REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 27388/2022

(The award application)

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 21 August 2023

E van der Schyff

In the matter between:

ANDRE HORN	FIRST APPLICANT
MELLINS i-STYLE OPTOMETRISTS INC	SECOND APPLICANT

and

DEON MARIUS NEL	FIRST RESPONDENT
HENRY JACQUE MALAN	SECOND RESPONDENT
HERMAN JOHANNES JANSEN	THIRD RESPONDENT

Case no: 011316/2022

(The sec 3(2) application)

And in the matter between:

HERMAN JOHANNES JANSEN	FIRST APPLICANT
DEON MARIUS NEL	SECOND APPLICANT

HENRY JACQUES MALAN	THIRD APPLICANT
and	
ANDRE HORN	FIRST RESPONDENT
MELLINS i-STYLE OPTOMETRISTS INC	SECOND RESPONDENT
LTC HARMS NO	THIRD RESPONDENT

Case no: 25568/2022
(The taxation review application)

And in the matter between:

DEON MARIUS NEL	FIRST APPLICANT
HENRY JACQUES MALAN	SECOND APPLICANT
HERMAN JOHANNES JANSEN	THIRD APPLICANT
and	
LTC HARMS NO	FIRST RESPONDENT
WC WANDRAG NO	SECOND RESPONDENT
ANDRE HORN	THIRD RESPONDENT
MELLINS i-STYLE OPTOMETRISTS INC	FOURTH RESPONDENT

JUDGMENT

Van der Schyff J

Facts

[1] Several entities have an interest in what will collectively be referred to as the Mellins Group. The Mellins Group is comprised of Mellins i-Style Optometrists Inc., Mellins and Partners, the Mellin Trust, the MV Trust, and Mellins i-Style (Pty) Ltd (Mellins (Pty)). The trusts hold the interest in 'Mellins and Partners' and the shares in Mellins (Pty). The arbitrator appropriately stated that the affairs of the Mellins Group were organised in a manner only a tax adviser could conceive of.

[2] The current litigation arises out of arbitration proceedings. In these proceedings, I am called on to adjudicate an application in terms of s 3(2) of the Arbitration Act 42 of 1965 (the Arbitration Act), an application in terms of s 31 of the Arbitration Act, and an application in terms of s 33 of the Arbitration Act.

The s 3(2) application

[3] The applicants in the award application, Mr. Horn and Mellins i-Style Optometrist Inc. (MO), seek an order in terms of s 31(1) of the Arbitration Act 42 of 1965 (the Act) to make the following awards by the arbitrator orders of court:

i. The arbitration award published on 20 May 2021;

ii. The arbitration award published on 28 March 2022.

[4] Messrs. Jansen, Nel, and Malan are the respondents in the award application. They are also the applicants in the s 3(2) application. In the s 3(2) application, Messrs. Jansen, Nel, and Malan seek an order setting aside the written arbitration agreement, 'retracting' the disputes referred to in the arbitration agreement from arbitration, holding that the arbitration clause shall cease to have effect concerning the disputes concerning the correctness of Nico Pienaar's determination of the value of their interest in the Mellin Trust and the MV Trust and that the costs of the arbitration proceedings to date, save for the costs orders that the arbitrator has already issued, be costs in the cause of any High Court proceedings for the setting

aside of Mr. Pienaar's determination of the value of their interests in the Mellin Trust and the MV Trust.

[5] The issues relevant to the award and s 3(2) applications are conflated and arise from the same facts.

[6] On 10 November 2001, the then-shareholders of MO concluded a written shareholders' agreement. In terms of the shareholders' agreement, the shareholders of MO agreed on a procedure for the exit of shareholders from MO, the Mellin Trust, and the MV Trust, which trusts hold the interests in the Mellins Group and a mechanism for the valuation of the interest held by them in the Mellins Group, and the price payable for the interest in the Mellins Group.

[7] The material aspects, insofar as this application is concerned, are the mechanism provided in the agreement for the determination of the value of Messrs. Jansen, Nel, and Malan's interest in the Mellins Group by Mr. Pienaar and the provisions for a referral to arbitration.

[8] Messrs. Jansen, Nel, and Malan, respectively, at different periods, became defaulting shareholders by reaching the age of 60 and consequently subject to the mandatory retirement regime as provided for in the shareholders' agreement. They were obliged to sell their respective interests in MO and related entities in the Mellins Group. In each instance, Mr. Horn agreed to and took over Messrs. Jansen, Nel, and Malan's respective shareholding in MO. They became entitled to payment of the purchase price in terms of the provisions of the agreement.

[9] In terms of the shareholders' agreement, Mr. Pienaar, a chartered accountant, was designated as the person who would determine the value of a shareholder's interest in the company at the relevant time of his/her retirement and to determine the purchase price payable to him/her in terms of the provisions of the shareholders' agreement. Mr. Pienaar is not a party to the shareholders' agreement.

[10] Mr. Pienaar determined Messrs. Jansen, Nel, and Malan's interests in the Mellins Group, respectively, as R3 473 883.81, R7 764 283.07, and R4 485 071.70. Messrs. Jansen, Nel, and Malan were dissatisfied with the valuations as determined by Mr. Pienaar and considered it be irregular, unreasonable, and/or so wrong that they were patently unjust.

[11] Messrs. Jansen, Nel, and Malan submit that their legal representatives advised them at the time that the shareholders' agreement contains an arbitration clause, and they were bound to proceed to arbitration to have the valuation and determination done by Mr. Pienaar set aside in arbitration proceedings. They were advised that since a challenge to Mr. Pienaar's valuation constitutes a dispute as defined in the arbitration clause, the parties contemplated that such a dispute may arise and that arbitration on such dispute can proceed in Mr. Pienaar's absence. As a result, arbitration proceedings commenced.

[12] Messrs. Jansen, Nel, and Malan state that it now appears that such advice was incorrect for the following reasons:

i. Messrs. Jansen, Nel, and Malan and Horn concluded a new written arbitration agreement 'which was to effectively replace the provisions of clause 11 in respect of the dispute concerning the determination of the said values as determined by Mr. Pienaar because the arbitration clause in the shareholders' agreement was 'tersely stated and outdated'.

ii. When the parties agreed to refer the dispute about the valuation to arbitration in terms of the new arbitration agreement, it effectively novated the terms of the arbitration clause in the shareholders' agreement. None of the parties raised any issue that it was not competent to arbitrate the issue of Mr. Pienaar's valuation, without Mr. Pienaar being a party to the shareholders' agreement or the new agreement.

iii. The third respondent was appointed as the arbitrator of the proceedings.

iv. Messrs. Jansen, Nel, Malan, and Horn, and MO delivered their respective pleadings, which were amended from time to time. Mr. Horn and MO pleaded that it is not competent to set aside Mr. Pienaar's valuation and determination without him being a party to the arbitration proceedings.

v. Mr. Horn and MO also raised issues akin to exceptions, as special pleas to the stated claim. Messrs. Jansen, Nel, and Malan contend that the parties agreed to separate the issues raised in the special pleas and requested the arbitrator to determine those issues first. As a result, they claim, the issue of whether it was competent to seek the setting aside of Mr. Pienaar's determination when he is not a party to the arbitration agreement was not fully canvassed and did not form part of the separated issues. Messrs. Jansen, Nel, and Malan inform the court that the separated issues were argued and subsequently upheld by the arbitrator, who allowed them to amend their statements of claim. A cost order was granted against Messrs. Jansen, Nel, and Malan. This costs order forms the subject of the application under case number 25568/2022, dealt with herein below.

vi. Messrs. Jansen, Nel, and Malan inform the court that they were recently advised that the position adopted by Mr. Horn and MO that Mr. Pienaar's determination cannot be set aside in arbitration proceedings to which he is not a party, is correct. As a result, and for them to obtain the relief of setting aside Mr. Pienaar's respective valuations, legal proceedings, to which Mr. Pienaar will be a party, must be launched in the High Court.

[13] Mr. Horn and MO oppose the s 3(2) application. They contend that commencing arbitration proceedings without Mr. Pienaar being a party thereto, was ill-conceived since no relief can be sought unless he is a party to the arbitration. As a result, Mr. Horn and MO pleaded that the relief sought by Messrs. Jansen, Nel, and Malan in arbitration proceedings could not be granted against Mr. Pienaar. Mr. Horn and MO, contrary to the position put forward by Messrs. Jansen, Nel, and Malan, contend that this issue was indeed canvassed before the arbitrator, and that he

upheld the plea that the relief sought by Messrs. Jansen, Nel, and Malan could not be granted in Mr. Pienaar's absence.

[14] A reading of the arbitrator's interim award sheds light on the question as to whether the arbitrator dealt with the issue of whether Mr. Pienaar's valuation and determination can be set aside in light of him not being a party to the arbitration agreement, and, consequently the arbitration proceedings. I pause to point out that both parties misinterpreted the situation and the arbitrator's finding on this issue.

[15] The arbitrator held as follows:

> 'That brings me prayers 1 and 2. The second special plea also raises the question of Mr. Pienaar's non-joinder, where his valuation and determination are to be set aside and declared as not binding on the parties. I disagree. His interest in this part of the case is indirect if not tenuous.'

[16] The portion of the second special plea referred to above reads as follows:

> ' 17.2 The statement of claim lacks the necessary averments to sustain a cause of action for the review and setting aside of Mr. Pienaar's determination of the purchase price. In particular:
>
> 17.2.1 no case has been made out that Mr. Pienaar has an obligation to redo the valuation;
>
> 17.2.2 no case has been made out that Mr. Nel, Mellins Inc, or Mr. Horn has a right to compel Mr. Pienaar to redo the valuation by applying factors along a newly fashioned formula; and
>
> 17.2.3 no case has been made out that entitles Mr. Nel to ask the arbitrator to compel Mr. Pienaar to redo the valuation, or to do so

without errors or by applying factors alongside a newly fashioned formula.

17.3 Mr. Pienaar has a direct and substantial interest in any relief sought that he must do the valuation in accordance with the shareholders' agreement and a newly fashioned formula.'

[17] The arbitrator definitively dealt with Mr. Pienaar's non-joinder. He held that he disagreed with the proposition that Mr. Pienaar needs to be a party to proceedings where the setting aside of his valuation is sought.

Section 3(2) of the Arbitration Act

[18] Section 3(2) of the Arbitration Act provides as follows:

'The court may at any time on the application of any party to an arbitration agreement, on good cause shown –

(a) set aside the arbitration agreement; or

(b) order that a particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or

(c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred.'

[19] The Supreme Court of Appeal, in *De Lange v Presiding Bishop for the time being of the Methodist Church of Southern Africa and another*,[1] explained that it is evident from s 3(2) of the Act that a court has a discretion whether to enforce an arbitration agreement. The question is whether the applicant has shown good cause to set aside the arbitration agreement. 'Good cause', the court held, 'is a

[1] 2015 (1) SA 106 (SCA).

phrase of wide import that requires a court to consider each case on its merits in order to achieve a just and equitable result in the particular circumstances.'

[20] In *Metallurgical and Commercial Consultants (Pty) Ltd v Metal Sales Co (Pty) Ltd,*[2] Colman J explained that the *onus* to show good cause is not easily discharged. He continues:

> 'There are certain advantages, such as finality, which a claimant in an arbitration enjoys over one who has to pursue his rights in the Courts; and one who has contracted to allow his opponent those advantages will not readily be absolved from his undertaking. In *Rhodesian Railways v Mackintosh*, 1932 AD 359, WESSELS, A.C.J. (as he then was), held that the discretion of the Court to refuse arbitration under a submission was to be exercised judicially, and only when a 'very strong case' for its exercise had been made out (see p. 375). The Court was acting under a different statute from the one before me. But the observation of WESSELS, A.C.J., is none the less apposite here, because it was based upon general principles. Similarly, in *Halifax Overseas Freighters, Ltd*. v *Rasno Export; Technoprominport and Polskie Linie Oceaniczne P.P.W. ("The Pine Hill"*), 1958 (2) Lloyds List Law Reports 146, MCNAIR, J., held that there should be 'compelling reasons' for refusing to hold a party to his contract to have a dispute resolved by arbitration. JESSEL, M.R., in *Russel v Russel*, (1880) 14 Ch. D. 411, said that the cases in which the discretion against arbitration should be exercised were 'few and exceptional'.'

[21] In *Rawstone and Another v Hodgen and Another*,[3] the court held that the discretion to order that 'any particular dispute referred to in the arbitration agreement shall not be referred to arbitration' is limited. An applicant seeking to avoid an agreement to resolve a dispute by arbitration should show compelling reasons for the matter to be heard in court. In *Kmatt Properties (Pty) Ltd v Sandton Square*

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[2] 1971 (2) SA 388 (T) at 391E-H.
[3] 2002 (3) SA 433 (W).

Portion 8 (Pty) Ltd and Another,[4] the court held that an applicant must make out a 'very strong case' for the granting of an order in terms of s 3(2)(b).[5]

Evaluation of the s 3(2) application

[22] Messrs. Jansen, Nel, and Malan's sole reason for seeking that the arbitration proceedings cease and that litigation commence in court, is founded on their view that because Mr. Pienaar is not a party to the shareholders' agreement, the arbitrator would not be empowered to compel him to provide a new and proper determination if the arbitrator sets aside his calculation and determination.

[23] In argument before this court, Messrs. Jansen, Nel, and Malan's counsel submitted that various findings, adverse to the professional capabilities or professional actions taken by Mr. Pienaar in conducting various valuations, may have to be made without Mr. Pienaar being a party to the arbitration proceedings. As such, counsel contended, Mr. Pienaar has a direct and substantial interest in the relief Messrs. Jansen, Nel, and Malan seek, namely the setting aside of his valuations. I disagree. The arbitrator will have to determine whether the value determination was done in accordance with the provisions of the shareholders' agreement. A finding that it was not, will not be adverse to Mr. Pienaar's professional capabilities.

[24] The arbitrator has already determined that Mr. Pienaar's interest in proceedings that might result in the calculation or valuation being set aside, is 'indirect if not tenuous'. It is only when a declarator is sought that Mr. Pienaar is disqualified from acting as an expert valuer under the agreement on the basis that he is not qualified to be the auditor of the company or that he was biased, that it can be said that he has a direct interest in the relief sought. The same cannot be said with the relief sought based on a contention that Mr. Pienaar incorrectly calculated the value of Messrs. Jansen, Nel, and Malan's respective interests or used the wrong formula in determining such value. He can be called as a witness to explain how he did the

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[4] 2007 (5) SA 475 (W).
[5] See also *Polysius (Pty) Ltd v Transvaal Alloys (Pty) Ltd and Another; Transvaal Alloys (Pty) Ltd and Another v Polysius (Pty) Ltd* 1983 (2) SA 630 (T) 656E.

calculations or value determinations, and the arbitrator can decide whether this was done in accordance with the terms of the shareholders' agreement.

[25] In my view, both parties misinterpret Mr. Pienaar's role in these proceedings. The matter is distinguishable from *Welihockyj v Advtech Ltd.*[6] In *Welihockyj,* the scheme that formed part of the subject matter, 'affected inappropriate savings and cost-cutting procedures (involving issues pertaining to third parties), all with the sole purpose of short-term cost savings to achieve the profit warranties provided for …'. The alleged fraudulent scheme involved the alleged fraudulent conduct not only of the applicants but also third parties. The third parties would, other than Mr. Pienaar in the current matter, be affected by findings made by the arbitrator, and the arbitrator did not have the power to make findings pertaining to the third parties who were not parties to the arbitration agreement. I agree with the arbitrator's finding that Mr. Pienaar's interest in the question as to whether his valuation and determination are to be set aside and declared as not binding on the parties, is indirect.

[26] If the arbitrator finds that the value determination was not done in accordance with the parties' agreement as contained in the shareholders' agreement, he will set aside the value determination for the determination to be done in accordance with the terms of the agreement. If the 'instrument' the parties crafted in the shareholders' agreement to determine the value of the retiring shareholders' interests 'malfunctions', the parties must turn to the agreement to resolve the issue. Mr. Pienaar not being a party to the shareholders' agreement did not prevent him from doing the value determinations and calculations when requested. One can ask oneself, what would the position have been if Mr. Pienaar refused to do the calculation in the first place? Could he be compelled to do so if he was not a party to the shareholders' agreement? The situation that will arise if his calculation is set aside in arbitration does not differ in any manner from the hypothetical position wherein the parties would have found themselves had Mr. Pienaar refused to do the valuation in the first instance. There is, in any event, no indication on the

[6] 2003 (6) SA 737 (W).

papers that Mr. Pienaar will refuse a request to redo the calculations if the arbitrator sets the current calculations aside.

[27] I pause to note that I find it difficult to discern between Mr. Pienaar's role in determining the value of the respective retired members' interests, and Mr. Wandrag's role as taxing consultant who drew up the bill of costs that was taken on review before the arbitrator.

[28] In light of the above, I do not agree with Messrs. Jansen, Nel, and Malan's contention that the relief sought in the arbitration proceedings is abortive and incompetent. This, in turn, leads to the finding that the application did not establish good cause on a balance of probabilities for the relief sought in terms of s 3(2) of the Arbitration Act. The application under case number 011316/2022 stands to be dismissed with costs.

The award application and the taxation review application

[29] As indicated above, Mr. Horn and MO seek an order in terms of s 31(1) of the Arbitration Act 42 of 1965 (the Act) to make the following awards by the arbitrator orders of court:

i. The arbitration award published on 20 May 2021;

ii. The arbitration award published on 28 March 2022.

[30] Pursuant to the referral of the disputes between the parties to arbitration, three special pleas were heard by the arbitrator. The arbitrator published his first award, the May 2021-award, and awarded costs in favour of the applicants.

[31] The parties could not agree on the amount of costs and appointed Mr. Wandrag, a taxing consultant, to tax the bill of costs. Messrs. Jansen, Nel, and Malan instituted review proceedings of Mr. Wandrag's *allocator,* which review proceedings served before the arbitrator, and is the subject matter of the third application dealt with

herein below. The arbitrator published this award on 28 March 2022, the March 2022-award.

[32] Both awards were duly published, but Messrs. Jansen, Nel, and Malan failed and refused to pay the costs as awarded.

[33] Messrs. Jansen, Nel, and Malan contend that the court has a discretion whether to make awards orders of court and submit that it is not in the interest of justice that the award be made orders of court at this juncture. Messrs. Jansen, Nel, and Malan submit that the decision to make awards orders of court should only be made after the final determination of the entire arbitration. They aver that Mr. Horn and MO want to 'strangle us, as retirees who are dependent upon to be paid to us by the Second Applicant, financially so that we forego the continuation of the arbitration'.

[34] Messrs. Jansen, Nel, and Malan submit that the application to make this award an order of court is premature due to the fact that they seek the March 2022-award to be reviewed and set aside. To deal with the issues in a practical manner, I will consider the taxation review application first. Brand J also applied this methodology in *Kolber and Another v Sourcecom Solutions (Pty) Ltd and Others: Sourcecom Technology Solutions (Pty) Ltd v Kolber and Another.*[7]

Section 33 of The Arbitration Act

[35] Section 33 of the Arbitration Act provides for the setting aside of an award. Section 33(1) provides that the court may, on application of any party to the reference, make an order setting the award aside where:

i. Any member of the arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

[7] 2001 (2) SA 1097 (CPD).

ii. An arbitration tribunal has committed a gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

iii. An award has been improperly obtained.

[36] Section 33(2) prescribes that an application under s 33 shall be made within six weeks after the publication of the award to the parties. The court may stay the enforcement of the award decision if it considers that the circumstances so require.[8]

[37] In *Kolber, supra,* Brand J agreed with the view postulated by Solomon JA in *Dickenson & Brown v Fisher's Executors,*[9] that:

> 'It seems 'impossible to hold that a *bona fide* mistake either of law or of fact made by an arbitrator can be characterised as misconduct'; 'where an arbitrator has given fair consideration to the matter . . . it would be impossible to hold that he had been guilty of misconduct merely because he had made a *bona fide* mistake either of law or of fact.'

[38] It is established in case law that a court cannot upset an arbitrator's award on the basis of misconduct unless it finds the arbitrator guilty of 'misconduct' in the sense of moral turpitude or *mala fides*.[10]

[39] In *OCA Testing and Certification South Africa (Pty) Ltd v KCEC Engineering Construction (Pty) Ltd and Another*,[11] the Supreme Court of Appeal (SCA) clarified the requirements for reviewing an arbitration award. The SCA explained that gross irregularity in an arbitration award refers to a methodological flaw in the proceedings that deprives a party of a fair and full determination of their case, even if the arbitrator's intentions were good.

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[8] S 33(3).

[9] 1915 AD 166 at 175-176.

[10] *Kolber, supra* at 1108A. See also, *Amalgamated Clothing and Textile Workers Union v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A) at 169C – E.

[11] (1226/2021) [2023] ZASCA 13 (17 February 2023).

[40] In coming to this finding, the SCA 'crystalised the principles for the review of an arbitration award on the basis of a gross irregularity as follows':[12]

i. Irregularity does not mean an incorrect award;

ii. The enquiry into whether an award should be reviewed is not concerned with the result of proceedings but rather the method of those proceedings (i.e., whether the aggrieved party was deprived of having their case fully and fairly determined);

iii. If the arbitrator prevents a fair trial of the issues, there is gross irregularity rendering the award capable of review;

iv. The arbitrator must engage in the correct enquiry. Misconceiving the nature of the enquiry renders the hearing unfair as the arbitrator fails to perform their mandate. Notwithstanding arbitrators' good intentions, their awards can be reviewed if they are mistaken about the inquiry.

v. The court reiterated that- 'we are here not dealing with a situation where the arbitrator got it horribly wrong without more, in which event there would have been no basis to disturb the award. Rather, he simply overlooked some of the crucial issues that he was required to determine. Section 28 of the Act explicitly provides that absent an agreement between the parties to the contrary, an award shall, subject to the provisions of the Act, 'be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms.' And as Harms JA forcefully put it: '[A]n arbitrator "has the right to be wrong.' Consequently, where an arbitrator errs in his or her interpretation of the law or analysis of the evidence that would not constitute gross irregularity or misconduct or

[12] Sethu, K and Rumsey, C. *When can an arbitrator's award be reviewed?* https://www.cliffedekkerhofmeyr.com/en/news/publications/2023/Sectors/Construction/construction-and-engineering-alert-23-march-2023-when-can-an-arbitrators-award-be-reviewed.html Accessed on 15 August 2023.

exceeding powers as contemplated in s 33(1) of the Act.'[13] (Footnotes omitted)

Evaluation of the taxation review application

[41] Messrs. Jansen, Nel, and Malan seek that the taxation review done by the arbitrator be set aside, and remitted back to him, 'together with a Notice of Taxation Review that complies with Uniform Rule 48(2), for a reconducting of the taxation review', alternatively that this court substitutes the decision of the arbitrator in respect of specified items on the Bill of Costs. They claim that the arbitrator committed a gross irregularity in the conduct of the taxation review that is so unreasonable that no other arbitrator, acting reasonably, would have come to the same conclusion.

[42] Messrs. Jansen, Nel, and Malan explain in the founding affidavit, that pursuant to the costs award being granted, Mr. Horn and MO submitted a bill of costs for taxation by Mr. Wandrag in the aggregate sum of R2 041 497.50. This included the attorney's fees, disbursements, and the costs of two counsel. They claim this is 'surreal, amounts to overreaching, constitutes recovery of costs that should only be recoverable at the end of the arbitration in respect of a final costs award and is simply unreasonable.'

[43] Messrs. Jansen, Nel, and Malan explain that they filed a notice to oppose the taxation, wherein they opposed every item contained in the bill of costs. An amount of R576 536.06, more than 25% of the bill of costs, was subsequently taxed down. The bill of costs finally amounted to R621 531.36. This amount includes the drawing fee and the attendance costs.

[44] A Notice of Review of Taxation in terms of Uniform Rule 48(1) was served. Mr. Wandrag, issued a taxing master's report and took issue with the fact that the Notice of Review, did not comply with Uniform Rule 48(2)(b), (c), or (d). Mr.

[13] *Supra*, at par [32].

Wandrag issued a report to which Mr. Horn and MO responded. Written submissions were also made on behalf of Messrs. Jansen, Nel, and Malan. Mr. Wandrag issued a further report, and Mr. Horn and MO made further written submissions. The arbitrator proceeded to review the taxation. Messrs. Jansen, Nel, and Malan contend that the arbitrator just 'glossed over' the fact that Mr. Wandrag indicated that their notice to review did not comply with Rule 48(2)(b), (c), and (d). He did, however, state same.

[45] Messrs. Jansen, Nel, and Malan contend that it was grossly irregular for the arbitrator to continue with the review if he opined that Uniform Rule 48(2) had not been properly complied with. This procedural error, contend Messrs. Jansen, Nel, and Malan, made it 'simply impossible' for the arbitrator to determine whether Mr. Wandrag's decisions were rational. The arbitrator was precluded from acting in a judicial manner.

[46] The second ground of irrationality raised, lies therein that the arbitrator's powers of review in a taxation review, are much broader than a mere rationality review. He must determine whether the fees incurred are reasonable or have reasonably been incurred. Allowing overlapping costs to be taxed as part of the costs incurred in relation to the special pleas is unreasonable and constitutes an irregularity.

[47] Messrs. Jansen, Nel, and Malan contend that the arbitrator misdirected himself when he found that the VAT issue was not raised as an independent issue when it was. In addition, it is contended that the arbitrator misapplied the law relating to the VAT issues on 'speculation and conjecture', and that the arbitrator failed to consider all documentation in relation to the tax review.

[48] In their answering affidavit, Mr. Horn and MO contend that the nature of the hearing was not the only factor Mr. Wandrag and the arbitrator considered. Other factors include, amongst others:

i. Messrs. Jansen, Nel, and Malan's election to triplicate the work had a material effect on the costs of the arbitration;

ii. A contextual perusal of all the documents;

iii. The complexity of the case;

iv. The fact that a document was not used during the hearing or referred to in the award does not mean it need not be perused.

[49] Mr. Horn and MO deny that the arbitrator failed to deal adequately with Messrs. Jansen, Nel, and Malan's non-compliance with Rule 48(2)(b), (c), and (d). They make the point that there is no merit in the argument that since Messrs. Jansen, Nel, and Malan failed to comply with Rule 48(2)(b), (c), and (d), the arbitrator acted gross irregularly by determining the review application. Messrs. Jansen, Nel, and Malan can't approbate and reprobate by arguing on the one hand that compliance with the said subsections of Rule 48 is not required and, on the other hand, rely on their non-compliance as a ground for review.

[50] Regarding the VAT issue, Mr. Horn and MO contend that the VAT issue *per se* was not raised as an objection at the taxation but only in the submissions filed by Messrs. Jansen, Nel, and Malan. It was also not raised in the notice of review.

[51] It is evident from the arbitrator's award that:

i. He was aware of the nature of the review;

ii. He duly considered Messrs. Jansen, Nel, and Malan's failure to adhere to Rule 48(2)(b), (c), and (d). The arbitrator explained that 'because the rule was not followed, one does not have the advantage of the taxing master's reasons for the decisions under attack, which is the whole purpose of review; to consider the rationality of the reasons'. He considered all the information before him;

iii. He considered the list of objections and explained that the VAT-related items listed were listed as a component of the objection against the fees charged, not as an independent issue, and that the term VAT does not appear in the notice. The arbitrator dealt with the VAT issue and dismissed this ground of review;

iv. The arbitrator dealt with the 'overlapping' argument, and other concerns raised.

[52] The record of the proceedings before the arbitrator indicates that Mr. Wandrag, despite holding the view that the taxation review in terms of Rule 48 was fatally defective because of Messrs. Jansen, Nel, and Malan's non-compliance with Rule 48(2)(b), (c), and (d), proceeded to provide the necessary information before the arbitrator.

[53] An application, in terms of s 33 of the Arbitration Act, is not a process where facts already established in the arbitration are being reassessed. It is a procedure to ascertain the existence and validity of the arbitral award itself. It is not a recourse against the award. Ramsden[14] highlights that the appropriate standard of review of arbitral awards is one which preserves the autonomy of the forum chosen by the parties and minimises judicial intervention.

[54] By agreeing to arbitration, parties limit the grounds of interference in their contract to the procedural irregularities set out in the Arbitration Act. If the requirements as set out clearly in *OCA Testing and Certification South Africa (Pty) Ltd v KCEC Engineering Construction (Pty) Ltd and Another, supra,* are considered, the arbitrator did not commit a gross irregularity in the conduct of the arbitration proceedings or exceeded his powers. Once again, it must be stressed that the ground of review envisaged by the use of the phrase 'gross irregularity in the conduct of arbitration proceedings' in s 33 of the Arbitration Act, relates to the conduct of the proceedings and not the result thereof.[15] The arbitrator expressly

[14] Ramsden, P. The Law of Arbitration. South African & International Arbitration. Juta, 2010, 199.

[15] Ramsden, *supra*, 203.

stated that the review is done in terms of rule 48(6)(a)(ii), which is indicative of the fact that he was well aware of the fact that a review of a taxation is not strictly 'a review' in the sense of the court interfering only with the exercise of an improper decision.

[55] I must add that it is challenging to understand how a party, who files a taxation review application without adhering to all the prescripts of rule 48(2), later complains if the review was dealt with and contends that '[t]he arbitrator has no power to condone non-compliance with the rules except insofar as the rules themselves expressly clothe the arbitrator with that power.'

[56] This application stands to be dismissed with costs.

Section 31(1) of the Arbitration Act

[57] Once an award is obtained through arbitration proceedings, the arbitration award is required to be made an order of court to enforce and execute the award if one party to the proceedings fails to honour the award. The award must, however, be final. For this to occur, an application for the award to be made an order of the court is made to the appropriate High Court, in terms of Section 31(1) of the Arbitration Act, Act 42 of 1965.

[58] Section 31(1) of the Arbitration Act provides as follows:

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

(3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect.'

[59] When considering a s 31 application, the determination is only whether the award was made in accordance with the requisite arbitration agreement and in accordance with the Arbitration Act. When the order of the High Court is delivered, the order is purely that the award, resultant from the arbitration proceedings, is made an order of court. The fact that a court may disagree with the arbitrator's findings, is not in itself a reason for refusing to enforce the award in terms of s 31(1) of the Arbitration Act.

[60] *In casu*, two disputes were referred to the arbitrator in accordance with an arbitration agreement. The arbitrator was appointed in accordance with the agreement between the parties. The arbitrator made two awards. The costs order has not been paid. The taxation review stands to be dismissed, and the s 3(2) application stands to be dismissed. Both awards are final awards, and Mr. Horn and MO can't execute the award as far as it pertains to the costs order granted, without it being made an order of court.

[61] The award application stands to be granted.

ORDER

In the result, the following order is granted:

Re case number 011316/22

1. The section 3(2) application is dismissed with costs;

2. The first, second, and third applicants are jointly and severally ordered to pay the respondents' costs, including the costs consequent upon the employment of two counsel.

Re case number 25568/2022

3. The taxation review is dismissed with costs.

4. The first, second, and third applicants are jointly and severally ordered to pay the respondents' costs, including the costs consequent upon the employment of two counsel.

Re: Case number 27388/22

5. The arbitration awards of retired Judge LTC Harms:

5.1. Published on 20 May 2021 in which the applicant's special pleas were upheld with costs (attached as annexure 'A' through the founding affidavit); and

5.2. Published on 28 March 2022 (attached as annexure 'B' to the founding affidavit) in which the respondent's taxation review application was dismissed with costs,

are made orders of court in terms of section 31(1) of the Arbitration Act 42 of 1965.

6. The first, second, and third respondents are jointly and severally ordered to pay the applicants costs of this application, including the costs consequent upon the employment of two counsel.

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be emailed to the parties/their legal representatives.

For Messrs. Jansen, Nel, and Malan in the s 3(2) application:	Adv. G. Kairinos SC
Instructed by:	HJ Van Rensburg Inc
For Messrs. Jansen, Nel, and Malan in the award and Taxation review application:	Adv. Q. du Plessis
Instructed by:	HJ Van Rensburg Inc

For Mr. Horn and MO:	Adv. E Van Vuuren SC
With:	Adv. J Pretorius
Instructed by:	Venter and Associates Inc
Date of the hearing:	25 May 2023
Date of judgment:	21 August 2023