

SOUTH AFRICA / JUDGMENT

Walker and Others v Faerie Glen Waterpark (Pty) Ltd and Others (2024/041428) [2025] ZAGPPHC 572 (2 June 2025)

[2025] ZAGPPHC 572

COURT

North Gauteng High Court, Pretoria

BEFORE

SG Maritz

CASE / FILE NUMBER

2024/041428

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REPUBLIC OF SOUTH

AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION,

PRETORIA)

CASE NO:

2024/041428

(1) REPORTABLE: YES

/ NO

(2) OF INTEREST TO OTHER

JUDGES: YES / NO

(3) REVISED. YES

DATE 2 June

2025

SIGNATURE

In

the matter between:

C
J WALKER
FIRST
APPLICANT
JOHN
WALKER ATTORNEYS INC
SECOND
APPLICANT
J
VAN DEN BERG
THIRD
APPLICANT
and
FAERIE
GLEN WATERPARK (PTY) LTD
FIRST
RESPONDENT
D
J VAN HEERDEN N.O.
SECOND
RESPONDENT
RESOLVE
AFRICA (PTY) LTD t/a THE TRIBUNAL FOR COMMERCIAL PROPERTY
THIRD
RESPONDENT

JUDGMENT

Introduction:

1. May an arbitrator, pursuant to handing down his final award, mero motu clarify his award by addressing an aspect that was omitted in his final award?
2. This is the crux of the application instituted by the applicants to set aside an arbitral award handed down by the second respondent.

Background:

3. During 2019, the first respondent and the second applicant entered into a written lease agreement in terms of which the first respondent let to the second applicant certain premises situated at Boardwalk Office Park, Faerie Glen for 5 (five) years commencing on 1 August 2019.
4. The second applicant is a firm of attorneys.
5. In January 2023, the second applicant vacated the premises without

the first respondent's consent. The first respondent contends that this amounted to a repudiation of the lease agreement, which repudiation the first respondent accepted and cancelled the lease agreement on 26 January 2023.

6. In terms of clause 20.1 of the written lease agreement aforesaid:

“Should any party breach any of the terms of this agreement (the ‘Defaulting Party’) and the other party (the ‘Aggrieved Party’) shall be entitled, at the election of the Aggrieved Party, to institute action/proceedings against the Defaulting Party either in a court having jurisdiction over such dispute, alternatively through Dispute Resolution in terms of the Rules of the Tribunal for Commercial Property (‘TFCP’).”

(my emphasis)

7. In terms of clause 3.9.2 of the written lease agreement:

“All legal costs incurred by the Lessor in consequence of any default of the provisions of this Agreement of Lease by the Lessee shall be payable on demand on a scale as between Attorney and Client and shall include...the costs incurred by the Lessor in endeavouring to enforce such rights prior to the institution of legal proceedings and the costs incurred in connection with the satisfaction of enforcement of any judgment awarded in favour of the Lessor in terms of or arising out of this Agreement of Lease.”

8. On 26 January 2023, the first respondent’s attorneys of record delivered a letter to the second applicant in terms of which the second applicant was informed of the fact that:

8.1. The lease agreement was cancelled;

8.2. That the second applicant remained liable for the full term of the lease agreement;

8.3. That the first respondent was proceeding with action against the second applicant for arrear rentals as well as damages suffered by the first respondent.[1]

9. The first respondent subsequently delivered its Statement of Claim, in which it sought to hold the second applicant liable for damages related to outstanding rentals, as well as damages for reinstatement (including repairs and renovations).

10. On 1 May 2023, the first respondent successfully secured a new tenant for the premises. This resulted in the first respondent reducing the amount claimed from the second applicant (as principal debtor) and against the first and third applicants (as sureties) to the following amounts:

10.1. Damages pertaining to outstanding rentals R34,716.12; and

10.2. Reinstatement damages of R904,13.

11. The second respondent, a practising advocate, was ultimately appointed as the arbitrator (“the arbitrator”).

12. Having regard to the significantly reduced claim, the arbitrator implored the parties to settle this matter. Had the parties taken this seriously, significant costs would have been spared.
13. Instead, the matter proceeded to arbitration and the first respondent called 2 (two) witnesses, namely one factual witness and one expert witness.
14. After the first respondent closed its case, the applicants likewise closed their case, but without presenting any evidence.
15. On 9 November 2023, the arbitrator issued the following final award:[2]

“145. The claimant is ordered to pay the defendants’ costs up until the date of the Amendment of the Statement of Claim, i.e., 26 June 2023;
146. The defendants are ordered to, jointly and severally, the one to pay the other to be absolved, make payment to the claimant as follows:
 - 146.1 Payment of damages in the amount of R34,716.12;
 - 146.2 Payment for reinstatement costs in the amount of R904.13;
 - 146.3 Interest on the aforesaid amounts at the prime rate, compounded monthly, from 1 February 2023 to date of final payment;
 - 146.4 Costs of the arbitration on an attorney and client scale, such cost to include the cost of the Arbitrator, the cost of the Tribunal and the cost relating to the hiring of the Arbitration facility.”
16. The aforesaid award does not specify whether the costs order in favour of the first respondent is to be taxed on a High Court or a Magistrates Court scale.
17. On 5 March 2024, the arbitrator issued a “Taxation Directive” (“the Taxation Directive”) in which he made the following ruling:

“2. On or about 22 January 2024 I was requested to tax the account of the Claimant.
3. I have, inter alia and in terms of Rule 36 appointed Ms Sylvia Venter as a Cost Consultant (the CC) to advise me accordingly. In this regard, the following Directive is issued:
 - 3.1. The defendants are to file their written objections, together with
reasons
thereto within 7 days hereof i.e., on/before 12 March 2024;
 - 3.2 The claimant is to respond to the objections within 5 days thereof, i.e., 19 March 2024 (the claimant’s submissions);
 - 3.3 The defendants may then respond to the claimant’s submissions within 3 days thereof, i.e., 22 March 2024, no new submissions will be allowed;

3.4 The CC will thereafter advise me as to an appropriate Tax Bill of Costs (BoC) to be issued by myself;

3.5 I will thereafter consider same and issue a BoC within 5 days i.e., 29 March 2024;

3.6 A failure to comply with the aforesaid time frames will obviate a party's opportunity to make representations to the CC;

3.7 The costs occasioned as a result of the taxation will be incorporated in the BoC.

4. Having perused and considered the correspondence leading up to the request for taxation, I issue the following Declarator pertaining to the cost award issued as part of the final award:

4.1 The costs shall be taxed on a High Court scale.

5. The Declarator is issued for purpose of clarity in circumstances where the very nature of this Tribunal, its Rules, the nature of the Lease Agreement between the parties as well as the pre-arbitration agreement, make such scale of costs obvious and undisputed."

(my emphasis)

The review application

18. The applicants have applied to set aside the Taxation Directive in terms of section 33(1) and (4) read with sections 35(1) and (2) of the Arbitration Act of 1965 ("the Arbitration Act”). The applicants in their Notice of Motion have formulated the relief sought as follows:

"1. That the "Taxation Directive" issued by the Second Respondent on 5 March 2024 be and is hereby set aside in terms of sections 33(1) and (4) read with sections 35(1) and (2) of the Arbitration Act of 1965;

2. That the award in respect to the scale of costs be referred to determination to the Arbitration Foundation of South Africa for the appointment of an arbitrator or to such other arbitration tribunal, and on such terms, as this court may determine.;"

19. The application to set aside the arbitral award, in broad terms, is based on the following:

19.1. The Taxation Directive and, in particular, the declaratory order that the costs were to be taxed on a High Court scale, amounted to a gross irregularity for the following reasons:

19.1.1. The arbitrator had no authority to issue this declaratory order;

19.1.2. None of the parties applied for this directive/declarator, and this was issued unilaterally;

19.1.3. Pursuant to handing down his final award on 9 November 2023, the arbitrator was functus officio.

19.2. The arbitrator committed a gross irregularity by awarding costs on a High Court scale.

19.3. The arbitrator was biased in favour of the first respondent.

19.4. The arbitrator was also guilty of committing other irregularities.

Applicable legal principles:

20. Before addressing the specific complaints raised, it is perhaps appropriate to discuss the differences between an appeal and a review, as well as to highlight other fundamental legal principles.
21. In Dexgroup[3] the Supreme Court of Appeal quoted with approval the principle[4] that "unless the arbitration agreement otherwise provides, the arbitrator is not obliged to follow strict rules of evidence provided the procedure adopted is fair to both parties and conforms to the requirements of natural justice."

22. And at para 20 the following was indicated:

"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.

23. In the article Judicial Review of Arbitration Awards[5] Justice Brand provides a very helpful synopsis of the relevant applicable legal principles:

At p249.

"...the primary and essential value of arbitration lies in the very fact that it exists as a way of avoiding a formal trial. Indeed, the advantages of arbitration are unfailingly framed in comparison with the disadvantages of litigation, and centre on the ways in which arbitration offers a means of circumventing these.

It stands to reason, then, that 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. There is also the argument that it is wrong in principle for the courts to meddle in disputes that the parties themselves clearly chose to withdraw from them."

At p253.

"...a useful starting point seems to be the oft quoted statement from Ellis v Morgan²⁸ that "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."

...

In *Goldfields Investment Ltd v City Council of Johannesburg* (“Goldfields Investment”) this statement was elaborated on by Schreiner JA in the following way:

... Where the point relates only to the merits of the case it will be straining the language to describe it as a gross irregularity or denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the court’s not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the enquiry or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial.”

From these authorities it is therefore apparent that “gross irregularity” relates to the conduct of the proceedings and not to the result thereof. Moreover, that it is not every irregularity in the proceedings which will constitute a ground for review on this basis. In order to justify a review on this ground, 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. Errors of law or fact can therefore no doubt lead to gross irregularities in the conduct of the proceedings. An example would be where an arbitrator, because of a misunderstanding of the audi principle, refuses to hear the one party.

And at p254:

An irregularity frequently relied upon, which often comes close to an attempted appeal on the merits, is that the award is not supported by any admissible evidence. Authority for this proposition is usually sought in the obiter statement to that effect by Lord de Villiers in *Dutch Reformed Church v Town Council of Cape Town*. With regard to the admissibility of evidence in arbitration proceedings, the Supreme Court of Appeal, however, recently referred with approval, in the case of *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* (“Dexgroup”), to the following statement by Butler and Finsen:

“[U]nless ... the arbitration agreement provides otherwise, whether expressly or by implication, an arbitrator is not as a matter of law obliged to comply with the formal rules of evidence, as long as the procedure which he follows complies with the rules of natural justice by being fair to both parties.”

And at page 256:

Most recently, in *Leadtrain Assessments v Leadtrain*, the Supreme Court held that:

*“The guiding principle of consensual arbitration is finality – right or wrong ... It would be extraordinary if the conduct of an arbitrator that falls short of the strict constraints of s 33(1) were nonetheless to be capable of being set aside and committed for reconsideration under s 32(2). As was pointed out in *Benjamin Sobac South African Building and Construction (Pty) Ltd*, correctly, the effect of so holding would be to emasculate the provisions of s 33(1). However one approaches the question of what is ‘good cause’ it seems to us that it inexorably requires something other than mere error on the part of the arbitrator.”*

Influence of the Constitution

With the advent of our new constitutional dispensation the question arose whether the provisions of our Constitution have any influence on the approach of our courts to the review of awards in private arbitrations.

When confronted with this issue in *Lufuno Mphaphuli and Associates v Andrews* the majority of the Constitutional Court held that... interference by the courts is limited to the grounds stipulated in section 33(1) of the Arbitration Act. But of course, so the Constitutional Court held, section 33(1) must be interpreted in the light of section 34 of the Constitution. On my reading of the majority judgment as a whole, I venture to suggest, however, that the current approach of our courts to the review of awards in private arbitrations will generally pass constitutional muster. As explained by the Constitutional Court, the focus of section 34 is clearly on the fairness of the hearing – as opposed to the fairness of the result. This accords with the touchstone of the tests formulated by our courts in applying the “gross irregularity” provision in section 33(1)(b) of the Arbitration Act.

With regard to consensual arbitrations “gross irregularity” still has the meaning attributed to the term in *Ellis v Morgan and Goldfields Investment*. That means it is purely procedure based. It has nothing to do with the outcome. It can only be invoked where, as a result of something that went wrong procedurally, the aggrieved party can be said not to have had a fair trial.

At page 262:

South African legislation governing the review of arbitration awards has, since the turn of the 20th century, provided only narrow grounds for review and these have in turn been restrictively interpreted. In the result, while the courts have demonstrated a willingness to assist parties aggrieved by procedural wrongs, they have limited their reviews to these alone and have refused jurisdiction in cases that requested their review of the arbitrator’s legitimate exercise of discretion. The courts have therefore maintained their lack of jurisdiction to enquire into the correctness of the conclusion arrived at by the arbitrator on the evidence before him or her. In the result, the integrity of the arbitration process is preserved save for in cases where the arbitrator himself has discredited it through mala fides, gross irregularity or the exercise of powers not conferred upon him.

And at page 263:

Just a few short months ago in the case of *Hubbard v Cool Ideas 1186 CC* the Supreme Court of Appeal wrote that “[e]ver since *Dickenson & Brown v Fisher’s Executors* it has been our law that a mistake of law by an arbitrator does not permit interference by a Court”. This comment perfectly reflects the consistency with which our law has developed. Remaining true to the restraint shown in these early decisions, our courts have over the years systematically resisted the judicial urge to right arbitral wrongs by making inroads into the finality of arbitration awards. Judicial restraint has gone so far as to disallow extended grounds for review even in cases where the parties to the arbitration agreement themselves contracted for a more generous standard of review. Our law in

this area has remained as constant as the Southern Cross, successfully guiding our courts even today through the vastly changed legal landscape of our constitutional democracy.

24. The three limited grounds in terms of which an Arbitrator's award may be reviewed and set aside should be construed reasonably strictly.

25. In *Telcordia*[6], the Supreme Court of Appeal held[7] 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 Arbitration Act. By necessary implication, they had waived the right to rely on any further grounds of review, whether it common law or otherwise."

and at para 67:

"The Act did not allow for review on the ground of material error of law."

26. In *Total Support Management*[8], the Supreme Court of Appeal held[9] that:

"Proof that the Arbitrator 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 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"."

27. It is not every irregularity which could justify a review. The court must be satisfied that the irregularity caused a substantial injustice. Only in those cases where it can be said that what happened is so far removed from what could reasonably be expected of the arbitral process that one would expect the court to act.[10]

28. In *Palabora Copper*[11], the Supreme Court of Appeal held[12] that:

"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 powers of the arbitrator:

The Arbitration Act:

"An arbitration tribunal may correct in any award any clerical mistake or any patent error arising from any accidental slip or omission."

30. In terms of section 35 of the Arbitration Act:>

“(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 fourteen 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.”

The lease dispute rules:

31. In the written lease agreement, the parties agreed that the commercial lease dispute rules of the Tribunal for Commercial Property (“the lease dispute rules”) would apply to the arbitration. The following relevant rules are emphasized:

“1.1 The purpose of these Rules is to give effect to the procedure and process of the arbitration and to allow for expedited resolution of disputes and are not aimed to create obstructions to the process of justice and should be interpreted and/or applied with these traits as primary objective and purpose ...

...

10. The arbitrator shall be entitled to, at the request of any of the Parties to the Arbitration, to abbreviate or curtail any time period laid down in the Rules and to conduct the arbitration on an expedited basis, which discretion the Arbitrator shall be entitled to exercise after affording the Parties an opportunity to make representations, either in writing or orally in this regard. The ruling or award made

by the Arbitrator in this regard shall be final and binding on the Parties. In exercising the discretion the Arbitrator shall however

comply with the requirements of the arbitration shall be conducted in a just and fair manner to all Parties ...

...

22.1 The Arbitrator shall proceed with the arbitration within the shortest time as practicable in the circumstances.

...

22.3 The Arbitrator shall act in an inquisitorial manner and shall therefore conduct the hearing in accordance to the principles relating to an inquisitorial hearing, which authority of the Arbitrator shall include but not be limited to: ...

...

27.2 The Arbitrator in his/her sole discretion shall decide any issues raised by any of the parties relating to procedural and interlocutory matters.

27.3 The Arbitrator shall furthermore be clothed with the same powers as accorded to a Judge of the High Court of the Republic of South Africa.

...

33.1 Within 5 (five) days after the receipt of an award, a party, with notice to the other parties, may request the Arbitrator to correct in the award any error in computation, any clerical or typographical error, or any error or omission of a similar nature. If the Arbitrator determines that the request is justified, he/she shall make the correction within 10 (ten) days of receipt of the request.

33.2 The Arbitrator may within 5 (five) days after the delivery of the award make such corrections of his/her own initiative.

33.3 Such corrections shall be in writing, signed by the Arbitrator and shall form part of the award. Such correction to the award shall be delivered by the Arbitrator to the parties and the Tribunal.

...

36.1 The Arbitrator shall, as part of the award or thereafter, make an award in respect of the costs.

36.2 In exercising his/her discretion, the Arbitrator may take into account such circumstances as he/she considers relevant, including but not limited to the success achieved by each of the parties and/or the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.

36.3 The Arbitrator may forthwith, as part of the award, fix, tax or settle the costs, and shall therefore include in the award, or in a separate award thereafter, an award for the amount of costs to be paid by any party to any other party in the arbitration proceedings on the scale as between attorney and own client. The Arbitrator shall determine the reasonableness of the costs.

36.4 If the Arbitrator fix, tax or settles the costs, he/she shall be entitled to employ the services of a cost consultant to assist him/her in determining the amount of such costs. In the event of the Arbitrator employing the services of a cost consultant, the costs thereof shall be costs in the cause subject to the Arbitrator's award as to costs. The election on the identity of any cost consultant shall be at the Arbitrator's sole discretion which it exercised shall be final and binding.

36.5 At any time during the arbitration, the Arbitrator may, on application of a party/ies, make an award on costs and if applicable that such costs shall be determined and payable immediately.

36.6 The Arbitrator shall, before making an award for costs, afford the parties an opportunity to make sufficient to the Arbitrator regarding the award of the costs, and the amount in which it shall be allowed by the Arbitrator.

36.7 The Arbitrator and/or cost consultant shall be entitled to obtain such information and/or documents including but not limited to draft Bill of Cost from the parties, as deemed fit by the Arbitrator.

....

36.9 The Arbitrator is not obliged to make the award regarding costs simultaneously with the award on the merits (without limiting the enforceability of such award on the merits); but is obliged to do so no later than 30 (thirty) days after conclusion of the application.”

The same powers as a Judge of the High Court:

32. In terms of the lease dispute rules, more specifically Rule 27.3, the arbitrator shall be clothed with the same powers as accorded to a Judge of the High Court of the Republic of South Africa.
33. In terms of Uniform Rule 42, a Judge of the High Court has the power to mero motu vary an order or judgment in which there is an ambiguity, or a patent error or omission.
34. In this regard, our courts have granted an order allowing qualifying fees in respect of expert witnesses,[13] an order to include interest where the court has overlooked the plaintiff's claim for interest,[14] an amendment of its order as to costs where an order for costs has been made without hearing argument thereon.[15]
35. From the aforementioned, it is clear that:
 - 35.1. Any of the parties could have requested the arbitrator to clarify the issue with regard to the scale of costs; or
 - 35.2. The arbitrator could mero motu clarify and/or vary any aspect of his award that he omitted to deal with.
36. Significantly, both parties in their respective affidavits allege that the arbitrator had omitted to specify the scale of costs, i.e., namely, whether the costs are to be taxed on a High Court or a Magistrates Court scale.
37. Under the circumstances and having regard to the wide powers of the arbitrator, it was clearly within his powers to mero motu address this omission by clarifying his judgment in the way that he did.

38. The reliance by the applicants on section 35(2) of the Arbitration Act is accordingly misplaced.
39. It can accordingly not be suggested that the arbitrator could not have clarified his award *mero motu*.

Could the arbitrator have awarded costs on a High Court scale?

40. In terms of the powers bestowed on the arbitrator, he had an unfettered discretion to award a costs order that he deemed appropriate, including costs on an attorney-and-own-client scale.
41. Assuming that the arbitrator had awarded costs on a High Court scale as part of his final award of 9 November 2023, the question is whether there would have been a basis for such a cost order.
42. The arbitrator, in his comprehensive final award, deals extensively with the reason why a punitive costs order was ultimately awarded in favour of the first respondent.
43. Accordingly, it cannot seriously be suggested that the arbitrator did not consider the various factors before awarding attorney-and-client costs (later clarified to be on a High Court scale).
44. If the arbitrator had properly considered various factors in arriving at his cost order, then it cannot be suggested that he committed an irregularity, let alone a gross irregularity.
45. If it turns out that the arbitrator was wrong in awarding costs on a High Court scale, then and in that event, it does not assist the applicants either, as arbitrators are entitled to be wrong and simply being wrong is not a basis in law to set aside an arbitral award.
46. But that is not all. In terms of the written lease agreement, the parties expressly agreed that in the event of a breach of the lease agreement by the lessee, and in the event of the lessor (the first respondent) having to enforce its rights, the lessee would be liable for the lessor's costs on an attorney-and-client scale.
47. Why would the parties have agreed to such a provision? Clearly, the lessor wanted to be adequately indemnified by the lessee when enforcing a claim against the lessee.
48. The objective and purpose of this provision will be better achieved if costs were to be awarded on a High Court scale.

The award fell within the monetary jurisdiction of the Magistrate's Court:

49. The main argument advanced by the applicants in this regard is that, because the ultimate amount awarded fell within the monetary jurisdiction of the Magistrates Court, costs ought to have been awarded on a Magistrates Court scale.

50. I agree with Mr. van Rensburg SC that, as a general point of departure, when costs are awarded, the arbitrator or a court should consider the capital amount awarded. That is, however, not the end of the enquiry, and there are countless other factors that a court or arbitrator ought to consider in exercising his/her discretion when awarding costs.
51. These additional considerations were properly considered by the arbitrator, and as such, I do not agree that the arbitrator committed an irregularity, let alone a gross irregularity, when awarding costs on a High Court scale.

Was the arbitrator functus officio?

52. The applicants further contended that as the arbitrator was functus officio, it was not permissible for him to issue the declarator by awarding costs on a High Court scale.
53. The arguments advanced by the applicants in this regard are mutually destructive. On the one hand, both the applicants and the first respondent contend that the arbitrator omitted to address a specific issue in his final award, namely the scale of costs. On the other hand, the applicants simultaneously suggest or contend that the arbitrator is functus officio.
54. If the arbitrator had omitted to deal with a specific issue, it self-evidently means that he has not yet addressed that specific issue, and as such, he cannot be functus officio.
55. Moreover, Uniform Rule 42 caters for an exception to the general principle that a court is functus officio, i.e., under circumstances where an order has an ambiguity, a patent error or an omission.
56. In this regard, section 30 of the Arbitration Act also makes it clear that the arbitrator is entitled to vary his award under the aforementioned circumstances.
57. Accordingly, it is the finding of this court that the arbitrator was not functus officio with regard to the scale of costs, and it was open to him to address it in the way that he did.

Was there proper audi?

58. The applicants contend that the Taxation Directive of 5 March 2024 was inherently unfair, and it failed to comply with the audi alteram partem principle.
59. Pursuant to the conclusion of the arbitration proceedings, both parties had to submit written heads of argument.
60. On the 8th of September 2023, the first respondent submitted its written heads of argument in which the first respondent dealt extensively with the issue of costs, including the first respondent's request that the costs had to be awarded on a High Court scale.

61. The applicants were required to submit their written heads of argument in response by September 18, 2023. The applicants had every opportunity to address the issue of costs (as well as a scale thereof). In addition, and aside from the written heads of argument filed by both parties, the issue of costs as well as the scale thereof was also extensively argued during closing argument. Again, the applicants had every opportunity to fully address the arbitrator regarding the scale of costs.
62. Accordingly, there is no merit in the suggestion that the applicants did not have an opportunity to address the arbitrator regarding the scale of costs.

Other irregularities

63. The applicants further suggest that the arbitrator was biased, as various findings were made in favour of the first respondent.
64. The arguments with regard to the alleged bias hinge, to a large extent, on the success of the applicants' arguments regarding the alleged irregularities. If there are no irregularities, let alone gross irregularities, the argument regarding the alleged bias largely falls away.
65. I have already found that there were no irregularities, let alone gross irregularities, and as such, there is no merit in the suggestion that the arbitrator was biased in favour of the first respondent.

Conclusion of the review application

66. Having considered the various grounds advanced by the applicants, it is the finding of this court that the arbitrator was not guilty of any irregularities, let alone gross irregularity in arriving at his

final award. Accordingly, the application for review ought to be dismissed.

The first respondent's counter-application

67. The first respondent has instituted a counter application in which it seeks an order that the arbitrator's final award (as amended) be made an order of court.
68. The application is opposed by the applicants on the basis of the alleged irregularities committed by the arbitrator as fully dealt with above. I have already found that there were no irregularities, and as such, the basis of the opposition to the counter-application falls away.
69. In the premises, the following order is granted:
- 69.1. The applicants' application is dismissed.
- 69.2. The final award granted by the arbitrator issued on 9 November 2023, and the subsequent inclusion of the High Court scale tariff costs on 5 March 2024, as well as the Taxation Award, is made an order of court in terms of section 31 of the Arbitration Act, 42 of 1965;

69.3. The applicants are ordered to pay the first respondent's costs pertaining to:

69.3.1. The applicants' application; and

69.3.2. The first respondent's counter-application,

jointly and severally, the one paying the other to be absolved, on a scale as between attorney and client (on a High Court scale), including the costs of senior counsel.

SIGNED AT PRETORIA ON THIS THE 2nd DAY OF JUNE 2025.

SG MARITZ AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Counsel for Applicant:

Adv SJ van Rensburg SC

Cell: 076 941 0447

Email: i@advstefen.com

Attorneys for the Applicant:

John Walker Attorneys/Wallberg Attorneys Inc.

Tel: 012 991 9141

Email: john@wallberg.co.za

jeanri@wallberg.co.za

Counsel for First Respondent: Adv J de Beer SC

Cell: 084 661 0623

Email: jdebeer@clubadvocates.co.za

Attorneys for First Respondent: AB Löwe Attorneys

Tel: 012 676 8775

Email: leigh@ablowe.co.za

Date of Hearing:

21 May 2025 Date of Judgment:

2 June 2025

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- [2] Pages 016 – 226 to 016 – 227.
- [3] Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd & Others 2013
- (6) SA 520 (SCA)
- [4] At para 17, p 526
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- [6] Telcordia Technologies Inc. v Telkom SA Ltd 2007
- (3) SA 266 (SCA)
- [7] ParA 51, p 292 A – B.
- [8] Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another 2002
- (4) SA 661 (SCA)
- [9] At para 21.
- [10] Unreported matter of Fourways Precinct (Pty) Ltd v Bentel Associates International (Pty) Ltd, Gauteng Division, Pretoria, case number: 49962/13 at para 31.
- [11] Palabora Copper (Pty) Ltd v Motlokwa Transport and Construction (Pty) Ltd [2018] 2 All SA 660 (SCA)
- [12] At para 8
- [13] Lynmar Investments (Pty) Ltd v South African Railways and Harbour 1975 (4) SA 445 (D).
- [14] West Rand Estates Ltd v New Zealand Insurance Co Limited 1926 AB 173.
- [15] Estate Darlick v Commissioner for Inland Revenue 1934 AB 499; Art v Broadacres Investments Ltd 1978 (2) SA 47 (N); Jojwana v Regional Court Magistrate 2019 (6) SA 524 (ECM) at 532A – 533B.
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