IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 2023-000980

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

02/02/2024
DATE

SIGNATURE [redacted]

In the matter between:

TRANSNET SOC LIMITED operating as **TRANSNET PIPELINES**	Applicant
and	
SPILL TECH (GAUTENG) (PTY) LTD	First Respondent
SPILL TECH (PTY) LTD	Second Respondent
ANDRÉ R GAUTSCHI SC	Third Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 2 February 2024.

JUDGMENT

CARRIM AJ

Introduction

[1] This is a review application in terms of section 33(1)(b) of the Arbitration Act 42 of 1965 ("the Arbitration Act"), against the award of the third respondent ("the Arbitrator") in which the applicant's five (5) special defences were dismissed.

Background

[2] The applicant, Transnet SOC Ltd ("Transnet"), acting through its subsidiary Transnet Pipelines[1]("TPL"), is the custodian of the country's strategic pipeline assets and currently services two key industries namely gas and liquid fuel. The liquid fuel products include crude oil, diesel, leaded and unleaded petrol, and aviation turbine fuels.

[3] The first respondent, Spill Tech (Gauteng) (Pty) Ltd ("Spill Tech Gauteng" or "STG"), and the second respondent, Spill Tech (Pty) Ltd ("ST"), are related companies. For ease of convenience, they are collectively referred to as Spill Tech unless the context requires specific details relevant to each entity.

[4] The liquid fuels network traverses the provinces of Kwa-Zulu Natal, Free State,

[1] Previously known as "Petronet".

Gauteng, North-West and Mpumalanga. The intake stations are the coastal Durban refineries at Coalbrook (Natref) and the inland Sasol 2 and Sasol 3 synfuel plants at Secunda. The network includes a tank farm at Tarlton which is used mainly for storage and distribution of liquid fuels into Botswana. TPL handles an average of 16 billion litres of liquid fuel per annum.

[5] From time to time, fuel spills occur due to damage caused to the pipeline network by thieves or wear and tear and Transnet requires the services of suitable contractors who can attend to the containment of spillages quickly and do the remedial work of polluted sites.

[6] Prior to 2016, Spill Tech was the only service provider that provided services to Transnet throughout the country based on a month-month contract.

[7] During 2016 Transnet went out on a public tender for a new contract in which the spills were split between spills above 50 000 litres ("major spills") and spills below 50 000 litres ("minor spills").

[8] The equipment, personnel, and experience required to deal with major and minor spills differ and the details of these were set out in the tender documents. It is axiomatic that major spills were likely to have a greater impact on the environment and on Transnet's business and would require a more experienced and larger service provider to deal with these spills promptly.

[9] The tender was ultimately awarded in 2018 with Spill Tech being awarded the

tender for spills above 50 000 litres and Drizit Spill Technologies (Pty) Ltd ("Drizit") for spills below 50 000 litres ("minor spills").

[10] Transnet did not appoint a panel of service providers from whom it could choose as and when spills occurred. It appointed only one contractor for major spills being Spill Tech and one contractor for minor spills being Drizit.

[11] STG was contracted to deal with spills in Gauteng, Mpumalanga, and North-West while ST was contracted to deal with spills in Kwa-Zulu Natal and Free State.

[12] Transnet concluded written "contract agreements" (collectively referred to as the "Contracts") with Spill Tech in terms of which Spill Tech was contracted to provide services for spills above 50 000 litres "as and when required". The agreements were effective from 1 May 2018 and were due to terminate on 30 April 2021 but were extended to 31 December 2021. Other than the differences in the geographic allocations, the Contracts for STG and ST were identical, and the material terms referred to in these proceedings apply equally to both respondents.[2]

[13] The Contracts incorporated the NEC3 Engineering and Construction Contract with the main option A and dispute resolution option W1. The Contracts were arranged in different parts and included Part C1 Form of Offer and Acceptance, Part C2 Pricing Data, Part C3 Scope of Services, and Annexures.[3]

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[2] Annexure FA2 as at CaseLines section 94.
[3] As at CaseLines section 93.

[14] The material express provisions of the Contacts relevant to this application are the following:

[14.1] The Contracts are "rate based" and "as and when" contracts. Hours of work by the Contractor's employees shall be paid on a per hour basis for work done, such hours will include time calculated from when employees leave their usual place of business to go to the job site and return to their usual place of business excluding lunch hours.

[14.2] The Contractor is obliged and entitled to attend to the remediation of all incidents involving major pipeline spills which comprise fuel spills or contain exceeding 50 000 litres.

[14.3] The Contracts incorporated the terms of the NEC3 Term Service Contract (June 2005), amended June 2006, the following option clauses:

[14.3.1] A Priced contract with price list;

[14.3.2] W1 Dispute resolution procedure;

[14.3.3] X2 Changes in the law;

[14.3.4] X17 Low service damages;

[14.3.5] X18 Limitation of liability;

[14.3.6] X19 Task Order Z.

[14.4] The Contractor is entitled to be paid for services rendered in accordance with its agreed rates in the Contract on a rates and measure basis.

[14.5] The service is described as: "*Responding to emergency and remediation of environmental incidental — major spills (>50 000 l) at Transnet Pipeline facilities and the pipeline network 'as and when required for a period of three years*".

[14.6] The Contractor's liability to the Defendant for indirect or consequential loss is limited to 0% of the Prices (clause X18.1).

[14.7] The direct fee percentage is 10% and the subcontracted fee percentage is 15%.

[14.8] A breach of contract by the Employer is a compensation event (clause 60.1(14)).

[14.9] If an event occurs that the Contractor considers to be a compensation event, the Contractor notifies the Service Manager accordingly within eight weeks of becoming aware of the event. If the Service Manager ought to have notified the event but did not, the eight-week time period does not apply (clause 61.3).

[14.10] If the Service Manager does not respond to the Contractor's notification within one week, the Contractor may notify the Service Manager to that effect and, if the Service Manager fails to reply within two weeks thereof, that is treated as

acceptance by the Service Manager that the event is a compensation event and an instruction to submit a quotation (clause 61.4).

[14.11] A compensation event is implemented, in other words, becomes effective and binding, with the amount of the quotation becoming payable when the Contractor's quotation is treated as having been accepted (clause 65.1).

[14.12] Disputes under the Contract are notified and referred to an Adjudicator in accordance with the Adjudication Table (clause W1.3(1)).

[14.13] The Adjudicator is the person appointed by the nominating body specified in the Contract Data, in this case being the Association of Arbitrators (Southern Africa).

[14.14] The Adjudication Table stipulates that: (a) the Contractor is entitled to refer a dispute about the action or inaction of the Service Manager to adjudication between two and four weeks after notification of the dispute to the Employer and the Service Manager, the notification itself being made not more than four weeks after the Contractor becomes aware of the action or inaction; (b) the Employer is entitled to refer a dispute to adjudication relating to a quotation for a compensation event which is treated as having been accepted by the Service Manager between two and four weeks after the Service Manager's notification of the dispute to the Employer and the Contractor, the notification itself being made not more than four weeks after the quotation was treated as accepted; (c) either party may refer a dispute to adjudication relating to any

other matter between two and four weeks after notification of the dispute to the other party and the Service Manager, (d) if a disputed matter is not notified and referred within the times set out in the Contract, neither party may subsequently refer it to the Adjudicator or the tribunal (clause W1.8(2).

[14.15] Payments to the Contractor payable in terms of the Contract are to be effected on or before the last day of the month following the month during which a valid tax invoice and month end statement are submitted to the Defendant (Contract Data clause 51.2)

[14.16] If, after the Adjudicator notifies his decision, a party is dissatisfied, he may notify the other party that he intends to refer the matter to arbitration for final determination, provided such notification is given within four weeks, in which event the matter is determined by arbitration.[4]

[15] The initial Transnet Service Manager appointed in terms of the contract was Jeffrey Madingani, who was replaced by Vicky Dlamini in 2019.

[16] At a practical level, the way the contract worked was that the Spill Tech would receive a call from the Transnet master control centre to inform them that there had been a spill that needed attention. Transnet would provide Spill Tech with as much information as they had regarding the location of the spill such as GPS coordinates or a physical address or farm name or the like. Transnet would also

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[4] STG Statement of Claim as at CaseLines section 276-281 Transnet Founding Affidavit paragraph 26 as at CaseLines section 12.

provide information on what type of product was involved such as diesel, intermix (a mixture of diesel and petrol), or Avtur (jet fuel). The Spill Tech operational team would then deploy to the site. The initial focus was on containment to contain the spill. Thereafter the Transnet Service Manager would attend on site with a geohydrologist and make an assessment as to what remediation measures were required for that site and Spill Tech would be instructed to proceed with remediation accordingly. The remediation process in major spills is a long one, could extend over several years, and could include bioremediation. [5]

[17] The issue of whether a spill was a major or minor was managed in the following manner: when Spill Tech attended to a site, and it emerged that the spill was a minor one it was asked to hand over the site to Drizit. The process also worked in reverse, where if Drizit was on site and it emerged that the spill was a major one, they would be asked to hand over to Spill Tech. Over approximately 20 months of the 36-month contract, Spill Tech experienced no issues in relation to major spills being incorrectly awarded to Drizit.[6]

[18] In September 2019, Tim Liversage alerted Spill Tech to the fact that Transnet's budget for the Spill Tech Gauteng contract was running low.[7] A meeting was convened at which it appears Transnet requested Spill Tech to do the work in a less costly manner. No resolution was reached at this meeting.

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[5] Radebe Witness Statement pages 389 -391.
[6] Van der Kwast Witness Statement pages 317-374.
[7] Van der Kwast Witness Statement paragraph 76 on page 374.

[19] In January 2020, Spill Tech became aware of the fact that Drizit was doing work on major spills. Spill Tech attempted to resolve these with Transnet to no avail.[8]

[20] Transnet's allocation of 13 spills to Drizit gave rise to the dispute between the parties.

[21] Spill Tech referred the dispute to adjudication in terms of the Contracts. On its interpretation of the "as and when" provisions of the contract Transnet was obliged to award it all major spills as and when they occurred and not to any other service providers. In the event that it had allocated major spills to other service providers Transnet was obliged to terminate them and allocate the work to Spill Tech. Spill Tech claimed that Transnet had breached the contract and claimed for loss of profits as a result of Transnet allocating major spills to Drizit. Transnet contested this interpretation and argued that it the "as and when" provision meant that it was not obliged to allocate any work to Spill Tech at all.

Proceedings before the Adjudicator

[22] The Adjudicator handed down his decision on 11 August 2021 dismissing Spill Tech's claims.[9] In his decision he favours Transnet's interpretation of the Contracts.

[23] It is notable that he makes only one finding namely that there was no contractual

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[8] Radebe Witness Statement page 391. Van De Kwast Witness Statement page 375.
[9] Annexure FA3 CaseLines 01-288

obligation on Transnet to allocate any particular spill to Spill Tech.[10] There was also not obligation upon Transnet to reallocate a site to Spill Tech in cases where it was later established that a spill did indeed exceed 50 000litres. In his view Spill Tech had failed on the first hurdle and the other disputes over the claims were therefore academic and there was no need for him to address them.[11]

[24] In his decision the adjudicator notes that he had limited information placed before him as to the background context of the Contracts. He also noted that Spill Tech had pleaded an alternative case namely that the terms of the contract meant that if a spill is allocated to Drizit (or anyone else for that matter) and it subsequently turns out that the spill was more than 50 000 litres, Transnet was obliged to hand over the site to Spill Tech.[12]

[25] The Adjudicator further notes in his decision the attitude that had been adopted by Transnet to the adjudication. Transnet had adopted the view that the entire adjudication process including his position as adjudicator was invalid. Its contention was that disputes as might exist were not subject to adjudication under the Contracts and that the claim for loss of profits was incompetent under the Contracts. Included in Transnet's contentions was a direct challenge to the jurisdiction of the adjudicator, accompanied by a threat to interdict the process. The adjudicator did not accede to Transnet's demand that the process be stopped. This led to Transnet launching motion proceedings in this division of

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[10] Para 12.3 CaseLines 01-309
[11] Paras 12.4 – 12.5 CaseLines 01-310
[12] Para 8.1 CaseLines 01-301

the High Court for purposes of interdicting the process. The matter was to be heard on 12 August 2021.[13] He proceeded to fulfil his function as adjudicator until a court decided otherwise and handed his decision down on 11 August 2021.

[26] On 17 August 2021, Spill Tech notified Transnet of its dissatisfaction with the Adjudicator's decision and subsequently filed new statements of claim ("SOC") referring the dispute to arbitration.

Proceedings before the Arbitrator

[27] On 06 December 2021 Spill Tech filed its statements of claims ("SOC") alleging breach of contract and claiming a total payment of R117 669 610.00 (one hundred and seventeen million, six hundred and sixty-nine thousand, and six hundred and ten Rands) for loss of profits, and which claim relates to the 13 sites.[14] In the STG statement of claim, it claims R115,277,010.00 (one hundred and fifteen million and two hundred seventy-seven thousand, six hundred and ten Rands) while in the ST statement of claim it claims payment of R 2 302 000.00 (two million, three hundred and ninety-two hundred thousand Rands) from Transnet in respect of only the Bethlehem site.[15]

[28] Transnet filed its statements of defence on 21 February 2022 in which it raised

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[13] Paras 2.2 CaseLines 01-289 and para 2.4 CaseLines 01-300
[14] Summarised in paragraph 105 of the Spill Tech Gauteng SOC.
[15] Annexures FA21 and 22. CaseLines 01-255 to 01-286.

five (5) special defences.[16] Transnet thereafter sought the separation of its special defences for determination. Spill Tech was opposed to the separation. After some initial resistance and Spill Tech requiring Transnet to bring a formal application, the Arbitrator separated the special defences.

[29] Transnet's special defences may be summarised as follows:

[29.1] The claimants (Spill Tech) have not referred to and/or do not challenge the adjudicator's determination of 11 August 2021 of the same dispute that they have referred to arbitration, and therefore the matter is *res judicata*. (the "*res judicata* defence");

[29.2] The Contracts concluded between Spill Tech and Transnet are on an "as and when required" basis. Therefore, Transnet was under no legal obligation to allocate any assignments for the containment and/or remediation of spills of more than 50 000 litres to Spill Tech, and to the extent that it allocated the assignment to clean up such spills to other contractors it did not breach the Contracts with Spill Tech (the "as and when required" defence);

[29.3] The damages claimed by Spill Tech are consequential and are excluded under the Contracts (the "consequential damages" defence);

[29.4] The Contracts limit the remedy that can be sought in relation to a

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[16] Annexures FA25 & FA26 as at CaseLines sections 01-226 & 01-338.

compensation event to adjustment of the Prices under the Contracts (clause 63.5). In any event, Transnet disputes that the events on which Spill Tech's claims are compensation events (the "incompetent remedy" defence). The two defences, defence three and four are related.

[29.5] The claims are time barred (the "time bar" defence).

[30] There were further debates about whether any evidence would be necessary in respect of the separated issues. Transnet's view was that the special defences could be decided purely on legal arguments based on the interpretation of the provisions of the contract without reference to any factual or extrinsic evidence. Ultimately the Arbitrator ruled that he would allow witness statements to be filed. Spill Tech filed two witness statements. Transnet declined to file any but objected to the admissibility of the evidence tendered by Spill Tech and, after hearing submissions, the Arbitrator ruled that the witness statements would be admitted provisionally.

[31] The Arbitrator heard oral submissions on the separated issues on 17 November 2022. At the end of the hearing, he asked the parties to make further submissions on the precise wording of the interpretation of the Contract.

[32] The Arbitrator handed down his award on 30 November 2022 ("the award") in which he dismissed all of Transnet's special defences.

[33] It is this award that Transnet seeks to review and set aside in its totality.

[34] Transnet has sought to review the award on the basis of section 33(1)(b). It submits, depending on the specific defence, that the Arbitrator –

[34.1] exceeded his powers by deciding an issue that was not defined by the parties in the pleadings;

[34.2] exceeded his powers by deciding a matter that the arbitration agreement does not empower him to determine;

[34.3] committed a gross irregularity because misconceived the nature of the enquiry and his duties in connection therewith; and

[34.4] did not provide Transnet with an adequate and fair opportunity.

[35] Spill Tech opposes the application on the basis that the Arbitrator did nothing more than interpret the Contracts as he was entitled and asked to do. The issues decided by the Arbitrator were indeed those that had been separated. The Arbitrator granted Transnet a fair hearing. Transnet is attempting to appeal the findings of the Arbitrator through this review application.

[36] Against this background, I have approached the matter in the following way –

[36.1] I deal broadly with the law applicable to reviews of arbitral awards.

[36.2] I then deal with the merits of each of the five special defences, summarising the relevant provisions of the contract, the statements of claim, other

submissions by the parties, and the Arbitrator's award as and when applicable. I conclude on each of the five special defences.

[36.3] I then make overall concluding remarks and grant the order.

[37] Before turning to the merits of the matter, I make the following preliminary remarks regarding Transnet's approach in this matter:

[37.1] In the arbitration proceedings, Spill Tech put up two witness statements namely those of Mr Van der Kwast[17] and Ms N C Radebe[18] which dealt with the history of the contractual relationship between Transnet and Spill Tech, the tender put out by Transnet, the details of the requirements of the two tenders, the details of the Contracts, the manner in which the size of spills was assessed, how the contract was executed, the switching of contractors, the details of the disputed spills, the engagement by Spill Tech with Transnet officials in order to resolve the disputes and finally the referral to adjudication.

[37.2] Transnet did not file any witness statements. It was of the view that the special defences could be decided without evidence and by legal argument on the interpretation of the Contracts. It however agreed that the facts in Spill Tech's witness statements could be accepted as correct but reserved its right to argue the relevance or admissibility thereof. The Arbitrator made an interim award

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[17] The chief operations officer of the Spill Tech group of companies at the time, which included Spill Tech Gauteng and Spill Tech.

[18] Director of Spill Tech (Pty) Ltd responsible for contract management.

to this effect[19] admitting Spill Tech's witness statements.

[37.3] In these proceedings, Transnet put up factual allegations in its founding affidavit disputing some the evidence Spill Tech had put up in the arbitration on how the spills were managed between the two contractors or what transpired between Transnet and Spill Tech prior to the referral of the disputes to adjudication. Spill Tech objected to this as being impermissible. In Spill Tech's view, Transnet was attempting to appeal the award under the guise of the review application. I agree. It is not open in these review proceedings for Transnet to dispute facts that had been placed before the Arbitrator in the arbitration hearing and in respect of which it had been granted an opportunity to address or rebut.

[37.4] A significant anomaly in these proceedings was that the transcript of the arbitration proceedings ("transcript") was not included in the papers nor were relevant portions thereof made available by Transnet despite it providing undertakings at different times to do so. Transnet had carefully selected certain portions of the documents that served before the Arbitrator such as the SOC and the adjudicator's award. However, it did not include any of its submissions made to the Arbitrator. Furthermore, it included documents (copies of correspondence and minutes of meetings dealing with factual issues) without indicating which or any of these served before the Arbitrator

[19] Arbitrator's award paragraph 6 as at CaseLines section 01-67.

during the arbitration.

[37.5] In its answering affidavit, Spill Tech included selected portions of the transcript. Unusually, Spill Tech put up a copy of Transnet's submissions (heads of argument) on the separated issues during the arbitration proceedings as annexure ST1 to its answering affidavit ("**ST1**"). In its replying affidavit, Transnet remarked on this and threatened to put up full extracts of the transcript, which it did not do. Transnet thereafter included selected extracts of the transcript in its heads of argument (which it had failed to include in its pleadings) in response to Spill Tech's answering affidavit but then failed to provide these.

[38] I set this out here upfront to emphasise that these are review, not appeal proceedings. The enquiry that this court is engaged with is whether, in the arbitration proceedings, the Arbitrator conducted himself in a manner that amounted to a gross irregularity or exceeded his powers to such an extent as to warrant interference by this Court. That assessment can only be done by reference to what was placed before the Arbitrator at that time and what occurred during the arbitration hearings.

[39] It might be that some courts do not require the full transcript of proceedings to be placed before them in review applications of this type, but when a party alleges that arbitration proceedings were grossly irregular or the arbitrator exceeded his powers, that party is required to put up relevant supporting

evidence to that effect. Transnet, the applicant bears the onus in respect thereof.

[40] I discuss below that it is well-settled that the remit of the Court in this enquiry is a narrow one, the bar is high, and a court will not easily interfere in setting aside arbitral awards.

The law

[41] Section 33(1) of the Arbitration Act 42 of 1965 regulates review of arbitral awards as follows:

[41.1] '(1) Where-

(a) any member of the arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

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

(c) an award has been improperly obtained,

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.'

[42] The reasons why parties opt to select their own dispute resolution method include

speed, efficiency, flexibility, and finality of the arbitration process.[20]

[43] In ***Telcordia Technologies Inc v Telkom SA,***[21] the SCA confirmed that our courts have consistently given due deference to party autonomy and the arbitral award since the early part of the 19th Century.[22] This approach is not unique to South Africa.

[44] In ***Telcordia,*** the SCA stated that "*By agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else. Typically, they agree to waive the right of appeal,*[23] *which in context means that they waive the right to have the merits of their dispute re-litigated or reconsidered.*" [24]

[45] By agreeing to arbitration, the parties limit interference by courts to the grounds of procedural irregularities set out in s33(1) of the Arbitration Act.

[46] That agreement carries with it the risk that the Arbitrator may get it wrong on the facts and the law and the parties will have to live with the result because where parties choose to resolve their disputes by arbitration, they limit the possibility of interference by courts to specified grounds of procedural irregularities set out in

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[20] *Eskom Holdings Limited v The Joint Venture of Edison Jehano (Pty) Ltd and KEC International Limited and Others* (177/2020) [2021] ZASCA 138 (6 October 2021) paragraph 22.
[21] [2006] 139 SCA (RSA).
[22] As at paragraph 4.
[23] Without a special provision there is in any event no appeal possible because appeals are only possible from lower courts to higher courts.
[24] As at paragraph 50.

the Arbitration Act.[25]

[47] An arbitrator *"has the right to be wrong"*[26] and mistakes made by arbitrators, whether in relation to the facts or law, are not grounds for reviewing and setting aside an award.[27]

[48] In ***Palabora Copper (Pty) Ltd v Motlokwa Transport and Construction (Pty) Ltd*** [28] the SCA held;

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

[49] A litigant who seeks to impugn an arbitration award in a court thus has a restricted and mainly procedural scope of challenge, the merits are not open to attack.[29]

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[25] *Telcordia* at paragraph [51].
[26] *Telcordia* at paragraphs [73] and [85].
[27] *Telcordia* at paragraph [73].
[28] (298/2017) [2018] ZASCA 23; [2018] 2 All SA 660 (SCA); 2018 (5) SA 462 (SCA) (22 March 2018).
[29] *Telcordia supra* at paragraph 48.

[50] In ***Eskom Holdings Limited v The Joint Venture of Edison Jehano (Pty) Ltd and KEC International Limited and Others***[30] the SCA confirmed the approach of the court that 'gross irregularity' in s33(1)(b) is essentially a 'process standard' which is 'to all intents and purposes identical to a ground of review available in relation to proceedings in inferior courts'. The ultimate test of whether an arbitrator's conduct constituted gross irregularity is whether the conduct of the arbitrator or arbitral tribunal prevented a fair trial of the issues. The common law grounds of review are excluded.[31] In modern arbitral practice, fairness goes beyond the strict observation of the rules of evidence, provided that the procedure adopted is fair to both parties and conforms to the rules of natural justice.[32]

[51] In summary, the gross irregularity ground in s33(1)(b) is thus restricted to serious procedural missteps on the part of the arbitrator. This would include failing to afford the parties a fair hearing. When the arbitrator arrives at an incorrect interpretation or an incorrect conclusion on the facts or the law, this does not amount to a gross irregularity. When an arbitrator arrives at an incorrect interpretation, he has not misconceived the enquiry but has made a mistake by which the parties are bound.[33] In order to justify a review on this basis the irregularity must have been of such a *serious* nature that it resulted in the

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[30] (case no 177/2020) [2021] ZASCA 138 (06 October 2021).
[31] *Eskom* at Paragraph 22 and the cases cited therein.
[32] *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2013 (6) SA 520 (SCA).
[33] *Telcordia* at paragraph 85.

aggrieved party not having his case fully and fairly determined. [34]

[52] The exceeding powers ground relates to the arbitrator deciding a matter falling outside of the disputes submitted to him for determination. In ***Hos+Med Medical Aid Scheme v Thebe ya Pelo Healthcare and Others***[35] the SCA held:

[52.1] "*In my view it is clear that the only source of an arbitrator's power is the arbitration agreement between the parties and an arbitrator cannot stray beyond their submission where the parties have expressly defined and limited the issues, as the parties have done in this case to the matters pleaded. Thus the arbitrator, and therefore also the appeal tribunal, had no jurisdiction to decide a matter not pleaded.*" [36]

[53] In the present context, this could include matters not forming part of the separated issues or envisaged by the pleadings.

[54] In ***Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh N O*** [37] the SCA found that ultimately only a court of law that finally determines the jurisdiction of an arbitrator and therefore his determination regarding jurisdiction is always provisional.[38] The question that the high court and the SCA were seized with was "*In the face of a dispute of fact that an agreement existed*

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[34] PAA Ramsden *The Law of Arbitration* Juta 2nd Ed p 253
[35] (015/07) [2007] ZASCA 163; [2007] SCA 163 (RSA); [2008] 2 All SA 132 (SCA); 2008 (2) SA 608 (SCA) (29 November 2007).
[36] *Hos+Med Medical Aid Scheme* at paragraph 30.
[37] (479/2020) [2021] ZASCA 163; 2022 (4) SA 420 (SCA) (1 December 2021).
[38] Transnet's Heads at paragraph 69.

to refer disputes between the parties to arbitration, was there any basis to find that the parties had agreed to refer to arbitration the very dispute as to the existence of an agreement to arbitrate? If that is not what the parties agreed to, then, was it competent for the high court to decide the dispute as to whether there was an agreement to refer the disputes to arbitration?"[39] This is sometimes referred to as the "existence dispute" i.e. whether there existed an agreement between the parties that the issue would be referred to arbitration.

[55] The onus rests on the applicant to prove that the arbitrator misdirected himself in relation to his duties or committed a gross irregularity in the conduct of the proceedings or exceeded his powers.[40]

Evaluation

[56] The approach I have taken is to deal with each of Transnet's defences, the grounds of review in respect thereof, and conclude on each one. I have elected not to summarise Spill Tech's statements of claim ("SOC") but to refer to aspects of these as and where necessary. Likewise, I deal with relevant provisions of the Contracts as and where appropriate.

[57] Transnet put forward many grounds of review and several legal arguments. I do not deal with all the facts and legal arguments put up by Transnet in detail

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[39] *Canton Trading* at paragraph 31.
[40] *Total Support Management (Pty) Ltd and Another v Diversified Systems (SA) and Another* 2002 (4) SA 661 (SCA) at paragraph 21.

because it is not the function of these proceedings for me to re-interpret the contractual provisions as if it were an appeal. I intend to limit the discussion to whether the reviewable acts said to have been committed by the Arbitrator were so committed.

[57.1] As stated by the SCA in ***Telcordia***:

> [57.1.1] "*But it was not for the high court to reinterpret the contract; its function was to determine whether the gross irregularities alleged had been committed*"[41]

[58] It must be noted that unlike in ***Eskom Holdings***,[42] the parties in this case had not agreed to the issues that were to be separated and determined by the arbitrator

[59] In this case it was Transnet that sought an application for the separation of its special defences, an application which had initially been opposed by Spill Tech. The special defences and its approach thereto, which Transnet directed against Spill Tech's claims, were of Transnet's own formulation.

[60] Moreover, all the special defences raised by Transnet required an interpretation of the Contracts.

[61] In ***University of Johannesburg v Auckland Park Theological Seminary***[39] the

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[41] *Telcordia* paragraph 99.
[42] As at paragraph 11.

Constitutional Court restated that the context in which the contract is concluded, and the language thereof must be considered together:

[61.1.1] "*This approach to interpretation requires that "from the outset one considers the context and the language together, with neither predominating over the other". In Chisuse, although speaking in the context of statutory interpretation, this Court held that this "now settled" approach to interpretation, is a "unitary" exercise. This means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose the basis upon which it argues the arbitrator ought to approach the interpretative exercise.*"

[62] In ***Natal Joint Municipal Pension Fund v Endumeni Municipality, ("Endumeni")*** the SCA set out the general approach to the construction of Contracts:

[62.1] "*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 ... 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."[43]

[63] In ***Endumeni,*** the court cautions that in a contractual context, if a sensible or bussinesslike meaning is not preferred it would be " to *make a contract for the parties other than the one they in fact made."*[44]

The *Res Judicata* defence

[64] It was common cause that Spill Tech had notified its dissatisfaction with the adjudicator's decision to Transnet as required under the Contracts. It was also common cause that it had not placed the adjudicator's decision before the Arbitrator but instead referred the dispute to arbitration. It is also common cause that the adjudicator's decision was eventually placed before the Arbitrator but by Transnet and not by Spill Tech the claimant.

[65] Transnet's defence here is that because Spill Tech had not referred the

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[43] Per Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at paragraph 18.
[44] Ibid.

adjudicator's *decision* to arbitration as it was required to in the Contracts but referred the dispute *de novo*, that decision still stood unchallenged. The matter was therefore *res judicata.* Transnet relied on its interpretation of Option W1 in the NEC3 Conditions of Contract in support of its argument.

[66] Option W1 in the NEC3 Conditions of Contract provides that:

[66.1] W1. (1) Any dispute arising under or in connection with this contract is referred to and decided by the *Adjudicator*."

[66.2] W1. (10) The *Adjudicator's* decision is binding on the parties unless and until revised by the tribunal and is enforceable as a matter of contractual obligation between the parties and not as an arbitral award. The Adjudicator's decision is final and binding if neither Party has notified the other within the times required by this contract that he is dissatisfied with a decision of the *Adjudicator* and intends to refer the matter to the *tribunal.* (In terms of Part One – Data of the contract provided by the Employer the *tribunal* is the arbitrator)

[66.3] Under W1.4 entitled Review by the Arbitrator, the dispute must first be referred to the adjudicator:

[66.3.1] (1) A Party does not refer any dispute under or in connection with this accordance with this contract to the tribunal unless it

has first been referred to the *Adjudicator* in accordance with this contract.

[66.3.2] (2) If, after the *Adjudicator* notifies his decision, a Party is dissatisfied he may notify the other Party that he intends to refer it to the tribunal. A Party may not refer a dispute to the tribunal unless this notification is given within four weeks of notification of the *Adjudicator's* decision.

[66.3.3] (3) If the *Adjudicator* does not notify his decision within the time provided by this contract, a Party may notify the other Party that he intends to refer the dispute to the tribunal. A Party may not refer a dispute to the *tribunal* unless this notification is given within four weeks of the date by which the *Adjudicator* should have notified his decision."

[66.3.4] The tribunal settles the dispute referred to it. ...A party is not limited in the *tribunal* proceedings to the information, evidence or arguments put to the Adjudicator."

[67] Transnet's submissions on the scheme of the dispute resolution can be summarised as follows: The fact that the adjudicator's decision is to be "revised" (clause W1.3(10)) and "reconsidered" (clause W1.4(4)) the scheme of the dispute resolution mechanism in the NEC3 Conditions of Contract is that if there is a decision by the adjudicator, the **decision** must be referred to arbitration. The

fact that Spill Tech had not referred the adjudicator's **decision** to arbitration means that the adjudicator's **decision** still stands unchallenged. Spill Tech was now out of time for referring the decision to arbitration and the matter was accordingly *res judicata*. The Arbitrator was accordingly not entitled to deal with the issue and exceeded his powers. There was a suggestion by Transnet that the Arbitrator lacked jurisdiction as a result.

[68] All of Transnet's arguments here are similar to those raised in the arbitration.

[69] In the arbitration, the Arbitrator found that Transnet's interpretation was not supported by the relevant provisions of W1. In his view W1 envisages that the 'dispute' not the decision must be referred to adjudication. It is also this 'dispute' that is referred to arbitration, but it may not be referred to arbitration unless it has been referred to the adjudicator. The Arbitrator settles the 'dispute' referred to it.

[70] The Arbitrator found that: '*Whilst the first sentence of clause W1.4(2) refers to a notification that "he intends to refer it" to arbitration, and in context "it" seems to refer to the adjudicator's decision, the clause continues to state that a party may not refer a "dispute" to arbitration unless notification is given with a certain period of time (clause W1.4(2)). It is therefore imprecise use of language which may create the impression, if one does not read the clauses as a whole and purposively, that it is the decision to be referred to arbitration, and that the decision needs to be revised and reconsidered. However, as pointed out above,*

it is ultimately the dispute which is referred to adjudication and thereafter to arbitration. Nothing more is required of the aggrieved party than to notify the other within the times required by this contract that he is dissatisfied with a decision of the Adjudicator and intends to refer the matter to the tribunal. If it were necessary for the disputing party to specify which parts of the adjudicator's decision had to be reviewed and revised, it would not have been sufficient, as the clause makes clear, that it merely had to notify its dissatisfaction with the adjudicator's decision. One would have expected more to be demanded to be specified in the notice of dissatisfaction. It is clear from the aforegoing that the arbitration is a hearing de novo and that the Arbitrator is not bound by anything considered or decided by the adjudicator.'[45]

[71] In his analysis, the Arbitrator also had regard to the differences between adjudication and arbitration. He stated that in essence, the adjudication process was *sui generis* designed to provide parties with a speedy mechanism for settling disputes on a provisional interim basis. In the context of large projects, this kind of provision is referred to as a "quick and dirty" mechanism or cash flow measurement to provide a speedy interim decision. The adjudicator must typically decide on the dispute within stringent time limits and his overriding obligation is to complete his decision within the time limit. The need to have a correct answer is subordinated to the need to have an answer quickly. Adjudication is not arbitration nor is it administrative action. The rules of natural

[45] Arbitration Award paragraph 9.1 to 9.9 CaseLines section 01-69 to 01-71.

justice do not find application and the adjudicator may make his own rules. Generally, the adjudicator may adopt the most cost- and time-effective procedure consistent with fairness to determine the dispute is subject to less strict standards of due process than an Arbitrator and is entitled to adopt an inquisitorial process to resolve the dispute summarily and expeditiously. Because of the nature of the process, it is recognised that mistakes will be made by adjudicators. Such mistakes can be rectified in subsequent arbitration or litigation. Having regard to the above principles, he found that the following passage from the ***Amec***[46] decision admirably sums up the status of the adjudicator's decision, namely that: "*...such a decision is temporarily binding. As a result, on an application to enforce, the court is not permitted to investigate whether the decision was right or wrong: indeed, such considerations are irrelevant. All that matters is whether the adjudicator had the jurisdiction to reach the decision that he did, and that he reached it by a fair process, making every allowance for the strict time constraints imposed in adjudication*".[47]

[72] By contrast, he found that arbitration is very different, and that arbitration is a matter of contract. The powers of the Arbitrator are governed by the provisions of the Arbitration Act, 42 of 1965, subject to the arbitration agreement. The function of an Arbitrator is judicial in nature and the enquiry held by an Arbitrator is in the nature of a judicial enquiry. Accordingly, an Arbitrator must observe the ordinary rules laid down for the administration of justice. That would dictate that

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[46] *Amec Group Ltd v Thames Water Utilities Ltd* [2010] EWHC 419 (TCC).
[47] Award paragraphs 10.1-10.10.

the process should be adversarial in nature. The Arbitrator must observe the rules of natural justice in his conduct of the proceedings.

[73] In arriving at his analysis of the differences between adjudication and arbitration the Arbitrator relied on several significant judgments and authorities.

[74] He went on to find that "*Given the differences between adjudication and arbitration, and particularly the fact that the adjudicator may decide the dispute on limited facts, under time constraints, and sometimes without any evidence or even oral argument, it is illogical that the arbitration should revolve around the adjudicator's findings and reasoning, rather than to simply decide the dispute afresh, with the benefit of a full ventilation of the issues by way of both evidence and argument, in an adversarial process. It was accordingly unnecessary for the claimants, if they were aggrieved by the adjudicator's decision, to do anything more than give notice of their dissatisfaction with the decision and to refer the same dispute to arbitration. The hearing before me is one de novo and I need not have regard to the adjudicator's findings or reasoning. The first special plea therefore fails and must be dismissed.*"

[75] The law on reviews of arbitral awards is well-settled. An Arbitrator is entitled to arrive at an incorrect interpretation of the contract provided he does not misconceive the nature of the enquiry.[48] Even if he was wrong in his

[48] *Telcordia* at paragraphs [73] and [85].

interpretation, or may have misinterpreted the agreement, this does not mean that he has *misconceived* the enquiry.

[76] I find little in the Arbitrator's reasoning that suggests that he misconceived the nature of the enquiry or that his interpretation was not supported by the provisions of W1. He embarked on the very exercise that Transnet had required of him, namely, to interpret the provisions of W1.

[77] There was no suggestion that the Arbitrator relied on selective jurisprudence in a biased or blinkered manner. Furthermore, no evidence is put up by Transnet that it was not provided with a full and fair opportunity to deal with this issue in the arbitration.

[78] Accordingly, Transnet's review application in respect of the *res judicata* defence is dismissed.

The "As and when required" defence

[79] The Contracts for both STG and ST were to the same effect save for the differences in territories. The Arbitrator and the parties dealt only with the provisions of the STG contract for purposes of this defence, an approach I have also adopted.

[80] In its statement of claim, Spill Tech claims that in the breach of contract, Transnet appointed Drizit to attend to spills which ought to have been awarded to it. In

other words, Transnet was under a legal obligation to allocate all major spills, (being spills in excess of 50 000 litres) to Spill Tech, as and when they occurred. Spill Tech's understanding of "as and when required" was that they would only be called upon as and when a spill occurred but when the spills were major spills, Transnet was obliged to allocate these to Spill Tech and not another service provider such as Drizit.

[81] Transnet's submission was that the words "as and when required" meant that Transnet was under no legal obligation to allocate any work to Spill Tech at all. Nor was it required to award major spills to Spill Tech as and when they occurred. It was at liberty to attend to the major spills itself or to award it to another service provider.

[82] In its Heads of Argument, Transnet[49] helpfully sets out the following trite principles of interpretation of Contracts:

[82.1] First amongst these is the uncontroversial proposition that people conclude agreements with a view to thereby achieving commercially sensible outcomes. In the words of the SCA, a *"sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."*[50]

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[49] Transnet Heads of Argument paragraph 54- 55.

[50] See also *Novartis South Africa (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) at paras 30 and 31; *Airports Company South Africa SOC Ltd v Airports Bookshops (Pty) Ltd t/a Exclusive Books* [2016] 4 All SA 665 (SCA) at para 21; *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA) at paragraph 13.

[82.2] In construing the Contract, as a written agreement, it must be read as a whole to determine the true intention of the parties and, if unambiguously expressed within the relevant context, no extrinsic facts or evidence are permissible to contradict, amend, or qualify the terms thereof.

[82.3] In reading the Contract as a whole, individual clauses must not be viewed in isolation but must be considered in relation to the other provisions of the agreement and how they fit into the overall contractual framework.

[82.4] What is clear from the above authorities is that there is no pecking order – the triad of language, context, and purpose must be considered together. As we see it, the purpose of the contract is effectively part of the contextual background. The language and the context must be considered together, as the context may ascribe a special and not the ordinary grammatical meaning to the language used.

[83] Let us turn to look at the approach taken by the Arbitrator.

[84] In his award, the Arbitrator first identifies the relevant provisions of the Contracts as follows:

[84.1] The Form of Offer 8 Acceptance commences as follows: "Responding to Emergency and Remediation of Environmental Incidents- Maors ills > 50000L at Transnet Pipelines Facilities and the Pipeline Network situated in Gauteng,

Mpumalanga and North West Provinces "As and When" Required for a period of Three Years."

[84.2] The Acceptance Form contains, on the second page thereof, a Schedule of Deviations of which item 2, Hours of work provides: "This agreement is an NEC3 Term Service Contract (June 2005) (amended June 2006) rate based and an "as and when" contract. As such, hours of work by the Contractor's employees shall be paid on a per hour basis for work done, such hours will include time calculated from when employees leave their usual place of business to go to the job site (Affected Property) and return to their usual place of business excluding lunch hours."

[84.3] In the Contract Data, clause 11.2(13), the service is described as "Responding to Emergency and Remediation of Environmental Incidents — Major Spills (> 50,000L) at Transnet Pipelines Facilities and the Pipeline Network, "as and when" required for a period of three years."

[84.4] In Part C3 of the contract, Scope of Services, the heading follows: "SCOPE OF WORK — RESPONDING TO EMERGENCY AND REMEDIATION OF ENVIRONMENTAL INCIDENTS AT TRANSNET PIPELINES FACILITIES AND THE PIPELINE NETWORK SITUATED IN GAUTENG, MPUMALANGA AND NORTH WEST PROVINCES, "AS AND WHEN" REQUIRED FOR A PERIOD OF THREE YEARS."

[84.5] Other relevant parts of the Scope of Services identified by him are:

[84.5.1] 1. Project The appointment of a service provider to respond to emergency and remediation of environmental incidents at the Transnet pipelines (TPI) facility and the pipeline network situated in Gauteng, Mpumalanga, and North West provinces, as and when required for a period of three years."

[84.5.2] 2. Executive overview TPI manages and operates a pipeline network and the associated infrastructure that transports crude oil, aviation turbine fuel (Avtur), petrol, and diesel between Durban and Johannesburg. TPI has a number of operational facilities (depots, pump stations, and workshops) and a pipeline network (Avtur, multi products, gas) in the following provinces: Kwazulu Natal, Gauteng, Free State, Mpumalanga, and North West. The service provider will respond to emergency environmental incidents at all PI sites situated in Kwazulu Natal and Free State provinces. The facilities that are in Gauteng, Mpumalanga, and North West provinces include the following: ...

[84.5.3] 3. Employer's objectives The Provision of an Emergency Environmental response service forms part of improving environmental management. It is therefore crucial that TPI has a contract in place with sufficient funds to ensure that spillages that may occur are addressed timeously. The

objectives of this contract are to reduce impacts to the public and the environment and increase the recovery rate of spilled products.

[85] He then summarises what the dispute is namely that the parties disagree about the meaning of "as and when required":

[85.1] "*The parties disagree about the meaning of 'as and when required'. The claimants contend that Transnet is obliged to appoint it to attend to spills of more than 50 000 litres, in other words the, "as and when required" simply refers to the fact of whether or not a large spillage has occurred that requires to be contained and/or remediated. In the absence of any spillage, there is no obligation on Transnet to appoint the claimants. Transnet on the other hand contends that 'as and when required' allows it to decide whether to use the claimants at all, even for spillages of more than 50 000 litres, and that it is free to appoint another contractor with impunity.*"

[86] The Arbitrator then deals with the issue of Spill Tech's witness statements. He records that Transnet had accepted the facts in those witness statements to be correct but argued that they were all irrelevant and inadmissible. He disagrees with Transnet's arguments and sets out his approach as follows:

[86.1] "*It is well established by now that evidence is permissible, regardless of ambiguity in a contract, to establish context and purpose, as well as the way in which the parties by their subsequent conduct interpreted the contract,*

which in this case the evidence in his opinion does.

[86.2] The facts relevant to context and purpose, and which would assist me in interpreting the phrase in question, may be summarised as follows:

[86.2.1] ST (then Spill Tech CC) had a previous contract with Transnet which ran from 2013 to 2016 and beyond, and which covered all spills in all regions without limitation as to the size of the spill.

[86.2.2] In 2016 Transnet issued tender documents, which, once awarded split the previous single contract into four Contracts, namely a contract for spillages of more than 50000 litres for the north (Gauteng, Mpumalanga, and North West Province), a contract for spillages less than 50 000 litres for the north, a contract for spillages of more than 50 000 litres for the south (KwaZulu Natal and the Free State), and a contract for spillages less than 50000 litres for the south. The two larger Contracts were awarded to STG and ST respectively, and the two smaller Contracts to Drizit.

[86.2.3] Only one contractor was appointed for each category. Notably, no panel of contractors was appointed for each category.

[86.2.4] Spills occur from the pipeline mostly as a result of a break into the pipeline because of theft, but not necessarily so.

[86.2.5] A spill involves two key actions. Containment of the spill, i.e. stopping the flow of product, vacuuming the ponded product as well as product remaining in the pipeline (which would have been blocked off at points in the pipeline before and after the breach). This exercise takes two days at most; and Remediation, which is a more lengthy exercise, involving largely earthworks-type work, is a lot less people intensive and requires plant and equipment. It essentially involves an exercise to reverse the environmental damage to spills and the seepage of product into the ground.

[86.2.6] Spills connected with a pipeline breach would result in almost all cases in a spill of product in excess of 50 000 litres, and in most cases, it would be fairly obvious on a visual inspection whether a spill exceeded or was less than 50 000 litres.

[86.2.7] If a spill is allocated incorrectly, it is not a difficult exercise for the original contractor to demobilise and withdraw from the site and for the correct contractor to take over.

[86.3] Evidence of the conduct of the parties to assist with the interpretation of the contract is admissible, and the evidence proffered by the claimants in this

regard is in my view relevant and admissible. It is namely the following:

[86.3.1] There was no difficulty in the allocation of spills to the relevant claimant or Drizit for the first approximately 20 months of these Contracts. Where, after a contractor had been appointed (such appointment would inevitably involve a measure of urgency to contain the spill as soon as possible) and it emerged that the contract should have been awarded to the other contractor because of the size of the spill, on several occasions the site was simply handed over to the correct contractor at the request of Transnet.

[86.3.2] In September 2019, Transnet gave an early warning to STG of the fact that it was running low on budget, and from early 2020 (for the last approximately 16 months of the Contracts), it became apparent that Transnet appointed Drizit for certain large spills which ought to have been allocated to STG. STG lists 13 such events in respect of which it claims loss of profits for breach of contract.

[86.3.3] The sidelining of the claimants in favour of Drizit coincides with Transnet running out of budget and it is clear that that is the reason for sidelining the claimants.

[86.3.4] Accordingly, the conduct of the claimants and Transnet for the first approximately 20 months of the Contracts is in line with the claimants' interpretation of the contract and in particular the "as and when required" phrase, and Transnet's change of stance is explained by its budgetary constraints and not by a bona fide contrary interpretation of the contract. (my emphasis)

[86.4] *Mr Luthuli submitted that "as and when required" gave Transnet the "wriggle room" to attend to spillages itself and to use the "piggy backing" option. The latter is a recognised option for an organ of state to employ a supplier duly appointed having regard to the relevant procurement processes by another organ of state for the same work. But neither situation applies, or was apparently envisaged to apply. The evidence establishes that Transnet did not have the wherewithal to attend to spillages itself and needed to outsource that function. Nor was there any suggestion that piggy backing was, or would ever be, available."*[51]

[87] The Arbitrator then arrives at his conclusions and states the following:

[87.1] "We are therefore left with the question of what "as and when required" means. If a panel had been appointed, one could understand that a contractor on the panel had no right to be appointed to attend to a particular spillage, and "as

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[51] Award paragraphs 18-21.

required" would have given Transnet the right to decide which contractor to appoint. But that is not the situation here. There is a single contractor for each region and size of spill. In that context, "as and when required" clearly means that there is no right to work (i.e. its services would not be required) if there is no spillage, but where there is a spillage, in the particular contractor's region and of the size for which that contractor has been contracted, it is entitled to be appointed to attend to the containment and remediation of that spill, and Transnet had no right to appoint another contractor. In theory, Transnet could decide to ignore a spill and take no steps to contain or remediate it. That would of course be unthinkable since it has statutory environmental duties. But if it is to appoint anyone to attend to a large spill (other than itself), it is not entitled to appoint any contractor other than STG.

[87.2] *The idea that Transnet is free to appoint another contractor for a spill of the size and in the region falling within STG's contract loses sight of the fact that Transnet is an organ of state, bound by legislative strictures regarding procurement. If is not at liberty to appoint a contractor or supplier that has not been properly selected after a valid procurement process. Drizit has not been appointed as a contractor or supplier for spills in excess of 50000 litres. Mr Luthuli's answer that such an appointment may be an unlawful act on the part of Transnet but does not affect the validity of Drizit's appointment by Transnet is too simplistic, but in any event begs the question: Why would the parties have intended that such a consequence could eventuate from the STG*

contract?

[87.3] *Mr Luthuli emphasised the difficulty in assessing the size of the spill, and the fact that Transnet was "blind" to the size of the spill at the time when it was noticed or reported and when a contractor was assigned to attend thereto. Whilst I accept that fact, it does not in my view alter my conclusion above. In particular, it does not allow Transnet with impunity to appoint the smaller (presumably cheaper) contractor to attend to every spill, regardless of size. That is not a bona fide application of the contract. Whilst I accept that an error may be made, legitimately, in allocating what is thought to be a smaller spill to Drizit, once the actual size of the spill is apparent (as for instance in the case of the Bronkhorstspruit spill of approximately 450000 litres, and other spills up to 380 000 litres), the position must be corrected, the originally allocated contractor told to withdraw, and the correct contractor awarded the contract. Mr Luthuli raised an obstacle to this, namely that Transnet may be liable to damages to the contractor originally assigned and thereafter told to cease work. That is not to my mind a valid obstacle. It would be fairly obvious to the contractors that when allocated a site, it would be conditional on the size of the spillage falling within its contract and, if that were not obvious enough, the appointment could always be made expressly conditional on such fact. Moreover, that is precisely what occurred in the first approximately 20 months of the Contracts, from the unchallenged evidence, and there is no suggestion that Transnet was at any stage confronted with a claim by the withdrawing*

contractor for damages in not being able to complete the contract. There is in any event a sound reason why Transnet should reverse an incorrect allocation, especially if it turns out to be a major spill. It is clear from the claimants that far more equipment is needed in order to remediate a spill, and STG would doubtless have been appointed for major spills because of its possession of or access to the necessary equipment, which a smaller contractor probably does not have. The choice of contractor for larger and smaller spills was presumably made on this basis. The adjudicator found in Transnet's favour on the interpretation of the contract. I do not agree with that conclusion, for all the reasons stated above. The second special plea accordingly also fails."[52]

[88] What is evident from the Arbitrator's award thus far is that his approach to the interpretation of the contract was in accordance with the established jurisprudence so helpfully summarised by Transnet. The Arbitrator's approach was to interpret the contract *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*. He relied on evidence from persons who were directly involved in the negotiation and execution for context, and not mere submissions from the Bar. The unchallenged evidence was that for the first 20 months, the contract was understood and implemented in accordance with Spill Tech's interpretation, with

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[52] Award paragraphs 21-28.

the assistance of the Transnet Service Manager. He arrives at an interpretation of the contract which is not far-fetched or removed from the commercial reality in which the parties had conducted themselves.

[89] The Arbitrator's award further demonstrates that he considered all of Transnet's submissions – including the factual averments made by Mr Luthuli from the Bar – and dealt with each of them.

[90] The Arbitrator then went on to clarify his interpretation for the guidance of the parties going forward. In his award, he states that his interpretation has two parts to it.[53] The first dealt with the meaning of "as and when required" which I have dealt with above. The second part identified by him is what is to occur if Transnet allocates a spill site to one contractor, and it turns out that it should have been allocated to the other contractor. He states that his finding in this regard is not simply a matter of a proper construction of the Contracts but rather that it is a tacit term.

[91] He goes on to state –

[91.1] *"Mr Luthuli submits that by making the last mentioned finding, I would be making a contract for the parties. I accept as a principle of law that I may not make a contract for the parties. But this to my mind is a clear case of an imputed tacit term. Had an officious bystander asked of the parties: "What*

[53] Paragraph 29.

would happen if there is a bona fide misallocation of a spill?", to my mind the unanimous answer of the parties would have been: "Of course, Transnet would instruct the contractor on site to hand the site over to the correct contractor. It is not necessary to put that in the contract, it is too obvious." The present hearing concerns five special defences, of which the interpretation of the Contracts arises as part of the second special defence. If I am against the defendant on the second special defence, I must dismiss it, and it would in my view not be proper for me to go further and embody my interpretation of the Contracts in the award. However, that does not cause a difficulty, as I see it, since my finding on the interpretation of the Contracts will dispose of that issue finally and would amount to an issue estoppel on the point. I accordingly find that upon the proper construction of each contract that:

[91.2] The claimant is entitled and obliged to attend to the containment and remediation of all spills at the defendant's pipeline facilities and pipeline network exceeding 50 000 litres in volume as and when they occur or as and when it becomes apparent that a spill exceeds that threshold, and that it is a tacit term of each contract that:

[91.3] If a spill exceeding 50000 litres in volume has been awarded to a contractor other than the claimant, once that becomes apparent the defendant is obliged to: a. terminate the appointment of that other contractor; and b. appoint the claimant to complete the containment and/or remediation of the spill concerned."

[92] As to this second finding, namely reading in a tacit term in the Contracts some background is required to understand the context in which this finding was made. After Spill Tech became aware of a major spill being allocated to Drizit, it sent a Request for Information (RFI) to TPL on 20 January 2020 in which it set out its concern that major spills were being allocated to Drizit.[54] In that RFI Spill Tech notes that it could be difficult to initially quantify the amount of the product lost during the initial stages of a spill and proposes a mechanism by which a process of site handover be agreed between the two contractors.

[93] In the arbitration proceedings, Transnet relied on this RFI in support of its arguments that the size of a spill was not easy to detect, that Spill Tech itself acknowledges this, and that the mechanism proposed by Spill Tech of site handover confirms that the Contracts as they currently stand, there is no obligation on the contractor to disestablish and hand over a site if it has been determined that the volume of the spill is either below or above the relevant contractual threshold. It argued further that Spill Tech proposed a legal solution to a *lacuna* in the contractual arrangement which according to Spill Tech was managed through understandings and gentleman's arrangements.[55]

[94] Thus, we see from this is that Transnet had engaged fully with the RFI albeit in favour of its argument that the Contracts did not require Transnet to request a contractor to disestablish the site.

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[54] ST1 paragraphs 44-49.
[55] ST1 paragraph 50 as at CaseLines section 01-531.

[95] However, what was before the Arbitrator was not only the RFI but also the witness statements of Spill Tech which he relied on for the interpretation exercise as contextual evidence.

[96] Mr Van der Kwast explains in his witness statement that while spills were initially difficult to assess, Tim Liversage of Transnet had developed a method for roughly assessing the volume of the spill at the Delmas spill. His method involved using a container, a bucket, or a 2-litre bottle, to catch the gushing product and to time how quickly the container fills up. This helped determine the rate of flow and an estimated period that the spill was running to obtain a volume. This bucket method was not always suitable when dealing with a tap into the pipeline below ground but where the method could be used, they did. Tim Liversage would attend on site to do it or ask the Spill Tech first responders to do it.[56] As to the switching of contractors, both Mr Van der Kwast and Ms Radebe confirmed that the way the contract worked was that they would get a call from the Transnet master control centre. They would then deploy to the site. The initial focus was on containment. There were some occasions where they were told to attend to a spill which it later emerged was going to be less than 50 000 litres and, in those cases, they were asked by Transnet to hand over the sites to Drizit.[57] It was Transnet's practice to reallocate spills on this basis.[58] For the first 20 months, this was how the contract was executed.

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[56] Van der Kwast witness statement paragraphs 49–54.
[57] Radebe witness statement paragraphs 36-42 as at CaseLines sections 01-389 to 01-390.
[58] Van der Kwast witness statement paragraphs 59-61 as at CaseLines sections 01-369 to 01-370.

[97] The Arbitrator, after considering the pleadings, and all of the contextual evidence and submissions from both parties, disagreed with Transnet's interpretation.

[98] In these proceedings, Transnet challenges this finding on the basis that the Arbitrator was in fact making a contract for the parties and exceeded his powers. It is clear from the arbitral award that this argument was put to the Arbitrator and was rejected by him for the reasons set out in the award.

[99] In essence these are the same arguments Transnet had made in the Arbitration.

[100] The following observations can be made to demonstrate why Transnet's grounds of review have little merit:

[100.1] Firstly, as to the 'as and when required' provision, Spill Tech expressly pleaded that it was *"an express and/or implied and/or tacit term of the contract that it is obliged and entitled to attend to the remediation of all incidents involving major pipeline spills which comprise fuel spills or contamination exceeding 50 000litres"*.[59] Hence from the commencement of the proceedings, Transnet was alive to the fact that Spill Tech advanced an interpretation of the Contracts that it was entitled to exclusive allocation of spills in excess of 50 000 litres and that it had pleaded an implied or tacit term to that effect. Indeed, Transnet itself deals with this issue in its submissions to the Arbitrator in the context of the RFI, the letter sent by Spill Tech to TPL

[59] Spill Tech Statement of Claim (SOC) para 4.1 CL 257. See also Answering Affidavit paragraph 55 as at CaseLines section 01- 466.

on 20 January 2020.[60]

[100.2] Secondly, it is clear from the Arbitrator's award and Transnet's submissions that the tacit term was canvassed in the hearings and with Transnet. This is why the Arbitrator was able to reproduce the arguments made by Mr Luthuli on this score. Hence there can be no suggestion of any unfairness to Transnet in the proceedings.

[100.3] Thirdly, the unchallenged factual evidence in the arbitration proceedings was that this is how the Contracts were understood and implemented by the parties themselves, at least for the first 20 months. While the Contracts did not expressly state this, the Transnet officials and the two contractors had put in place a practical mechanism by which the different contractors were allocated to spills and then asked to withdraw once the extent of the spillage was more accurately determined. Transnet did not put up any evidence from its employees to challenge Spill Tech's factual evidence.

[101] In deciding this issue, the Arbitrator was required to interpret the Contracts. In this exercise had regard to the wording of the Contracts, the pleadings, and the evidence of the Spill Tech witnesses on how the Contracts were executed by the parties as context. He did not impose an *ex post facto* understanding of the Contracts on the parties but based it on the conduct of the parties which was placed before him by the Spill Tech witnesses.

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[60] ST1 Transnet Pipelines Written Submissions on Separated Issues paragraph 49.

[102] Unless he conducted a gross irregularity by not permitting Transnet a fair opportunity to address the issue or misconceived the enquiry, his interpretation of the Contracts – even if this be wrong – will not be set aside by the court. There is no suggestion that he misconceived the enquiry. He was required to interpret the Contracts which he did.

[103] Transnet was given every opportunity to place factual evidence before the Arbitrator, an opportunity it elected not to take. No evidence was put up by Transnet that the Arbitrator had denied it a fair and adequate hearing on this issue.

[104] Accordingly, Transnet's application in relation to this defence stands to be dismissed.

Consequential Damages Special Defence

[105] The third and fourth special defence are related but dealt with separately by the parties and the Arbitrator. To avoid any confusion, I maintain the distinction and refer to the third defence as the consequential damages defence.

[106] In its statement of claim Spill Tech set out its basis of liability as follows:

[106.1] *"58. The Defendant's allocation of the various CE sites to Drizit and/or its failure to terminate Drizit's services on the relevant sites once it became apparent that they involved spills exceeding 50 000 litres constituted a breach*

of the Contract."

[106.2] *"59. The Defendant's breach of contract in turn constitutes a compensation event as contemplated in clause 60.1(14)of the Contract."*

[106.3] *"60. The Claimant has suffered damages as a result of the Defendant's breach of the Contract in the form of its loss of the profit it would have earned had it been allocated the sites concerned as it should have been.*

[106.4] *"61. The Claimant's loss in this regard constitutes damages which flow naturally and directly from the Defendant's breach and/or are damages which it may be reasonably supposed to have been in the contemplation of the parties at the conclusion of the Contract as a probable consequence of any such breach."*

[106.5] *"62. The Defendant is liable for the Claimant's aforesaid damages and loss by virtue of the compensation event regime contained in the Contract, alternatively in accordance with the common law principles applicable to a breach of contract."*

[106.6] *63. The Claimant's claims set out above represent the fair and reasonable quantum of the Claimant's damages and loss occasioned by the Defendant's breaches."*[61]

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[61] SOC paragraphs 58-63 as at CaseLines section 01-271.

[107] It is evident from the way Spill Tech pleaded its claims that it was contending for loss of profits connected with incorrectly allocated sites by Transnet and that it relied on both the compensation regime in the Contracts as well as the common law principles applicable to breach of contract. While the common law claim was not separately formulated Spill Tech clearly states it as an alternative basis of liability.

[108] Transnet's special defence in the arbitration proceedings was that the claims by Spill Tech were simply consequential damages that were not cognisable under the Contract. It argued that consequential damages are excluded under the Contracts (Part C1.2 Contract Data (Part one) clause 80.1, clause 80, and clause 18.1). On a plain reading of the Contracts, the parties' liability to each other is limited to what is expressly stated in the Contracts.[62] Transnet argued that once the Arbitrator determines that consequential damages are excluded under the Contracts, Spill Tech's claims fall to be dismissed.

[109] In its Statement of Defence, in which this defence was entitled No Cause of Action, Transnet stated:

[109.1] "*The alleged damages suffered and claimed by Spill Tech Gauteng are pleaded in paragraphs 60 to 64 of the statement of claim, and each and every one of those allegations are denied. The damages claimed by Spill Tech Gauteng are consequential damages and are excluded under the Contract.*

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[62] ST1 paragraphs 79-83 as at CaseLines section 01-542 -543.

Accordingly, Transnet denies that Spill Tech Gauteng has a claim arising in connection with the Contract."[63]

[110] In its application for the separation of the defence, in which the defence is now entitled the Consequential Damages Special Defence, Transnet submitted:

[110.1] *"The consequential damages special defence is set out in paragraphs 13 to 15 of the statements of defence. The consequential damages special defence is simply that what is claimed by the Claimant are consequential damages — a claim which is not cognisable under the Contract. This special defence works in tandem with the fourth special defence - the incompetent remedy special defence. The Defendant contends that: The consequential damages special defence requires an interpretation of the Contract to determine whether a claim for consequential damages is competent or not. The interpretation of the Contract is a legal question and will not require the leading of any evidence. If the question is determined in the Defendant's favour it will be dispositive of all claims. For all these reasons the Defendant contends that it will be convenient to separate the consequential damages special defence and asks the arbitrator to direct that it be separated accordingly."*[64]

[111] The change in the title of the defence suggests that Transnet had changed its litigation strategy midstream. But this much is clear – in its submissions Transnet

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[63] Annexure FA25 as at CaseLines section 01-318.
[64] Paragraphs 33-37 as at CaseLines section 01-656.

contends that '*the consequential damages special defence requires an interpretation of the Contract to determine whether a claim for consequential damages is competent or not'.(*My emphasis*).*

[112] In his award the Arbitrator found:

[112.1] "*Assuming they are consequential (and not general damages) these are included in common law claims for breach of contract, common law remedies are not excluded by the NEC3 Contracts and therefore consequential damages are cognisable in the Contracts.*"

[113] In his award, the Arbitrator describes this defence as having two aspects.[65] The first is whether the damages claimed by the claimants are consequential damages. The second is whether consequential damages or general damages claimable under the common law are expressly or by necessary implication excluded by the contract. The Arbitrator concludes that the damages claimed by Spill Tech are not indirect or consequential but flow naturally and generally from the breach complained of. They were general damages. But even if they were consequential damages, they are not precluded from the Contracts because the NEC3 Conditions of Contract do not expressly exclude common law rights. He concludes that Spill Tech's claims may be claimed under the Contracts because the NEC3 Conditions of Contract do not exclude common law remedies.

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[65] Paragraph 33 as at CaseLines section 01-86.

[114] Hence the enquiry into whether consequential damages were cognisable under the Contracts had acquired a 'second leg' namely *whether consequential damages or general damages claimable under the common law are expressly or by necessary implication excluded by the contract.*

[115] In these proceedings, Transnet challenges this finding *inter alia* on the basis that Spill Tech's reliance on the common law basis of its claim for loss of profits for breach of contract was not properly pleaded, did not form part of the separated issues, that the Arbitrator exceeded his powers and conducted the wrong enquiry. All that he was required to do was determine whether a loss of profits claim was expressly included in the Contracts. Furthermore, the Arbitrator did not provide Transnet with an adequate opportunity to address the second issue decided by him namely whether common law rights for breach of contract were included in the Contracts and whether Spill Tech's claim fell within these common law rights for breach of contract. Transnet has been prejudiced by this finding.

[116] It alleges further that its approach was to direct the special defences to the provisions of the Contracts only and not to Spill Tech's common law rights (assuming they were properly pleaded) and that its intention was to deal with Spill Tech's common law case sometime in the future and possibly in some other forum.

[117] I understand this argument to mean that Transnet directed its special defences against only the express provisions of the Contracts and the four corners of the

documents containing these and that it had a view that the common law claim would be dealt with sometime in the future and that the parties had not agreed to refer this to arbitration i.e. the existence debate.

[118] Spill Tech disputes that Transnet was not provided with an adequate opportunity or that its claim based on common law rights for breach of contract were not fully ventilated in the arbitration. Spill Tech submits the issue of its claims being based on common law principles was extensively debated at the arbitration hearing.

[119] Let us turn to consider how these events came about. Since the full transcript of proceedings was not placed before me, I am constrained to rely on the limited extracts of the record and the award to discern the chronological progression of this issue.

[120] In its answering affidavit Spill Tech further provides the following excerpt of the transcript in support of its contention that Spill Tech's claim being based on common law principles was extensively debated:

[120.1] "MR LUTHULI We are not Mr Arbitrator contending that they will never have a claim for consequential damages. Such a claim may exist at common law. All we are saying to you Mr Arbitrator is that it does not exist under the contract and here we are being sued under the contract.

> *ARBITRATOR Well the common law claim may not be outside of the contract. It may be that one of the remedies that you have is provided by the common law, but it arises out of a breach of the contract. You are not suing in a delict or in an enrichment or something like that. It's a claim of breach of contract and if the contract doesn't provide a specific remedy, that may assist the claimant in saying well then I have a claim under common law or for general damages, maybe even for consequential damages so why do you say that's outside of the*

contract?

MR LUTHULI Because the contract expressly excludes it Mr Arbitrator. ARBITRATOR Well the contract doesn't deal specifically with this type of breach.

MR LUTHULI It doesn't." [66]

[121] At this point of the proceedings, we see that the Arbitrator has pertinently put his views about the common law claim for damages to Transnet's legal representative.

[122] In its Heads of Argument (not in its replying affidavit), Transnet submits at paragraph 37 that given the way the supposed alternative claim is pleaded in the SOC Transnet's legal team did not appreciate that the common law claim was meant to be a complete and separate alternative claim. In fact, Transnet's legal advisor's attention was drawn to the alternative common law claim when it was mentioned by the Arbitrator during the hearing. Even Spill Tech's counsel was not certain that Spill Tech had pleaded an alternative claim until it was pointed out to her by her attorney. Transnet states that the relevant exchange can be found at pages 73 and 74 of the transcripts which it said would be made available at the hearing of this matter[67] and went as follows:

"ARBITRATOR I have a difficulty in seeing how one fits a loss of profits into a change of pricing. That prices I think are specifically defined and I'm not sure that a loss of profit can fit there and so that's, that's the one difficulty. The other is that

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[66] Paragraph 87 CaseLines as at CaseLines section 01-474.
[67] Needless to say this was not made available at the hearing

if you say well it's the loss of profit is something outside of the compensation events, then the question is whether you've pleaded that at all.

MS ANNINDALE The claim currently is pleaded on the basis it is a compensation event and the requirements had to be followed, so we accept that is not pleaded. If you were to conduce to the view Mr Arbitrator that in fact this was not a compensation event because of its nature but nonetheless Spill Tech retained its contractual remedies, then it would be open to Spill Tech to amend and to plead that, but it would still be in that dispute which would then be determined here. It would just mean that the actual differences and limitations did not have to be complied with because one didn't have to go through the referral process. My instructing attorney Mr Arbitrator draws my attention quite rightly to what is pleaded at paragraph 62 of the Gauteng Spill Tech pleadings, that's at page 16. What is pleaded is indeed in the alternative to say:

"The defendant is liable for the claimant's damages by virtue of the compensation regime contained in the contract alternatively in accordance with the common law principles applicable to breach".

And paragraph 63 then states:

"That the claims represent the fair reasonable quantum of the damages and losses occasioned by the breaches."

So apologies, I misspoke earlier when I said that was not pleaded. It was indeed pleaded in the alternative. I'm indebted to my instructing attorney."

[123] Transnet submits that the exchange quoted above would have been odd if the alternative claim was pleaded with sufficient clarity to inform Transnet of it. Spill Tech's counsel would have known about it. Moreover, the above exchange would have been odd if the issue had been one of the separated issues. The parties would have addressed it in their heads of argument and would have been well prepared and been on top of the issues.[68]

[124] Ms Annandale in response says that at that time she had misspoke but points to the fact that Spill Tech's claim had been pleaded, Transnet was aware of this from the beginning and had been provided with an opportunity to make extensive submissions to the Arbitrator. Furthermore, the Arbitrator provided the parties with an opportunity to make further submissions.

[125] Whether an opportunity to make further submissions ("further opportunity") was provided is not disputed by Transnet in its founding affidavit.[69]

[126] In its answering affidavit at paragraph 66.3, Spill Tech alleges that its heads of arguments filed in the arbitration proceedings addressed its reliance on the common law remedy expressly. ("**66.3 Heads**") . It is not clear to me whether these were filled prior to or in response to the further opportunity but nothing much turns on this.

[127] Extracts from the 66.3 Heads are reproduced below:

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[68] Heads paragraph 39.
[69] As at paragraph 70 as at CaseLines section 01-26.

[127.1] *"146. Even if that clause is somehow to be read in reverse, it is an exclusion of special damages, not of ordinary consequential damages within the contemplation of the parties as discussed in Holmedene Brickworks.*

[127.2] *152. It is manifestly so that a breach by the Defendant in not allocating the spills to the Claimants which the Contract provides for will result in the Claimants suffering loss in the form of loss of profits. As such loss of profits in the context of the Contract constitutes direct damages, amount of which must be treated as a change in the Prices.*

[127.3] *153. In the alternative ..... and if the arbitrator does not accept that clause 60, 1(14) read with clause 63.5 of the Contract falls to be interpreted as set out above and does not permit of a direct damages claim for loss of profits, the Claimants submit that:*

[127.3.1] *153.1 the Claimant's claims constitute damages claims to which the Claimants are entitled in terms of normal common law contractual principles in any event;*

[127.3.2] *153.2 Clause 63.5 cannot be construed as a clause which excludes the Claimants entitlement to such common law contractual damages."*[70]

[128] In its replying affidavit, all that Transnet says about this is the following:

[128.1] "45. Ad paragraph 60 to 77

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[70] CaseLines section 01-469.

45.1 *I deny the averments under these paragraphs to the extent that they are inconsistent with what is set out in the founding affidavit and this affidavit and refer to what is stated above and in the founding affidavit.*"

[129] This is a bizarre manner of pleading. Either Spill Tech's heads contained those submissions, or they didn't. Since Transnet does not place these in dispute, I must assume that they did.

[130] Nevertheless, it appears from the limited aspects of the transcript put before me by Transnet and Spill Tech that the Arbitrator had been mulling over three issues which he then raised with the parties during the hearing of 17 November 2022, namely -

[130.1] Whether loss of profits (whether these be direct or consequential damages) claimed by Spill Tech were outside of the compensation regime;

[130.2] The claim for consequential damages (loss of profits) might arise from common law rights for breach of contract and whether these were outside of the Contracts; and

[130.3] Whether this alternative claim was pleaded by Spill Tech.

[131] He debates these questions with the parties and both parties are provided with an opportunity to file further submissions.

[132] Even if I am to assume in favour of Transnet for argument's sake that somehow its legal team was not alive to Spill Tech's alternative common law claim at the commencement of the arbitration, by the time of the hearing on 17 November 2022, there could be no doubt that it had been made aware of the issue by the questions put to the parties by the Arbitrator and by Spill Tech's 66.3 Heads.

[133] The obvious questions that come to mind are whether Transnet made further submissions and whether it raised with the Arbitrator all the objections it now raises. Did it place before the Arbitrator that in its view that this issue was not properly pleaded? That this was not a separated issue? Or that its defences were directed only at the express provisions of the Contracts? Did it ask for a postponement of the proceedings to enable it to prepare adequately? Did it object to the jurisdiction of the Arbitrator regarding the common law claim which it now advances?

[134] Transnet is silent in its founding papers on what it submitted to the Arbitrator or how it dealt with the issue during the arbitration hearings. For present purposes, I can only assume from its silence that it elected not to respond to Spill Tech's submissions, did not raise any objections in relation to this issue and did not make further submissions to the Arbitrator.

[135] It is often the case that an arbitrator might during an oral hearing suggest a line of argument or approach to a case that has not occurred to the parties. It is then for the parties to determine whether they wished to adopt a new point and not for

the arbitrator.[71]

[136] This is why it is incumbent on parties when faced with a line of enquiry that they had not anticipated or in their view were not formulated in their pleadings or their affidavits to raise their objections with the arbitrator. To do nothing especially in contested proceedings might lead to an inference of waiver, or consent or at the very least acquiescence to the line of enquiry.

[137] Transnet has not placed before me any evidence that in the arbitration it had objected to this line of enquiry by the Arbitrator or had in anyway brought to his attention why embarking on this debate would be unfair or prejudicial to Transnet.

[138] It was provided with an adequate opportunity to make further submissions, an opportunity in which it could have raised any number of objections or concerns about this issue, including the objection to the Arbitrator's jurisdiction over this matter. If Transnet was of the view that the alternative claim was not properly pleaded or that its special defences were directed only at the express provisions of the Contracts, or that this line of enquiry by the Arbitrator constituted a seismic shift in its case, it had a duty to raise this at this juncture in the arbitration or in the further submissions requested by the Arbitrator. Had Transnet raised the objections it now raises the Arbitrator might have come to a different decision which might have rendered the review of his finding unnecessary.

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[71] PAA Ramsden, *The Law of Arbitration*, Juta 2nd Edition page 170

[139] Moreover, Transnet had at its disposal any number of remedies in the event that it required more time or if the Arbitrator dismissed any of its objections including applying for postponement of the proceedings or even an interim court ruling on the matter as it had done in the adjudication.

[140] Transnet was represented by a comprehensive legal team, and it would seem odd – given its objections now – that it would not have placed any of these objections before the Arbitrator. More so given its earlier conduct during the adjudication. Recall that in that proceeding, Transnet had raised its objections to the adjudicator's jurisdiction and had threatened to interdict the process. Indeed, it had launched motion court proceedings to that effect.

[141] To suggest now that there was an existence dispute as in ***Canton Trading*** is not open to Transnet. In any event, ***Canton Trading*** is distinguishable on the facts.

[142] Finally, when regard is had to the Arbitrator's reasoning it cannot be said that he acted in a high handed manner or misconceived the nature of the enquiry. The enquiry he embarks on is precisely that which was asked of him namely whether the damages claimed by Spill Tech were consequential damages which were not cognisable under the Contracts. In his award, after having requested and receiving further submissions, he summarises the special defence as follows:

[142.1] "*There are two aspects to this defence. The first is whether the damages claimed by the claimants are consequential damages. The second is whether consequential damages, or general damages claimable under the common*

law, are expressly or by necessary implication excluded by the contract."

[143] He finds:

[143.1] *"Transnet refers to two clauses to support its contention that consequential damages are excluded under the contract. The first is clause 80.1, which lists the employer's risk, and of which it may fairly be said that the present claims do not fit happily into that clause. But there is no express mention or exclusion of consequential damages in that clause. Transnet further refers to clause X18.1, to be found in the Contract Data. It provides under the heading "Limitation of liability" that "The Contractor's liability" to the Employer for indirect or consequential loss is limited to: 0% of the Prices". This clause of course refers to the Contractor's liability and not the Employer's, and if indirect or consequential loss were excluded from the contract, it may well be asked why it was necessary to state that the Contractor's liability for such loss had to be limited at all. The clause, if anything, is against Transnet. It would in my view take clear wording to construe the NEC3 Conditions of Contract as excluding common law rights, which I do not find, and nor does it seem to me, are common law rights excluded as a necessary implication. The contract simply does not contemplate the present situation where the contractor complains that it was not allocated work to which it was entitled. Assuming those to be special (consequential) damages, those are to my mind not excluded by the contract. Accordingly, not only are the damages claimed in my view not special damages (indirect or consequential damages) but even if*

they were, they are in any event not expressly or by necessary implication excluded by the contract. It must then be asked whether the damages claimed by the claimants (i.e. direct or general damages) may be claimed under the contract at all. It is true that there is no express provision for such a claim, but then the scheme of the contract assumes that work is actually allocated to the contractor. There is undoubtedly a common law claim for damages for breaches of the nature alleged in these matters, and it would in my view take express wording, or very clear implication, to exclude such a claim. It is inconceivable that the parties intended, absent a clear indication to the contrary, that the employer could with impunity bypass the claimants in breach of their Contracts and suffer no consequences."[72]

[144] In deciding these issues, the Arbitrator refers to authorities referred to him:

[144.1] For the enquiry as to the nature of the damages, he refers to ***Holmdene Brickworks***[73] and the authorities referred to him by Ms Annandale namely 2 Entertain Video Ltd and Others v Son DADC Euro e Ltd [2020] EWHC 972 (TCC) in support of his conclusion.

[144.2] For the enquiry whether the NEC3 contract excluded he refers to two commentaries by respected authors Keatin on NEC3, paragraphs 7-123 and Eggleston, The NEC3 Engineering and Construction Contract A Commentary

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[72] Award paragraph 37-42.
[73] *Holmdene Brickworks P Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687C-H.

at paragraph 11.5 on pages 217/8 and 226, which support the notion that the NEC3 Conditions of Contract do not exclude common law remedies.

[145] In these proceedings, Transnet put up extracts of Keatin and Eggleston which it required me to have regard in support of its review grounds, an invitation which I decline. These are submissions that Transnet ought to have placed before the Arbitrator when it was asked to and provided with an opportunity to do so. It is not open to Transnet to now launch opposing arguments to Spill Tech's submissions which it ought to have done in the arbitration.

[146] It appears to me that Transnet's failure to engage with this issue was not because it was not provided with an opportunity to do so but that "*it was part of a tactical decision which has resulted in the bringing of this review.*"[74]

[147] In ***Lufuno Mphaphuli and Associates (Pty) Limited v Andrews and Another*** [75], Ngcobo J in discussing why the Court should be very reluctant to entertain a constitutional matter that could have been, but was not, raised in the High Court or the Supreme Court of Appeal, held:

[147.1] *"[293] It is patently clear from these statements that the constitutional issue was raised as an afterthought in order to get the ear of this Court."*

[148] While Ngcobo J's comments applied to a constitutional issue that ought to have

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[74] See *JMH-Doctors SPV (RF) (Pty) Ltd v 3 Health Holdco Mauritius Ltd and Others* (32492/2021) [2022] ZAGPJHC 266 (26 April 2022) paragraph 44.

[75] 2009 (4) SA 529 (CC).

been raised by the appellant, I would venture that the same principle applies in this matter.

[149] In conclusion on this defence, I find that the Arbitrator's enquiry on whether *consequential damages were cognisable under the Contracts* was not misconceived. This is the enquiry he had been asked to do and what he embarked on. The issue was clearly before him as a separated issue for consideration. When he was mulling over the issue of whether consequential damages would be cognisable under the common law claim for breach of contract and whether these were included or excluded in the Contracts, he raised this pertinently with both parties and provided both to make further submissions.

[150] That the Arbitrator might have not favoured Transnet's version, or arrived at an incorrect interpretation of the contract, or made errors of law is not a ground of review that warrants interference by this Court.[76]

[151] Accordingly, Transnet's application in relation to the third defence is dismissed.

The Incompetent remedy defence

[152] This fourth special defence is related to the third defence.

[153] In his award, the Arbitrator found that:

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[76] *Telcordia supra.*

[153.1] *"This special plea is based on the fact that the claimants consider and have pleaded the alleged events to be compensation events, in which event Transnet points to clause 63.5 which provides that: "The rights of the Employer and the Contractor to changes of the Prices are their only rights in respect of a compensation event." Transnet alleges that a claim for loss of profit is not a change of the Prices as contemplated in the contract and that the statement of claim therefore does not disclose a cause of action. Notwithstanding the claimants' reliance on compensation events, I am of the view that the breaches complained of are not compensation events but are breaches which fall under the common law and are not excluded by the contract. Reliance on common law remedies has been pleaded by the claimants in the alternative. Accordingly, whilst I agree that loss of profit is not a change of the Prices, I am of the view that the remedy is competent and that the fourth special plea should also be dismissed."*[77]

[154] This finding by the Arbitrator is linked to the earlier findings under the third defence. In its founding affidavit, Transnet submits that it's difficult to understand the Arbitrator's findings namely that Spill Tech's claim for loss of profit does not amount to compensation events but then is still a competent remedy under the Contract.

[155] The difficulty is only Transnet's. What is clear from the reasoning of the Arbitrator

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[77] Award paragraphs 45-47 and 89-90 on CaseLines.

is that the issue of consequential damages and incompetent remedy were considered together. When the arbitral award is read as whole, the Arbitrator's reasoning on this defence flows logically from his conclusion on the third defence namely that the NEC3 conditions of contract do not exclude common law rights for breach of contract, that under the common law,do consequential (or direct) damages is a competent remedy and that Spill Tech had pleaded its alternative claim in the SOC.

[156] His enquiry is not misconceived and nor was there any evidence put up by Transnet that it was not provided with a fair opportunity to address this issue.

[157] Accordingly, this defence stands to be dismissed.

Time Bar

[158] In his award, the Arbitrator held:

[158.1] "*There are three aspects to this special defence. The first is whether proper notice was given in terms of the compensation event procedure, secondly, whether the interim payment procedure in clause 50 of the NEC3 Conditions of Contract complied with, and thirdly whether referral to adjudication took place timeously.*" [78]

[158.2] "*Once I have found that the events in question were not compensation events,*

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[78] As at paragraph 48.

the first question falls away. There was no need for the claimants to comply with the provisions of clauses 60 to 65 of the NEC3 Conditions of Contract. The second aspect involves clause 50 of the NEC3 Conditions of Contract. That clause provides for the procedure of assessing the amount due by the Service Manager. It is unnecessary that I delve into the details of that procedure because the claimants allege in their witness statements that the payment process followed in relation to the contract did not follow the procedure envisaged in clause 50 of the NEC3 Conditions of Contract, and the Service Manager did not issue interim payment certificates. In this regard: 50.1 Ms Radebe for the claimants described the process as follows (I paraphrase): each month the Service Manager issued a task order; the claimant formulated and submitted a costing schedule and pro forma invoice for each spill site to the Service Manager relating to services rendered for the month concerned for vetting; the Service Manager raised queries; the claimant addressed the queries raised and amended its costing schedule as agreed; and the claimant then submitted its final invoice for payment. 50.2 Mr Luthuli submitted that variations to the contract had to be reduced to writing and signed by the parties. Ms Annandale SC, in turn, referred me to the case of Van der Walt v Minnaar 1954 (3) SA 932 (0) at 937, which is authority for the proposition that performance of an obligation written contract in a manner other than that prescribed at the request of one party and as a favour by the other would be considered to be proper performance and could be proved by extrinsic evidence. In my view, this is applicable in the present situation and

Transnet is precluded from, at this stage, contending that there should have been strict compliance with clause 50. The third aspect involves the referral to adjudication. The table at clause W1.1(3) of the NEC3 Conditions of Contract provides for four different scenarios. I agree with the claimants that 'Any other matter" applies, in which case the referral to the adjudicator had to be between two and four weeks after notification of the dispute to the other party and the Service Manager. The notification by Transnet that it rejected liability for the invoices and that no payment would be made in respect thereof occurred on 2 June 2021 and was notification of the dispute, and the referral took place within four weeks on 30 June 2021, i.e. timeously. In the circumstances, the fifth special plea must also be dismissed."

[159] The relevance of the letter of 2 June 2021 is that it is in this letter that Transnet unequivocally rejects Spill Tech's claim. Until that point the parties were still trying to engage with each other.[79] The calculation of whether proper notice was given by Spill Tech is done in terms of the adjudication table in the Contracts.

[160] Transnet's grounds of review include that the Arbitrator misconceived the enquiry and strayed beyond the pleaded and separated issues. It was not clear how Transnet could have given notice about the common law claims when these were not notified and when in fact it did not know of such claims (because they had been pleaded only in the arbitration proceedings). Furthermore, the basis on

[79] Radebe Witness Statement paragraphs 89-95 as at CaseLines section 01-433 to 01-434.

which the Arbitrator determined this issue namely on Transnet's letter of 2 June 2022 was not pleaded by Spill Tech or Transnet nor relied upon it in argument by either.[80]

[161] Spill Tech disputes this in its answering affidavit. It submits that Transnet's contentions are contrary to Spill Tech's pleaded case, and that Transnet chose not to engage with the replication of the evidence which was before the Arbitrator regarding the letter of 2 June 2021.[81] It submits that had Transnet wished to make anything of the letter referred to, it could and should have done so at the right time and in the right forum, namely the arbitration.

[162] I agree. The letter of 2 June 2021 and the events preceding it are dealt in detail by Ms Radebe in her witness statement.[82] These disputes ought to have been fully ventilated in the arbitration. Recall that Transnet elected not to file any witness statements. It cannot now seek to raise factual disputes that it ought to have raised with the Arbitrator in the arbitration.

[163] In relation to the whether the common law claim was notified or not this was also a matter that Transnet ought to have raised in the arbitration or in its further submissions. By then it was alive to the fact that the Arbitrator was debating whether the Contracts did not necessarily exclude common law rights for breach of contract.

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[80] Founding Affidavit paragraph 109-114 as at CaseLines sections 01-41 to 01-42.
[81] Answering Affidavit paragraphs 140.1-140.3 as at CaseLines section 01-496.
[82] REF

[164] There is no evidence that the Arbitrator misconceived the nature of the enquiry or strayed beyond the pleadings, or the factual evidence placed before him.

[165] Accordingly, Transnet's application in relation to this defence also stands to be dismissed.

Conclusion

[166] In conclusion, I find that Transnet's application for review of the arbitral award stands to be dismissed.

[167] The Arbitrator did not misconceive the enquiries. The only way in which he could determine the five special defences was to interpret the provisions of the Contracts, an exercise which Transnet in seeking the separation of issues required him to do.

[168] In the arbitration Transnet elected not to lead any factual evidence and to limit its approach to legal arguments confined to the express provisions of the Contracts. However, its approach was not an agreed one but was contested by Spill Tech from commencement of the dispute and during the arbitration. Transnet was alive to this contested view.

[169] It was given a full opportunity to make written and oral submissions on all its defences. In relation to the third and fourth defences in particular, Transnet's legal team had been squarely confronted with the Arbitrator's views that

consequential damages (or loss of profits) were cognisable under the Contracts because the NEC3 did not exclude common law rights for breach of contract. Transnet was afforded an opportunity to deal with this issue, and to make further submissions. It could have raised any number of objections that it now raises during the arbitration which it failed to do.

[170] Transnet as applicant bears the onus to show that the Arbitrator committed a gross irregularity or exceeded his powers. In my view, Transnet has not discharged its onus.

[171] Finally, it must be borne in mind that the findings by the Arbitrator (other than some aspects of the Time Bar issue) are findings of law. It remains to be seen, given the negotiations that took place between the parties after September 2019, whether as a matter of fact Spill Tech will be able to show a breach of the Contracts.

[172] As to the issue of costs, the usual principle is that costs follow the suit. I cannot see any reason to depart from this.

[173] Accordingly, I make the following order

1. The application is dismissed with costs.

Y CARRIM
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION
JOHANNESBURG

APPEARANCES

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DATES OF HEARING:	30 October 2023
DATE OF JUDGMENT:	02 February 2024