **MISCELLANEOUS PROVISIONS**

37. Service of notices
38. Extension of periods fixed by or under this Act
39. This Act binds the State
40. Application of this Act to arbitrations under special laws
41. ...
42. Repeal of laws
43. Short title

## 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.

## **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**

...

#### **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;
- (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.
- (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;

## **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 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
- (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.
- (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**

### **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
- (c) by sending it by post to that person at his usual or last known place of residence in the Republic; or
- (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.

## **SECTION 6**

# **ARBITRATION: THE AGREEMENT TO ARBITRATE**



**AFSA**

The Arbitration Foundation of Southern Africa  
NPC

## THE AGREEMENT TO ARBITRATE

- The arbitration agreement is defined in the Arbitration Act (section 1) to mean a written agreement which provides 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.
- The arbitration agreement is the foundation stone of private arbitration, i.e. it is the consensual element (the binding agreement) which is the legal pre-requisite for arbitration.
- Since it is an agreement, it can be varied, or cancelled, or supplemented, as the parties wish from time to time, and it falls to be interpreted according to the rules of interpretation which apply to any contract.
- The arbitration agreement is addressed in the following sections of the Arbitration Act:  
3(1);3(2);4;5;6;7 and 8
- The arbitration agreement is addressed and amplified in the following articles of the AFSA Commercial Rules:  
3.3;4.2;6.1.4;6.2;8;9;10.1.2;11;14;21.2
- Previously, the “Agreement to Arbitrate” was called the “Submission to Arbitration”.
- The “Agreement to Arbitrate” can be a self-standing Agreement, or it can be a single clause in a larger commercial Agreement.

## DEFINING THE ISSUE IN THE ARBITRATION AGREEMENT

- The arbitration agreement is usually drawn before the dispute has arisen and therefore cannot precisely state the nature of the particular dispute which eventuates.
- Nonetheless, the definition of the issue in the arbitration agreement is vital, because it defines what the Arbitrator is allowed and mandated to decide, and insofar as the Arbitrator goes beyond it, his decision (award), is invalid.
- An unclear definition gives rise to disputes as to what it includes or excludes thus necessitating recourse to Court, delay or wasted costs.
- Draftsman must draw the clause widely-  
“in connection with”  
“arising from”  
“in any way connected with”
- This is best done by spreading the net wide and not by identifying classes or categories of issues.

## EXAMPLES OF ARBITRATION AGREEMENTS FOR COMMENT AND CONSIDERATION

### EXAMPLE A

#### ARBITRATION

**A dispute arises in regard to:**

the interpretation of, or

the carrying into effect of; or

any of the parties' rights and obligations arising from, or

the termination or purported termination of, or arising from the termination of;

**or**

the rectification or proposed rectification of;

this agreement or pursuant to this Agreement or on any manner which in terms of this Agreement (other than where an interdict is sought or urgent relief may be obtained from a court of competent jurisdiction), shall be submitted to and decided by arbitration.

**That arbitration shall be held-**

with only the parties and their representatives present thereat at Johannesburg;

otherwise in terms of the Arbitration legislation for the time being in force, but subject to the provisions hereof.

It being the intention that the Arbitration shall, where possible, be held and concluded in twenty-one (21) working days after it has been demanded. The parties shall use their best endeavours to procure the expeditious completion of the Arbitration.

**The Arbitrator shall be, if the matter in dispute is principally –**

a legal matter, a practising advocate of not less than ten (10) years' standing , or a practising attorney of not less than ten (10) years' standing;

an accounting matter, a practising chartered accountant of not less than ten (10) years' standing.

any other matter, an independent person agreed upon between the parties.

If the parties fail to agree on an arbitrator within three (3) days after the Arbitration has been demanded, the Arbitrator shall be nominated, at the request of either of the parties, by the President for the time being of the Law Society of the Transvaal.

If the parties fail to agree whether the dispute is of a legal, accounting or other nature within five (5) days after the arbitration has been demanded, it shall be considered a matter referred to in clause 21.3.3.

The Arbitrator shall have the fullest and most free discretion with regard to the proceedings. His award shall be final and binding on the parties to the dispute.

Furthermore, the Arbitrator may by notice to the parties within seven (7) days after his appointment, dispense wholly or in part with formal submissions or pleadings provided that the parties are given the opportunity to make proper and full submissions-

shall determine the applicable procedures and shall not be bound by strict rules of evidence and may, in addition to any other award he/she may be able to make-

to cancel this Agreement or determine that a party has lawfully cancelled or is entitled lawfully to cancel this Agreement or requires specific performance, with or without an award for damages, but may not award cancellation of this Agreement or determine that the Agreement was lawfully cancelled, or that a party is lawfully entitled to cancel the Agreement unless the breach complained of is found by him to be a material one going to the root of the contract which cannot be compensated for by an award of damages or recoupment under any indemnity given in terms of this Agreement:

“make the contract” between the parties by completing any gaps or omissions in the contract, or by determining any matter which has been or is left to be agreed upon by the parties and on which they have not reached agreement;

may take into account the practicality or otherwise of ordering the continuance of any legal relationship between the parties;

unless this Agreement otherwise requires, may sever any contract constituted by this Agreement between any two or more of the parties hereto from any other contract so constituted and may cancel one without thereby cancelling all or any of the others.

Shall make such order as to costs as he/she deems just.

Either party shall be entitled to have the award made an order of court of competent jurisdiction.

Any dispute shall be deemed to have been referred or subject to Arbitration hereunder when either party given written notice to the other of the dispute, demands an Arbitration and requests agreement on an Arbitrator.

The provisions of this clause are severable from the rest of this Agreement and shall remain in effect even if this Agreement is terminated for any reason.

## EXAMPLE B

### ARBITRATION

**If there is any dispute between the parties as to:**

the interpretation of this Agreement; or

the implementation of this Agreement; or

the cancellation of this Agreement; or

the performance of any of the parties of its obligations in terms of this Agreement;

**or**

any other matter in terms of or arising out of the provisions of this Agreement such dispute shall be settled by Arbitration in terms of the provision of clause 21.2 below:

“21.2 Any dispute referred to in clause 21.1 above shall be settled by Arbitration in the following manner:

The Arbitrator shall be such party as may be agreed upon between the parties within seven (7) days after the date on which any such dispute arises and failing agreement as aforesaid, the Arbitrator shall be a senior counsel practising at the Johannesburg Bar, or a retired judge selected by the President for the time being of the Transvaal Law Society;

the procedure (including the venue and times of hearing) relating to such Arbitration shall be determined by the Arbitrator in his /her sole discretion;

the decision of the Arbitrator shall be final and binding on the parties;

subject to the foregoing, the provisions of the Arbitration Act, 1965, shall apply to such Arbitration.”

## EXAMPLE C

### ARBITRATION

1. Save as expressly provided in this deed, should any dispute arise between any of the parties and/or unitholders in regard to:
  - 1.1. the interpretation of;
  - 1.2. the effect of;
  - 1.3. the parties' and/or unitholder's respective rights or obligations under;
  - 1.4. a breach of;
  - 1.5. the termination of;
  - 1.6. any other matter arising out of the termination of-

this deed, that dispute shall be decided by Arbitration before a single Arbitrator in the manner set out in this clause.
2. The Arbitrator shall be appointed by the parties, and failing agreement, shall be appointed by the President of the Arbitration Foundation of Southern Africa (AFSA). Should AFSA not be in existence at the time, the nomination shall be by the Chairman for the time being of the Johannesburg Bar Council.
3. The Arbitration shall be held at Sandton.
4. The Arbitration shall be held in accordance with the Rules of AFSA. If AFSA shall not be in existence, the Arbitration shall be held in accordance with the formalities and procedures settled by the Arbitrator which shall be an informal and summary matter, that is, it shall not be necessary to observe or carry out either the usual formalities or procedures or the strict rules of evidence, and otherwise subject as aforesaid to the Arbitration Act, 1965 of the Republic of South Africa and any statutory modification or re-enactment thereof.
5. The Arbitrator shall be entitled to:
  - 5.1. investigate or cause to be investigated any matter, fact or thing which he considers necessary or desirable in connection with any matter referred to him for decision;
  - 5.2. decide the matters submitted to him according to what he considers just and equitable in all the circumstances, having regard to the purpose of this Agreement; and
  - 5.3. make such award, including an award for specific performance, an interdict, damages or a penalty or the costs of Arbitration or otherwise as he in his discretion may deem fit and appropriate.
6. The Arbitration shall be held as quickly as possible after it is demanded, with a view to it being completed within thirty (30) days after it has been so demanded.

7. The Arbitration shall be held in camera and the parties shall maintain the utmost confidentiality with regard to all matters in issue in the Arbitration.
8. The clause is severable from the rest of the Agreement and shall therefore remain in effect if this Agreement is terminated.
9. The law governing the Agreement shall be the South African law, and the court having jurisdiction to enforce any award made under this clause shall be the appropriate division of the High Court of South Africa, which has jurisdiction over the party against whom the award is being enforced.

## EXAMPLE D

### RECOMMENDED AFSA STANDARD CLAUSES

The following standard clauses are recommended by AFSA for inclusion in contracts and for use after a dispute has arisen.

The Foundation recommends the use of the following standard clauses designed widely to encompass disputes arising in connection with contracts:

A. *“Any dispute arising from or in connection with this Contract shall be finally resolved in accordance with the Rules of the Arbitration Foundation of Southern Africa by an Arbitrator appointed by the Foundation.”*

**B. ARBITRATION CLAUSE FOR USE AFTER A DISPUTE HAS ARISEN**

“We

A,B of \_\_\_\_\_

And

X,Y of \_\_\_\_\_

*hereby agree to refer all disputes and differences between us arising out of or in connection with a contract between us dated \_\_\_\_\_.*

**OR**

*the disputes and differences set out in the Schedule to this Agreement for final resolution in accordance with the Rules of the Arbitration Foundation of Southern Africa by an Arbitrator or Arbitrators by the Foundation.*

**C. DISPUTE RESOLUTION (MED-ARB) CLAUSE FOR INCORPORATION IN STANDARD CONTRACTS BEFORE A DISPUTE HAS ARISEN**

*“Should any dispute, disagreement or claims arise between the parties (called hereafter “the dispute”) concerning the Agreement, the parties shall try to resolve the dispute by negotiation. This entails that the one party invites the other in writing to a meeting and to attempt to resolve the dispute within seven (7) days from date of the written invitation.*

*If the dispute has not been resolved by such negotiation, the parties shall submit the dispute to AFSA administered mediation, upon the terms set by the AFSA Secretariat.*

*Failing such a resolution, the dispute, if arbitrable in law, shall be finally resolved in accordance with the Rules of the Arbitration Foundation of Southern Africa by an Arbitrator or Arbitrators appointed by the Foundation.”*

**D. ARBITRATION CLAUSE FOR INCORPORATION IN INTERNATIONAL AGREEMENTS BEFORE A DISPUTE HAS ARISEN**

*“The parties agree to submit any disputes or differences between them arising out of this contract to Arbitration as provided by the UNCITRAL Arbitration Rules in respect of which the Arbitration Foundation of Southern Africa will act as the appointing and administering authority.”*

## EXAMPLE E

### ARBITRATION

In the event if a dispute arising between the parties with regard to any matter arising out of this Agreement, then either party shall be entitled to claim by written notice to the other that the dispute should be submitted to and decided by Arbitration on the following basis:

The Arbitrator shall be if the question in issue is-

1. Primarily an accounting matter, an independent practising Accountant of not less than ten (10) years' standing, agreed to between the parties.

Primarily a legal matter, a practising Senior Counsel or Attorney of not less than ten (10) years' standing, agreed to between the parties;

Any other matter, an independent person agreed to by the parties and failing agreement being reached within three (3) days after the date on which the Arbitration is demanded, the Arbitrator shall be a person nominated by the Chairman for the time being of the Johannesburg Bar Council, who may be instructed by either party to make that nomination at any time after there has been failure to agree.

2. The Arbitration shall be held in Johannesburg with the formalities and procedure settled by the Arbitrator which may be an informal and summary matter in the sense that it shall not be necessary to observe or carry out either the usual formalities or procedures or the strict rules of evidence.
3. The Arbitrator shall be entitled to investigate or cause to be investigated any mater, fact or thing which he considers necessary or desirable in connection with the matter referred to him for decision; he/she shall be entitled to interview and question under oath any other parties to the dispute; to decide the matters submitted to him/her according to what he/she considers just and equitable in the circumstances; to make such award as he/she in his or her discretion may deem fit and appropriate.
4. The Arbitration shall be held as quickly as possible after it is demanded.
5. The parties hereby irrevocably consent to the said Arbitration proceedings being held in terms hereof and agree and undertake that any award that may be made by the Arbitrator shall be final and binding upon them.

## EXAMPLE F

### ARBITRATION CLAUSES

#### Short form submitting to AFSA process

*(as suggested by Practical Legal Training School under auspices of the Law Society of South Africa and by AFSA)*

Any dispute, difference, impasse or deadlock between the parties pursuant to this Agreement must be referred to Arbitration in terms of the rules and regulation of the Arbitration Foundation of Southern Africa.

#### Common form found in many contracts

1. Should any dispute arise between the parties in regard to:
  - 1.1. the interpretation of;
  - 1.2. the carrying into effect of; or
  - 1.3. the parties' respective rights and obligations in terms of this Agreement;
  - 1.4. the rectification of; or
  - 1.5. the termination arising out of the termination of;
  - 1.6. any question as to whether a valid and binding Agreement was concluded between the parties or whether such Agreement is of legal force or effect; or
  - 1.7. any other matter whatsoever emanating from this Agreement, that dispute shall be submitted to and finally settled by Arbitration.
2. Any party to this Agreement may demand that a dispute be settled in terms of this clause by giving written notice to the other party.
3. This clause 1 shall not prevent a party from obtaining relief on an urgent basis from a competent court, pending the decision of the Arbitrator.
4. The Arbitration shall be held-
  - 4.1. in.....(town/city) at.....(place);
  - 4.2. with only the parties and their representatives thereat;
  - 4.3. *mutatis mutandis* in accordance with the Rules of the High Court, provided that no time period specified therein shall be longer than ten (10) court days for the purpose of the Arbitration;
  - 4.4. otherwise in terms of the Arbitration Act of 1965, it being the intention that the Arbitration shall be held and concluded as soon as possible.

4.5. The Arbitrator shall, if the matter is principally-

4.5.1. **a legal matter**, be a practising counsel or a practicing attorney of not less than ten (10) years' standing;

4.5.2. **an accounting matter**, be a practising chartered accountant of not less than ten (10) years' standing;

4.5.3. **any other matter**, be an independent person qualified to hear and adjudicate upon such matter and **shall be agreed to between the parties to the dispute.**

## EXAMPLE G

### ARBITRATION

#### 1. **separate, divisible Agreement**

This clause is a separate, divisible Agreement from the rest of this Agreement and shall not be or become void, voidable or unenforceable by reason only of any alleged misrepresentation, mistake, duress, undue influence, impossibility (initial or supervening), illegality, immortality, absence of consensus, lack of authority or other causes relating in substance to the rest of the Agreement and not specifically to this clause. The parties intend that any such issue shall be subject to Arbitration in terms of this clause.

#### 2. **disputes subject to Arbitration**

Any dispute arising out of or in connection with this Agreement or the subject matter of this Agreement, including, without limitation, any dispute concerning –

- 2.1. the existence of this Agreement apart from this clause;
- 2.2. the interpretation and effect of this Agreement;
- 2.3. the parties' respective rights or obligations under this Agreement;
- 2.4. the rectification of this Agreement;
- 2.5. the breach, or any matter arising out of the breach of this Agreement;
- 2.6. damages in delict, compensation for unjust enrichment or any other claim, whether or not the rest of this Agreement apart from this clause, is valid and enforceable, shall be decided by Arbitration as set out in this clause. The decision of the Arbitrator shall be final and binding on the parties, provided that any party may institute appeal proceedings in accordance with the appeal rules of **AFSA**.

#### 3. **appointment of Arbitrator**

- 3.1. The parties shall agree on the Arbitrator who shall be an attorney or advocate on the panel of Arbitrators of the Arbitration Foundation of Southern Africa (AFSA). If agreement is not reached within ten (10) days after either party in writing calls for agreement, the Arbitrator shall be an attorney or advocate nominated by the Registrar of AFSA for the time being.
- 3.2. The request to nominate an Arbitrator shall be in writing outlining the claim and any counterclaim of which the party concerned is aware, and, if desired, suggesting suitable nominees for appointment, and a copy shall be furnished to the other party who may, within seven (7) days submit written comments on the request to the addressor of the request.

#### 4. **venue and period for completion of Arbitration**

The Arbitration shall be held in Sandton and the parties shall endeavour to ensure that it is completed within ninety (90) days after notice requiring the claim to be referred to Arbitration is given.

#### 5. **Arbitration Act-rules**

The Arbitration shall be governed by the Arbitration Act 1965 or any replacement Act and shall take place in accordance with the Commercial Arbitration Rules of **AFSA**.

6. Should the parties to a dispute fail to agree whether the dispute is principally a legal, accounting or other matter within seven (7) days after Arbitration has been demanded, the matter will be considered to be a legal dispute.
7. Should the parties fail to agree upon an Arbitrator within fourteen (14) days after the Arbitration has been demanded, then the Arbitrator shall be appointed at the request of either of the parties to the dispute by the President for the time being of the Law Society for the province.
8. The parties irrevocably agree and undertake with each other that any award may be made by the Arbitrator –
  - 8.1. shall be final and binding upon them;
  - 8.2. will be carried into effect;
  - 8.3. may be made an order of court of the country to whose jurisdiction such party to the dispute may be subject.
9. The provisions of this clause constitute the irrevocable consent of the parties to the Arbitration proceedings in terms hereof and none of the parties shall be entitled to withdraw therefrom or to claim at any such Arbitration proceedings that it is not bound of the provisions of the clause.

## PRACTICE NOTES TO KING REPORT III

A dispute concerning or arising out of this Agreement exists once a party notifies the others in writing of the nature of the dispute and requires it to be resolved under this clause. The parties must refer any dispute to be resolved by:

- negotiation; failing which
- mediation; failing which
- Arbitration

Within ten (10) Business days of notification, the parties must seek an amicable resolution to the dispute by referring it to designated and authorised representatives of each of the parties to negotiate and resolve it by the parties signing an Agreement resolving it within fifteen (15) Business days.

If negotiation fails, the parties must refer the dispute for resolution by mediation under the Rules of the Arbitration Foundation of Southern Africa (or its successor or body nominated in writing by it in its stead (AFSA).

If mediation fails, the parties must refer the dispute within fifteen (15) Business Days for resolution by Arbitration (including any appeal against the Arbitrator's decision) by one Arbitrator (appointed by agreement between the parties) as an expedited Arbitration in Sandton under the then current rules for expedited Arbitration of AFSA.

The periods for negotiation or mediation may be shortened or lengthened by written agreement between the parties.

This clause will not preclude any party from access to an appropriate court of law for interim relief in respect of urgent matters by way of an interdicts, or mandamus pending finalisation of this dispute resolution process, for which purpose the parties irrevocably submit to the jurisdiction of a division of the High Court of the Republic of South Africa.

This clause is a separate, divisible agreement from the rest of this Agreement and must remain in effect even if the Agreement terminates, is nullified, or cancelled for any reason or cause.

Parties are entitled to use any dispute resolution administrator, but **AFSA** is recommended by the iODSA. If another administrator is appointed, then its name must be inserted in place of **AFSA**.

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  - ***Complete copies of the King Report III and the Practice notes supporting the report and the Code are available from the Institute of Directors of Southern Africa ([www.iodsa.co.za](http://www.iodsa.co.za))***

## HIDDEN TRAPS IN ARBITRATION AGREEMENTS

- Where an Arbitration Agreement is part of a larger contract does its validity or continuing nature depend upon the validity or the continuing nature of the larger Agreement, or is it separate from the fate of the larger Agreement.
- If the larger Agreement is cancelled, then does it mean that the Arbitration Agreement is cancelled?
- Can an Arbitrator decide on these questions or must they go to Court?

## WAYLAND v EVERITE GROUP LTD

### 1993 (3) SA 946 W

**Judge**                      **Levy AJ**

Flynote:

Arbitration - Reference of dispute to arbitration - Validity of contract 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:

It seems to be eminently reasonable that a clause of a contract (in the 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 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 would be an improper reference.

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 application. The application was accordingly dismissed.

#### 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.

#### Judgment

Levy AJ:

It will have been noted that the arbitration clause contained in the 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 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:

- 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
- 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 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 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:

'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 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 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 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 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 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, 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 . . .).'

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 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 do otherwise would 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 had in entering into the main agreement and the one must be co-existent

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.

## **DIPENTA AFRICA CONSTRUCTION (PTY) LTD v CAPE PROVINCIAL ADMINISTRATION**

**1973 (1) SA 666 C**

**Judge Corbett J**

Flynote:

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 dispute - Engineer to be appointed - Provision for submission of disputes of law to Supreme Court - Effect.

Headnote:

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 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 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.

Semle: That the parties should exercise a wise forbearance in regard 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.

### **Judgment**

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 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 Administration, with whom the applicant contracted for the execution of this work in terms of a written contract.

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 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.

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 counter-application for the appointment of one or other of its three nominees.

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 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 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.

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 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 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 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.

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.

It is accordingly ordered as follows:

- (1) that the disputes between the parties which have been submitted to arbitration be adjudicated upon by a professional engineer appointed as arbitrator;
- (2) that the applicant be given a period of one month within which to notify the respondent in writing which of the three nominees submitted by the respondent, namely, Dr. H. L. B. Uhlmann, Prof. M. F. Kaplan and Mr. E. R. P. Chunnett, it chooses as arbitrator;
- (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;
- (4) the costs of this application will be costs in the cause, such costs to include the costs of two counsel.

## STEWART v CITY OF HARARE

### 1985 (1) SA 34 Zimbabwe High Court

**Judge**                      **McNally J**

Flynote:

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 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.

## **NORTH EAST FINANCE (PTY) LTD v STANDARD BANK OF SOUTH AFRICA LTD**

**2013 (5) SA 1 SCA**

**Judge Lewis JA, Ponnann JA, Shongwe JA, Saldulker JA and Zondi AJA**

Flynote:

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 regarding validity/enforceability of contract may nevertheless be determined by arbitration, provided that parties foresaw possibility of such dispute arising.

Contract — Interpretation — Contract must be interpreted by determining the parties' intention having regard to context and its purpose — Commercially sensible meaning to be attributed.

Headnote:

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 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.

Held, that there were two issues before the court: (i) whether the arbitration 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.)

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 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.)

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 is having been envisaged that the arbitrator's role would be to determine disputes in respect of accounting issues. (Paragraphs [26] – [28] at 9H – 10G.)

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.)

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.

Order

The appeal is dismissed with costs including those of two counsel.

Judgment

Lewis JA (Ponnan JA, Shongwe JA, Saldulker JA and Zondi AJA concurring):

The legal issues

[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 argued, to a party escaping an arbitration clause, when it was no longer considered desirable, by simply alleging fraud.

[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 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.

[11] As I see it, there are really only two issues for determination. First, 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'.

#### **The effect of fraud on an arbitration clause in general**

[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*, where Cameron JA said that an arbitration clause 'embedded in a fraud-tainted agreement' could not stand. The court referred in this regard to *Wayland v Everite Group Ltd* which in turn relied on *Allied Mineral Development Corporation (Pty) Ltd v Gembok Vlei Kwartsiet (Edms) Bpk*. That decision referred to *Heyman v Darwins Ltd* where Viscount Simon LC said:

'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 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.'

[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 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'.

## The interpretation of the arbitration clause

[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 '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 voidable: the aggrieved party may elect whether to abide by the contract and claim damages (if it can prove loss) or to resile — 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.

[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*, where the authors write of rescission of a contract induced 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*. It is not, however, necessary (indeed it is not possible, given the disputes of fact in respect 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 arbitrator, then he or she would determine whether the contract was valid and enforceable, or voidable or void.

[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 questioned. That is suggested in *Heyman*. Lord Porter said:

'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 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 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 not be done.' [My emphasis.]

[18] North East relied also on the House of Lords decision in *Fiona Trust & Holding Corporation and Others v Privalov and Others* 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 dispute, including whether the contract was valid. The approach set out 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.

[19] The fresh start was needed in part to avoid the very fine distinctions 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:

### 'Separability of arbitration agreement

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 treated as a distinct agreement.'

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.

[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'. Lord Hoffmann put it this way:

'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. 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.'

[21] It was necessary, therefore, Lord Hoffmann said, to have regard to 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 say so.

[22] In his speech in *Fiona Trust* Lord Hope agreed with the approach 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 proceedings' (my emphasis).

[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 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.

### Interpretation of the arbitration clause in question

[26] North East argued that in construing the arbitration clause we must take into account the phrase 'including any question as to the enforce- 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 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 —

'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.'

[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 that the arbitrator's role would be to determine disputes in respect of accounting issues.

[29] North East's counter to that argument was that the arbitration clause provided that the arbitrator would be a senior member of the 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.

[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 arbitrable. That brings me to the next question: were the allegations made by the bank, in its answering affidavit, sufficiently substantiated such that the court should refuse to compel a reference to arbitration?

#### **Substance in the allegations of fraud?**

[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 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.

[35] The appeal is accordingly dismissed with costs including those of two counsel.

## DE GOEDE v VENTER

### 1959 (3) SA 959 O

**Judge**                      **De Villiers R**

Flynote:

Arbitration - Arbitrators - Nomination of - Agreement cancelled - Provision that disputes to be determined by arbitration - Application granted - Costs - Attorney and client - Granting of.

Headnote:

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.

Held, that the application should be granted.

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.

'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*:

'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 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.

If, however, the parties are at one in asserting that they entered 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.'

The present is not a case where either party has attacked the validity 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 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

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.'

VISCOUNT SIMON, L.C page 347 in die saak van Heyman and Another v Darwins Ltd., 1942 (1) A.E.R. 337,

'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 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 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 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 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.'

## **SECTION 7**

# **ARBITRATION APPOINTMENT OF THE ARBITRATOR**



**AFSA**

The Arbitration Foundation of Southern Africa  
NPC

Ensure the Arbitrator is not conflicted

See the Arbitration Act, section 9 – 13 and **AFSA** Rules

Articles 4.2.5, 6.1.1, 6.1.2, 6.1.3, 7. 9 and 14

## SELECTING THE ARBITRATOR

- The first prize is that the parties agree on the Arbitrator.
- The Arbitration Agreement should allow the parties to choose but must provide an alternative if they fail to agree.
- Avoid using the Court or an inappropriate body to make the selection.
- Never complicate the selection by imposing detailed specifics.
- Make sure the system accommodates reasonable objections by either party.
- Ensure the Arbitrator is not conflicted.

***See the Arbitration Act, sections 9-13 and AFSA Rules, Articles 4.2.5, 6.1.1, 6.1.2, 6.1.3, 7, 9 and 14***

# **SECTION 8**

## **ARBITRATION**



**AFSA**

The Arbitration Foundation of Southern Africa  
NPC

## **COMMENCEMENT OF PROCESS**

- (i) The AFSA Rules for Expedited Arbitration ..... 108
- (ii) The AFSA Rules for Commercial Arbitration ..... 112

# AFSA RULES FOR EXPEDITED ARBITRATIONS

These Rules apply for **AFSA**, **ADRASA**, and **PROPERTY ASSOCIATION** arbitrations.

## 1. SUPERVISION OF THE AFSA SECRETARIAT

- 1.1 The AFSA Secretariat is a body appointed and constituted by the Alternative Dispute Resolution Association of South Africa (“ADRASA”) in order to supervise and administer the resolution of disputes under these Rules.
- 1.2 Parties to any dispute undertake to co-operate with the AFSA Secretariat in order to assist it in its functions. Parties further undertake to deal with any requests made to them by the Secretariat quickly and constructively.
- 1.3 The address of the AFSA Secretariat is c/o AFSA at Arbitration House, 4 Protea Place, Sandown, or PO Box 653007, Benmore, 2010, Telephone no. (011) 320-0600 and Fax no. (011) 320-0533, Docex 143, Randburg.
- 1.4 Any communications between the parties and the ARBITRATOR should take place through the AFSA Secretariat, which is always available to assist the parties with their queries concerning procedural aspects of the dispute and in clarifying issues arising out of these Rules.

## 2. INITIATING DISPUTE RESOLUTION

Any party to a dispute (the CLAIMANT) shall initiate the dispute resolution procedure by notifying the AFSA Secretariat in writing, briefly declaring the nature of the dispute. The AFSA Secretariat will itself notify the DEFENDANT(S) of the dispute resolution procedure once CLAIMANT has complied with all requirements.

## 3. EARLY SETTLEMENT PROCEDURES

The AFSA Secretariat will take steps to encourage the parties to settle any dispute amicably and quickly. However, where in the opinion of the Secretariat the prospect of settlement is slim, the AFSA Secretariat will notify the parties that it has referred the matter to arbitration and the steps set out in the rest of the Rules will follow.

## 4. SELECTING THE ARBITRATOR

The AFSA Secretariat will enquire from the parties whether they have agreed on an ARBITRATOR and, if so, such ARBITRATOR will be appointed by the Secretariat to resolve the dispute. If, on enquiry, it appears that the parties have not agreed on an ARBITRATOR, then the Secretariat will itself select and appoint a suitable ARBITRATOR, and, if necessary, any substitute or alternative ARBITRATOR where appropriate. Any ARBITRATOR appointed through the AFSA Secretariat will be required to accept the Code of Conduct for ARBITRATORS, a copy of which is available from the AFSA Secretariat.

## **5. ADMINISTRATION FEE**

- 5.1 Once the matter is referred to the AFSA Secretariat by the CLAIMANT, the parties will be requested to pay the prescribed administration and arbitrator's fees, from time to time as the proceedings progress, such other fees and costs as may be payable. The tariff for such fees and costs are available on request from the AFSA Secretariat.
- 5.2 Should any one party fail to pay its share of any administration fee or cost when requested by the AFSA Secretariat that party risks losing the right to participate in the arbitration process, so long as that party is in default of payment. The defaulting party may, in the discretion of the ARBITRATOR, be excluded from further proceedings depending upon the circumstances of the case. Where one party is excluded by reason of default, the Secretariat will revise the fees payable by the remaining party to cover all costs and expenses subject to the right of the paying party to recover if so ordered by the ARBITRATOR.

## **6. RULES FOR ARBITRATION PROCEEDINGS**

- 6.1 The ARBITRATOR will notify the parties of a date to meet with the ARBITRATOR in order to determine the procedure to be followed to finalise the dispute.
- 6.2 The ARBITRATOR may require the parties to set out their respective claims and answers in writing, or in greater detail, on such terms as he/she may require.
- 6.3 It shall be entirely within the power and competence of the ARBITRATOR to decide upon any matters related to the proper preparation of the dispute for hearing and in that regard the ARBITRATOR will direct the parties accordingly.
- 6.4 The ARBITRATOR will set the date for hearing and choose the venue for the hearing and determine all matters regarding any aspect of the hearing. Moreover, the ARBITRATOR can decide whether at the hearing the parties are to be given leave to adduce oral evidence or whether they will be confined to presenting their cases in writing or by some other appropriate procedure. In this regard, the ARBITRATOR will be guided by considerations of fairness, the cost-effective resolution of the dispute, and the need to resolve the dispute quickly.
- 6.5 The ARBITRATOR has the widest discretion and powers allowed by law to ensure that the just, expeditious, economical and final determination of all the disputes raised in the proceedings including the matter of costs and, if needs be, he/she shall have all the powers accorded to an ARBITRATOR acting under the AFSA Rules for Administered Arbitrations. All powers and functions exercised by the ARBITRATOR shall be in accordance with the provisions of the Arbitration Act of 1965.

## **7. INTERLOCUTORY MATTERS AND TEMPORARY ORDERS**

Should the need arise for any party to seek interim or temporary relief before the arbitration is finalised, that party may apply to the ARBITRATOR to grant such interlocutory order or give the required temporary relief and the ARBITRATOR shall have the same power to do so as if the matter were one heard by a Judge

of the High Court save that if by law such power or order cannot be exercised or given by an ARBITRATOR then, and then only, should the parties refer such matter to an appropriate Court.

## **8. CONFIDENTIALITY**

The proceedings shall be confidential. Neither the parties nor the ARBITRATOR shall disclose to third parties any information regarding the proceedings, the award, or settlement terms unless the parties otherwise agree in writing.

## **9. DEFAULT**

Should any party fail to co-operate either way with the Secretariat or with the ARBITRATOR with the result that in the view of the ARBITRATOR such default or omission prejudices the arbitration process then the ARBITRATOR can either –

- 9.1 give that party written notice that unless it remedies the default or omission within a given time, it will forfeit the right to continue to participate in the arbitration with the same consequences as set out in 5.2 above, or
- 9.2 warn the party in writing that its default or omission may make it liable to a punitive order of costs irrespective whether it succeeds in the arbitration or not and such punitive award of costs may include an order of attorney and client costs or attorney and own client costs as those expressions are understood in the Uniform Rules of Court.

## **10. THE AWARD**

- 10.1 The ARBITRATOR must give his/her award within 30 (thirty) days after finalisation of the proceedings unless the parties otherwise agree or unless the AFSA Secretariat permits an extension of that time.
- 10.2 The ARBITRATOR's award must be published to the parties in an appropriate fashion as determined by the AFSA Secretariat.
- 10.3 Unless the parties have in writing instructed the AFSA Secretariat otherwise at any time before the final award is given, there shall be no right of appeal from the award. In cases where the AFSA Secretariat has been instructed otherwise, the appeal provisions contained in Article 22 of the AFSA Rules for Commercial Arbitrations will apply.

## **11. TAXATION OF COSTS**

At the request of any party the ARBITRATOR may direct the Secretariat to appoint a person from its Legal Costs Panel to tax any bill of costs relating to any costs order given in the arbitration and any such person shall proceed to tax the bill upon the same basis and tariff as though he/she were a taxing master acting under Rule 70 of the High Court. The ARBITRATOR shall direct which party shall pay the fee of the person appointed to tax and shall thereafter incorporate in his/her award the amount so taxed which shall then become part of his/her award.

## **12. NON-LIABILITY OF FOUNDATION AND ARBITRATOR**

The Foundation shall not be liable to any party for any act or omission relating to an arbitration conducted under its aegis, and shall have no liability or responsibility towards the parties or to any ARBITRATOR in respect of any arbitration commenced under the aegis of the Foundation but not completed according to these Rules. An ARBITRATOR appointed by the Foundation shall not be liable for any act or omission relating to an arbitration in which he was the ARBITRATOR, except for deliberate misconduct by him.

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Revised 30.10.2013

# RULES OF THE ARBITRATION FOUNDATION OF SOUTHERN AFRICA

## COMMERCIAL ARBITRATIONS

1020A - commercial rules amended 01.04.2017

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## ARTICLE 1: DEFINITIONS

### 1.1

- 1.1.1** Words in the singular shall, where applicable, include the plural, and the feature that in some instances express references are made to the plural, or to the singular and plural, will not detract from the foregoing.
- 1.1.2** References to the male gender shall include references to the female gender and to the neuter.

### 1.2 Unless the context otherwise indicates the following words and phrases shall bear the following meanings.

- "arbitration agreement": a written agreement providing for the reference to arbitration of an existing dispute or a future dispute, whether or not an arbitrator is named or designated therein;*
- "the court": a Magistrates Court or the Supreme Court of South Africa, or any court established or recognised by section 166 of the Constitution of the Republic of South Africa, 1996, as the context may indicate; and the "Supreme Court" includes any successor in title to the Supreme Court;*
- "deliver": to deliver or send copies to all parties as provided for in these Rules, and to file the original to the Registrar; and "delivery" has a corresponding meaning; but "physically deliver" shall mean physically deliver to the party indicated by the context;*
- "pleading": includes documents comprising a Request for Arbitration, a statement of defence, a counter-claim and a statement of defence to a counter-claim;*
- "the Act": the Arbitration Act, 1965;*
- "the Foundation": the Arbitration Foundation of Southern Africa, being the name under which the Arbitration Foundation of Southern Africa ("AFSA") conducts its activities of providing the administrative means for the conduct of arbitration proceedings.*
- "the Registrar": the officer appointed by AFSA under that title to perform the administrative functions conferred upon him/her under these Rules for the Foundation;*
- "the Secretariat": the body of persons appointed by AFSA to perform the functions conferred upon it under these Rules;*
- "writing": includes typewriting and the record of transmission by telex, telefax or other means of telecommunication; and "written" has a corresponding meaning.*

## ARTICLE 2: THE FOUNDATION'S SECRETARIAT AND ADMINISTRATION

**2.1** The Arbitration Foundation of Southern Africa ("the Foundation") is the name under which the Arbitration Foundation of Southern Africa ("AFSA") conducts its activities of providing administrative means for the conduct of arbitration proceedings. Its activities include the appointment of a panel of persons who have agreed to act as arbitrators under the aegis of and according to the Rules of the Foundation, the appointment of an arbitrator or arbitrators for resolution of particular disputes, the provision of the venue and the administrative services for conduct of arbitration proceedings under and in accordance with these Rules for fees covering its administrative services and provision of a venue and the fees and expenses of the arbitrator or arbitrators.

### 2.2

**2.2.1** The Foundation's activities in providing the aforesaid arbitration facilities are controlled by a Secretariat, which comprises the persons appointed by AFSA.

**2.2.2** Any steps to be taken, and any decision to be made, and any directions to be given, by the Foundation in terms of these Rules, shall be taken by the Secretariat. The decision by majority vote of the members of the Secretariat shall be the decision of the Secretariat, and a written communication signed or authorised by the person presiding over any meeting of the Secretariat, shall be *prima facie* proof of the decision of the Secretariat.

**2.2.3** In matters of urgency, the Chairman or Vice-Chairman of the Secretariat may take any step, decision or give any direction which the Secretariat may have taken or given, and the decision of the Chairman or Vice-Chairman that a matter is one of urgency, shall be decisive of the question whether a matter is one of urgency within the purview of this sub-rule.

**2.3** In the respects and to the extent delegated by or not actually conducted by the Secretariat under 2.2.1 above, the administration of the Foundation's activities shall be conducted by the Registrar of the Foundation, who is the person appointed by AFSA to that office, assisted by administrative personnel appointed by AFSA.

The Registrar shall be the channel through which parties to administration proceedings communicate with the Foundation, with the Secretariat, and, except during hearings in his or their presence, with the arbitrator or arbitrators.

**2.4** Communications to AFSA, the Secretariat and the Registrar should be physically delivered to:-

**The Registrar**  
**First floor**  
**Africa**  
**Grindrod Tower**  
**8A Protea Place**  
**SANDTON**

or be addressed to:

**The Registrar**  
**The Arbitration Foundation of Southern**  
  
**P.O. Box 653007**  
**Benmore,**  
**2010**

## ARTICLE 3: AREA OF APPLICABILITY OF THESE RULES

### These Rules -

- 3.1 do not apply to disputes on matters in respect of which reference to arbitration is, by law, not permissible;
- 3.2 apply only to commercial arbitrations administered by or under the aegis of the Foundation; provided that, if the Secretariat of the Foundation accepts a Request for Arbitration as provided for in these Rules, such acceptance shall have the effect of the arbitration being deemed to be a commercial arbitration;
- 3.3 supplement any specific provisions of an arbitration agreement to arbitrate under the aegis of or according to the Rules of the Foundation, in so far as such specific provisions are silent on matters provided for in these Rules;
- 3.4 apply subject to any peremptory provisions of law applicable to an arbitration conducted under these Rules.

## ARTICLE 4: THE REQUEST FOR ARBITRATION AND PAYMENT OF FIRST FEE

- 4.1 A party wishing to resort to arbitration under the aegis of and according to the Rules of the Foundation, shall submit a written Request for Arbitration to the Secretariat of the Foundation through the office of the Registrar.
- 4.2 The written Request for Arbitration shall include the following:
  - 4.2.1 the names, description, addresses, telephone and fax numbers (if any) of the claimant or claimants and of the party or parties cited as defendant or defendants; the address given for the defendant or defendants shall be an address as envisaged in 20.4.2;
  - 4.2.2 a copy of the written agreement in terms whereof all the parties to the requested arbitration agree to arbitration to be conducted under the aegis of or according to the Rules of the Foundation by one or more arbitrators appointed by the Foundation; (This written agreement is hereinafter referred to as "**the arbitration agreement**");
  - 4.2.3 a brief statement indicating that an award in accordance with the claims would fall within the terms of the arbitration agreement;
  - 4.2.4 a statement setting out the *locus standi* of each party; the nature of the dispute; all the material facts and contentions relied upon by the claimant so as clearly to establish the circumstances of the case, and the relief claimed; such statement shall annex copies of all documentation relied upon by the claimant in support of such facts and contentions;
  - 4.2.5 the claimant's choice of whether there should be one or three arbitrators, and the claimant's choice (if any) of a particular arbitrator or arbitrators. If the claimant has no choice of a particular arbitrator or arbitrators, this fact shall be stated in the Request.

**4.2.6** a first fee indicated in paragraph 1 of the annexe, the form of payment whereof is to be acceptable to the Foundation.

**4.3** The Request for Arbitration shall be accompanied by so many copies thereof as total the number of defendants cited and arbitrators requested.

## **ARTICLE 5: ACCEPTANCE OR REFUSAL OF THE REQUEST FOR ARBITRATION**

**5.1** The Secretariat, if satisfied that the dispute is *prima facie*, and that all the claims fall within the terms of the arbitration agreement, and that 4.2 and 4.3 have been complied with, and if it is not otherwise in its free discretion unwilling to accept the Request for Arbitration, shall notify the claimant that it accepts the Request to provide the administrative means for the requested arbitration. If the Secretariat declines to accept the Request for Arbitration, it shall notify the claimant accordingly, and if it so declines solely on the ground that it, in its free discretion is unwilling to accept such Request, it shall refund the first fee to the claimant.

## **ARTICLE 6: RESPONSE OF THE DEFENDANT**

**6.1** If the Foundation accepts the Request for Arbitration, the Registrar shall forward a copy of the Request for Arbitration to the defendant at the address indicated in the Request for Arbitration, and at the same time in writing notify the defendant that he is, within 21 calendar days of receipt of the Request for Arbitration, required, by delivery to the Registrar and the claimant, to respond -

**6.1.1** to any choice expressed by the claimant as to whether one or three arbitrators should be appointed;

**6.1.2** to any choice for a particular arbitrator or arbitrators expressed by the claimant;

**6.1.3** if he does not agree to either the number or to the choice of the arbitrator or arbitrators proposed by the claimant, by expressing his own choice of the number of arbitrators and of the particular arbitrator or arbitrators.

**6.1.4** by indicating whether he disputes or admits that the arbitration agreement was concluded by him and is still operative for the purposes of arbitration, and whether he disputes or admits that the claim falls within the terms of the arbitration agreement; and, if he does so dispute any of the foregoing, to set out his grounds for so disputing it;

**6.1.5** if no such dispute as is referred to in 6.1.4 is raised,

**6.1.5.1** by delivering his statement of defence, setting out the material facts and contentions relied upon by him, and indicating which of the claimant's facts and contentions are admitted and which are disputed by him, and which of the claimant's claims for relief are conceded and which are disputed by him, and setting out his prayers for relief; such statement shall annex copies of all

documentation relied upon by the defendant in support of such facts and contentions;

**6.1.5.2** by delivering any counter-claim, which he seeks to bring, which counter-claim shall *mutatis mutandis* comply with 4.2.1, 4.2.3 and 4.2.4 above.

**6.1.6** by including with his response so many copies thereof as total the number of claimants and the number of arbitrators requested by the claimant or claimants or the defendant or defendants.

**6.2** The Registrar's written notification referred to in 6.1 above shall be accompanied by further written notification

**6.2.1** that, despite any dispute by the defendant that the arbitration agreement was concluded by him or was or still is valid and operative or that the claim falls within the terms of the arbitration agreement, the Foundation will appoint an arbitrator to consider the issues so disputed and decide whether or not to proceed with the arbitration, and, if he decides to proceed therewith, to do so;

**6.2.2** that to the extent that there is no agreement between the claimant or all the claimants and the defendant or all the defendants, as to the number of arbitrators, the choice of arbitrator or arbitrators, or the category from which an arbitrator or arbitrators should be appointed, the Secretariat will make a choice, and will appoint an arbitrator or arbitrators accordingly.

**6.2.3** that the defendant, or the defendants jointly, as the case may be, is or are required to pay first fee in the amount indicated in the annexe, the form of payment whereof is to be acceptable to the Foundation.

**6.2.4** default by the defendant to respond timeously as required by 6.1, may result in the arbitrator, after giving notice of the time and place of the arbitration proceedings as contemplated in 10.1, making an award without further notification to him.

**6.3**

**6.3.1** A defendant may within the said period of 21 calendar days apply in writing to the Secretariat, through the Registrar, for an extension of time to deliver his statement of defence and, where applicable, counter-claim, giving grounds for the requested extension and the period of extension requested. Whether or not a defendant makes such application for an extension of time, and, if he does so, then at the same time as making such application, the defendant or defendants shall nevertheless respond as required by paras. 6.1.1 to 6.1.4 inclusive and 6.1.6 above, and pay the first fee referred to in 6.2.3 above, and furnish the Registrar with an address for delivery to him of pleadings and receipt of all communications from the Secretariat or the Registrar and from the other party, failing which he will be deemed to have accepted the address furnished to the Secretariat by the claimant as such address.

**6.3.2** Within the period indicated in 6.1, or the period extended in terms of 6.3.1, the defendant shall deliver his statement as required by 6.1.4 or 6.1.5, as the case may be.

- 6.4** In the event of the delivery of a counter-claim, the claimant shall deliver a statement of defence, complying *mutatis mutandis* with 6.1.5.1 above, within 21 calendar days of the delivery of the counter-claim. The provisions of para. 6.3 in regard to the extension of time will *mutatis mutandis* apply in regard to delivering a statement of defence to a counter-claim.

## **ARTICLE 7: NOTICE TO CLAIMANT IN THE EVENT OF A PARTICULAR ARBITRATOR OR ARBITRATORS AGREED UPON, NOT BEING AVAILABLE**

Whenever the Secretariat has not declined to accept the Request for Arbitration as provided for in Article 5, but the service of the particular arbitrator or arbitrators agreed upon in the arbitration agreement or under the procedure set out in 4, 5 and 6, cannot be procured for the particular arbitration, the Secretariat shall -

- 7.1** inform the parties that the services of the particular arbitrator or arbitrators cannot be procured for the particular arbitration;
- 7.2** invite the parties to agree within a stated time, upon another particular arbitrator or other particular arbitrators selected by them from the Foundation's panel of arbitrators, and inform them of the consequences under 7.3.2.1 or 7.3.2.2, as the case may be, of a failure so to agree;
- 7.3**
  - 7.3.1** in the case of such agreement, and after it is satisfied as prescribed by 9.1.1, 9.1.2, and 9.1.3, appoint an arbitrator or arbitrators in accordance with such agreement, in which event 9.2 shall apply;
  - 7.3.2** in the case where there is no such agreement
    - 7.3.2.1** where the arbitration agreement permits it, and after it is satisfied as prescribed by 9.1.1, 9.1.2, and 9.1.3, appoint an arbitrator or arbitrators in accordance with the applicable provisions of 9.1, in which event 9.2 shall apply;
    - 7.3.2.2** where the arbitration agreement does not permit it, inform the parties that the requested arbitration cannot proceed under the aegis of the Foundation.

## **ARTICLE 8: ARBITRATOR TO DEAL WITH JURISDICTIONAL ISSUES**

- 8.1** Where the Secretariat has accepted a Request for Arbitration, but a party cited as a defendant disputes that he was a party to an arbitration agreement, or that the arbitration agreement is still valid and operative, or that the claim falls within the terms of the arbitration agreement, or a defendant to a counterclaim disputes that the counterclaim falls within the arbitration agreement, an arbitrator shall be appointed in accordance with these Rules, to consider the matters so contested and decide whether or not to proceed with the arbitration, and, if he decides to proceed therewith, to do so.

- 8.2** Any application to a court of law on any matter so contested, or on any other matter in dispute in arbitration proceedings commenced under the aegis of the Foundation, shall not affect the continuation of the arbitration proceedings, save and to the extent that a court otherwise orders.
- 8.3** Any party to such arbitration proceedings who is aware of such an application to a court, shall notify the Registrar, who shall inform the arbitrator thereof.

## **ARTICLE 9: APPOINTMENT OF ARBITRATOR**

**9.1** Where the Secretariat is satisfied -

- 9.1.1** that a dispute is *prima facie* arbitrable by an arbitrator to be appointed by the Foundation; and
- 9.1.2** that the defendant is in default timeously to deliver a response as required by 6.1, or that the response as required by 6.1 and, if applicable, as required by 6.4, has or have been delivered; and
- 9.1.3** that a first fee as required by 4.2.6 has been paid by the claimant; and that a first fee as required by 6.2.3 has been paid by the defendant, or, in default of such payment by the defendant, that it has been paid by the claimant;

**9.2** The Registrar shall thereupon

- 9.2.1** in writing notify the arbitrator or arbitrators of his or their appointment;
- 9.2.2** in writing notify the parties of the appointment of the arbitrator or arbitrators;
- 9.2.3** forward the file to the arbitrator or arbitrators, and inform him or them, as the case may be, that the arbitration may, subject to the provisions of 10.2, proceed in accordance with Rule 10.1.

the Secretariat shall appoint an arbitrator or arbitrators in accordance with any agreement between the parties, and, to the extent that there is no such agreement on the number of arbitrators or the choice of arbitrator or arbitrators, the Secretariat shall appoint a single arbitrator; and provided further that, where three arbitrators are appointed, the Secretariat shall appoint one of them as chairman.

## ARTICLE 10: CONTINUANCE OF THE ARBITRATION PROCEEDINGS

**10.1** The arbitrator shall, subject to 10.2, proceed with the arbitration at the place and at the time determined by him and of which reasonable notice has been given to the parties, as follows:-

- 10.1.1** in cases where the arbitrator is satisfied that the Request for Arbitration and notices referred to in 6.1 and 6.2 have been delivered or sent to the defendant in the manner prescribed in 20.3 and 20.4.2, and that the prescribed time for responding thereto has expired, and that the party cited as defendant is in default of responding as required by 6.1, and has not furnished the arbitrator with good and sufficient cause for such failure, proceed with the arbitration to its final conclusion in the absence of the defaulting party;
- 10.1.2** in cases where the party cited as defendant disputes that he was a party to the arbitration agreement, or that the arbitration agreement is still valid and binding, or that the claim falls within the terms of the arbitration agreement, (all of which disputes are hereinafter referred to as "*jurisdictional disputes*"), then (unless the party against whom the jurisdictional dispute is raised, informs the arbitrator that he does not wish to proceed until such dispute has been decided by a court) first decide the jurisdictional disputes, and, if he decides them against the party raising any or all of such disputes, then make a ruling for a period for the delivery of a statement of defence (if not already delivered) and counterclaim, if any, in accordance with 6.1.5, and a statement of defence to any counterclaim in accordance with 6.4, and then proceed as set out below;
- 10.1.3** in all other cases, hear the parties on the most expeditious or least costly procedure to be adopted for the further conduct of the arbitration, and thereafter rule upon such procedure and upon time limits for complying with such procedure;
- 10.1.4** thereafter, in such manner as he deems appropriate, on the application of a party or *mero motu*, conduct hearings or otherwise deal with any further procedural and interlocutory matters, including matters relating to compliance or non-compliance with his procedural rulings;
- 10.1.5** proceed with the hearing until the final conclusion thereof;
- 10.1.6** thereafter make a written award on all issues in the dispute, including an award on costs;
- 10.1.7** notwithstanding anything provided in 10.1.1 to 10.1.6, combine or dispense with any of the steps provided in 10.1.1 to 10.1.6 if he considers it appropriate for the just, expeditious, economical and final determination of all the disputes raised in the proceedings.

### 10.2

- 10.2.1** Before devoting any time to any step in the proceedings, the arbitrator shall notify the Secretariat of the nature of such step and of the time which he estimates will be required therefor. The arbitrator shall give a similar notification to the Secretariat before further proceeding with any step which will take more time than he estimated before commencing such step.

- 10.2.2** Upon receipt of such notification from the arbitrator the Secretariat shall notify the parties of the fees payable by each of them in respect of the next step in the proceedings, or in default of timeous payment by any party, may be paid by the other party to ensure the continuance of the next step in the proceedings, and of when such fees are payable.
- 10.2.3** Upon receipt of such payments, the Secretariat shall authorise and instruct the arbitrator to proceed with the arbitration only for the estimated time or further time in respect whereof such fees have been paid; so that at all stages the parties shall be required to pay fees only in respect of the estimated time required for the completion of any current step or the next step in the proceedings, and the arbitrator shall proceed only for such time as advance payment of the required fees has been made.
- 10.2.4** Nothing provided above shall preclude parties or any party to pay to the Secretariat an amount greater than is required for any particular step or steps, and in that event the Secretariat shall notify the arbitrator of the time for which he may proceed with the arbitration without further authorisation and instruction from the Secretariat.
- 10.2.5** The Secretariat may
- 10.2.5.1** in any case where an arbitrator appointed by it has nevertheless proceeded with the arbitration beyond the time for which advance payment of the fees has been made, instruct the arbitrator not to proceed with the proceedings until payment for the time spent by the arbitrator and the required advance payment has been made;
  - 10.2.5.2** refund to the parties the whole or part of any advance payment of fees where it is satisfied that such advance payment, or part thereof, will, for any reason, constitute an overpayment for the proceedings;
  - 10.2.5.3** in any case where a counterclaim materially exceeds the claim, in its discretion require the defendant to pay an additional amount in respect of the first fee payable by the defendant so that such payment accords with the scale relating to first fees in the annexe.
- 10.2.6**
- 10.2.6.1** Save as provided in 10.2.6.2, the arbitrator, after satisfying himself that any notice required to be given to a party in terms of these Rules has been given in the manner prescribed in 20.3 and 20.4, and that the prescribed time for responding thereto has expired, may regard a party who fails to appear at a time and place of which reasonable notice has been given to the parties, or who fails to comply with any ruling made by him as being in default, and may, after giving the parties reasonable notice of the time when and place where he intends to proceed with the arbitration, proceed with the arbitration in the absence of such defaulting party or without hearing or further hearing such party; provided that a defaulting party who does appear personally or by representative at the said time and place shall be given an opportunity of applying in such manner and within a period prescribed by the arbitrator, to the arbitrator to cure his default, whereupon the arbitrator may either grant such application on such terms and conditions as he deems fit and proceed with the further conduct of the arbitration in the manner ruled upon by

him (but subject to these Rules), or refuse such application and proceed with the arbitration without further hearing the defaulting party.

**10.2.6.2** Where a party has at any time before an award is made, on reasonable notice to all other parties, given the arbitrator good and sufficient cause for his default in timeously complying with these Rules or with any ruling made by the arbitrator, the arbitrator may afford him an opportunity for curing such default, and, if he fails to cure such default within the time stipulated by the arbitrator, the arbitrator may proceed with the arbitration in the absence of, or without further hearing, the defaulting party; to its final conclusion at a time and place of which reasonable notice has been given to all parties, including the defaulting party.

## **ARTICLE 11: POWERS OF THE ARBITRATOR**

**11.1** 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.

**11.2** Without detracting from the generality of the foregoing, the arbitrator shall have the following powers:

- 11.2.1** to determine the language or languages in which the proceedings shall be conducted, and the award made, and which party shall have the duty to provide for the services of an interpreter if required;
- 11.2.2** to rule on his own jurisdiction, including rulings on any dispute in regard to the existence or validity of the arbitration agreement or the scope thereof;
- 11.2.3** to strike out or dismiss any claim or defence on the grounds of failure of a party timeously to comply with any ruling or interim award of the arbitrator, or on the ground of delaying conduct on the part of a party so as to give rise to a substantial risk of serious prejudice to the other party or parties;
- 11.2.4** to proceed with the arbitration in accordance with these Rules, and make an award in the absence of or without hearing any party who is in default as provided for in these Rules, or fails to appear or to comply with any ruling or interim award of the arbitrator;
- 11.2.5** to make any ruling or give any direction mentioned in these Rules or as he otherwise considers necessary or advisable for the just, expeditious, economical and final determination of all the disputes raised in the pleadings, including the matter of costs;
- 11.2.6** to determine, from time to time, the time, date and place of the hearing, and the hours during which the hearing shall take place;
- 11.2.7** to extend before or after their expiry, or abbreviate any time limits provided for in these Rules or by his rulings or directions;

- 11.2.8** to appoint one or more advisors or experts on any matter (including law) to assist in the conduct of the arbitration, but only with the agreement of all parties and of such advisor or experts, and only if the parties and such advisors or experts have agreed on the payment of the fees of such advisors or experts directly by one or more of the parties;
- 11.2.9** to order any party who is a claimant, or claimant under a counterclaim, to furnish security for costs in respect of his claim or counterclaim;
- 11.2.10** to allow (but only with their express written consent) other parties to be joined in the arbitration proceedings, and to make an award on all issues submitted by all parties, including parties so joined, for decision by the arbitrator;
- 11.2.11** to determine the existence or validity of any contract, including any contract containing the arbitration agreement, and to order rectification of such contract;
- 11.2.12** to order the parties to produce or make available for inspection by any other party and by the arbitrator, by any advisors or experts appointed to assist him in terms of 11.2.8, and by any expert engaged by any party, any property or thing under the control of the party or parties against whom such order is made; and to hold inspections in loco; and to make orders for the interim custody or preservation of goods or property, or, where such goods or property would otherwise lose their value, for the realisation of such goods or property and the interim preservation of the proceeds of such realisation;
- 11.2.13** to permit the amendment of any pleading or other document (other than an affidavit) delivered by a party;
- 11.2.14** to make rulings or give interim awards of any matter of onus, admissibility of evidence, and of procedure, including rulings or awards of an interlocutory or interim nature, and rulings or interim awards relating to liability for and payment of costs and implementation of interim or final awards;
- 11.2.15** to receive and take into account such oral or written evidence as he deems relevant, and to make such findings of fact and law as may be required for the purposes of the proceedings and the award;
- 11.2.16** to state, at any stage before making a final award, 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 of counsel.  
  
This power may be exercised on the application of any party to the reference and shall be exercised if the court on the application of any party so directs. Such opinion shall be final and not subject to appeal and shall be binding on the arbitrator or arbitration tribunal and on the parties to the reference;
- 11.2.17** to express his award in such currency as may be required by the exigency of the situation, unless otherwise agreed by the parties;
- 11.2.18** to order specific performance of any contract in circumstances in which the Supreme Court of South Africa would have the power to do so;
- 11.2.19** to make an order as to costs;

- 11.2.20** conduct the arbitration proceedings at any place, inside or outside the Republic of South Africa, determined by him;
  - 11.2.21** to appoint a commissioner to take the evidence of any person within or outside the Republic of South Africa and forward such evidence to the arbitrator as if he were a commissioner appointed by the court;
  - 11.2.22** to require any party to amend its pleadings so that they are not evasive but are to the point; and, on the application of another party, to strike out from a party's pleadings any averments which are embarrassingly vague, scandalous, vexatious or irrelevant;
  - 11.2.23** to receive evidence given by telephonic or telecasting means, provided that he is satisfied that such means afforded all parties adequate opportunity of examining the witness giving such evidence;
  - 11.2.24** to make an award whereby a party is restrained from any conduct, either as an interim or final basis;
  - 11.2.25** generally to exercise such powers and duties as are allowed to him by any agreement of the parties or by the laws of the Republic of South Africa and as are required for the just, economical and expeditious conduct and conclusion of the proceedings, where these Rules are silent in any respect.
- 11.3** In determining the procedure for the conduct of the arbitration proceedings, and without detracting from the generality of 11.1, the arbitrator may, after hearing the parties thereon, and if he considers it appropriate for the just, economical, expeditious and final determination of the dispute, direct:
- 11.3.1** that the dispute should be determined summarily at an informal hearing attended by all parties;
  - 11.3.2** the summary trial of an issue to decide whether any issue or point raised has no reasonable prospect of success and should therefore be dismissed or struck out;
  - 11.3.3** the summary trial of an issue as to whether an interim award should be made for any sum indisputably due (whether on account of debt or damages or on any other basis);
  - 11.3.4** that any party should furnish more particulars or details of his case on any issue;
  - 11.3.5** that there should be discovery on oath or otherwise of documents and recordings (subject to valid legal objection) either in regard to all relevant matters or in regard to such issues as determined by the arbitrator;
  - 11.3.6** that parties provide each other with a list of the names of witnesses to be called, and with a statement of the substance of each witness' evidence, and that, save with the leave of the arbitrator, no witness shall be called in respect of whom such name and summary has not been provided;
  - 11.3.7** that the hearing should proceed on documents (including written submissions), only, without the presentation of other evidence; and, if the parties so agree, without the presentation of argument.

## ARTICLE 12: THE AWARD

- 12.1** The arbitrator shall make his final award as soon as may be practicable, and in any event not later than 60 calendar days after completion of the hearing, unless the parties in writing agree to an extension of this period or, in exceptional circumstances, the Secretariat extends such period.
- 12.2** The final award and all interim awards shall be made in writing, and, unless all the parties in writing agree otherwise, shall set out the reasons upon which the award is based. The award shall be signed and dated by the arbitrator, or, in the case of a tribunal of three arbitrators, by all the members of the arbitration tribunal. If a minority of the members of a tribunal refuses to sign the award, such refusal shall be mentioned in the award but shall not invalidate it.
- 12.3** The arbitrator, the parties or their representatives being present or having been summoned to appear shall deliver the award. The award shall be deemed to have been published to the parties on the date when it is so delivered.
- 12.4** Interim awards may be made on different issues at any time within the period allowed for making a final award.
- 12.5**
- 12.5.1** If the parties reach a written settlement after the file has been forwarded to the arbitrator, the arbitrator shall, upon being furnished by any party with proof that the parties have in writing agreed thereto, make an award in accordance with such written settlement.
- 12.5.2** If such settlement does not deal with all disputes raised in the arbitration, the arbitrator shall, unless the settlement in its terms precludes it, make an award in accordance with such settlement under 12.5.1, and proceed with the arbitration proceedings in respect of any disputes, including the matter of costs, not dealt with in such settlement.
- 12.6** Where there is more than one arbitrator, the decision of the majority shall be the decision of the arbitration tribunal, provided that, in the absence of a majority on any issue, the decision of the chairman shall determine the issue.
- 12.7**
- 12.7.1** A party to arbitration proceedings in respect whereof an award, whether interim or final, has been made under these Rules, may, within 14 calendar days after publication of the award, upon written notice to the arbitrator and all other parties, apply to the arbitrator to correct in the award any clerical or typographical errors, any patent errors arising from any accidental slip or omission, errors in computation, or any errors of a similar nature.
- 12.7.2** The arbitrator shall, if he considers the application for correction to be *prima facie* warranted, give the other parties an opportunity of making oral or written submissions, as he may determine, on the application for correction, and thereafter and in any event within 30 calendar days of the application, either refuse the application or correct his award, and thereupon the uncorrected award or the corrected award, as the case may be, shall be his award.

## 12.8

- 12.8.1** The parties to the arbitration may, within 6 weeks after publication of the award, by writing signed by them, remit any matter which had been referred to the arbitrator, to the arbitrator for reconsideration and for the making of a further award or for a fresh award or for such other purposes and in such manner as they may specify in the said writing.
- 12.8.2** The arbitrator shall dispose of such matter as soon as is practicable, and in any event within three months after the date of the said writing, unless such writing otherwise directs.
- 12.8.3** If the arbitrator has, after making the award, died or become unable or unwilling to deal with the remittal, the award may be remitted to a new arbitrator agreed upon by the parties or appointed, with agreement of the parties, by the Secretariat, which new arbitrator's powers shall include the powers referred to in 14.5.2

**12.9** Where an award orders the payment of a sum of money, such sum shall, unless the award otherwise provides, carry interest from the date of publication of the award at the same rate as a judgement debt.

**12.10** Unless the parties have in the arbitration agreement or otherwise agreed that the award shall be subject to appeal, or unless and to the extent that it is remitted as provided in 12.8, an award, or an award as corrected in terms of 12.7, shall, subject to the provisions of the Act or any other law, be final and not subject to appeal, and each party shall abide by and comply with the award in accordance with its terms.

**12.11** Anything to the contrary in these Rules notwithstanding, the arbitrator may withhold his award until all payments due to the Foundation have been made.

## ARTICLE 13: COSTS OF THE ARBITRATION

**13.1** Unless the parties have in writing otherwise agreed, the arbitrator shall in his award deal also with the costs of the arbitration and decide which parties shall bear the costs of the arbitration or in what proportions the parties shall bear such costs.

## 13.2

- 13.2.1** The costs of the arbitration referred to in 13.1 include the fees payable to the Foundation in respect of the administrative charges and the provision of a venue and the arbitrator's fees according to the annexe and any expenses incurred by the arbitrator for the performance of his arbitral duties, the fees and expenses of expert witnesses specifically declared by the arbitrator to be recoverable costs, and the normal legal costs incurred by the parties.
- 13.2.2** The arbitrator shall, when he awards costs, direct the scale on which such costs are to be taxed and be recoverable.

### 13.3

**13.3.1** If an award does not state that there is to be no award as to costs and also omits any provisions in regard to costs, or omits to deal with all aspects of costs required to be dealt with, or omits to direct the scale upon which costs awarded are to be taxed and be recoverable, then any party to the arbitration may, within 14 days of the publication of the award apply, on notice to other parties having an interest therein, to the arbitrator for an order directing by and to whom such costs shall be paid or the scale upon which such costs shall be taxed and be recoverable.

**13.3.2** The arbitrator to whom an application is made in terms of 13.3.1 shall, after affording all parties having an interest therein an opportunity to be heard, make such award as to costs as he deems fit so as to cure the omission referred to in 13.3.1.

**13.4** The arbitrator may, in making an award as to costs, declare that such costs shall include the costs incurred in the obtaining of an opinion of the court or the opinion of counsel on a question of law under these Rules or under the provisions of a law.

### 13.5

**13.5.1** A party in whose favour or against whom an order for costs has been made by an arbitrator, shall be entitled to have the amount of such costs taxed according to law, and if neither party so insists, such costs may, if the arbitrator is prepared to do so, be taxed by the arbitrator.

**13.5.2** If the arbitrator is requested and agrees to settle or tax the amount of costs payable in terms of the award, he shall estimate the time which will be taken up thereby, and notify the Secretariat accordingly. The Secretariat shall thereupon notify the parties of the fee payable by each party; or of the fee payable by one party in the event of default of payment by the other party, and upon receipt of the whole of such fee, the Secretariat shall notify the arbitrator that he may proceed to settle or tax the amount of the costs awarded.

**13.5.3** The arbitrator shall thereupon give reasonable notice to the parties who have an interest therein, of the time and place of such settlement or taxation of the amount of the costs awarded, and at such time and place so settle or tax the amount of such fees.

**13.5.4** In settling or taxing the costs the arbitrator may, with the written agreement of the parties and of a taxing consultant, whose fees the parties have in writing undertaken to him to pay, engage the services of such taxing consultant to assist him.

**13.6** Notwithstanding anything provided in 13.1 to 13.5, an arbitrator may, if he considers that in all the circumstances (not being limited to the degree of success of the parties on the merits of the dispute) it is just to do so, provide in his award for a limit to the amount of costs which may be recovered.

## **ARTICLE 14: QUALIFICATION AND DISQUALIFICATION OF ARBITRATORS, TERMINATION OF APPOINTMENT OF ARBITRATORS, AND APPOINTMENT OF SUBSTITUTE ARBITRATORS**

### **14.1**

- 14.1.1** A prospective arbitrator shall, before his appointment by the Secretariat, in writing disclose to the Secretariat any facts and circumstances of which he is aware and which might reasonably give rise to justified doubts as to his independence or impartiality in the eyes of the parties.

An arbitrator already appointed shall, if any facts or circumstances of which he is aware thereafter arise, which might reasonably give rise to justified doubts as to his independence or impartiality in the eyes of the parties, in writing disclose the same to the Secretariat.

- 14.1.2** Where 14.1.1 is not applicable, an arbitrator shall, on assuming his duties, sign and furnish to the Secretariat a declaration to the effect that he is not aware of any circumstances which might reasonably give rise to justified doubts as to his independence or impartiality to act as arbitrator in the matter, and that he will forthwith disclose such circumstances to the Secretariat if they should arise at any time before the arbitration is concluded.

### **14.2**

- 14.2.1** Upon receipt of any notification as referred to in 14.1.1, the Secretariat shall forthwith provide copies thereof to the parties, and determine when the parties must notify the Secretariat whether or not they wish the arbitrator to be appointed, or continue or cease to act as arbitrator, as the case may be, and, if they or any of them wish the arbitrator not to be appointed, or to cease to act, as the case may be, the grounds for such wish shall be furnished.

- 14.2.2** If the time determined in accordance with 14.2.1 has expired without a party notifying the Secretariat that he does not wish the arbitrator in question to be appointed or continue to act as arbitrator, as the case may be, or if the Secretariat, after affording the parties and the prospective or appointed arbitrator an adequate opportunity to respond in writing to the submissions and comments of each other, decides that there are insufficient grounds for not appointing the arbitrator in question, or for the appointed arbitrator to cease to act as such, it shall notify the parties and the prospective or appointed arbitrator accordingly, and the appointment or proceedings, as the case may be, shall then proceed in accordance with these Rules.

- 14.2.3** If the Secretariat, upon receipt of a notification as referred to in 14.1.1, decides that a prospective arbitrator should not be appointed, or an appointed arbitrator should cease to act as such, it shall appoint a substitute arbitrator in terms of 14.5.

- 14.3** An arbitrator shall recuse himself when, due to physical, mental, or other disability, he becomes incapable properly to perform his duties, and in circumstances which would require a judicial officer to recuse himself.

- 14.4** The Secretariat shall be entitled, after a written or oral hearing (as directed by the Secretariat) of the parties and the arbitrator, to terminate the appointment of an arbitrator on the grounds that he has

become disqualified from acting or continuing to act in terms of these Rules, or his inability or refusal to act, or that he has failed timeously and effectively to perform any of his functions as arbitrator.

## 14.5

- 14.5.1** Whenever the Secretariat has decided not to appoint a particular arbitrator, or his appointment has been terminated by the Secretariat, or he is removed from office, or dies, or he recuses himself, or his appointment is in any other way terminated or set aside, the Secretariat may, unless the arbitration agreement provides otherwise, appoint a substitute arbitrator in accordance with the agreement of all the parties, or, failing such agreement, of its own choice.
- 14.5.2** A substitute arbitrator, appointed as aforesaid, shall have the power to act in the arbitration and make an award as if he had been appointed in accordance with the terms of the arbitration agreement, and may avail himself of the evidence recorded in the arbitration proceedings before his appointment, and may, if he thinks fit, recall for further examination the person who has given such evidence.

## ARTICLE 15: LAW TO BE APPLIED:

### 15.1 Subject to 15.2,

- 15.1.1** the parties shall be free to agree upon the law to be applied to the merits of the dispute, and the arbitrator shall in that event apply that law;
- 15.1.2** in the absence of such agreement, the arbitrator shall apply the law, which he considers as the applicable law, according, where applicable, to the rule of conflict of laws, which he considers applicable.

### 15.2

- 15.2.1** Where the law to be applied is not South African law (hereinafter referred to as "*foreign law*"), the arbitrator shall apply such foreign law only if it can be ascertained by him readily and with sufficient certainty and only to the extent that such foreign law is not opposed to South African principles of public policy or natural justice. Where the arbitrator informs the parties that he is unable to ascertain such foreign law readily and with sufficient certainty, it shall be the duty of the party relying on such foreign law to prove the relevant foreign law by means of evidence. In the absence of such evidence, or where the arbitrator, despite such evidence, is unable to determine such foreign law, he shall apply South African law.
- 15.2.2** Where the written agreement of all parties require the arbitrator to make his award *ex aequo et bono*, he shall make his award on that basis.

- 15.3** The arbitrator shall apply the South African law of evidence; provided that he may allow a party to present evidence in written form, either as signed statements or in affidavit form, in which event any other party may require the deponent to attend the proceedings for oral examination and cross-examination, and, if the deponent fails to attend and submit to be examined and cross-examined, the arbitrator may exclude such evidence in written form altogether, or may attach such weight to it as he thinks fit.

## **ARTICLE 16: REPRESENTATION OF PARTIES**

**16.1** Any party may -

- 16.1.1** in the case of a natural person, represent himself or be represented by any other person or persons authorised by him;
- 16.1.2** in the case of a juristic person or a representative litigant, be represented by any person or persons authorised by it or him.

**16.2** The name and address, professional title (if any), telephone number, and fax number (if any) of a person representing a party in the arbitration proceedings shall, forthwith upon receipt of notification that an arbitrator has been appointed, be notified to the arbitrator and to the other parties.

## **ARTICLE 17: RECORDING OF EVIDENCE AND RECORD OF ALL PROCEEDINGS**

- 17.1** The oral evidence of witnesses shall be recorded in such manner and to such extent as the parties may agree, or failing such agreement, as the arbitrator from time to time, after consultation with the parties, directs.
- 17.2** In the event of any agreement or directive as referred to in 17.1 at any time not being carried out, the arbitrator shall himself, in such manner as he sees fit, keep a record of the oral evidence of witnesses.
- 17.3** The arbitrator shall retain in the file supplied by the Secretariat, all pleadings and other documents delivered by all parties or submitted to the arbitrator, and all interim and final awards made by him, and all reports furnished to him and by him to the Secretariat, and all notes kept by him of oral evidence or argument which was not otherwise recorded, and of a transcript of evidence and of argument recorded otherwise than by the arbitrator and furnished to the arbitrator by the parties or any of them. Upon conclusion of the arbitration proceedings the arbitrator shall return this file to the Secretariat by delivering it to the Registrar.

## **ARTICLE 18: SUMMONING OF WITNESSES**

The attendance of any witness to give evidence and to produce books, documents or things to the arbitrator may be secured by invoking the provisions of any law, and the arbitrator shall render such assistance to a party as he may require to invoke such provisions.

## **ARTICLE 19: OFFERS OF SETTLEMENT**

- 19.1** Any party against whom a claim is made may at any time prior to publication of the arbitrator's award tender, without admission of liability and as an offer of settlement, to pay or perform the whole or

part of the claim made, and such tender may be accompanied by a tender to pay all or part of the costs of the arbitration of the party to whom the tender is made.

**19.2** Such tender shall be in the form of a written notice, given to the claimant but not to the Registrar nor to the arbitrator, and shall specify:

**19.2.1** the claim or counterclaim, or the particular part thereof, in respect of which the tender is made;

**19.2.2** the precise payment, or undertaking to do or not to do something, which is tendered;

**19.2.3** any tender made in respect of the costs of the arbitration.

**19.3** The party to whom the tender is made shall be entitled, for a period of 10 calendar days from the receipt of the notice containing the tender, by written notice to the party making the tender, to accept the tender, failing which he shall be deemed to have rejected the tender.

**19.4**

**19.4.1** If the tender is accepted in terms of 19.3, the party accepting the tender shall be entitled to disclose the tender and the acceptance thereof to the arbitrator and, upon notice to the party who made the tender and all other parties, apply to the arbitrator for an award in terms of the accepted tender. To the extent that the tender does not extend to costs of the arbitration, the party applying for an award in terms of the accepted tender may, if the terms of the tender did not preclude it, apply to the arbitrator also for a costs award.

**19.4.2** The arbitrator shall, upon notification of an application for an award in terms of 19.3, make an award in terms of the accepted tender, and, if the accepted tender does not cover the issue of costs, hear the parties on the issue of costs and thereafter make such award as to costs as he deems just.

**19.5** If the tender is not accepted in terms of 19.3, the fact of the tender and of its non-acceptance shall not be brought to the knowledge of the arbitrator until he has made his award on all issues in dispute in the arbitration, other than costs, whereafter those facts may be made known to the arbitrator and shall then be taken into account by him in making an award as to costs; provided that, if the arbitrator has made an award as to costs before acquiring knowledge of the tender and its non-acceptance, the party who made the tender shall be entitled to have the costs award reconsidered and, if the arbitrator deems it just, varied by the arbitrator in the light of the facts of the tender and non-acceptance thereof brought to his knowledge.

## **ARTICLE 20: MANNER OF TIME PERIODS FOR DELIVERY OF PLEADINGS, DOCUMENTS AND OTHER NOTIFICATIONS**

**20.1** All pleadings and other documents and notifications, complete with annexes, shall be delivered in typed form with an original for the Secretariat, and a sufficient number of copies to provide one copy for each party and one copy for the arbitrator or each of the arbitrators.

**20.2** All pleadings, documents and notifications required to be delivered, shall, save where the Rules otherwise provide, be physically delivered to the Registrar and sent to other parties by the Registrar, and all communications of parties with the Secretariat shall, save where the Rules otherwise provide, be communicated through the Registrar.

**20.3** All notices or communications from the Secretariat or the Registrar or the arbitrator to a party shall be copied to all other parties, and shall be deemed to have been validly given or effected if they are physically delivered, or sent by registered post or sent by facsimile transmission, telex, telegram, or other recorded form of transmission providing a record.

## **20.4**

**20.4.1** The address to which all pleadings, documents, and other notifications to a claimant may be physically delivered or sent, shall be the address furnished by him in the Request for Arbitration, or such other address as he may thereafter in writing notify to the Registrar and all parties.

### **20.4.2**

**20.4.2.1** Subject to 20.4.2.2, the manner in which all pleadings, documents, and other notifications to a defendant, or a third party who has in the manner prescribed in these Rules consented to be joined in the arbitration proceedings, may be physically delivered or sent, shall be the following:

- a) by physically delivering it to him personally; provided that if he is a minor or a person under legal disability, it may be physically delivered or sent to his guardian, curator, tutor or a person in a similar legal relationship to him (hereinafter referred to as his "**guardian**"); or
- b) by physically delivering it at or sending it to his or his guardian's residence or place of business; or
- c) by physically delivering it at or sending it to his place of employment; or
- d) if he has chosen a *domicilium citandi*, by physically delivering it at or sending it to the address given as such *domicilium citandi*; or
- e) in the case of a corporation or company, by physically delivering it at or sending it to the registered office or to the principal place of business of such corporation or company; or
- f) by physically delivering it to or sending it to any agent who is authorised in writing to accept it on behalf of the party to whom it is addressed; or
- g) where the defendant or third party is a firm, a partnership or a voluntary association, by physically delivering it or sending it to its place of business or to the proprietor of the firm, a partner of the partnership, or the chairman or secretary of the committee or managing body of the voluntary association in the manner referred to in (a), (b), (c), (d) or (f); or

- h) if more than one person is cited jointly as defendant or third party in their representative capacities, by physically delivering or sending it to each of them in any manner provided for in this Article; or
- i) where the defendant or third party is a central or provincial government or a local government body, or a statutory body, by physically delivering it or sending it to the nominal executive head of that government or local government body or statutory body, or in any manner provided for by law.

**20.4.2.2** Where a claimant, defendant, or third party who has in the manner prescribed in these Rules consented to be joined in the arbitration proceedings, furnished to the Registrar an address for the purposes of the delivery or sending of pleadings, documents, or other notification, they may be physically delivered or sent to that address or such other address of which he has in writing notified the Registrar and all other parties.

**20.5** Delivery or notification or communication of any pleading, document, or other notification from the Secretariat or the Registrar, and from a party to another party, shall be deemed to have been effected on the day when such delivery or notification or communication was actually received, or if made in accordance with 20.3 to an address referred to in 20.4, should in the ordinary course have been received by the party to whom it was addressed or his representative or a person at that address who would ordinarily be expected to have brought it to his attention.

**20.6** Periods of time specified in these Rules or by the arbitrator shall commence on the day following the day on which a pleading or notification is deemed to have been delivered or sent as provided above, or, as the case may be, the order of the arbitrator was made or other event occurred whereafter a party is required to take any step or perform any act within a certain period; provided that, if the first or last day (but not intervening days) of such period is a Saturday or Sunday or official holiday, the period in question shall commence or expire, or both commence or expire, on the first working day thereafter.

**20.7** Whenever, in terms of these Rules, it is required that notice be given of any step or proceeding by or to the Secretariat, the Registrar, or any party, the period of such notice shall, unless otherwise provided herein, be 7 calendar days.

## **ARTICLE 21: GENERAL**

### **21.1 FEES PAYABLE PRO RATA**

The fees payable to the Secretariat shall, as provided herein, be payable in equal shares by the claimant and by the defendant; provided that, if there is more than one claimant or defendant, such claimants or defendants shall pro rata to their numbers be liable to pay their share of the fee; and provided further that, if any party defaults in paying his share of such fee, any other party may pay the defaulting party's share to enable the arbitration to proceed, and may at any stage of the proceedings apply for an order for costs to recover the other party's share so paid. The arbitrator may make such order as to costs on such application as he deems just.

## **21.2 ARBITRATION TO BE PRIVATE**

- 21.2.1** The arbitration proceedings shall be conducted in private, and a party shall be entitled to require the arbitrator to exclude therefrom any person whose presence is not reasonably required by another party.
- 21.2.2** Save as is required by law, or for the exercise of a party's rights in a court of law, the Secretariat and the Registrar shall, unless the parties in writing notify the Secretariat otherwise, maintain confidentiality in regard to any matter being dealt with or dealt with by the Foundation.

## **21.3 NON-LIABILITY OF FOUNDATION AND ARBITRATOR**

The Foundation shall not be liable to any party for any act or omission relating to an arbitration conducted under its aegis, and shall have no liability or responsibility towards the parties or to any arbitrator in respect of any arbitration commenced under the aegis of the Foundation but not completed according to these Rules. An arbitrator appointed by the Foundation shall not be liable for any act or omission relating to an arbitration in which he was the arbitrator, except for deliberate misconduct by him.

## **21.4 DECISIONS BY MAJORITY**

Where three arbitrators have been appointed, the decision of the majority shall on all matters prevail; provided that where there is no majority on any issue or matter, ruling, decision, or award, the decision of the chairman shall prevail.

Wherever a matter relating to the procedure of an arbitration is, according to these Rules, not within the power of an arbitrator to rule upon or decide, the Secretariat shall have the residual power to decide such issue, and the parties shall be bound by such decision.

## **ARTICLE 22: APPEALS**

- 22.1** Where the parties have, whether in terms of the arbitration agreement or otherwise, in writing agreed that an interim award or the final award of an arbitrator or arbitrators shall be subject to a right of appeal the following rules shall, save to the extent otherwise agreed by them in writing, apply.
- 22.2** A notice of appeal shall be delivered by the appellant, within 7 calendar days of publication of the award, failing which the interim award or final award shall not be appealable. If there is a cross-appeal, a notice of cross-appeal shall be delivered within 7 calendar days of delivery of the notice of appeal, failing which a cross-appeal shall be precluded.
- 22.3** The notice of appeal and notice of cross-appeal, if any, shall state whether the whole or part only of the award or interim award is appealed against, and, if only part thereof is appealed, it shall state which part, and shall further specify the findings of fact and rulings of law appealed and the grounds upon which the appeal or cross-appeal is founded.

## 22.4

- 22.4.1** Upon delivery of a notice of appeal, the Secretariat shall obtain from the arbitrator or chairman of the arbitrators, as the case may be, an estimate of the time which will reasonably be required for the appeal tribunal to study the record, hear the appeal and cross-appeal, if any, and make an award thereon.
- 22.4.2** Thereafter the Secretariat shall, through the Registrar, notify the parties of the fees payable by each of them in respect of the appeal, cross-appeal, if any, and of the date by which such fees are payable, and that, if any party fails to pay his share of such fees, the other party is entitled within 10 calendar days of being notified by the Secretariat of such failure, to pay also the fee of the defaulting party to ensure the continuance of the appeal.
- 22.5** Upon receipt of the fees payable for the appeal, and cross-appeal, if any, the Secretariat shall appoint the appeal arbitrator or arbitrators agreed upon in writing by the parties, or the number of appeal arbitrators from the category of arbitrators agreed upon in writing by the parties, or, failing agreement upon the number of appeal arbitrators, a single appeal arbitrator, and, failing agreement on the said category, from a category of its choice.
- 22.6** The appeal arbitrator or appeal arbitrators, as the case may be, shall then, after hearing the parties, direct the party by whom, the manner in which, extent to which, and the time within which the record for the appeal and cross-appeal, if any, shall be prepared and the place where and the time when the appeal and cross-appeal, if any, shall be heard.
- 22.7** If any party is in default of timeously paying his share of the fees for the appeal and cross-appeal, and the other party does not timeously as provided in 22.4.2 pay also the share of fees payable by the defaulting party, or if the directions referred to in 22.6 are not complied with, the appeal or cross-appeal, as the case may be, shall lapse.
- 22.8** The nature of the appeal and cross-appeal, and the powers of the appeal arbitrator or arbitrators shall, save to the extent that the written agreement between the parties or this article 22 provides otherwise, be the same as if it were a civil appeal and cross-appeal to the Appellate Division of the Supreme Court of South Africa.

## ARTICLE 23: ARBITRATIONS TO BE HELD URGENTLY BY CONSENT OF THE PARTIES

- 23.1** If all parties to a dispute agree in writing that, at a time and place agreed upon, and according to a procedure agreed upon or expressly stated to be decided by the arbitrator, an arbitration should be conducted as a matter of urgency, they may jointly apply in writing to the Secretariat for such an arbitration to be conducted by an arbitrator of their choice or to be appointed from a particular category in the annexe, by the Secretariat.
- 23.2** The Secretariat shall notify the parties whether such an urgent arbitration can be held, and, if so, of the administration and venue fee and the further daily fees therefor, and, upon payment of such administration fee and the first daily fee, appoint such arbitrator.
- 23.3** The arbitrator shall then and only for so long as the fees payable for each day after the first day of the hearing have been paid by not later than noon of the previous day, at the time and place agreed

upon, and according to the procedure agreed upon, or, if expressly left to him for decision, decided upon by him, conduct such arbitration to its conclusion and make an award.

- 23.4** Save as set out in 23.1, 23.2 and 23.3, other provisions of these Rules shall apply *mutatis mutandis* to such urgent arbitrations.

## **ARTICLE 24: AMENDMENT OF THESE RULES**

- 24.1** These Rules may at any time be amended by the Secretariat and will be available on request made to the Registrar. Such amendments shall be applicable to all future and current, including part-heard, arbitrations, save to the extent that the arbitrator may, in the interests of a just determination of the dispute, rule otherwise. It shall be the duty of the parties at all times to ascertain such amendments from the Registrar.

## **ANNEXE**

### **FEES APPLICABLE in terms of COMMERCIAL RULES and EXPEDITED RULES with effect from 1 April 2018**

#### **1. First fee payable by both parties in terms of Rule 4.2.6 of the Commercial Rules**

##### **1.1 Payable in arbitrations in which a money amount is claimed. These fees are quoted excluding VAT.**

Matters up to R100 000 are charged at R5 250 per party.

Matters of R100 001 – R500 000 are charged at R5 250 per party plus 1.25% of the amount exceeding R100 000 per party. (max. R10 150)

Matters of R500 001 – R1 500 000 are charged at R10 250 per party plus 1% of the amount exceeding R500 000 per party. (max. R20 250)

Matters from R1 500 001 to R3 000 000 are charged at R20 250 per party plus 0.5% of the amount over R1 500 000 per party. (max. R27 750)

Matters from R3 000 001 to R35 600 000 are charged at R27 750 per party plus 0.125% of the amount over R3 000 000 per party. (max. R68 500)

Matters from R35 600 001 to R100 000 000 are charged at R68 500 per party plus 0.0625% of the amount over R35 600 000 per party. (max. R108 750)

Matters exceeding R100 000 001 are charged at R150 000 per party.

**These fees are non-refundable.**

##### **1.2 Payable in arbitrations in which the claim is not expressed in money.**

In the discretion of the Secretariat.

##### **1.3 Cases of appointment only**

Where AFSA does not administer a matter but only appoints an arbitrator / adjudicator / expert. The referring party will pay a once-off fee of R7 500, **excluding VAT**.

## **2. Fees payable, after appointment of arbitrator, for continuance of arbitration proceedings in terms of Article 10.**

After consultation with the parties and the nominated arbitrator, AFSA will fix the remuneration which will be due to the arbitrator in the course of the proceedings. This remuneration is payable by AFSA, which will recoup its payment in advance from the parties in equal shares.

Where an arbitrator has reserved dates at the request of the parties and the matter is then settled the Secretariat will retain an appropriate amount by way of the arbitrator's collapse fee. **All fees quoted exclude VAT.**

## **3. Appeals**

R17 500 per side, **excluding VAT.**

## **4. Venue fees**

Venue fees, if applicable, are charged separately, subject to quotation.

# **SECTION 9**

## **THE PRE-ARBITRATION MEETING**



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## THE PRE-ARBITRATION MEETING

- The pre-arbitration meeting is intended to allow the Arbitrator to take control of the process and to clarify fundamental aspects of the Arbitration and the programme going forward.
- The pre-arbitration meeting can be held as frequently as necessary and the Arbitrator should not hesitate to convene such meeting when necessary.
- Where the matter is an **AFSA** administered matter, the agenda is much simpler since the fundamental issues and the process are set out in the Rules. Where, however, the process is *ad hoc*, the agenda is much more complicated assuming that the Arbitrator and the parties have a real understanding of the task ahead of them.
- Typical pre-arbitration agendas are enclosed for both an AFSA administered and an *ad hoc* pre-arbitration meeting.

### AD-HOC ARBITRATIONS

## AGENDA FOR DISCUSSION AT THE PRE-ARBITRATION MEETING

What follows the issues which may appropriately be raised at the first and subsequent pre-arbitration meetings between the Arbitrator and the Disputant's lawyers.

- Is there a binding Agreement to Arbitrate?
- Identify the parties.
- The addresses (email or physical) to which notices and correspondence are to be sent.
- Is there a dispute that can be lawfully Arbitrated?
- Is the Arbitrator able and willing to act?
- Are there any objections by any of the parties to the appointment of the Arbitrator?
- What arrangements have been made for payment of the Arbitrator's fees and disbursements?
- How much is the Arbitrator to be paid in the event of a postponement or settlement of the matter and what fees are to be paid for preparation for the hearing, preparing reasons of the award and a collapsed fee?
- Make clear that the Arbitrator is entitled to withhold his/her award pending payment of his/her fees?
- Confirmation that the Arbitration is not time barred and that any pre-conditions have been met. In the later event, the Arbitration cannot proceed unless or until they have been met.

- Defining the issues. In this regard the Arbitrator should insist on clarify of the issues
- As regards pleadings would it not be in the interests of expedition that the parties set out the exact nature of the claim and defence? Unless the parties insist to the contrary confession and avoidance should not be permitted.
- Insofar as the Rules may not provide for them what of the following?
- What provisions (if any) will be made for an appeal?
- What form will the Arbitration take? For example, is oral evidence necessary or will it be decided on affidavit or on documents only?
- An early exchange of witness statements should occur prior to the hearing. It should be stressed that Arbitration is not trial by ambush.
- What provisions apply to discovery and expert witnesses? An early exchange should be encouraged?
- Is there to be an inspection in loco and should this influence the choice of venue for the Arbitration?
- When and where will be arbitration take place?
- The hours during which the Arbitrator will sit. Although the emphasis must be on expedition, the hours of sitting should not be excessive as this could have a negative effect on concentration.
- Who is responsible for hiring a venue and who pays?
- Is the evidence to be recorded mechanically? If so, who must set it up and what are the arrangement regarding payment?
- What specific penalties attach to non-compliance or late compliance with the Rules? What do the Rules provide regarding a default award?
- May the Arbitrator use his/her own technical expertise?
- Are the disputants to be legally represented?
- Is the Arbitrator required to give reasons and if so, within what period after the conclusion of the Arbitration?
- What method is to be applied in determining the costs of the successful party in the event of the unsuccessful party being ordered to pay the winner's costs?
- If costs are to be taxed by the Taxing Master, identify the name of the court to which is to be referred e.g. *"High Court of South Africa, North Gauteng Division"*.
- Making case law available to the Arbitrator.
- Are the proceedings confidential?

- Do the provisions of section 23 of the Arbitration Act 1965 to apply, which states that the award is to be made within four (4) months after the date on which the Arbitrator entered the reference?
- If not, how long after completion of the Arbitration must the Arbitrator publish the award?
- Do the parties agree to accept the award by e-mail?
- **As regards interlocutory matters is it agreed that a letter setting out the complaint addressed to the Arbitrator and copied to the other parties is sufficient?**
- **Who bears the onus to begin on the claim and any counterclaim?**
- **Can the Arbitrator recuse him/herself if an application is made by one of the parties and opposed by the other?**
- **Security for costs.**
- **The names of the witnesses to be called by each party.**
- **Any other matters.**

***Note: the outcome of this and any subsequent pre-arbitration meetings should be recorded in a Minute drawn by the Arbitrator and submitted to the parties for signature.***

## **AGENDA FOR PRE-ARBITRATION MEETING IN AFSA ADMINISTERED MATTERS**

1. Confirmation of a valid Arbitration Agreement and that any preconditions to Arbitrate have been met.
2. Confirmation that a dispute exists.
3. The names and contact numbers of the parties' legal representatives.
4. Procedure:
  - (i) The AFSA Rules that shall apply -Commercial/Expedited).
  - (ii) The issues in dispute:
    - Agreement on the issues in dispute.
    - How the issues shall be defined i.e. by affidavit or pleadings.
    - Check that the issues fall within the Arbitration clause.
  - (iii) Dates for the exchange of pleadings (including Discovery, if required.)
  - (iv) Dates for any additional meetings.

- (v) Date for the hearing, duration of the hearing and the venue.
- (vi) Arbitrator's fees in the event of the matter collapsing/ settling.
- (vii) Will witnesses be called?
- (viii) Are expert witnesses required?
- (ix) Is an inspection in loco required?
- (x) Do the parties have the option of an appeal?
- (xi) Recording of the proceedings – yes or no? (Matters with an appeal option must be recorded).
- (xii) The award –
  - Any special agreement regarding costs?
  - Publication – In terms of section 25 of the Act (i.e. parties appear before the Arbitrator who announces the decision and hands down a signed copy of the award to each party- can this be changed by agreement to allow publication of the award by e-mail or other means?)
  - Do the parties agree to the extension of the four (4) month time period (envisaged in section 23 of the Arbitration Act 42 of 1965) for making the award?

## **SECTION 10**

# **ARBITRATION: FROM THE PRE-ARBITRATION MEETING TO THE HEARING**



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## FUNCTION OF THE ARBITRATOR

The function of the Arbitrator is to manage the process of the case from the pre-arbitration meeting to the hearing in order -

- to ensure strict adherence to the timetable and to monitor the parties' compliance therewith;
- to deal quickly and decisively with any disputes between the parties relating to such compliance;
- to ensure that production of documents is properly done;
- to ensure that any requests for further information regarding either party's case is timeously requested and timeously provided.

# **SECTION 11**

## **ARBITRATION: THE DISPUTE**



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## THE DISPUTE

Before an Arbitrator can be appointed, there must be a dispute (*Telecall (Pty) Limited v Logan*, 2000(2) SA 782 (SCA)).

What is a dispute? “A dispute exists when one party maintains one point of view and the other party a contrary view or a different one, even if one disputant is prepared to listen to further argument (*Williams v Benoni Town Council* 1949 1 SA 507 (W)).

What happens when one party makes a demand and the other party is silent? Is there a dispute which can go to Arbitration? According to Judge Didcott in *Parekh v Shah Jehan Cinemas (Pty) Limited and other* 1980 (1) SA 301(D) at 340E, the answer is no but the English judges gave a different answer in *Halki Shipping Case* (1998) 2AER at 56).

Not every dispute can be sent to Arbitration. Only disputes which involve legally enforceable rights and duties can be arbitrated.

## INTERLOCUTORY APPLICATIONS AND OBJECTIONS

- It very often happens that one- or other-party claims that the other has not properly followed the procedures or requirements of the pleadings or discovery and wishes to obtain a direction from the Arbitrator rectifying such irregularity.
- There are interlocutory applications and need to be dealt with as simply and quickly as possible to keep the preparation on track and not to disrupt the programme of the hearing.
- It is usually quite enough for the Arbitrator to direct the objecting party to record its objection in a letter and for the other party to respond in like fashion. The Arbitrator can then see whether an oral hearing is necessary or not and how the matter can be dealt with as quickly as possible.

## PAREKH v SHAH JEHAN CINEMAS (PTY) LTD AND OTHERS

1980 (1) SA 301 D

**Judge**                      **Didcott J**

Flynote:

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 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 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 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.

Practice - Judgments and orders - Postponement of judgment on plaintiff's claim under Rule of Court 22 (4) pending decision of defendant's 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 until counterclaim decided merely because he is a landlord suing for rent.

Headnote:

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 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 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 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 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 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 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.

# **SECTION 12**

## **THE HEARING**



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## THE ORDER OF THE HEARING

### The usual order of hearing is as follows:

- The claimant's counsel opens the claimant's case by telling the Arbitrator about the issues that arise in the case and how the claimant intends to deal with those issues, indicating what the substance of its case will be. Any "housekeeping" matters are also dealt with.
- The claimant's counsel calls each witness for the claimant who is first questioned by the claimant's counsel (evidence-in-chief) and then questioned by the defendant's counsel (cross-examination) and finally questioned again by the claimant's counsel (re-examination).
- After the conclusion of the evidence to be led for the claimant, the claimant closes its case.
- The defendant then leads the witnesses in support of the defendant's case and the same process of evidence-in-chief, cross-examination and re-examination follows, but this time with defendant's counsel leading the witness in evidence-in-chief and the claimant's counsel doing the cross-examination.
- The defendant's case is closed.
- The claimant's counsel addresses argument to the Arbitrator in which the evidence is analysed and the legal issues addressed in order to establish that the claimant has proved the necessary facts in support of its case and is entitled in law to succeed in its claim.
- The defendant's counsel presents the defendant's analysis of the evidence and submissions as to the law in order to show why the claimant has failed to establish its case and why the defendant's case should be preferred.
- The claimant's counsel then replies to the defendant's argument, so that the claimant has the last word in the hearing.
- The hearing is then closed and the Arbitrator takes time to consider the matter and to make his award.
- The award is then published as required by section 25 of the Arbitration Act and the Arbitration is thereby finalised.

## MATTERS RELATING TO EVIDENCE

Whole textbooks have been devoted to the legal rules and requirements relating to evidence. No attempt is here made to summarise those rules, but some fundamental points are noted as follows-

- The purpose of evidence is to establish the facts on which the issues depend. The claimant must prove all facts necessary to establish his claim. The defendant may admit certain of these facts (refer to the defendant's statement of defence), but insofar as he does not, these facts must be proved through the evidence.
- The only evidence which can be given is evidence which is relevant to the pleaded issues. Irrelevant evidence is inadmissible.
- Evidence may consist of documentary material as well as statements of witnesses (viva voce evidence). However, documents must be identified by a witness (or through admissions) before the document can be used as part of the evidence.
- The witnesses who give evidence as to facts must generally be able to speak to facts from their personal knowledge. They themselves must have been present when the events about which they testify occurred. Where a witness seeks to give evidence about something which was not in the personal knowledge of that witness, the evidence is regarded as hearsay evidence (i.e. the witness is saying what he heard from someone else) and such evidence is usually excluded by the Arbitrator or, where appropriate, received, but given much less weight than the evidence of a witness who can speak directly to the facts.
- Weighs up the competing versions in the light of the common cause and undisputed fact. This is a useful exercise because one party's version may contradict facts which are common cause or uncontested. If so, the version of the party is unreliable.
- Considers which of the two sets of witnesses gave the more **credible** version. In so doing, the Arbitrator considers the extent to which the evidence of each witness stood up to cross-examination or was demonstrated in cross-examination to be unreliable.
- Most importantly of all, determines the objective probabilities of the case. In other words, the Arbitrator considers what would be likely to have happened given the situation revealed by the circumstances of the case, i.e. which of the competing versions is the most reasonable one in accordance with one's experience and insight, for example, is it probable that a moneylender would agree to give up his claim for repayment? Is it probable that the buyer of a house would have purchased it at full market price if he or she was aware of a very serious defect?

## **SECTION 13**

# **LEGAL ISSUES AND THE LAYMAN ARBITRATOR**



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## SECTION 20 OF THE ARBITRATION ACT, 42 OF 1965

### ***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.

# **SECTION 14**

## **ARBITRATION: THE AWARD**



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## THE AWARD<sup>6</sup>

- The award is the decision of the Arbitrator made by virtue of the Agreement to Arbitrate or in terms of same law.

### The formal requirements

- Must be in writing and signed by the members of the Tribunal (but not by a dissident – section 24).
- Published by delivery to the parties or their representatives on being summoned by the Tribunal for that purpose – section 25.
- Must be made with four (4) months of entering the reference but may be extended – section 23.

### Substantive requirements

- The award must be – (i) conclusive.

### Conclusive

- must deal finally and certainly with all the matters submitted (including costs).
- must not make an order concerning any matter not submitted for decision.

### Clear and definite

- must not contain vague or contradictory provisions.

### Possible of performance

- must be legally possible (i.e. not contrary to any legal norm or to public policy).
- must be physically possible.

## REASONS FOR THE REWARD

- The award should be accompanied by written reasons.
- These should be sufficient to show why the Arbitrator reached his conclusions thus demonstrating what he took into account, how he/she analyzed the position and reached his conclusions.
- Allows the court to satisfy itself that the Arbitrator acted properly.
- Explains to the parties why the one won and the other lost.
- Should be written in the language in which the Arbitration was conducted.
- Should deal shortly with each important argument that was rejected, showing why.
- Be written plainly but politely.

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<sup>6</sup> Please read the articles and guidelines on judgment/award writing in File 4

## THE AWARD – A CHECKLIST FOR ARBITRATORS

In presenting the award, the Arbitrator might care to use the following as a checklist:

### 1. HEADING

Names of the parties indicating who is the Claimant and who is the Defendant.

### 2. IDENTIFICATION AND JURISDICTION

- 2.1. Identification and description of the parties.
- 2.2. Identification of the contract or other relationship between the parties.
- 2.3. The essential provisions of the Arbitration Agreement/Arbitration clause.
- 2.4. The provisions for the appointment of the Arbitrator and any incorporated Agreement or powers and procedures including rules.
- 2.5. The fact of a dispute having arisen and any counterclaims.
- 2.6. The general nature of the dispute(s) and the matters in issue.
- 2.7. The resultant appointment of the Arbitrator.
- 2.8. Any challenge to jurisdiction and how it was dealt with.

### 3. INTERLOCUTORY PROCEDURAL MATTERS

- 3.1. The “seat” of the Arbitration.
- 3.2. Any interlocutory Agreements regarding:
  - 3.2.1. procedural and evidential matter;
  - 3.2.2. the appointment of experts;
  - 3.2.3. on the preservation of evidence.
- 3.3. Any necessary clarification or amendment of the matters in issue.
- 3.4. The issues as regards claim and counterclaim (if any) to be decided by this award.
- 3.5. Preliminary meetings.
- 3.6. The application and consequences of orders made by the Arbitrator such as –
  - 3.6.1. hearing of documents only;
  - 3.6.2. timetable for the exchange of pleadings;
  - 3.6.3. disclosure and production of documents;

3.6.4. exchange of witnesses' statements and expert reports;

3.6.5. meeting of experts;

3.6.6. if appropriate language and translations;

3.6.7. other relevant matters.

3.7. Resultant party action-

3.7.1. brief details of exchange;

3.7.2. admissions or Agreements including the result of meeting(s) of experts;

3.7.3. any resultant reduction in or expansion of the matters in issue.

3.8. Other directions and/or administrative directions not already dealt with and relevant to the award, for example –

3.8.1. order for security for costs;

3.8.2. limitation of costs;

3.8.3. costs to follow the award or not.

3.9. Any interim order.

3.10. Any party default, for example –

3.10.1. inordinate or inexcusable delay;

3.10.2. failure to comply with any order for direction.

3.11. Any other matter relevant to this sub-section.

## **4. THE HEARING**

4.1. Date and place of the hearing.

4.2. Failure to attend.

4.3. Who represented the parties, witnesses' names and designations.

4.4. Whether oral evidence was taken on oath or affirmation.

4.5. Inspection(s) etc. (and who was present).

4.6. Any other matters to the extent that they are relevant to this sub-section.

## **5. SUBMISSIONS AND EVIDENCE**

5.1. The contentions of the parties (claim and counterclaim).

5.2. A brief but adequate precis or summary of the respective advocates' opening and closing submissions, whether in writing, oral, or a combination.

5.3. Brief precis of relevant evidence (including any admissions under cross-examination).

5.4. Whether the Arbitrator had made any inspection *in loco*-

5.4.1. the purpose of the inspection and who present;

5.4.2. the result of inspection;

5.5. any other matters to the extent that they are relevant.

## **6. ANALYSIS/FINDINGS/REASONS/DECISIONS/ON THE SUBSTANTIVE ISSUES**

6.1. A numbered list of the issues dealt with in this award (unless sufficiently detailed in the recitals.

6.2. Any undisputed facts.

6.3. An adequate, but brief, precis of and analysis of the submissions and evidence (unless it is to be an award without reason), effectively thereby determining (in respect of liability and, if then relevant, the financial or other consequences) and giving the reasons for –

6.3.1. findings of fact;

6.3.2. what held as matters of law;

6.3.3. application of the law to the facts;

6.3.4. consideration of any interest claimed as special damages;

6.3.5. the decision on the substantial issue(s), also showing why any

6.3.6. contentions were rejected;

6.3.7. a summary of those decisions (if there are several to draw together)

6.3.8. where money is awarded, effect of any amounts claimed, but paid during the period of Arbitration.

## **7. INTEREST**

Consideration (on claim and counterclaim) of any allowable interest to be added, the rate applicable and whether it is to be simple or compound.

## **8. COSTS**

8.1. Consideration of liability for recoverable costs (arbitrator's fees and expenses, fees and charges of any arbitral institution concerned, legal or other costs of the parties).

8.2. Principle adopted and reasons if not following the result.

8.3. Basis of determination of recoverable costs.

8.4. Effect of any limit on recoverable costs.

8.5. Effect, and disposition, of any security provided.

- 8.6. Effect of any rejection of offer in settlement of substantive dispute.
- 8.7. Decision(s) on liability for costs -claim and counterclaim.
- 8.8. Determination (if appropriate at this stage) of amount of recoverable costs.

## 9. AWARD

- 9.1. The fact of having considered submissions-
  - 9.1.1. If a monetary award, the appropriate declaration, direction, or for example, rectification.
  - 9.1.2. If a non-monetary award, the appropriate declaration, direction or for example, rectification.
- 9.2. Any conditions or terms.
- 9.3. Time for performance.
- 9.4. VAT implications if appropriate.
- 9.5. Who is to pay what costs (and, if a party has already paid any fees of the Arbitrator(s) for which it is not liable, provision for reimbursement together with any interest relating to such reimbursement.

## 10. RESERVED MATTERS

Matters left over to a subsequent award.

## 11. SIGNATURE AND FORMALITIES

- 11.1. Date when award was made (and, if different, date when signed).
- 11.2. Signature of the Arbitrator(s).

***(Adapted from “Arbitration Awards – a practical approach”- Ray Turner – Blackwell Publishing)***

## **SECTION 15**

### **IN WHAT CIRCUMSTANCES THE COURT WILL INTERVENE**

**EITHER TO REMOVE AN ARBITRATOR, OR TO SET  
ASIDE THE ARBITRATOR'S AWARD BY WAY OF  
REVIEW, OR BECAUSE THE ARBITRATOR WENT  
BEYOND THE MANDATE**



**AFSA**

The Arbitration Foundation of Southern Africa  
NPC

For removal of Arbitrator, see Arbitration Act,  
section 13 and AFSA Rules, Article 14.

For review, see section 33.

For the case where the Arbitrator exceeds the mandate see.....

## REMOVAL OF ARBITRATOR

- The court will remove an Arbitrator on good cause shown which includes a failure on the part of the Arbitrator to use all reasonable dispatch in dealing with the matter (section 13).
- **AFSA** Rules, Article 14.4, permits the same intervention by the **AFSA** secretariat which should be a much quicker form of intervention.

## REVIEW

- Unless the parties agree to an appeal option, there is no appeal permitted in an arbitration.
- The Arbitration Act permits the Court to set aside an Arbitrator's award only if one of the circumstances are present:

*misconduct*

*a gross irregularity in the procedure adopted; and*

*the improper obtaining of an award*

- Very often parties try to disguise an appeal by dressing it up as a review, and the courts must be careful to ensure that they do not allow the system to be abused in that way.
- In *Lufuno's* case, the Constitutional Court said at paragraph 236-

*".... 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 s33 (1), the goals of private Arbitration may well be defeated."*

**Note – if an award is set aside, either party can request that the dispute be submitted to a new Arbitration Tribunal.**

## **SHERWOOD ELEVEN THIRTY INVESTMENTS CC v ROBRIDGE CONSTRUCTION CC AND ANOTHER**

**2001 (4) SA 741 W**

**Judge            Navsa J**

Flynote:

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 rendering nugatory scheme of Act, which provides mechanisms to ensure either finality through enforcing arbitration agreement or cessation of arbitration.

Headnote:

The applicant and the first respondent had referred a dispute to an arbitrator (the second respondent) in terms of a contract 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 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.

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 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.)

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.)

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.)

Held, accordingly, that the applicant was entitled to the relief sought by it. (At 747G/H.)

## SECTION 33 OF THE ARBITRATION ACT, 42 OF 1965

### 1. Where-

- 1.1. Any member of an Arbitration Tribunal has misconducted himself in relation to his duties as Arbitrator or Umpire;
  - 1.2. An Arbitration Tribunal has committed any gross irregularity in the conduct of the Arbitration proceedings, or has exceeded its powers; or
  - 1.3. An award has been improperly obtained, **the court may, in 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 (6) 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 corruption, such application shall be made within six (6) weeks after the discovery of the corruption and in any case not later than three (3) years after the date on which the award was so published.
  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.

## SETTING ASIDE THE AWARD UNDER SECTION 33(a) AND (b) OF THE ARBITRATION ACT

- “**misconduct**” means something wrongful or improper (fraud, bias, dishonesty) not a mere mistake of fact or law no matter how gross.
- Dereliction of duty is not lightly inferred and strong evidence will be needed to *infer mala fides* by the Arbitrator.
- “**gross irregularity**” refers to something which happens during the conduct of the Arbitration and prevents the aggrieved party from having his/her case fully and fairly determined.

**Cases:** *Dickenson & Brown v Fishers Executors*, 1915 AD 166, SEE FILE 3 PAGE 319, *Hyperchemicals International v Maybaker Agrichem* 1992(1) SA (W), SEE FILE 3 PAGE 328, *Bester v Easigas (Pty) Ltd* 1993(1) SA30, SEE FILE 3 PAGE 342, *Diversified Total Support Management (Pty) Limited & Another Health Systems (SA) (Pty) Ltd & Another* 2002 (4) SA 661 (SCA), SEE FILE 3 PAGE 356, *Telcordia Technologies Inc. v Telkom SA Ltd* 2007 (3) SA 266 (SCA) SEE FILE 3 PAGE 374

## 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.  
28440-159,160,61 / 36440-252  
42440-340,350

51(1)-715. DICKENSON & BROWN, Appellants, v. FISHER'S  
EXECUTORS, Respondents.

51(3)-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)758(2A)

(BLOEMFONTEIN).

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.).

## DICKENSON & BROWN v. FISHER'S EXECUTORS. 167

*Held*, further, that a mistake not amounting to misconduct appearing on the face of an award was, in the Roman-Dutch law, of no more consequence than one not so appearing, and would not justify the setting aside of an award, although in English law an award might be set aside if a mistake of law appeared on its face, even when it did not amount to misconduct.

*Held*, further, that this was not a case for exercise by the Court of its power under sec. 17 (a) of the Act "to remit the matter referred to the re-consideration of the arbitrators or umpire."

The decision of the Natal Provincial Division in *Exors. Estate Fisher v. Dickenson and Brown* affirmed.

Appeal from the decision of the Natal Provincial Division (DOVE-WILSON, J.P., BROOKE, J., and CARTER, J., making an award a Rule of Court, and dismissing a counter-application to set aside the award.

It appeared that the respondents had sued the appellants in the court of the magistrate of Durban for £120, alleged to be due under a partnership agreement between the parties, commencing in April and May, 1910, which was to continue until 31st December, 1914.

By clause 12 of the agreement arbitration was provided for in case of any disputes arising. The defendants accordingly applied for a stay of proceedings under sec. 7 of the Natal Arbitration Act of 1898, in order that the matter might be referred to arbitration. The agreement expressly provided that "the decision of the arbitrator or umpire, as the case may be, shall be absolutely final and binding on the parties."

Clause 6 of the agreement provided that the capital of Fisher (whose executors were plaintiffs) in the partnership business, was £10,000, which he subsequently reduced to £9,600, and that on this sum "he was to receive interest at the rate of 8 per cent. per annum, and beyond the said sum and the interest thereon, he is declared to have no other interest in the assets and profits of the business." It was further provided that "in the event of his death during the subsistence of the agreement the remaining partner shall have the right to retain the said sum of £10,000 in the business until the completion of the term thereof, but in such event interest shall only be payable to his estate thereon at the rate of 5 per cent. per annum."

Clause 11 provided that "in the event of the death of any partner during the term of the partnership, the partnership shall not thereby be dissolved, but shall continue for the full term thereof."

## **HYPERCHEMICALS INTERNATIONAL (PTY) LTD AND ANOTHER v MAYBAKER AGRICHEM (PTY) LTD AND ANOTHER**

**1992 (1) SA 89 W**

**Judge                      Preiss J**

Flynote:

Arbitration - Arbitration Act 42 of 1965 - Review of arbitrator's award - Grounds for review - Section 33(1) of Act - 'Legal 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 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.

Headnote:

The applicants sought the setting aside of an award made by an 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 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 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 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. 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.

The Court accordingly held, in the light of the applicants' disavowal of 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 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.

'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 which the arbitrator was called upon to decide was whether Maybaker was entitled to avoid the toll manufacturing agreement on the 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 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 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 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 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 the content of his award.

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:

'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 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.'

'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.

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 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:

Accordingly, in deciding the issue in limine I must consider whether the founding affidavit makes out a prima facie case that falls within the 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 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 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 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 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 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, 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.

...

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.

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.

Some confusion stems from the allegation in para 32.2 supra when it was averred that the arbitrator exceeded his powers, more particularly in 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 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 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 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 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.'

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, and it is the Court's function to ensure that the 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 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 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 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 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 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 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:

'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.'

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 the part of the person whose behaviour is in question.'

'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.'

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,

"(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.'"

'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 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:

'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 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 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).

'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 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. . .'

(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 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 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 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.'

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.

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.

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.

(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 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 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 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 be awarded to the second respondent. As was stated in *Cambridge 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 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.

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.

## BESTER v EASIGAS (PTY) LTD AND ANOTHER

1993 (1) SA 30 C

**Judges**                      **King J and Brand AJ**

Flynote:

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).

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.

Headnote:

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.

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 applicant contended that 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.

Held, further, that there was no room for the inference that the arbitrator had been mala fide. Application dismissed.

Brand AJ

#### Gross irregularity in the conduct of the proceedings

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:

'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.)

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 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 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.
- 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 about discussion 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 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 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 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.

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.

King J concurred.

## **TOTAL SUPPORT MANAGEMENT (PTY) LTD AND ANOTHER v DIVERSIFIED HEALTH SYSTEMS (SA) (PTY) LTD AND ANOTHER**

### **2002 (4) SA 661 SCA**

**Judges**                    **Smalberger ADP, Marais JA, Cameron JA, Brand JA and Lewis AJA**

Flynote:

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 judgment, particularly where such errors not gross.

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) arbitrations.

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.

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 functions of arbitrator - Question ultimately whether arbitrator exercised own judgment in deciding issues.

Headnote:

In October 1995 a written agreement was concluded between I (Pty) Ltd and the second appellant, as sellers, and the first 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 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 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.

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 R20 million respectively. The first sum of R13,5 million was to become payable on fulfilment of any one of three conditions set 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 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 the interest due, leaving an overpaid balance of R11 675 761,64, which it claimed on the basis of the *condictio indebiti*.

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 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 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 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,

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 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', 'dishonesty', 'mala fides or partiality' or 'moral turpitude'. (Paragraph [21] at 672E - I.)

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 exercised, viz whether it was administrative or not. (Paragraph [23] at 673C - D/E.)

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, flowing from the parties' consent to the arbitration agreement. The parties defined the powers of 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.)

Semle: 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 arbitrators' decisions, might well merit reconsideration in the context of compulsory (as opposed to consensual) arbitrations. (Paragraph [26] at 674A/B - C.)

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 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.)

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 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.)

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 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.)

Held, further, as to whether an inference of impropriety and mala fides amounting to dishonesty could be drawn from the 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.)

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 employed by the arbitrator should not be allowed to perform tasks that might 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.)

Held, further, that there was nothing to suggest that the second respondent had been influenced by M to the extent that his 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.

The decision in the Transvaal Provincial Division in Total Support Management (Pty) Ltd and Another v Diversified Health Systems (South Africa) (Pty) Ltd and Another upheld.

Judgment

Smalberger ADP:

### **The issues arising from the arbitration**

[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

'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'.

(I shall refer to this as the first ground of review.)

[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 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 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).

### **The applicable legal principles**

[14] Section 33(1) of the 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.'

[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 for the setting aside of an arbitral award where, inter alia, 'an arbitrator or umpire has misconducted himself'. In the course of his judgment (concurring 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 went on to hold (also at 176) that

'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'.

'As I read *Dickenson and Brown v Fisher's Executors* (1915 AD 166), the misconduct which entitles a Court to set aside the award of an arbitrator must amount to dishonesty. I think that is the true reading of the judgment.'

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.

[18] Later cases, some of which are referred to in *Hyperchemicals International (Pty) Ltd and Another v Maybaker 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 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.

[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. 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. 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)).

The second ground of review

[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 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 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.

[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 a letter to the attorneys for the parties in which he stated, inter alia, that 'upon 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.

[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 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 assistant to write the judgment and award for him ...'.

[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 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, expressly or impliedly, and whether his conduct amounted to a usurpation of the second respondent's duties.

[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 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 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 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.

[42] There is no justification for the appellants' purported belief that Milo would only play a formal or secretarial role in the 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 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 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 assistance expressly or impliedly agreed upon.

[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 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.

[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 Town. The second respondent agreed to this, according to him,

'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 my overall supervision and prior direction.'

[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 structure was not what he wanted; he devoted 15 hours to a consideration of the draft, its re-drafting and discussing 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.

[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 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 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.

[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 s 33(1)(a) and (b) of the Act have not been satisfied. It follows that the second ground of review cannot succeed either.

#### Order

The appeal is dismissed with costs including, in respect of both 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.

## TELCORDIA TECHNOLOGIES INC v TELKOM SA LTD

### 2007 (3) SA 266 SCA

**Judges** Harms JA, Conradie JA, Cloete JA, Lewis JA and Ponnann JA

Flynote:

Arbitration - Award - Review of - Grounds for setting aside.

Arbitration - Arbitration Act 42 of 1965 - Appeal against decision to review and set aside 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 quo correctly exercising discretion in appointment of new arbitration tribunal.

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 proceedings having no 'right' to state case for opinion of court.

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.

Arbitration - Award - Review 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.

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 interpreting agreement, in determining applicable law, or in determining admissibility of evidence.

Arbitration - 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' 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.

Headnote:

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 agreement, which hinged on the parties' respective interpretations of the agreement. The dispute was referred to arbitration and the arbitrator ultimately accepted Telcordia's interpretation of the agreement.

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:

(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

(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.

Telkom relied on: (i) the common-law ground of review of awards tainted by material error of law; and (ii) review in terms of 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.

The High Court upheld the application on the latter ground and reviewed and set aside the arbitrator's award. On appeal,

#### Review for material error of law

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

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.)

#### 'Gross irregularity'

Held, that the general principle was that an irregularity related to the conduct of the proceedings rather than to the merits. 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.)

Held, further, that, in the present case, the arbitrator's mandate included interpreting the Integrated Agreement. An arbitrator 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.)

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; 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.)

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.)

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 the enquiry and his duties in connection therewith, ie he was found to have committed an irregularity, and simultaneously to have exceeded his powers. (Paragraph [99] at 305H - 306C.)

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.)

#### Section 20 of the Act

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.)

Appeal upheld. Order of the Court a quo set aside and replaced with one dismissing the application. (Paragraphs [157] and [158] at 320C - E.)

Judgment

Harms JA:

In addition, art 33 provides:

'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 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.'

[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. Typically, they agree to waive the right of appeal, which in context means that they waive the right to have the merits of their dispute re-litigated or reconsidered. They may, obviously, agree otherwise by appointing an arbitral appeal panel, something that did not happen in this case.

[51] Last, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set 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 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.

The meaning of s 33(1)(b): 'gross irregularity' and 'exceeding powers'

[52] The term 'exceeding its powers' requires little by way of elucidation and this statement by Lord Steyn says it all: 30

'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 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.'

[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 it, a rule abolished in England only in 1969. 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

[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 '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.

[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.

[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 approach renders the difference between appeals and reviews meaningless and in effect gives a right of appeal, which the Act prohibits.

[69] Errors of law can, no doubt, lead to gross irregularities in the conduct of the proceedings. Telcordia posed the example where 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 connection therewith.

[72] It is useful to begin with the oft quoted statement from *Ellis v Morgan* where Mason J laid down the basic principle in these terms:

'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.'

The nature of the inquiry, the duties of the arbitrator, and the scope of his powers

[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.

[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, the parties consented to the jurisdiction of South African courts.

[83] In short, the arbitrator had to: (i) interpret the agreement; (ii) by applying South African law; (iii) in the light of its terms; and (iv) all the admissible evidence.

[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 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.

[85] The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. It only 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 saying that they constitute a misconception of the nature of the inquiry. To adapt the quoted words of Hoexter JA: 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 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.

[86] 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.

[87] In support of this I revert to *Doyle v Shenker*, 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:

'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 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, be the first occasion on which a court of law has misread a statutory provision or overlooked one not 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.'

[88] Innes CJ added:

'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.'

The admission of illegal evidence is in itself an independent ground of review. 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.'

[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 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.

#### **How did the arbitrator understand his duties?**

[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 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 was based on the wording and structure of the Integrated Agreement itself.

[91] The arbitrator understood that he had to apply South African law.

He knew that he could only rely on background evidence and not on surrounding circumstances, and he stated that he had kept this in mind in interpreting the Integrated Agreement. 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 did consciously, relying on Christie, who in turn

relies on *Shill v Milner* as explained by Goldstone J in *Briscoe v Deans*. 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.

[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.

[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 the powers he had according to his terms of reference.

[96] The statement that the arbitrator had failed to refer to the applicable principles of construction, as I have indicated in the 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 failed to take into account.

[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 SOC's could not in themselves identify the 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 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.

The s 20 issue

[143] This brings me to the last ground of review with which I shall deal. It concerns the events surrounding Telkom's s application. Section 20 of the Act is in these terms:

'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 ss (1) shall be final and not subject to appeal and shall be binding on the arbitration tribunal and on the parties to the reference.'

[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 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. The first ground was abandoned before us.

[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 'right' under s 20 to approach the court, which right the arbitrator frustrated.

[151] The first matter I wish to address is the nature of the arbitrator's discretion. Eloff J, in *Kildrummy*, 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 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

'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 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 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.

If those three requisites are satisfied, the arbitrator or umpire should state a case.'

[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 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.

[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'. Its purpose, at the 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 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.

[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 proceedings. The arbitrator made it quite clear that the Shifren issue was at that stage hypothetical because 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.

[156] I therefore conclude that since Telkom had no right to approach the High Court in the circumstances of the case the 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.

The order

[158] The following order is made:

- 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.
- b) The order of the Court a quo is set aside and, in its stead, the following order issues:

'The application is dismissed with costs, including the costs of three counsel.'

## WHERE THE ARBITRATOR EXCEEDS THE MANDATE

- In a court case an issue which is not on the pleadings may be fully ventilated without objection from either party during the trial in which case the judge can find that point even though it was not pleaded.
- The position is different in arbitration where the Arbitrator is confined to the dispute as formulated by the parties and cannot find on an issue which goes beyond the agreed defined issues even if it was fully ventilated in the Arbitration.

***(Case: Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare marketing and Consulting (Pty) Limited & OTHERS 2008(2) SA608 (SCA))***

## **HOSMED MEDICAL AID SCHEME V THEBE YA BOPHELO HEALTHCARE MARKETING AND CONSULTING (PTY) LIMITED & OTHERS**

**2008(2) SA 608 (SCA)**

***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.***

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### **JUDGMENT**

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#### **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.

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. . .’

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.

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.<sup>7</sup> 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

<sup>7</sup> 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.

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.

[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.

[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.<sup>8</sup> Thus the arbitrator, and therefore also the appeal tribunal, had no jurisdiction to decide a matter not pleaded.<sup>9</sup>

<sup>8</sup> See LAWSA 2 ed vol 1 para 607 and the authorities there cited.

<sup>9</sup> 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.

[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*<sup>10</sup> 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.

[[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.

[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 approval<sup>11</sup> to the decision of the House of Lords in *Lesotho Highlands Development Authority v Impreglio SpA*<sup>12</sup> 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*<sup>13</sup> applied by the court in *Telcordia*.<sup>14</sup> 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:

<sup>10</sup> 1937 AD 101 at 105.

<sup>11</sup> *Telcordia Technologies Inc* above para 52.

<sup>12</sup> [2005] UKHL 43 para 24.

<sup>13</sup> 1915 AD 166.

<sup>14</sup> Above paras 56ff.

‘(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.
- (a) 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.
- (b) 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.’

[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.<sup>15</sup> 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.<sup>16</sup> Equally, because of the 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.<sup>17</sup>

[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,

<sup>15</sup> 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’.

<sup>16</sup> 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.

<sup>17</sup> 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.

in my view, also constitutes substantial success. In the circumstances I conclude that there should be no order as to costs.

(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.’

(c) No order is made as to costs.

# **SECTION 16**

## **ARBITRATION: EXECUTION OF THE AWARD**



**AFSA**

The Arbitration Foundation of Southern Africa  
NPC

## **SECTION 31 OF THE ARBITRATION ACT, 42 OF 1965**

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 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 e enforced in the same manner as any judgment or order to the same effect.

# APPENDIX



**AFSA**

The Arbitration Foundation of Southern Africa  
NPC

## APPENDIX

In this Appendix, we deal with various miscellaneous matters of importance:

1. When the courts intervene under the provisions of section 3 (2) of the Arbitration Act to set aside an Arbitration Agreement or direct that it should not apply in a particular case?
2. What would an Arbitrator do when faced with a contention that only the court has jurisdiction to decide on questions relating to the Arbitrator's jurisdiction.
3. When does an Arbitrator "enter into the reference" for the purpose of section 23?
4. How has a party interrupt the running of prescription in an arbitration?

## APPENDIX

### QUESTION 1:

**WHEN WILL THE COURTS INTERVENE UNDER THE PROVISIONS OF SECTION 3(2) OF THE ARBITRATION ACT TO SET ASIDE AN ARBITRATION AGREEMENT OR DIRECT THAT IT SHOULD NOT APPLY IN A PARTICULAR CASE?**

- Any such intervention by a court must be on “good cause shown”.
- See *Sera v de Wet*, 1974(2) SA 645 (T) on page 440 of File 3.
- As noted by Ransden “The Law of Arbitration”, 2009, courts have intervened where:
  - (i) A defendant’s counterclaims affected third parties not subject to the provisions of the Arbitral Agreement and in respect of which the Arbitrator had no powers of investigation, and where a court of law was in a better position to adjudicate and conclude all of the issues in the same process.
  - (ii) A party against whom fraudulent conduct was alleged requested that the disputed averments of fraud should be ventilated in open court rather than in the privacy of Arbitration proceedings. However, far less weight is accorded to an application by the party alleging fraud that the dispute be heard in open court than to a similar application by the party accused of fraud; and
  - (iii) There were a number of legal problems at stake in the dispute, and where the technical matters were easily resolved by a court of law.

## QUESTION 2:

**WHAT SHOULD AN ARBITRATOR DO WHEN FACED WITH A CONTENTION THAT ONLY THE COURT HAS JURISDICTION TO DECIDE ON ISSUES RELATING TO THE ARBITRATOR'S JURISDICTION?**

- The question is important in cases where the Arbitrator has not been given the power to decide on his or her jurisdiction.
- Does such an Arbitrator throw up her or her hands when faced with such an issue?
- See *Radon Projects v NV Prospects* 2013 (6) SA 345 (SCA)

## **RADON PROJECTS (PTY) LTD v NV PROPERTIES (PTY) LTD AND ANOTHER**

### **2013 (6) SA 345 SCA**

Flynote:

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 Principal Building Contract 2004 (4 ed), clause 40.

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.

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.

Headnote:

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 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.

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 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 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 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. (Paragraphs [9], [21] – [25] and [27] – [32] at 350B – D, 352D – 353H and 354A – 355E.)

An appeal against a decision in the Eastern Cape High Court, Grahamstown (Da Silva AJ).

Order

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.

## Judgment

Nugent JA (Leach JA, Pillay JA, Erasmus AJA and Saldulker AJA concurring):

[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 the Joint Building Contracts Committee (JBCC) 4 ed (March 2004).

[15] The present dispute concerns claims by the contractor for revisions 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 completion only on 14 December 2009, in consequence of which the contractor incurred penalties amounting to a little more than R6 million.

[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.

[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.

[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, 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 resolution by arbitration.

[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.

[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'.

[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 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).

[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 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 (before the Arbitration Act, 1996), in reliance on *Christopher Brown Ltd v Genossenschaft Oesterreichischer etc*:

'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 has no jurisdiction then he might well take the view that he should not go on with the hearing at all.'

[30] The position was fully explained by Devlin J in that case as follows:

'I think that the answer to that question becomes clear if one bears in 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 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. They are not obliged to take either of those courses. They are entitled to inquire into the merits of the issue whether they have jurisdiction or 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 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.'

[31] In short, what is called for when confronted with a jurisdictional 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* and Russel on Arbitration provide helpful assistance as to the manner in which an arbitrator should exercise his judgment.

[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.

### QUESTION 3:

#### WHEN DOES AN ARBITRATOR “ENTER INTO THE REFERENCE” FOR THE PURPOSE OF SECTION 23?

- Section 23 of the Arbitration Act requires an Arbitrator to render an award within four (4) months after the date on which the Arbitrator “entered on the reference”, or the date on which he was called on to act by notice in writing from any party to the reference.
- See **Van Zyk v Von Haeblier**, 1993(3) SA654 (SECLD)

## VAN ZIJL v VON HAEBLER

### 1993 (3) SA 654 (SE)

**Judge**                      **Kroon J**

Flynote:

Arbitration - Arbitration proceedings - Failure to attend - Proceedings 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 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.

Arbitration - The award - Application to have award made order of Court - Award in fact a nullity - Failure by one party to arbitration 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.

Arbitration - The award - Time for making - Interpretation of phrase 'entered on the reference' occurring in s 23(a) of Arbitration Act 42 of 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.

Headnote:

Where an arbitrator's award is in fact a nullity, the failure by one party 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.

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, 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.

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.

Application for an order that an arbitration award be made an order of Court.

In the result the following order is made:

- (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.
- (2) The time for the making of the award is extended to 31 July 1991.

(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 thereof.

(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 October 1992.

(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 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.

## QUESTION 4:

### HOW DOES A PARTY INTERRUPT THE RUNNING OF PRESCRIPTION IN AN ARBITRATION?

- In litigation the service of a summons interrupts the running of prescription, i.e. the time in which a case must be brought before it happens. What is the equivalent in an Arbitration which does not commence with the issue of a summons?
- In an Arbitration, the claimant can do no more than follow the procedure set out in the Arbitration Agreement to commence the Arbitration proceedings – e.g. file a request for Arbitration in an **AFSA** Arbitration. Once the claimant has done all that he or she can do to commence the Arbitration proceeding, prescription is interrupted.

See ***Murray & Roberts (Cape) (Pty) Limited v Uppington Municipality***, 1984(1) SA571 (AD)

## **MURRAY & ROBERTS CONSTRUCTION (CAPE) (PTY) LTD v UPINGTON MUNICIPALITY**

**1984 (1) SA 571 A**

**Judges                    Wessels JA, Trengove JA, Botha JA, Howard AJA and Grosskopf AJA**

Flynote:

Prescription - Extinctive prescription - Delaying completion of in terms of s 13 (1) (f) of Act 68 of 1969 - 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 damages arising out of breach of engineering contract delayed in terms of s 13 (1) (f) of the Act.

Headnote:

The appellant had sought an order in a Provincial Division declaring that a claim for damages by the respondent against 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 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 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 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,

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 considered one of arbitration and that the dispute in the present case had been subjected to arbitration when it was submitted to the engineer.

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).

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.

The decision in the Northern Cape Division in *Murray & Roberts Construction (Cape) (Pty) Ltd v Upington Munisipaliteit* 1982 (3) SA 385 confirmed.

## QUESTION 5:

### CAN AN ARBITRATOR GO BEYOND THE PLEADINGS?

The answer is no

## CLOSE-UP MINING (PTY) LTD AND OTHERS V THE ARBITRATOR, JUDGE PHILLIP BORUCHOWITZ AND ANOTHER

2023 (4) SA 38 (SCA)

**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.

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**Unterhalter AJA(Scribe) (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*,<sup>18</sup> 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.

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<sup>18</sup> *Shill v Milner* 1937 AD 101 (A) at 105.

[10] It is well understood that parties may agree the matters to be referred to arbitration, and enjoy considerable autonomy in doing so.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

[13] The holding in *Hos+Med*<sup>23</sup> 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*.<sup>24</sup> 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.

<sup>19</sup> *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* [2009] ZACC 6; 2009 (6) BCLR 527 (CC); 2009 (4) SA 529 (CC) para 219; *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266 (SCA); [2007] 2 All SA 243 (SCA); 2007 (5) BCLR 503 (SCA) para 4.

<sup>20</sup> Section 173 of the Constitution.

<sup>21</sup> Section 2 of the Arbitration Act.

<sup>22</sup> See *Telcordia Technologies Inc* para 4 as well as authorities cited therein.

<sup>23</sup> *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing and Consulting (Pty) Ltd and Others* [2007] ZASCA 163; [2008] 2 All SA 132 (SCA); 2008 (2) SA 608 (SCA) paras 30-31.

<sup>24</sup> *Holford v Carleo Enterprises (Pty) Ltd and Others* [2014] ZASCA 195 (SCA) para 9.

[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.<sup>25</sup>

[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.

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<sup>25</sup> *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25.

[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.<sup>26</sup> 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.

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D N UNTERHALTER  
ACTING JUDGE OF APPEAL

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<sup>26</sup> *Siyangena Technologies (Pty) Ltd v PRASA and Others* [2022] ZASCA 149; [2023] 1 All SA 74 (SCA); 2023 (2) SA 51 (SCA) para 50 and case cited therein.