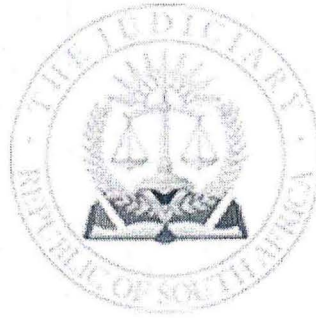




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~/NO
 (2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
 (3) REVISED: NO

DATE: 7 AUGUST 2020 – **DELIVERED ELECTRONICALLY**

SIGNATURE:

[Handwritten signature]

Case No. 2014/2020

In the matter between:

**TRANSACTION CAPITAL RECOVERIES (PTY)
LIMITED**

APPLICANT

And

EMFULENI LOCAL MUNICIPALITY

RESPONDENT

JUDGMENT

MILLAR, A J

1. The applicant and respondent are presently engaged in arbitration proceedings for the determination of disputes. The applicant claims payment of monies it contends are owed to it by the respondent and the respondent has counterclaimed from the applicant monies it contends were overpaid to the applicant.
2. The arbitrator, pursuant to the arbitration made an "award"¹. It is this award and the applicant's contention that it is appealable which is the subject matter of the present application. For its part, the respondent argues that the award is not a final award and for that reason is not appealable.
3. The applicant having taken the view that it did, after the award was handed down on 4 December 2019, then proceeded to deliver a notice of appeal and to initiate the appeal process in terms of the agreement that had been reached between the parties. The respondent, disputing that the award is appealable, refused to take part in the appeal process or to nominate an appeal arbitrator as it was entitled to do. The nominated appeal arbitrators for their part, absent the agreement of the respondent, are unable to hear the appeal and hence the

¹ "award" – used as a verb means to give something officially as a prize, payment, or reward – Compact Oxford English Dictionary, Third Edition, Oxford University Press, 2005.

present application for a declaratory order so that the applicant can proceed with an appeal at this stage.

4. The award of 4 December 2019 is as follows:

“AWARD

67. *In the event, I make the following award:*

67.1 *In the light of the conclusion in this award, the parties are required to deliver within 14 days written submissions on the following issues:*

67.1.1 *The total amount of commission, if any, to which the Claimant is entitled for the period August – September 2018 as at the date of this award together with interest capitalised and accrued up to the date of this award.*

67.1.2 *The amount of which the Respondent is entitled pursuant to its counterclaim together with interest capitalised and accrued up to the date of this award.*

67.2 *What is the appropriate order to make in these proceedings?”.*

5. It was argued on behalf of the applicant that notwithstanding the terms of the award and the request for further submissions in respect of the either the further amounts which may be due to the applicant or the value of the respondent's counterclaim as well as the question posed as to the appropriate order to be made in the proceedings – the arbitrator had expressly and if not expressly, impliedly made findings from which the questions posed in the award could be answered.
6. It was argued that this was apparent from the finding in paragraph 65 of the award that *"the experts indicated that the amount received by TCR on behalf of the municipality from 22 September 2018 to 17 May 2019 is R10, 769, 702.11. This amount has not been updated and the experts undertook to update this amount as and when subsequent bank statements and information is made available to them. It may well be that the (sic) TCR is entitled to some commission for the period August 2018 to September 2018 when it stopped collections."*
7. This it was argued was indicative of a finding of the amount that was due to the applicant and that no further submissions need have been made by the applicant. Additionally, it was argued that the award in paragraph 67.1.2 which made plain, although it did not express it in specific monetary terms, that the respondent's counterclaim was allowed and that having regard to the evidence led before the arbitrator, the allowing of such counterclaim had the effect of extinguishing the claim of the applicant was in fact in its effect, a final award dismissing the applicant's claim.

8. The respondent argued that the award was not a final award given its express terms and that it had been agreed between the parties at the pre- arbitration meeting that only a “final award” would be subject to an appeal.
9. The use of the term “award” to describe the directions given, or even the fact that the paragraph containing such directions was headed “Award”, does not as a matter of course elevate them to either an award or to being final².
10. In **Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another**³ the Constitutional Court held that :

“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 concluded, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of section 33(1), the goals of private arbitration may well be defeated.”

11. The refusal of the appeal arbitrators to proceed with the appeal in the absence of the agreement of the parties or the order of this court is consonant with the

² Turffontein Estates Ltd v Mining Commissioner Johannesburg 1917 AD 419 at 431.

³ 2009 (4) SA 529 (CC), at para 236.

approach to be followed in such instances. In *Gutsche Family Investments (Pty) Ltd and Others v Mettle Equity Group (Pty) Ltd and Others*⁴ the Supreme Court of Appeal concluded, that in circumstances where parties do not expressly agree to the jurisdiction of an appeal arbitrator (or a panel) the appeal arbitrator cannot proceed to finally determine the issue and thus determine his own jurisdiction

12. In regard to the approach to be taken in the interpretation of the award in the present matter, in *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁵ the court held:

“[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 document in order to trace those developments. The relevant authorities are collected and summarized 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

⁵ 2012 (4) SA 593 (SCA), para [18] footnotes omitted.

the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, considerations 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."

13. Objectively construed, the agreement between the parties was that only a final decision or award could be the subject of an appeal. Whether or not the award made by the arbitrator is in fact an award or even final, must appear from its express terms and not by inference as the applicant has sought to do.
14. The award in the present matter, is, properly construed nothing more than directions by the arbitrator to the parties for further submissions. This much is readily apparent from the text.
15. Most telling perhaps and indicative of the fact that the award is neither final nor for the matter an award in the true sense, is apparent from paragraph 67.2 in which the arbitrator poses the question as to what the appropriate order to be made was "in these proceedings". From this it is self-evident that the arbitrator did not intend to make any award, final or otherwise, in the true sense.
16. For the reasons set out above, I find that the award of 4 December 2019 by the arbitrator is neither an award nor is it appealable.

17. In the circumstances, I make the following order:

17.1 The application is dismissed.

17.2 The applicant is ordered to pay the respondent's costs of the application, which costs are to include the costs consequent upon the employment of two counsel.



**A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

HEARD ON: 4 AUGUST 2020

JUDGMENT DELIVERED ON: 7 AUGUST 2020

(ELECTRONICALLY HANDED DOWN BY EMAIL DELIVERY TO THE PARTIES)

COUNSEL FOR THE APPLICANT: ADV. ARG MUNDELL SC

INSTRUCTED BY: MARIE-LOU BESTER INC

REFERENCE: MS ML BESTER

COUNSEL FOR THE FIRST RESPONDENT:	ADV. W MOKHARE SC
	ADV. MC MAKGATO
INSTRUCTED BY:	SELEKA ATTORNEYS
REFERENCE:	MR SELEKA