

SOUTH AFRICA / JUDGMENT

Rabinowitz v Levy and Others (1276/2022) [2024] ZASCA 8 (26 January 2024) [2024] ZASCA 8

COURT

Supreme Court of Appeal

BEFORE

Mbatha, Mothle, Mabindla-Boqwana, Koen, Masipa

CASE / FILE NUMBER

1276/2022

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1276/2022

In the matter between:

GARY RABINOWITZ APPELLANT

and

COLIN LEVY FIRST

RESPONDENT

DANIEL MPANDE SECOND

RESPONDENT

TRITON PHARMACARE (PTY) LTD THIRD

RESPONDENT

HILTON EPSTEIN SC

FOURTH RESPONDENT

Neutral citation: Rabinowitz v Levy and Others (Case no 1276/2022) [2024] ZASCA 8 (26 January 2024)

Coram:

MBATHA, MOTHLE AND MABINDLA-BOQWANA JJA AND KOEN AND MASIPA AJJA

Heard:

30 November 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email publication on the Supreme Court of Appeal website and by release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 26 January 2024.

Summary: Arbitration award – application of s 33(1)(b) of the Arbitration Act 42 of 1965 – whether alleged failure by arbitrator to comply with terms of email by the parties regarding future conduct of the arbitration procedure reviewable – whether further hearing was required – whether arbitrator strayed beyond the pleadings – whether arbitrator failed to adjudicate a counterclaim – whether arbitrator committed a gross irregularity in the proceedings and denied the parties a fair hearing.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Daniels AJ, Francis J and Meersingh AJ concurring, sitting as a court of appeal).

(a) The appeal is upheld.

(b) The order of the full court under case number A5061/2021, dated 25 July 2022:

(i) is set aside; and

(ii) replaced with the following order:

‘The appeal is dismissed with costs including the costs of the application for leave to appeal to the full court, such costs to be paid by the first, second and third appellants jointly and severally.’

(c) The first, second and third respondents are liable jointly and severally to pay the appellant's costs of the appeal.

Koen AJA (Mbatha, Mothle and Mabindla-Boqwana JJA and Masipa AJA concurring):

Introduction

[1] Voet[1] wrote that arbitration was often resorted to for ‘the termination of a suit and the avoidance of a formal trial’ and

as an alternative to the ‘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’. But, as FJD Brand has cautioned,[2]

‘... these advantages are diminished, or even largely destroyed, if the courts should adopt an over-keen approach to intervene in arbitration awards. This is so because an interventionist approach by the courts is likely to encourage losing parties who feel that the arbitrator's decision is wrong — as losing parties mostly do — to take their chances with the court. And if arbitration becomes a mere prelude to judicial review, its essential virtue is lost.’[3]

This appeal considers whether, on the peculiar facts relating thereto, the arbitration award of the fourth respondent, Mr Hilton Epstein SC, should have been reviewed[4] and set aside.

Background

[2] The genesis of the appeal is to be found in a sale agreement (the sale agreement) concluded on 30 June 2017. In terms of the sale agreement Mr Gary Rabinowitz, the appellant (the seller), sold 34 of his shares in SDK Agencies (Pty) Ltd (SDK), which made and sold cosmetics, to Mr Colin Levy, the first respondent, and 66 of his shares in SDK to Mr Daniel Mpande, the second respondent (the first and second respondents are collectively referred to as the buyers).[5] Triton Pharmacare (Pty) Ltd, the third respondent (the surety), bound itself to the seller for the due performance of the obligations of the buyers.

[3] The sale agreement provided that disputes arising from ‘the interpretation of, the effect of, the parties’ respective

rights or obligations under, a breach of, the termination of, or any matter arising out of the termination of the Sale agreement,’

were to be referred to arbitration.[6] Various disputes arose and were referred to arbitration. The fourth respondent was appointed by the parties as the arbitrator to decide the disputes.

[4] In the arbitration proceedings the seller claimed payment of the sum of R15 064 754.24, representing the balance[7] of the purchase price,[8] plus interest and costs from the buyers and the surety.[9] According to the sale agreement the purchase price was R18 million plus interest, plus ‘the aggregate value of the stock’,

plus certain adjustments which were required to be made. The aggregate value of the stock fell to be determined in accordance with

the provisions of the sale agreement.[10] At the time of signature, the sale agreement recorded that the portion of the purchase price attributable to the value of the stock

as at 1 March 2017 was R6 197 211.14. Although the buyers signed the sale agreement, they later complained that the audited

financial statements of SDK at 28 February 2017,[11] reflected a stock figure of only R2 239 002.00.

[5] In opposition to the seller’s claim for payment, the buyers:

- (a) raised as a primary defence that the sale agreement was induced by various fraudulent misrepresentations, which entitled them to resile from the sale agreement;
- (b) claimed in the alternative, if they were not entitled to resile from the sale agreement, that they were entitled to a reduced purchase price by virtue of various conditional counterclaims: the first counterclaim related to alleged breaches of various accounting warranties, and included an amount of R34 736.06 for an irrecoverable debt stemming from an undercharge to Clicks (the Clicks claim); the second counterclaim related to the alleged failure to deliver the value of stock as per the stock sheets furnished, which the buyers claimed required that R3 997 211.14 should be deducted from the balance of the purchase price claimed (the stock claim); the third counterclaim related to various assets in SDK's

Fixed Asset Register at the signature date allegedly being missing and never delivered, resulting in a claim for delivery of these

assets, alternatively an order for payment of the value thereof (the missing assets claim); and three further counterclaims (the further counterclaims) the details whereof are not relevant to this

judgment.

- [6] After the conclusion of the evidence and argument before the arbitrator, an email dated 28 June 2019 (the email) was addressed by the seller's counsel to the arbitrator, providing as follows:

'Dear Hilton

[The respondents' counsel] and I have spoken and discussed the issues that I address below. He checked the wording of this email before I sent it to you, so it reflects both of our views.

- (a) First, as to [the buyers'] claim for R34 736.06 based on the irrecoverable debt owed by Clicks: as I was preparing a note for you on this topic, I realised that I made an error in one of my key assumptions, which means that the respondents are correct. As a result, my instruction is to ask you to set off the amount of R34 736.06 against any monetary sum that you may award to my client.
- (b) Secondly, as to the issue of restitutio in integrum: [the respondents' counsel] and I have looked at the law and are in agreement that, if you find that the respondents are entitled to resile from the agreement, there will need to be evidence on whether
- (a) restitution may be ordered, and (b) if so, on what terms. [He] and I are in agreement that much of the relevant evidence already exists in the papers, transcript and record of this matter. However, either party may wish to top up that evidence with something further, either in the form of reports, documents or oral evidence.

You will recall that we had already all agreed that, should you uphold any of the respondents' counterclaims that still require

evidence on quantum (the best example of which is Clicks; another example is some of the claims based on missing assets), a further

hearing on quantum will be necessary. So our suggestion on how to proceed is the following:

- (1) If you uphold the counterclaims (other than those, for example the claim relating to the rebate to Clicks of R144 557.94, where the amount is clear) or the fraud claims of the respondents, a further hearing on remedy will be necessary.
- (2) We are of the view that 1 day will be sufficient for such a hearing, if we perhaps start at 9h00 and try to be as efficient as possible.
- (3) Our suggested road ahead is for you to go ahead and make your award when you are ready and then, if a further hearing on remedy is necessary (which will of course depend on your conclusion in the award), we will between us agree [on] a date for the hearing subject to an understanding (which could, if needs be, be reflected in your award) that:
 - (a) Either party who wishes to lead evidence that is additional to what is already on record must notify the other party and you 14 days before the remedy hearing,
 - (b) The parties must present a case in the form of written submissions, to be sent to you by no later than the week before the hearing on remedy.

We hope that you are okay with all of the above. Please let us know if you wish to canvass any of these issues further.'

This email was 'noted' by the arbitrator in a reply on 1 July 2019.

- [7] The arbitrator issued his award on 10 July 2019. He dismissed the allegations of fraud, which meant that the buyers were not entitled

to resile from the sale agreement (this finding has not been subsequently challenged); upheld the Clicks claim to the extent that

he found that the buyers were entitled to the credit of R34 736.06; found in respect of the stock claim that the purchase price fell to be reduced by R3 958 209.14; [12] dismissed the further counterclaims; determined that the buyers jointly and severally were liable for the balance of the purchase

price of R11 071 809.04 (R15 064 754.24 less R34 736.06 less R3 958 209.14), together with interest on the amount of R11 071 809.04 at the rate of prime plus 2% from 28 February 2018 to date of payment; directed the buyers and surety to pay two thirds of the seller's costs of the arbitration to be taxed on the high court scale on a party and party basis; and directed that the liability of the buyers and surety to make the payments in the award and the costs would be joint and several.

[8] Dissatisfied with the arbitrator's award, the buyers launched a review to the Gauteng Division of the High Court, Johannesburg (the high court), based, as subsequently conceded, on the provisions of s 33(1)(b) of the Arbitration Act 42 of 1965 (the Act). Section 33(1)(b) provides that:

‘(1) Where –

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

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.’

[9] The specific grounds relied upon in support of the review included the following:

- (a) There was a gross irregularity in the conduct of the proceedings relating to the arbitrator's decision regarding the stock claim, as he failed to convene a separate hearing for the quantification of that claim, which, it was alleged, the email required, and instead awarded ‘a self-conceived amount’ and applied ‘his own calculation as to the value of the stock’;
- (b) The arbitrator committed a gross irregularity as he strayed beyond the pleadings and thus exceeded his jurisdiction by upholding the buyers' stock claim on the basis of an ‘innocent misrepresentation’ by the seller, where this was not pleaded – the buyers having relied on a breach of contract as the basis for the stock claim;
- (c) The arbitrator failed to adjudicate the missing assets claim; that he dismissed the buyers' claim for payment or the return of the missing assets on the basis that these claims ‘had not been pursued with rigour’; and that he failed to appreciate that the buyers' version in respect of the missing assets claim was not challenged.[13]

[10] The high court, as per Wright J, dismissed the review and directed the buyers and the surety jointly and severally to pay the seller's costs of the review. The high court concluded *inter alia*:

- (a) In regard to the email, that ‘a further hearing would not be needed where quantification of any item relied upon by the [buyers] to reduce the amount owed to the seller could be clearly established

without the need for further hearings’;

- (b) That the arbitrator did not reasonably require further hearings for the quantification of the counterclaim regarding stock, as this had been disputed and was debated in evidence and argument, and was

clear;

(c) That the arbitrator's award is 'detailed, careful, comprehensive . . . and generally shows that Mr Epstein took into account everything that both sides required him to consider'; and

(d) Finally, that:

'The balance of the grounds for review and setting aside is really an attempt to appeal the award through the back door. A series of nit-picking challenges is raised which is clearly without merit. Mr Alli, for the present applicants quite properly did not suggest that a mere error of law or fact or both, without more would advance his clients' case. In any event no error is shown in the award.'

[11] With the leave of Wright J, the buyers appealed to the full court. The full court found *inter alia*:

(a) That the high court had considered only the allegation that the arbitrator had wrongly failed to convene a separate hearing on quantum before he made his final award;

(b) That 'while the arbitrator probably did take "into account everything that both sides required him to consider" that was in relation to the evidence presented', but that 'both

parties had agreed that, if either party wished to lead further evidence, that party must notify the other party and the arbitrator

of its intention to do so 14 days before the remedy hearing'.

(c) That 'the counterclaim in respect of the stock was not clear at all, even if the arbitrator thought that he was entitled, by way of a simple mathematical calculation, to determine the actual value of the stock';

(d) That '[b]y doing so he went against an agreement reached by the parties in relation to a further hearing. He was unfair to both parties and committed gross misconduct';

(e) The arbitrator had concluded that the true value of the stock attributable to the purchase price was R2 239 002.00, being the stock value reflected in the audited financial statements of SDK at 28 February 2017, and accordingly that the purchase price had to be reduced by an amount of R3 958 209.14, but he did not attempt to explain either what the stock value of R6 197 211.14, or the stock value of approximately R2.2 million consisted of;

(f) Due to the discrepancies in the stock figures, the arbitrator was

obliged to have convened another hearing to determine the value of the counterclaim in respect of the stock, as he had undertaken to do in his response to the email;

(g) That '[t]he arbitrator misconceived the nature of the enquiry he was to conduct and that resulted in both parties being denied an opportunity to adduce further evidence in respect of the quantum

relating to the stock counterclaim, which resulted in unfairness to both parties and constitutes a gross irregularity in the conduct of the proceedings’;

- (h) The arbitrator adopted a procedure that was not fair because the ‘email was clear regarding a further hearing . . . all the parties had already agreed upon’;
- (i) Did not consider the further issues relating to straying beyond the pleadings and not deciding the missing assets claim.

[12] The full court accordingly:

- (a) upheld the appeal;
- (b) set aside the order of the high court and replaced it with an order:
 - (i) Upholding the review and setting aside the arbitrator’s award.
 - (ii) Ordering that the arbitration start afresh before a new arbitrator.
- (c) Directed the seller to pay the costs of the full court appeal and the costs occasioned in the high court.

[13] The present appeal is against the decision of the full court with the special leave of this Court.[14] The broad issues in the appeal, as is apparent from the above, addressed in this judgment, are: first, whether there was a gross irregularity in the proceedings as a result of the failure of the arbitrator to have convened a further hearing on the quantification of the stock claim; second, whether the arbitrator had strayed beyond the pleadings in upholding the stock claim, allegedly on the basis of an innocent misrepresentation; and third, whether the arbitrator had failed to adjudicate the counterclaim regarding the missing assets, and whether this amounted to a gross irregularity in the proceedings and/or the denial of the right of the first to third respondents to a fair hearing. These issues[15] will be addressed seriatim below after considering the relevant legal principles.

The legal principles regarding the review of an arbitration award

[14] The provisions of s 33 of the Act are exhaustive of the grounds for review of awards in consensual arbitrations.[16] An aggrieved party wishing to successfully review an arbitration award must bring his or her case squarely within the four corners of the relevant provisions of s 33 of the Act. The primary principle is that material errors in an award, that is, errors which lead to a party being unsuccessful, are not reviewable, otherwise the distinction between appeals and reviews would be eroded[17] and s 33 of the Act impermissibly becomes a right to appeal arbitration decisions.[18]

[15] The ‘gross irregularity’ required by s 33(1)(b) must relate to the conduct of the proceedings, and not the result or outcome of the proceedings.[19] Thus, if an arbitrator is guilty of conducting an arbitration in some form of high-handed or arbitrary manner, or dishonestly, he or she would be guilty of a gross irregularity. But a bona fide mistake in respect of the merits, no matter how gross, will not suffice.[20] It is furthermore not every irregularity in

the conduct of the proceedings that will afford grounds for review: 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.[21]

[16] In *Lufuno Mphaphuli and Associates v Andrews*[22] the Constitutional Court held:

‘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.’

O’Regan ADCJ cautioned that:

‘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 . . . 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 . . . 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.’[23]

[17] *Goldfields Investment Ltd v City Council of Johannesburg*[24] (*Goldfields Investment*) held, as regards what would constitute a ‘gross irregularity,’ albeit in the context of a review of magistrate’s court proceedings, that:[25]

‘The crucial question is whether [the irregularity] prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect . . . If, on the other hand, [the magistrate] merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law.’[26]

Simply put:

‘an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial . . . which has prevented the aggrieved party from having his case fully and fairly determined.’[27]

[18] A gross irregularity may include a decision-maker misconceiving the mandate. As was held in *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd (Palabora)*: [28]

‘It suffices to say that where an arbitrator for some reason misconceives the nature of the enquiry in the arbitration proceedings with the result that a party is denied a fair hearing or a fair trial of the issues, that constitutes a gross irregularity. The party alleging the gross irregularity must establish it. Where an arbitrator engages in the correct enquiry, but errs either on the facts or the law, that is not an irregularity and is not a basis for setting aside an award. If parties choose arbitration, courts endeavour to uphold their choice and do not lightly disturb it. The attack on the award must be measured against these standards.’

[19] A review in terms of s 33(1)(b) of the Act will include where an arbitrator has exceeded his or her powers. The focus is on whether the arbitrator purported to exercise a power he or she did not have. An erroneous exercise of a power that the arbitrator has does not amount to a ground for review.[29] As much as an award going beyond the terms of an arbitrator’s reference may result in a successful review of an award,[30] 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’[31] by the arbitrator, as a transgression of the limits of the arbitrator’s power. In *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd*, [32] regarding an argument that the arbitrator’s award was not supported by admissible evidence, the court approved of the statement

by Butler and Finsen that:

‘Provided the parties receive a fair hearing there are no grounds for challenging the arbitrator’s decisions in that regard . . . The advantages of arbitration over litigation, particularly in regard to the expeditious and inexpensive resolution of disputes, are reflected in its growing popularity worldwide. Those advantages are diminished or destroyed entirely if arbitrators are confined in a straitjacket of legal formalism that the parties to the arbitration have sought to escape.

Arbitrators should be free to adopt such procedures as they regard as appropriate for the resolution of the dispute before them, unless the arbitral agreement precludes them from doing so. They may therefore receive evidence in such form and subject to such restrictions as they may think appropriate to ensure, as the arbitrator in this case was required to do, the “just, expeditious, economical and final” determination

of the dispute.’[33] (Emphasis added.)

[20] An arbitrator might also exceed his or her jurisdiction if a matter is decided on a basis not covered by the pleadings.[34] This will depend on the nature and ambit of what was referred to the arbitrator to determine.[35] Whether an arbitrator has strayed beyond the pleadings, and possibly exceeded his or her powers requiring under s 33(1)(b) that the award be set

aside, is a question to be decided on the facts of each case. Courts, however, generally remain reluctant to interfere with an arbitrator's award and are prepared to adopt 'a rather generous approach'[36] to the pleadings.

The contentions of the buyers

[21] The high court and the full court correctly observed that '[t]he gist of the complaint with regard to the alleged irregularity in the proceedings was that the parties had agreed to a separate hearing in the event of the arbitrator making certain findings, but that no such hearing took place.' The buyers have persisted with this contention. The implications thereof in relation to the stock claim and the missing assets claim are examined below.

The stock claim

[22] In their heads of argument, the buyers articulate their contention regarding the stock claim as follows:

'The arbitrator, in making a finding on the value of the stock without affording both of the parties a hearing, contrary to the agreement

between them to that effect (when this was disputed), caused for there to be a gross irregularity in the proceedings.'

[23] That proposition raises inter alia the following questions:

- (a) Did the email give rise to a legal obligation requiring the arbitrator to have a hearing before deciding the quantum of the stock claim?
- (b) Irrespective of the status of the email, was the arbitrator's application, based on his interpretation of the terms thereof open to review?
- (c) If the arbitrator's application of the email was open to review, was his failure to have a hearing where the quantum of the stock claim was clear, so unfair as to constitute a gross procedural

irregularity which should be reviewed and set aside?

A further consideration arising in regard to the stock claim was whether the arbitrator exceeded his mandate (and thus his jurisdiction) by allegedly having decided the stock claim on the basis of an innocent misrepresentation, when that was not pleaded.

The purpose and effect of the email

[24] The fons et origo of the arbitrator's powers and obligations was the sale agreement. Clause 27.1 thereof provided that any dispute, as contemplated by its terms, would 'be decided by arbitration in the manner set out in this clause 27'. (Emphasis added.). Clause 27.4 provided that:

‘[t]he arbitration shall be held in accordance with the Rules of AFSA,[37] . . . it shall not be necessary to observe or carry out either the usual formalities or procedure or the strict rules of evidence, and otherwise subject as aforesaid of the Arbitration Act No 42 of 1965 and any statutory modification or re-enactment thereof.’

The arbitrator was enjoined in terms of clause 27.5 to ‘make such award, including an award for specific performance, an interdict,

damages or a penalty or the costs of the arbitration or otherwise as he in his discretion may deem fit and appropriate’. Rule 27.4 of the AFSA rules required the arbitrator to ‘hear the matter on the most expeditious or least costly procedure . . .’. Further, he could ‘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 . . .’. (Emphasis added.). The arbitrator was given a very wide discretion by the terms of the agreement and the law, as to the procedure he could and should adopt to decide the issues arising in the arbitration.

[25] The buyers’ contention that the email contractually required the arbitrator to have a further hearing before finalising his award, would constitute a limitation on, and hence a variation of the arbitrator’s wide powers to decide the disputes as he deemed appropriate. The terms of the email could however not validly add to or amend the powers conferred and obligations imposed on the arbitrator by the sale agreement. The sale agreement expressly provided that it was the whole agreement between the parties relating to the subject matter thereof and that ‘[n]o addition to, novation, amendment or consensual cancellation . . . shall be binding unless recorded in a written document signed by the Parties . . .’.

The email did not comply with these formalities for any addition to or amendment of the arbitrator’s powers in the sale agreement.

[26] It was conceded by counsel during argument that this issue had not occurred to the seller or the buyers. The buyers, however, argued that it had been common cause between them and the seller on the affidavits exchanged in the review that further hearings were required to be conducted before the award could be issued and that the arbitrator was accordingly bound by their agreement. I disagree. The buyers argued that the arbitrator, as a matter of law, should have had a further hearing and that it was his failure to do so which constituted a gross irregularity and resulted in a procedural unfairness. The issue whether the arbitrator was obliged to have had a further hearing was accordingly a question of law. The terms of the email could not validly add to or amend the arbitrator’s powers in terms of the agreement, unless reduced to writing and signed by them. Absent compliance with that formality, there was no valid amendment or addition to the arbitrator’s powers which would impose a binding obligation on him in law to have a further hearing, irrespective of what the buyers and seller might have agreed. It was entirely in the arbitrator’s discretion, depending on whether he thought it necessary in giving effect to the terms of his original mandate, to conduct any further hearings. If the intention was that his discretion and the wide powers in the sale agreement had become fettered by the terms of the email requiring him to have a

hearing, then the terms of the sale agreement should have been amended in the manner contemplated for its amendment.

The interpretation of the email

- [27] Even if my aforesaid conclusion was wrong and the email could impose valid obligations adding to or amending the wide terms of the arbitrator's original appointment, then the email would have to be interpreted to determine the ambit of such obligations. It was for the arbitrator, and only the arbitrator, to interpret the email, just as he had to interpret and apply the arbitration sale agreement embodied in clause 27 of the sale agreement, other provisions of the sale agreement itself, or any other document which featured in the arbitration. He would have to do so having regard to the wording of the email in the context within, and the purpose for which, it came into existence.[38] His interpretation, whether right or wrong, would be final and not subject to review.
- [28] Mr Friedman, for the seller, seemed to suggest that if the arbitrator's interpretation of the email was so unfair or unreasonable as to not be sustainable on any basis, that the arbitrator would then have exceeded his mandate. I shall, in the interest of brevity, accept the correctness of that proposition for the purposes of the present argument, but without deciding the issue. I do so as there is not the slightest possibility on the evidence, of concluding that the arbitrator had interpreted the email in an unfair manner resulting in him exceeding his mandate.
- [29] Although it is not for this Court to interpret the email, I make the following brief observations regarding the email. The email did not impose an unequivocal obligation requiring a hearing in respect of the counterclaims generally, otherwise it would have said so. Specifically, if the intention was that the quantum on the stock claim was to be referred to evidence regardless of whether it was clear or not, then the email would have said so. On the contrary, what was proposed was equivocal and stated to be merely a 'suggestion' (not a definitive obligation), and contained what counsel termed 'our suggested road ahead'. (Emphasis added.). The proposals in the email were furthermore conditional, depending on certain scenarios arising, as is apparent from the repeated use of the word 'if'. In addition, the email contemplated two factual scenarios arising. The first scenario, that is, if the buyers were found to be entitled to resile from the agreement, was rejected by the arbitrator in the award and need not be considered further. The other scenario was, 'as we had already all agreed that, should you uphold any of the respondents' counterclaims that still require evidence on quantum . . . a further hearing on quantum will be necessary',

but the 'suggestion on how to proceed' was that this was where a counterclaim was upheld '(other than those . . . where the amount is clear) . . .' (Emphasis added.). Fairly interpreted, a hearing on quantum would thus be required only if the quantum was not clear. The arbitrator accordingly had not erred, and even less so acted irregularly or unfairly, in interpreting the email to not require a hearing where quantification of any item relied upon by the buyers to reduce the amount owed to the seller could be clearly established without the need for a further hearing.

Is the arbitrator's determination that the claim was clear, open to review?

[30] Given the above interpretation of the email, the question whether the quantum of a claim was clear or not, would again be an issue for the arbitrator to determine. The arbitrator's decision would bear on the outcome of the award, would be final, even if wrong, and would not be susceptible to review. Accepting again the correctness of the proposition stated by Mr Friedman for the purpose of argument, I am not persuaded that the arbitrator's implicit finding that the quantum of the stock claim was clear, resulted in any unfairness[39] to the buyers, or amounted to a 'gross irregularity'.

[31] That the arbitrator determined the quantum of the stock claim in a justifiable and fair manner requires a brief examination of the relevant material facts and evidence. These included the following: the stock sheets of the physical stock take performed on 26 or 27 February 2017 by employees of SDK were provided to the buyers; applying the prices of the stock to the physical items on the stock sheets resulted in the stock figure of R6 197 211.14; the buyers subsequently disputed that value contending that the stock value was approximately R2 200 000 (a rounded off value); the buyers bore an evidentiary onus to establish which items of stock were not present (they were unable to do so); there was no evidence from the buyers identifying the items on the stock sheets of SDK that were allegedly missing on take-over, nor was there evidence of what stock was found on take-over and the value thereof; the only other evidence of the value of the stock of SDK on 28 February 2017 was the value of R2 239 002.00 reflected as the 'inventories' (stock) total in the financial statements of SDK at 28 February 2017.

[32] The arbitrator found in regard to the quantification of the stock claim that:

'the issue crystallises into the following: on what basis should the [seller], when carrying out the stock take, have attributed the value of the stock. The parties did not specify the method to be used in valuing the Stock. The Clause defining Stock requires interpretation. . . In interpreting the meaning of the aggregate value of the Stock, the words must be considered but in the context and by considering all of the factors holistically. . . Thus, the true value of the stock which must be attributable to the purchase price is R2 239 002.00. Accordingly, the purchase price must be adjusted and reduced by the sum of R3 958 209.14.'[40]

[33] The value of R2 239 002.00 was consistent with the buyers' evidence. Mr Mpande testified that following the stocktake in February 2018, the buyers determined that the stock reflected in the 2017 financials, (the R2 239 002.00)[41] had been present.[42] His wife, Mrs Zanele Mgidi-Mpande testified that they had not found any evidence that there was stock received in March 2017 other than what was provided in the balance sheet in the amount of some R2.2 million worth of stock. (The R2 200 000 was obviously a rounded off figure to refer to the R2 239 002.00).[43] She agreed with this figure of '2.2' and maintained that they actually said there was R2.3 million worth of stock that they counted that would have been on the premises on 28 February 2017.

[34] The arbitrator's award decided the stock claim on the buyers' version. The balance of the purchase price claimed by the seller was, insofar as it concerned stock, thus clearly overstated by R3 958 209.14 (R6 197 211.14 included in the purchase price less R2 239 002.00 reflected in the financial statements as at 28 February 2017). The arbitrator reduced the claim of the seller against the buyers by that amount. There was no need for any further evidence. The relevant evidence had been adduced. A further hearing would be meaningless, simply delay the arbitration proceedings, and add unnecessarily to the costs thereof. The buyers and surety would not be prejudiced by the arbitrator's

award and would only pay for the nett realisable value of the stock they actually took over.

Exceeding powers – allegedly straying beyond the pleadings

[35] The arbitrator in his award remarked:

‘Thus, affirmation by the [buyers] in the [sale agreement] that the stock was valued at the amount of R6,197,211.14 was an innocent mistake based on an innocent misrepresentation. However, the [buyers] are not bound by this figure. Thus, the true value of the stock which must be attributable to the purchase price is R 2,239,002.00.’

Based on this remark the buyers argued that the arbitrator had decided the stock claim on the basis of an innocent misrepresentation, that this was not pleaded, and accordingly, that the arbitrator had therefore exceeded his powers.

[36] The value of the stock had to be determined in accordance with the terms of the sale agreement. The seller, in giving effect to what he considered to be the terms of the sale agreement, had used the figure of R6 197 211.14. That was a mistake. But it was an innocent mistake, the arbitrator having cleared the seller of any fraudulent intent. The arbitrator on the evidence determined that the true value of the stock that should have been used to arrive at the purchase price, as contemplated by the sale agreement, was the sum of R2 239 002.00. That is the figure that should have been inserted in the sale agreement. By wrongly inserting a stock figure which the sale agreement had not contemplated amounted to a breach of the sale agreement. That was the cause of action pleaded and found to be established. The reference to ‘an innocent misrepresentation’ during the course of the award was casual and not descriptive of the cause of action found to be proved. Specifically, the reference to ‘innocent misrepresentation’ did not convert the cause of action to one based on an innocent misrepresentation, which induced the conclusion of the sale agreement, which otherwise would not have been concluded. There was no evidence to that effect. Indeed, the buyers had pleaded that ‘[t]he incorrect representation as to the value of the stock amounted to a breach of the agreement’. The arbitrator simply confirmed that legal conclusion, and, gave effect to the prayer of the buyers, that he determine that the seller was ‘obliged to pay to the [buyers] the sum of . . . the difference . . .’ alternatively ‘that the claim of the [seller] be set-off against such amount’.

[37] The remedy granted was that following on a breach of contract, which is what the buyers had sought. The arbitrator had not exceeded his powers.

The missing assets claim

[38] The buyers alleged in their amended statement of claim that at the signature date SDK was the owner of fourteen assets reflected in its fixed asset register, which they termed 'the missing assets', each with a value as reflected against it in the buyers' statement of claim. They alleged that these assets were not delivered by the seller, accordingly, that the seller was obliged to deliver the missing assets to SDK, alternatively to pay to SDK the sums reflected against each asset in lieu of delivery.

[39] The full court does not appear to have dealt with this claim. The claim was nevertheless argued before this Court and has no prospects of success. The first point of significance is that a claim for delivery of the assets, or payment in lieu of delivery of the assets, would properly be a claim by SDK and not a claim by the buyers. SDK was not a party to the arbitration. If it had been deprived of any of its assets, then it should claim those assets, or the value thereof from whoever deprived it of the possession thereof. It is conceivable that the buyers might have some claim for damages based on a breach

of the warranties relating to the assets and liabilities of SDK, but that is not the basis of the alternative claim pleaded. The appeal in regard to the missing assets claim falls to be dismissed for that reason alone.

[40] Insofar as there might be some other basis for the buyers to claim the delivery of, alternatively the value of the alleged missing assets, the buyers' complaint was that the arbitrator failed: first, to have proper regard to the evidence; and second, to decide the issue at all.

[41] Not having proper regard to the evidence involves a finding on the merits, which would not be subject to review. It is accordingly unnecessary to analyse the evidence that was adduced. At best for the buyers, the only remaining issue then was whether the arbitrator failed to carry out his mandate by allegedly not having decided the issue at all.

[42] That submission is similarly devoid of any merit. The arbitrator did decide the missing assets claim. He found that:

'124. This claim was not pursued with rigour. This is evident from the evidence concerning the so-called missing assets and the value

attributed to them without the benefit of expert evidence. Apportioning to each item a value from a fixed asset register is an

insufficient basis to establish the value of such alleged missing assets for purposes of compensation. Clearly, and in any event, the asset register values in some instances bear no relation whatsoever to the asset claimed. Nevertheless this is academic, absent the [buyers] establishing that the assets were missing which they failed to do.' (Emphasis added.).

[43] The arbitrator had thus found that the buyers had not established that the assets were missing. That is a finding of fact, specifically on the merits of the arbitration and not subject to review. He did not fail to rule on the claim for the missing assets, and thereby made himself guilty of misconduct, nor did he commit a gross irregularity in not carrying out his mandate.

Conclusion

[44] The full court erred in concluding that grounds existed to review the arbitrator's award and that the high court had erred in not reviewing the award. The full court should have dismissed the appeal against the order of the high court. There is no reason why the costs of the appeals to the full court and to this Court should not, in each instance, follow the result of the appeal, and be directed to be paid by the buyers and surety jointly and severally.

Order

[45] The following order is accordingly granted:

- (a) The appeal is upheld.
- (b) The order of the full court under case number A5061/2021, dated 25 July 2022:
- (c) The first, second and third respondents are liable jointly and severally to pay the appellant's costs of the appeal.

P A KOEN

ACTING JUDGE OF APPEAL

Appearances

For the appellant: A Friedman

Instructed by: TWB – Tugendhaft Wapnick Banchetti & Partners, Sandown

Lovius Block Inc, Bloemfontein.

For the first, second and third respondents: Y Alli

Instructed by: Hajibey Bhyat Mayet & Stein Inc, Johannesburg

Van der Merwe & Sorour, Bloemfontein.

No appearance for the fourth respondent.

- [1] Voet 4.8.1.
- [2] F D J Brand 'Judicial review of arbitration awards' (2014) 25(2) Stellenbosch LR 247 at 249.
- [3] R H Christie 'Arbitration: Party Autonomy or Curial Intervention: The Historical Background' (1994) 111(1) SALJ 143 at 144 notes that 'the law of arbitration has sought to define when the court will and will not intervene, by striking a balance between absolute non-intervention and constant intervention.'
- [4] The judgment deals only with the principles which apply to a review of an award of a private arbitrator appointed pursuant to a consensual agreement. Different considerations apply to reviews of arbitration awards on administrative common law grounds – *Telcordia Technologies Inc v Telkom SA Ltd*
- [2006] ZASCA 112; 2007 (3) SA 266 (SCA) paras 53 and 57 (*Telcordia*). Furthermore, this Court has held that consensual arbitrations, as opposed to statutory arbitrations, for example in terms of the Labour Relations Act 66 of 1995, involving the Commission for Conciliation, Mediation and Arbitration, do not fall within the purview of 'administrative action', accordingly that the administrative justice provisions of section 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000 (PAJA) can be discounted, thus excluding reviews of arbitration awards on the grounds of irrationality or other grounds in PAJA – *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd and Another*
- [2002] ZASCA 14; 2002 (4) SA 661 (SCA) para 24; *Telcordia* para 45.
- [5] Although the agreement was dated 30 June 2017, the risk in and the benefit attaching to the sale of the shares passed to the buyers with effect from 1 March 2017.
- [6] The terms of the referral are contained in clause 27 of the agreement. This is not an instance as in *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and others* [2007] ZASCA 163; 2008
- (2) SA 608 (SCA) paras 30-32 where what was referred to arbitration was what was contained in the pleadings. Pleadings were exchanged but these simply identified the issues between the parties.
- [7] The buyers made certain payments. They are not relevant to this judgment.
- [8] The purchase price was payable in accordance with a formula providing for staggered payment over several years. By the time of

the arbitration, payment of any part of the purchase price which remained owing, was due and payable.

- [9] There was also a claim for rectification of clause 9.3 of the agreement, which was granted. That claim is not relevant to this

judgment.

- [10] 'Stock' is defined in the agreement to mean: 'the stock in trade of [SDK] including finished and partly finished products, packaging, raw materials, imported product and all items used in the normal and ordinary course of business of manufacturing the products manufactured by [SDK] as at 28 February 2017, and expressly excluding the Woolworths Stock.' The Woolworths Stock, excluded from 'stock', is defined to mean the stock ordered by [SDK] specifically for the purpose of sale to Woolworths as set out in Schedule 4.' Schedule 4 however did not contain any details. A stock take revealed a total value for stock of R8 192 397.42, from which the stock intended for Woolworths had to be deducted, resulting in a balance of R6 197 211.14.

- [10] 'Stock' is defined in the agreement to mean:

'the stock in trade of [SDK] including finished and partly finished products, packaging, raw materials, imported product and all items used in the normal and ordinary course of business of manufacturing the products manufactured by [SDK] as at 28 February 2017, and expressly excluding the Woolworths Stock.'

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- [11] Defined in the Agreement as the 'Effective Date Accounts.' In terms of the Agreement the risk in and benefit attaching to the 'Sale Shares' passed to the purchasers with effect from 1 March 2017.

- [12] The seller claimed that the value of the stock was R6 197 211.14, being the figure included in the calculation of the purchase price. The arbitrator concluded that the value of the stock as contemplated in the agreement, at the time of transfer of the business to the buyers was the sum of R2 239 002, as reflected in the financial statements of SDK at 28 February

2017. The purchase price thus had to be reduced by R3 958 209.14 (R6 197 211.14 less R2 239 002)

- [13] The buyers and surety also alluded to other grounds in the review. These included: that the arbitrator failed to consider all of the evidence and committed a 'gross error (amounting to misconduct)' because the evidence primarily established that the appellant's version was not credible; that the arbitrator issued an 'irregular costs order' because the evidence

established that the appellant ‘committed a number of fraudulent acts’; and that the costs order in favour of the seller was accordingly a gross mistake because it sanctioned an illegality. These have rightly not been persisted with.

- [14] Granted on 10 November 2022. The appeal is opposed by the buyers and the surety. The fourth respondent has not participated in the court proceedings subsequent to issuing his award.
- [15] The grounds in respect of which leave to appeal was granted to the full court also constitute the grounds of appeal in this court.
- [16] *Dickenson & Brown v Fisher’s Executors* 1915 AD 166 at 174-175; *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun*
- [1993] ZASCA 158; 1994 (1) SA 162 (A) at 169.
- [17] *Telcordia* fn 4 paras 59-60 and 68.
- [18] *Ibid* para 68.
- [19] *Ellis v Morgan; Ellis v Dessai* 1909 TS 576 at 581; *Goldfields Investment Ltd. and another v City Council of Johannesburg and another* 1938 TPD 551; *Bester v Easigas (Pty) Ltd and another* 1993
- (1) SA 30 (C) at 42I-J; *Telcordia* paras 53-76.
- [20] *Brand* fn 2 op cit 252.
- [21] See for example *Bester v Easigas (Pty) Ltd* 1993 (1) SA 30 (C) at 42J.
- [22] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and another* 2009
- (4) SA 529 (CC) para 221.
- [23] *Ibid* paras 235-236.
- [24] *Goldfields Investment Ltd and another v City Council of Johannesburg and another* 1938 TPD 551 at 560.
- [25] In relation to the term ‘gross irregularity our Courts have adopted the line of cases dealing with reviews from lower courts.
- The analogy is therefore a valid one.
- [26] *Goldfields Investments; Telcordia* para 73.
- [27] *Ellis v Morgan; Ellis v Desai* 1909 TSS 576 at 581.
- [28] *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd* [2018] ZASCA 23; 2018 (5) SA 462 (SCA) para 8.
- [29] *Telcordia* fn 4 para 52.

[30] Adamstein v Adamstein 1930 CPD 165; Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk 1968

(1) SA 7 (C) at 12A.

[31] Telcordia Technologies Inc v Telkom SA Ltd

[2006] ZASCA 112; 2007 (3) SA 266 (SCA) para 86.

[32] Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and others 2013 (6) SA 520 (SCA) paras 19-20.

[33] To similar effect is the statement by R Clay and N Dennys Hudson's Building and Engineering Contracts 14 ed (2021) at 11-010 endorsed by this Court in Framatome v Eskom Holdings SOC Ltd [2021] ZASCA 132; 2022 (2) SA 395 (SCA) para 30, that: 'It should only be in rare circumstances that the courts will interfere with the decision of an Adjudicator, and the courts should give no encouragement to an approach which might aptly be described as "simply scrabbling around to find some argument, however tenuous, to resist payment".'

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'It should only be in rare circumstances that the courts will interfere with the decision of an Adjudicator, and the courts should give no encouragement to an approach which might aptly be described as "simply scrabbling around to find some argument, however tenuous, to resist payment".'

[34] Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and others [2007] ZASCA 163; 2008

(2) SA 608 (SCA) para 30-32; Gutsche Family Investments (Pty) Ltd and others v Mettle Equity Group (Pty) Ltd and Others [2012] ZASCA 4 para 18; Brand op cit at 255.

[35] A referral might be one of the disputes as formulated in extant pleadings, or the referral might be of disputes arising from an agreement, as in this appeal, in which instance the pleadings only serve to identify the contentions of the parties regarding the various issues referred to arbitration. The ambit of the arbitration is then not restricted to the pleadings - cf Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and others [2007] ZASCA 163; 2008

(2) SA 608 (SCA) para 31.

[36] Brand op cit at 255.

[37] The Arbitration Foundation of South Africa (AFSA). It was recorded at the pre-arbitration meeting on 22 June 2018 that the arbitration

agreement did not provide for an appeal process and that the AFSA (commercial) rules would apply to the arbitration.

[38] Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

[39] Telcordia fn 4 para 86; Palabora fn 29 para 8.

[40] The discrepancy between the value of R6 197 211.14 and the value in the 28 February 2017 financials of R2 239 002.00,

based on the different methods of valuation, was explained in the evidence of Mr Waldemar Wasowicz, who performed accounting services for SDK when it was a close corporation, and who thereafter became the auditor of SDK.

[41] In the evidence the amount of R2 239 002.00 in the financial statements was generally referred to as ‘the amount

of R2.2 million’ or ‘2.2.’

[42] The buyers complained that any ‘additional stock’, that is in excess of R2 239 002.00, was missing. No attempt was however made to identify this ‘additional stock’ on the stock sheets completed when the stock take was done by SDK which was missing, although such knowledge would be peculiarly within the knowledge of the buyers.

[43] As stated in the buyers’ heads in the arbitration, the approximate R2 200 000 figure was reconstructed. Mrs Mpande testified that there had been a stock take carried out in February 2018, which was reconciled back to the year’s

purchases, and looking at purchases in previous years, which would have appeared on the stock sheets on 28 February 2017, tied back to the R2.2 million figure that appeared on the financial statements.

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