

REPUBLIC OF SOUTH AFRICA



THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

28/6/2017
DATE


SIGNATURE

CASE NO A5015/2016

In the matter between:

BUILDCURE CC

APPELLANT

AND

BREWS, GORDON DONALD N.O.

FIRST RESPONDENT

UNTERHALTER, GLENN N.O.

SECOND RESPONDENT

DRUE, WARREN N.O.

THIRD RESPONDENT

LITVIN, LOIS N.O.

FOURTH RESPONDENT

MASSEY, EUAN

FIFTH RESPONDENT

JUDGMENT

Sutherland J:

INTRODUCTION

[1] This appeal is against the order of Masipa J who, on 3 December 2015, dismissed a review application to set aside an arbitration award. The appellant was the disappointed claimant in the arbitration. The appellant is a builder who concluded a contract to effect alterations to a house owned by a trust of whom the first to fourth respondents are the trustees (hereafter, simply, the respondent). The fifth respondent is the arbitrator.

[2] Two questions were raised before the review court and again on appeal; they are:

(1) Did the arbitrator validly publish an award within the meaning of the Arbitration Act No 42 of 1965 (The Arbitration Act)?

(2) If so, did the arbitrator commit a gross irregularity in the conduct of the proceedings, as contemplated in section 33(1)(c) of the Arbitration Act?

[3] These two questions are addressed in turn.

THE (NON) PUBLICATION OF THE AWARD ARGUMENT

[4] The parties reached agreement on these powers to be conferred on the arbitrator:

- 3.1. Save for as expressly dealt with in this agreement, the arbitration shall be conducted in accordance with the terms of the Arbitration Act 42 of 1965. The arbitrator is expressly authorised to determine the format and procedure of the arbitration and in so doing and more particularly with regard to pleadings, discovery of documents and other matters of that kind, the arbitrator shall in his sole discretion determine the procedure to be adopted and shall have regard in that connection to the primary need to determine the dispute or difference as expeditiously and as cheaply as possible and with resort to as little formality as is reasonably practical, provided always that where the arbitrator is required to make a decision on any disputed matter both parties shall be entitled to be heard.
- 3.2.
- 3.3.
- 3.4. In order to expedite matters, the arbitrator shall be entitled to initially furnish his award to the legal representatives of the parties by way of electronic mail and, thereafter, furnish the respective parties with a signed hard-copy thereof.
(Emphasis supplied)

[5] What thereupon transpired was that the arbitrator sent a hardcopy of his award dated 14 August 2014 to each party, which, in each case, was delivered on 18 August 2014. No email was transmitted. No summoning of the parties to his presence was directed.

[6] The contentions advanced on behalf of the appellant are these:

- 6.1. No award has been published because what purports to be an 'award' was not delivered in the peremptory manner prescribed by section 25 of the Arbitration Act.
- 6.2. Moreover, the agreement between the parties did not vary the peremptory provisions of section 25.

6.3. In any event, what the arbitrator did was not in accordance with their agreement, properly interpreted.

6.4. The purported 'award' must be set aside as a nullity.

[7] Axiomatically, the purpose of arbitration proceedings is to resolve a dispute by the production of an award by the designated arbitrator. In terms of section 28 of the Arbitration Act an award is binding on the parties. The exact consequences of an award are provided for as follows in that section:

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

(Emphasis supplied)

[8] Plainly, the status of an award as binding is dependent on compliance with all the relevant provisions of the Arbitration Act. The coming into being of an award and its transmission to the parties is closely regulated. Sections 23 -26 address several aspects of the communication of an award to the parties. An arbitrator must, in terms of section 23, 'make' an award within a period of four months calculated from the date the arbitrator became seized of the dispute.¹ The parties may agree to a later deadline or a court may

¹ Section 23: The arbitration tribunal shall, unless the arbitration agreement otherwise provides, make its award-

- (a) in the case of an award by an arbitrator or arbitrators, within four months after the date on which such arbitrator or arbitrators entered on the reference or the date on which such arbitrator was or such arbitrators were called on to act by notice in writing from any party to the reference, whichever date be the earlier date; and
- (b) in the case of an award by an umpire, within three months after the date on which such umpire entered on the reference or the date on which such umpire was called on to act by notice in writing from any party to the reference, whichever date be the earlier date,

order an extension of the deadline. The award must be in writing and signed by the arbitrator.² The arbitrator may make an interim award.³ Lastly, the publication of the award is dealt with thus, in section 25:

- '(1) The award shall be delivered by the arbitration tribunal, the parties or their representatives being present or having been summoned to appear.
- (2) The award shall be deemed to have been published to the parties on the date on which it was so delivered.'

[9] As is apparent, section 25 provides for a high degree of formality. The duty of an arbitrator is to 'deliver' an award in the presence of the parties. Subsection (2) belabours the point of 'delivery' by describing that act as constituting 'publication' to the parties, but more significantly, ordains the date of delivery with a status. The use of the term in section 23 to 'make' an award hints at a distinction between 'making' and 'delivering' though, on a purely textual appreciation of these sections, no such distinction is apparent. A decision on that nuance is unnecessary in this case.

[10] No equivalent to a formal handing down procedure exists in English law. The English Arbitration Act, 1996 provides thus:

- '[54]
- (1) Unless otherwise agreed by the parties, the tribunal may decide what is to be taken to be the date on which the award was made.

or in either case on or before any later date to which the parties by any writing signed by them may from time to time extend the time for making the award: Provided that the court may, on good cause shown, from time to time extend the time for making any award, whether that time has expired or not.

² Section 24(1): The award shall be in writing and shall be signed by all the members of the arbitration tribunal.

³ Section 26: Unless the arbitration agreement provides otherwise, an arbitration tribunal may make an interim award at any time within the period allowed for making an award.

- (2) In the absence of any such decision, the date of the award shall be taken to be the date on which it is signed by the arbitrator or, where more than one arbitrator signs the award, by the last of them.

[55]

- (1) The parties are free to agree on the requirements as to notification of the award to the parties.
- (2) if there is no such agreement, the award shall be notified to the parties by service on them of copies of the award which shall be done without delay after the award is made.
- (3)

[11] In the United States, the Federal Arbitration Act, 9 USC, (FAA) in the context of regulating the procedure for challenging an award, requires the challenge to be made within three months after the award is 'delivered', but does not define 'delivery.'⁴ However, the Rules of the American Association of Arbitrators (AAA), in its rules for both 'Labor' and 'commercial' proceedings provide:

'Delivery of Award to Parties

Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail, addressed to the party at its last known address or to its representative; personal or electronic service of the award; or the filing of the award in any other manner that is permitted by law.'⁵

[12] Very little academic attention has been devoted to implications of section 25 of the South African Arbitration Act.⁶ However, *Butler and Finsen, Arbitration in South Africa*,

⁴ See: *Tallakoy & Others v Black Fire Energy Inc & Others* Case No 15-6322 (United States court of Appeal for 6th Circuit)

⁵ Rules 39 and 489 respectively of the AAA Rules for Labor arbitration and for Commercial arbitration.

⁶ See: *Marcus Jacobs, The Law of Arbitration in South Africa (1977) Juta*, at p129 notes the section without comment. *McKenzie, The Law of Building contracts and Arbitration in South Africa (1977) 3rd ed Juta*, at p156, likewise, merely notes the text of the section. *Ramsden, The Law of Arbitration, South African and International arbitration, (2009) Juta*, in dealing with publication, offers no substantive comment. In Ramsden's reworking of *McKenzie in McKenzie's Law of Building and Engineering Contracts and arbitration, 7th ed (2014) Juta*, he does no more than repeat the text from the 1977 edition.

Law and Practice (1993) Juta make several useful observations. At p 267ff, the authors' mention that the formality of presence before an arbitrator, as contained in section 25, has roots in the common law, according to *Voet* 4.8.15. The authors also state that, despite the Common Law requirement of the presence of the parties, from the mid-19th century the universal practice in the Cape Colony was to the contrary. They rely on the authority of *Hawes, Stanbridge & Hedley v Meintjies and Dixon* (1858) 3 Searle 62 at 68, 74.⁷ Moreover, the authors state that colonial legislation on arbitration omitted a formalistic requirement on publication. It may be supposed that the English practice exerted an influence in this regard.

[13] In the UNCITRAL model law, of 21 June 1985, Article 31 which addresses the 'form and content of [an] award', no ritual convening of a 'handing down' procedure exists, and in Article 31(3) the chief concern is to determine the place and date of an award, which is determined by an express statement to that effect in the award by the arbitrator or arbitrators. Article 31(4) then provides: 'After the award is made, a copy signed by the arbitrators in accordance with [article 31(1)] shall be delivered to the parties.' No amplification of how this is to occur is provided for. In the draft bill to apply the model law in South Africa, no provision is made for any ritual form of delivery.⁸

[14] Hans Van Houtte, '*The Delivery of Awards to Parties*' (2005) Vol 21 (2) *Arbitration International* 177 – 185, addresses the question of various modalities of rendering awards

⁷ In that case, Bell J and Watermeyer J each remarked that it was the universal practice to make the award in the absence of the parties, but did not elaborate on how the award was communicated to the parties.

⁸ See: Report of The South African Law Commission: Project 94, Arbitration: An International Arbitration Act for South Africa (July 1998), p 119, 217, 242.

in the countries of the European Community. Predictably, there are several methods. None of the examples cited stipulate a formal convening of a 'handing down' ritual. In some jurisdictions, the issue of a 'delivery' is wholly encompassed from the perspective of fixing a date from which prescriptive periods are calculated, about which more is said hereafter.⁹

[15] Accordingly, it is noteworthy that the present South African Arbitration Act is exceptional in its prescription as to delivery of an award in the presence of the parties, which model is not ostensibly to be replicated in the prospective South African legislation on international arbitration, at present, under consideration.

[16] If it is indeed correct that no award has been published then logically, no juridically cognisable act or deed exists that imposes obligations on either party and the dispute remains unresolved. As already alluded to, Section 23 regulates what may happen if the time to render an award expires without publication, and one or both parties desire an extension of time for the arbitrator to perform the mandate of rendering an award.¹⁰

[17] What the appellant seems to want, based on the premise that there is no proper award in existence, is a declaratory order that the purported 'award' is not capable of cognition as an 'award' and that, in consequence, cannot be binding, as contemplated by section 28. In my view, in a case where an award has indeed been improperly 'delivered'

⁹ Van Houtte, (supra) p180

¹⁰ See footnote 1.

the appropriate remedy for a party who wants the dispute finalised is to apply to a court for an order of specific performance; ie to compel a proper delivery. Ordinarily, a party who took that step would do so towards having the award made an order of court in terms of section 31 so that its terms could be enforced.¹¹ In this case, the appellant is in the reverse predicament; it has failed to impress the arbitrator that it is entitled to payment for services allegedly rendered. Presumably, if the purported award is set aside, the appellant might again refer its claim to arbitration or sue in a court of law. However, the attempt by the appellant to both seek to deny the existence of an award and have it reviewed for gross irregularity constitutes two incompatible causes of action, and can, at best, if at all, only be advanced in the alternative. Although that is not the stance adopted by the appellant, and without deciding whether it is not conceptually incompatible to advance both complaints, even in the alternative, we shall treat the two causes of action in the alternative.

[18] The first question to address is whether the provisions of section 25 are incapable of variation, thereby denying to parties a right to vary the need to convene in the presence of the arbitrator and oblige them always to ritually have the award 'delivered' to them whilst present. This issue has been addressed in *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town & Another & Four Related Applications 2014 (1) SA 141*

¹¹ Section 31:

- (1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.
- (2) The court to which application is so made, may, before making the award an order of court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.
- (3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect.

(WCC) (*EP Props*). In that case, it was held that an agreement had been concluded between the parties that the arbitrator would email the award to them. The argument was advanced that such an agreement was unenforceable in the face what was contended were the peremptory provisions of section 25. Louw J held thus:

'[49] In view of the direct evidence by the arbitrator, that an agreement had in fact been concluded and that he acted pursuant to the agreement by emailing the award to the attorneys, I conclude on the papers that the parties did agree with the arbitrator on the method by which the award would be published. I return hereunder to the reasons why Mr Singh's request that the issue be referred to oral evidence should be refused.

[50] It was submitted on behalf of Tobias Marais that the provisions of s 25(1) are peremptory and that the award cannot be delivered otherwise than as provided for in s 25(1), that is, 'the parties or their representative being present or having been summoned to appear'. The award may be delivered in the absence of one or more of the parties, provided that they were summoned to appear. There is no provision in the Arbitration Act that the award must be given to the party who is not present when it is delivered, and there is no express provision that a failure to publish the award in the manner set out in s 25(1) results in an invalid award. The basis of arbitration is consensus between the parties, and to hold that publication in a manner agreed between the parties could result in an invalid award is contrary to the consensual nature of arbitration. Tobias Marais admits that he came into possession of the award during February 2009. Paragraph 4 of the order made by consent states that the procedure to be followed at the arbitration should be agreed between the parties and the arbitrator. This, in my view, allowed the parties to agree with the arbitrator on the manner in which the award would be delivered. Section 25(2) is a deeming provision which fixes the date of publication where the publication occurs in terms of s 25(1). Even if the provisions of s 25 are peremptory, it does not follow that the award itself is void because it was not delivered in the prescribed manner. The object sought to be achieved by s 25 is to fix a date on which the award was published. Time periods run from this date; a review has to be instituted within six weeks. However, the object to fix the date of publication was achieved in another manner, namely the agreed delivery of the award by email. To hold that the award, delivered in the manner agreed upon, is nevertheless invalid, would serve only a strict legalistic interpretation which takes no account of the substance of what is sought to be achieved by s 25.

[51] In the present case the order referring the matter to arbitration sanctioned an agreement regarding the procedure to be followed. An agreement relating to procedure, determining the manner of publication of the award, was reached with the arbitrator. It was complied with, and, in my view, resulted in a valid award.

[52] I hold that on the facts of this case there was a valid publication of the award on 18 December 2008.' (Emphasis supplied)

[19] I am in respectful agreement with the thesis encapsulated in these dicta. In short, to insist on a formalistic interpretation of a statute whose avowed objective is, through a consensual process, to resolve private disputes, that freely contracting parties be held to be obliged to observe prescribed procedures on pain of bringing about invalidity, when alternative procedures were agreed upon which more readily serve the parties aims of expedition, informality and reduction of costs, would be to strangle the purposes of the statute and result in a triumph of foolishness. Thus, purposefully interpreted the provisions of section 25 the Arbitration Act are not immune from variation by agreement, but are merely a default procedure which shall apply in the absence of a contrary intention evinced by the contracting parties.

[20] The second argument advanced on behalf of the appellant is that the agreement between the parties did not, in fact, vary the provisions of section 25. Clause 3.4, of the agreement, cited above, identifies two 'executory' acts, one permissive and the other compulsory. First the arbitrator was 'entitled' to email the award. This phrase is permissive. No email was sent. Accordingly, no legal consequence can occur. Second, the arbitrator is instructed that he 'shall....furnish the respective parties with a signed hard-copy [of the award]' This phrase is compulsory. The nub of the appellant's thesis is that this duty of the arbitrator could only take place by summoning the parties to his presence and thereupon 'furnishing' them with a hard copy of the award.

[21] In this regard, it must be observed that interpreting text in an agreement requires a holistic reading, not a narrow focussed obsession with a few selected words.¹² Clause 3.4 expressly states that the chosen methods of communication of the award have been agreed upon 'in order to expedite matters'. Indeed, the provisions of clause 3.1 are replete with allusions to expedition, informality, practicality, and cheapness. Plainly, the parties had in mind a process that was permeated by slick business-like procedures. If this is the ethos that the parties sought to dominate the arbitration, why would they intend that in

¹² See, on interpreting text: *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA) at [17] – [18]:

[17] The trial judge said that the general rule is that the words used in a statute are to be given their ordinary grammatical meaning unless they lead to absurdity. He referred to authorities that stress the importance of context in the process of interpretation and concluded that:

'A court must interpret the words in issue according to their ordinary meaning in the context of the regulations as a whole, as well as background material, which reveals the purpose of the Regulation, in order to arrive at the true intention of the draftsman of the rules.'

While this summary of the approach to interpretation was buttressed by reference to authority, it suffers from an internal tension because it does not indicate what is meant by the 'ordinary meaning' of words, whether or not influenced by context, or why, once ascertained, this would coincide with the 'true' intention of the draftsman. There were similar difficulties in the heads of argument on behalf of Endumeni. In one paragraph they urged us, on the basis of the evidence of the actuary who advised the Fund, to adopt the approach that the proviso was not intended to cater for 'a Maltman type of event' and, in another, cited authorities for the rule that the 'ordinary grammatical meaning of the words used must be adhered to' and can only be departed from if that leads to an absurd result. In view of this it is necessary to say something about the current state of our law in regard to the interpretation of statutes and statutory instruments and documents generally.

[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*. The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

'furnishing' the award, the arbitrator was obliged to summon them to a ritual meeting, a gesture bereft of utility, imposing more costs, and defeating the express aim mentioned in clause 3.4 'to expedite matters'? In short, such an understanding cannot be attributed to them. Accordingly, the agreement did intend to vary the provisions of section 25.

[22] A third argument was advanced on behalf of the appellant in support of the idea that the formality of a designated moment of 'publication' was a critical juridical act. The contention is that because the date of publication was functionally linked to various legal consequences; in particular, the period of three months within which to seek to set aside the award as contemplated in section 33(2), 'six weeks after the publication'¹³; and prescription of the award, if not diligently enforced, it had to follow that the date had to be objectively capable of identification.

[23] On the facts of this case it is suggested that the critical date is uncertain. Is it the date of signature, ie, 14 August 2014? Is it the date of physical delivery, ie, 18 August 2014? However, it is common cause that the parties each received the award on the same day.

[24] The facts of this case do not compel an answer to the question how to resolve a genuine confusion about the date of delivery of an award because it is common cause that it was indeed received by each party on the same day.

¹³ Section 33(2): An application pursuant to this section shall be made within six weeks after the publication of the award to the parties: Provided that when the setting aside of the award is requested on the grounds of the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, such application shall be made within six weeks after the discovery of that offence and in any case not later than three years after the date on which the award was so published.

[25] Nonetheless, the risk of uncertainty is generic. Accordingly, a generic observation can be made about such risk of uncertainty: the date of delivery is a question of fact to be decided *ad hoc* by a court called upon to decide that question. If it is a correct statement of law that the parties may vary the provisions of section 25, then any potential vagueness must be resolved in relation to the terms of their agreement. In the present example, the term 'furnish' could arguably suggest that the date of receipt might be the appropriate date, and, perhaps, the date of signature might be a likely candidate too, but the choice is the product of interpreting the agreement. On the terms of this agreement, in my view, the 'furnishing' of the hard copy on 18 August 2014 seems more likely to be the appropriate date of 'publication', which the arbitrator achieved by delivery, as contemplated in their agreement on the same day to both parties.

[26] That 'effective delivery' points towards 'receipt' by the parties is illustrated in the Indian decision, *State of Maharashtra & Others v M/S Ark Builders* [2011] INSC 201 (28/02/2011), applying the decision in *Union of India v Tecco Trichy Emgineers & Contractors* [2005] INSC 180(16/03/2005). In *Tecco Trichy* it was held that delivery is 'not a matter of mere formality. It is a matter of substance.' In construing section 34 of the Indian Arbitration and Conciliation Act 1996, which provided that a challenge to an award had to be made not later than 'three months have elapsed from the date on which the party making that application had received the arbitral award' the Supreme Court of India held that delivery had to mean effective delivery and thus had to be received by the party. On the facts in that case, a copy had reached the offices of the party but had taken

some time to wend its way to the responsible person, ie the general manager. The court held:

'Therefore, in our opinion, service of arbitral award on the General Manager by way of receipt in his inwards office cannot be taken to be sufficient notice so as to activate the Department to take appropriate steps in respect of and in regard to the award passed by the arbitrators to constitute starting point of limitation for the purposes of Section 34(3) of the Act. The service of notice on the Chief Engineer on 19.3.2001 would be the starting point of limitation to challenge the award in the Court.'

[27] However, in a case where it might not be possible to determine with clarity what the date is, the solution is provided in the judgment of Landman JA in *South African Transport and Allied Workers Union v Tokiso Dispute Settlement & Others* [2015] 8 BLLR 818 (LAC). A controversy about the date of the award arose in relation to determining if the 6-week period prescribed in section 145(1) of the Labour Relations Act 66 of 1995, within which to bring a review, had expired. The labour appeal Court held that the applicant for a review bore an onus to prove the application was in time. Landman JA considered the matter at length and held thus:

[7]

The parties and the court *a quo* were content to assume that an award was duly published when the parties received it. Implicit in this must be the further assumption that if the parties each received the award on different dates the award would be assumed to have been published on the date that it is last received. It is unnecessary to decide when an award may be assumed to be published where it is not delivered in the presence of the parties. This appeal may be decided on the assumptions which the parties and the court *a quo* made.

[8]

The onus, generally speaking, was upon the appellants to show that the review application had been launched timeously because this is a fact or element which goes to establishing the jurisdiction of the Labour Court to hear the application for review. But the question of where the onus lies depends upon the form in which a challenge is mounted. In *Malherbe v Britstown Municipality* Ogilvie-Thompson AJ (as he then was) said the following:

"Under the procedure now prescribed by Act 32 of 1944 any question of onus which arises in connection with any challenge of the Court's jurisdiction must, in my judgment, be determined on a consideration of the particular form in which that challenge is raised on the pleadings in the particular case. It is the province of the plaintiff to establish the jurisdiction of the Court into which he, as *dominus litis*, has brought the defendant. In this sense the onus of establishing jurisdiction is, in my view, always on the plaintiff. But the form of defendant's plea may be such as to burden him with an onus to prove certain facts. As shown by Van Den Heever, J.P. (as he then was) in *Lubbe v Bosman*, there is weighty roman-Dutch authority for the proposition that once a defendant raises the *exceptio fori declinatoria* as a substantive plea 'the onus rests upon him of proving the facts upon which his plea to the jurisdiction is based'. In such a case the defendant in his plea avers the existence of certain facts which, if proved, will defeat the jurisdiction. The onus of proof of such facts rests upon the defendant."

See also *Munsamy v Govender* 1950 (2) SA 622 (N) at 624 [also reported at [1950] 2 All SA 292 (N) – Ed].

[9]

'I am of the opinion that appellants bore the initial *onus* and it remained with them. Although the appellants may be excused for not filing an affidavit by Tokiso setting out when the award was delivered, it should have made an averment about when the award was received; more so when the date of receipt was challenged. The appellants placed before the court the award (this is common cause) and a cover sheet, *prima facie* showing that the award was faxed by Tokiso to the appellants on 5 October 2005 but without an affidavit stating when the award was received.

[10]

The award was not delivered in the presence of the parties. This has the effect that the presumption in section 25(2) does not apply. The date of the award of 29 August 2005 is of no significance in this case. The Arbitrator followed a procedure, which is fairly common, of providing a copy of the award to the parties by fax. This may well be in accordance with Tokiso's domestic rules but the rules have not been referred to in the papers.

[11]

Where an award is not delivered in the presence of the parties, it would probably not be sent simultaneously. Some interval would elapse. Putco does not deny that the appellants received the award by fax on 5 October 2005. It may be that the deponent to Putco's answering affidavit overlooked the fax cover sheet attached to the appellants' papers. In any event, the furthest that Putco is prepared to go is to say that the award was faxed by Tokiso to Putco on 5 September 2005 and it assumes that the award was also faxed by Tokiso to the appellants on that date.

[12]

Of course, the appellants should have filed a replying affidavit which would have assisted the court but this was not done. But they were not obliged to do so.

[13]

The court *a quo* overlooked the fact that the deponent to Putco's answering affidavit was making an assumption. It was incumbent on the court *a quo* to interrogate the assumption and to determine whether the assumption was such that it could be elevated to a fact. L Steynberg "*Fair*" *Mathematics in Assessing Delictual Damages* 2011 (14) 2 PER/PELJ relying on Keynes *Treatise on Probability* points out that:

"Probabilities are not surrendered to human imagination, which means that a supposition or assumption is not probable merely because someone thinks so. The facts that establish the knowledge upon which the probability is based should be determined objectively and independently of human opinion.

[14]

The assumption, in the light of the fax cover sheet apparently sent with the award to the appellants, casts doubt on the correctness of that assumption. But it is unnecessary to rely on this as where an award is not delivered in the presence of parties but is faxed to one party it cannot be assumed as a fact that it reached the other party at the same time or on the same date. There are many reasons why it might have not been faxed to the appellants on the same date that it was faxed to Putco. The court *a quo* should have found that the award was published as regards the appellants on 5 October 2005.

[15]

If the court *a quo* could not decide when the award was published, the court was empowered to remit the award to the Arbitrator to deliver it in the presence of the parties. Cf M Jacobs *The Law of Arbitration in South Africa* Juta 1978 at 129 and *Anning v Hartley* (1885) 27 LJ Ex 145, 2 Dig (Repl) 453'.

(Footnotes omitted)

[28] Two matters of importance bear emphasis. First, the notion is that if the 'delivery' is by a means of a method of communication to the parties that cannot guarantee that the award will be received simultaneously, the appropriate 'date of delivery' would be that date upon which the party, last to receive it, got it. Second, the resolution of a controversy about the fact of which date delivery took place lies in a remittal to the arbitrator to deliver it in accordance with section 25(1), the default method. However, no invalidity results from

a botched initial attempt to effect delivery. In *Anning v Hartley* (1858) 27 LJ Vol XXVII 145 (*Court of Exchequer*), 2 Dig 453, to which Landman JA referred, the controversy was about three arbitrators having signed the award at different dates and places, a common cause fact. Pollock C.B. held that the court had the power to remit for correction, and that '...it would be indeed lamentable if we not able to send back the award to them to be set right...' This approach, therefore, enjoys the endorsement of both common sense and ancient authority, in consequence of which the risk of a declaration of invalidity of an award cannot arise.¹⁴

[29] The result is, therefore, as follows:

29.1. As a matter of law, the provisions of section 25 are not incapable of variation, but rather, stipulate a default procedure which can be varied by the intention of the parties, duly proven.

29.2. The parties in this case indeed varied those provisions by the terms of clauses 3.1 and 3.4 of their agreement.

¹⁴ In *Tallakoy & Others v Black Fire Energy Inc & Others* (*Supra*) six potential dates were offered as the date of delivery. The Court of Appeal for the 6th circuit remitted the matter for clarification. No question of invalidity was entertained.

29.3. The arbitrator's conduct of hand-delivering hard copies of the award to each party on 18 August 2014 satisfied his obligation in terms of clause 3.4 of their agreement.

29.4. A valid award was thus delivered and published on 18 August 2008, within the contemplation of section 25.

THE GROSS IRREGULARITY ARGUMENT

[30] It was incumbent on the appellant to bring the allegation of a gross irregularity within the compass of the dicta of Harms JA in *Telcordia Technologies Inc v Telkom* 2007(3) SA 266 (SCA):

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

[80] Before considering the attack on the arbitrator on the ground that he had committed gross irregularities in the conduct of the arbitration proceedings (by misconceiving the nature of the inquiry and his duties) or exceeded his powers, it is necessary to determine the nature of the inquiry, the arbitrator's duties, and his powers.

[81] As mentioned at the outset, according to the Integrated Agreement the arbitrator had to determine all disputes between the parties, including disputes relating to the interpretation of the agreement and disputes of a legal, financial and technical nature; the procedural rules of the ICC were to apply; the laws of the Republic would govern the agreement; and, subject to the arbitration clause, the parties consented to the jurisdiction of South African courts.

[82] The May issues, as defined, required the arbitrator to determine Telcordia's primary contractual obligation under the Integrated Agreement 'having regard to the terms thereof and all admissible evidence in relation thereto'. In this regard, he had to choose between two opposing contentions. It is clear from the way the May issues were defined that the questions were interdependent and that, depending on the outcome of, say, question 1, question 3 could have fallen away.

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

[84] In addition, the arbitrator had, according to the terms of reference, the power (i) not to decide an issue which he deemed unnecessary or inappropriate; (ii) to decide any further issues of fact or law, which he deemed necessary or appropriate; (iii) to decide the issues in any manner or order he deemed appropriate; and (iv) to decide any issue by way of a partial, interim or final award, as he deemed appropriate.

[85] The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry - they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry. To adapt the quoted words of Hoexter JA: it cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by a court.

[86] Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly. Errors of the kind mentioned have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate. To illustrate, an arbitrator in a 'normal' local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd.'

(References in footnotes omitted)

[31] It bears emphasis that the correctness of a finding by an arbitrator appointed under the Arbitration Act is therefore irrelevant to a complaint of gross irregularity.

[32] The controversy which precipitated the referral to arbitration arose thus:

- 32.1 The parties' agreement provided for progress payments during the course of building operations. A quantity surveyor, Bryant, was responsible for issuing certificates from time to time, which certificates triggered the obligation of the respondent to pay the sum so determined.
- 32.2. On 19 September 2008, Bryant issued certificate no 5. When the certificate was presented by the appellant to the respondent for payment, the respondent unilaterally deducted a sum. That conduct was alleged to be a breach. (In due course, the arbitrator held that the short payment was indeed a breach, the rationale being that the obligation to pay was triggered by a certificate regardless of whether the certificate itself was an accurate measurement of progress.)
- 32.3. On 15 October 2008, a demand to rectify the breach was sent, demanding performance, failing which action would be taken. The demand was not met and the sum claimed remained unpaid.
- 32.4. On 30 October 2008, Bryant issued certificate no 6. In that certificate, the state of the account between the parties was declared to be a credit balance in favour of the respondent; ie the appellant had been overpaid what was due and payable, as at that date.

32.5. On 14 November 2008, the appellant purported to cancel the contract, payment of the sums demanded, not being forthcoming.

32.6. Thereafter, the appellant referred the dispute about the breach to arbitration as provided for in the agreement.

[33] The relevant portion of arbitration agreement is in clauses 3.1 and 4.1 and 4.2; clause 3.1 is cited above, only the critical portion of the text is, for ease of reference, repeated here:

'3. The Powers of the Arbitrator:

3.1.the arbitrator shall in his sole discretion determine the procedure to be adopted and shall have regard in that connection to the primary need to determine the dispute or difference as expeditiously and as cheaply as possible and with resort to as little formality as is reasonably practical, provided always that where the arbitrator is required to make a decision on any disputed matter both parties shall be entitled to be heard.

4. The issues to be determined:

4.1. The issues to be determined shall be set out in the pleadings already exchanged between the parties.

4.2. The arbitrator shall prepare, in the light of the pleadings, a list of issues and shall submit this to the parties giving directions at that time for the provision of any.'

[34] Upon appointment, the arbitrator engaged the parties and a list of issues, as envisaged by the terms of the agreement, was drawn up. It is unnecessary to mention all of them. The issues included item 37 which read 'Has the claimant lawfully cancelled the contract?' The arbitrator thereafter wrote to the parties confirming their further agreement

to separate the issue of the cancellation, as described in item 37 of the list and to resolve that issue before dealing with other aspects of the dispute. The arbitrator also set out what he thought were 'ancillary issues' that needed to be addressed in order to decide the issue about the lawfulness of the cancellation.

[35] After a hearing, which included the submission of written arguments and an oral debate, the arbitrator found that the cancellation was unlawful.

[36] The manner in which the arbitrator came to a conclusion and made a finding of an unlawful cancellation is the critical issue upon which the allegation of gross irregularity by the arbitrator is founded.

[37] The foundation of the appellant's case is that, anterior to the finding that the cancellation was unlawful, the arbitrator made a decision on an 'issue' on which the appellant was not heard, thus violating the dictates of paragraph 3.1 of the arbitration agreement.

[38] The portion of the award which is supposed to evidence this violation reads thus:

'CANCELLATION

34. Clause 12.2.2 set out the grounds upon which the claimant has relied in its claim that it has cancelled the contract. The thrust of this clause is that the contractor becomes entitled to cancel the contract if payment is not made to the contractor in accordance with clause 11 and such default continues for seven days after notice specifying same.

35. As stated in paragraph 30 above, in terms of the contract, Mr Bryant was tasked with determining amounts due. The obligation to pay under clause 11 is premised against the payment certificates which were issued by Mr Bryant.
36. Mr Bryant was not entitled to withhold retention from the payment certificates and should not have done so. However, the erroneous withholding of retention does not amount to a breach of contract by the employer as envisaged in clause 12.2.2 and would not constitute valid ground for termination. The defendants' obligation to pay was premised on the certificates issued by Mr. Bryant. The issuing of an incorrect certificate and the non-payment of a certified amount are not the same thing.
37. With regards to payment certificate number 5 Mr Brews was not entitled to amend such payment certificate and he should have paid the amount as certified to the claimant. The short payment of payment certificate 5 provided valid ground for termination as this was a failure to make payment in terms of clause 11.
38. The claimant issued notice under clause 12.2.2 on 15 October 2008 and then issued a letter to cancel the contract on 14 November 2008. The defendant admits receipt of the letter to cancel the contract on 14 November 2008 but denies that there was any basis for the claimant to cancel the contract as alleged or at all.
39. In terms of clause 12.2.2 the claimant became entitled to terminate the contract from 23 October 2008.
40. Mr Bryant issued payment certificate number 6 on 30 October 2008.
41. The effect of the payment certificate was to effectively remedy the breach complained of in the letter of 15 October 2008. In terms of payment certificate number 6 no payment is due to the claimant. Had the claimant issued notice of cancellation from 23 October 2008 and prior to the issue of payment certificate number 6 then the termination would probably be legitimate. However, the claimant issued its notice of termination two weeks after it received payment certificate number 6 and it knew that at that date in terms of clause 11 no payment was due to the claimant.
42. Based on the above I agree with the defendants' assertion that as at 14 November 2008 there was no basis for the claimant to cancel the contract.'

[39] It is useful to read this finding, which spawned the controversy, in conjunction with the pleadings to assess the context in which it was made. The appellant's claim included a reference to the 6 certificates issued by Bryant, of which only certificates 5 and 6 are pertinent. It is averred that Certificate No 5 stated a sum due to the appellant of

R201,360.91 and Certificate No 6 stated a credit balance in favour of the respondent of R1915.75. These averments were admitted by the respondent.

[40] Then in paragraph 70 of the claim, the conduct that constituted the material breach is averred:

"The Defendant has materially breached the contract in one or more of the following manners:

- 70.1. by failing to pay the Claimant the amount of R201 360-91 which the QS determined to be due to Claimant in terms of Payment Certificate No 5 and making a short payment of R38 326-36;
- 70.2. by failing to pay the Claimant an amount of R125 000-00 in terms of payment Certificate No 5 which the QS, contrary to the provision of the contract, deducted as retention;
- 70.3. by failing to pay the Claimant in terms of Payment Certificate No 5 the amounts due for tiles, pelican pools, light fittings and sanitary ware;
- 70.4. by failing to make payment to the Claimant in terms of draw No 6 in the sum of R813 924-65 being a reasonable estimate of the value of the work executed minus previous payments;
- 70.5. by failing to properly consider the Claimant's request for a reasonable extension of time."

The respondent in its plea, denied these averments.

[41] In paragraph 56 of the claim it had been alleged that notice of breach was given, and demand made to remedy the breach, as contemplated in the agreement, based on the non-payment of monies due in terms of certificate No 5. The respondent pleaded that

no monies were due and payable as at 21 October 2008, a date of significance as it was after the date of the demand and before the purported cancellation.

[42] The cancellation, which occurred on 11 November 2008, was pleaded in paragraph 68. The respondent answered by pleading that no basis existed to cancel as alleged or at all.

[43] The contention advanced in support of the appellant's complaint is that the 'loss' of the 'right to cancel' was not an issue on the pleadings or in the list of issues and it was therefore a gross irregularity by the arbitrator to have made a decision on such 'issue' of which the appellant was neither alerted, nor had the opportunity to be heard. The thesis advanced on behalf of the appellant is not that the finding is incorrect, but rather, the finding is challenged because of the absence of *audi alterem partem* on the 'issue' (or, to use the exact words of the agreement a 'disputed matter') of the lapsing of the right to cancel.

[44] In my view, the argument advanced on behalf of the appellant is fundamentally misconceived. The misconception exists in two respects. First, the misconception derives from the belief that an extraneous 'issue' has been intruded into the case in the shape of a supposedly 'lost right to cancel'. This notion cannot be correct. The 'issue' or 'dispute matter' on which the parties had to be heard is the validity or lawfulness of the cancellation. The proposition that the cancellation was invalid, because at the moment that the cancellation took place no obligation to pay any money to the appellant then

existed (because such an obligation could, in terms of the agreement, only arise pursuant to a certificate by Bryant, and the prevailing certificate No 6 stated a credit balance) cannot be elevated to the status of an 'issue' on which the parties had to be heard. The proposition is, after all, merely that; ie a proposition which is one of several components of a chain of mixed legal and factual reasoning resulting in a conclusion about the real issue; ie the validity of the purported cancellation. Second, the very point that a valid cancellation cannot be effected at a time when no money is due and payable, and by inference, any breach that might have existed no longer exists, is encapsulated in the pleadings. The 'point' was always apparent and there ought not to have been any surprises to the attentive reader of the pleadings.

[45] Once it is appreciated that the lapsing of the right to elect to cancel is not an 'issue' or 'disputed matter', properly understood, the complaint about not being heard on an extraneous 'issue' simply cannot arise. There cannot be doubt that the parties were heard on the issue of the purported cancellation.

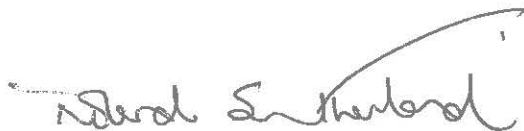
Conclusions

[46] Accordingly, the order of the review court has not been shown to be incorrect in any respect, and the appeal falls to be dismissed.

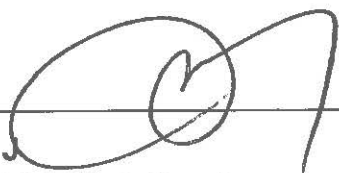
[47] The costs of the appeal should follow the result.

The Order

[48] The appeal is dismissed with costs.



Sutherland J (with whom Moshidi et Nicholls JJ Concur)
Judge of the High Court,
Gauteng Local Division, Johannesburg



Moshidi J
Judge of the High Court,
Gauteng Local Division, Johannesburg



Nicholls J
Judge of the High Court,
Gauteng Local Division, Johannesburg

Hearing: 15 May 2017.

Judgment: 20 June 2017

For the Appellant:

Adv Bisscoff,

Instructed by McDonald Attorneys

For the Respondent:

Adv Bitter,

Instructed by Harratt Mbuyisa Neale Inc