



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

CASE NO: 2021/11461

(1) REPORTABLE: YES/ NO	
(2) OF INTEREST TO OTHER JUDGES: YES/ NO	
(3) REVISED: YES/ NO	
20/11/2023	[REDACTED]
DATE	SIGNATURE

In the matter between:

EMALINI ENTERPRISES 15 CC

FIRST APPLICANT

LUMAR MAREE

SECOND APPLICANT

And

GRAINS FOR AFRICA COMMODITY BROKERS (PTY) LTD

FIRST RESPONDENT

MR PETER WATT N.O

SECOND RESPONDENT

DRIANCO TRANSPORT (PTY) LTD

THIRD RESPONDENT

JUDGMENT

THUPAATLASE AJ

INTRODUCTION

[1] The applicants *inter alia* seek relief setting aside portions of the arbitrator's award in terms of section 33 of the Arbitration Act, 42 of 1965 (the Act).

In this regard the applicants seek an order as set out in the Notice of Motion for:

- (i) The setting aside of two portions of the arbitration award which was issued by the Second Respondent against the Applicants in favour of the Respondents on 14 December 2020.
- (ii) The award in respect of Claim B of the First Respondent's statement of claim; and
- (iii) The award of R 50 000. 'punitive costs'.
- (iv) A declarator that the items and amounts set out in the bill of costs are not recoverable in terms of the attorney and client cost award.
- (v) An order making the undisputed portion of the arbitration award an order of court against themselves for payment of the undisputed amount (being R 15 769.08) plus interest thereon (amounting to R 1 231.08) with costs of the arbitration on the attorney and client scale.
- (vi) A declarator that the First applicant's indebtedness was extinguished by set-off not later than 1 December 2020.
- (vii) An order of payment of R 423 141, 58 (alternatively R 345 695.20) against the First respondent with interest at mora rate from December 2019.
- (viii) Condonation for the late bringing of the application for partial setting aside of the award.

Parties

[2] The first applicant is EMALINI ENTERPRISE 15 CC, a Close Corporation duly registered in terms of the Close Corporation Act, No. 69 of 1984 and having its principal business address at Plot 61 WILGEBOOM, POTCHEFSTROOM. The second applicant is an employee and surety of the first applicant. These parties will be referred as applicants in this judgment.

[3] The first respondent is GRAINS FOR AFRICA (PTY) LTD, a company duly incorporated in terms of the laws of the Republic of South Africa and having its principal place of business at 3/5 17th Street ORANGE GROVE, JOHANNESBURG.

[4] The second respondent is Mr Peter Watt an adult arbitrator who conducts business under the auspices of Arbitration Foundation of Southern Africa (AFSA).

[5] The third respondent is DRIANCO TRANSPORT (PTY) LTD, a company duly incorporated in terms of the laws of Republic of South Africa having its registered office at 35 KERK Street REITZ. No relief is sought against the third respondent.

Background

[6] The first applicant and first respondent entered into a written agreement on the 27 November 2018 ("the agreement"). The standard terms set out in the SAGOS¹ Agreement were incorporated by reference. It is not in dispute that the agreement was a transport agreement. The first applicant agreed to transport specified goods on behalf of the first respondent.

[7] The agreement was for transportation of specified liquid cargoes on behalf of the first respondent from various places in Southern Africa to certain nominated destinations in South Africa and thus, transnational. This was for the season of 2019/2020 or until 31 March 2020.

[8] During May 2019 a dispute arose between the parties that resulted in the applicants suspending the transportation of goods for the first respondent. The first respondent alleged a breach of the exclusivity clause of the agreement by the first applicant. It was alleged that the latter rendered transport services to other clients contrary to the exclusivity clause.

[9] The first respondent referred the dispute for arbitration as stipulated in the agreement and in terms of dispute resolution mechanism provided in SAGOS. The referral was on 01 September 2020 On 20 September 2020 applicants pleaded and

¹ Contract for the purchase and sale of grain and pulses and oilseeds, and products derived therefrom. (Approved by Animal Feed Manufacturers Association, Grain Silo Industry, Grain South Africa, National Chamber of Milling, SA Cereals and Oilseeds Trade Association and The Dispute Resolution Agreement (Approved by The Arbitration Foundation of Southern Africa) – SAGOS 1 Version 9- effective 1 August 2012.

counterclaimed. First respondent delivered a response on 08 October 2020. First respondent's reply thereto was delivered on 19 October 2020.

[10] The arbitration award was issued on 14 December 2020 ("the award"). It is a portion of that award which the applicants allege ~~is in part~~ reviewable and falls to be set aside. In the same award, the applicants for an amount of R 144 821 925.00 was dismissed.

[11] The Statement of Claim comprised of two claims. Claim A was based on an alleged breach of the agreement in that on or about 27 November 2019 transportation of goods on behalf first respondent was stopped by the applicants.

[12] As a result of the alleged breach, first respondent was compelled to use alternative transport arrangements to ferry its goods. The arrangements resulted in the first respondent suffering damages which were computed by calculating the difference between the agreed rate per metric tonne and the rate paid to the alternative carrier. Claim B was for damages the first respondent suffered due to breach of the exclusivity clause, which related to applicants' commitment to transport molasses exclusively for the first respondent.

Arbitration Award

[13] The second respondent was the appointed arbitrator. In the award the second respondent provides a detailed account of what he understood to be the main issues for determination at the hearing. In terms of para 7.6.6 among the issues for the determination was: *'what actual financial damages did the Claimant suffer, resultant from the breach of exclusivity clause, if it were found that such clause was in fact breached?'*

[14] Paragraph 7.6.15 of the award states: *'the hearing, including the consideration of the claim by the Claimant for punitive costs against the Defendant as detailed below ended at approximately 11h25hrs (sic) on Wednesday 2nd December 2020'*. The arbitrator also made further detailed findings. These findings will be dealt with later in the judgment when the court considers the grounds of review raised by the applicants against the award.

[15] Following his findings based on written and oral submissions of the parties, the second respondent made the following award:

- Both the Claimant and the Defendant are equally liable for the arbitrator's costs, and all AFSA (Arbitration Foundation of Southern Africa) costs.

- Claim A by the Claimant against the Defendants is only partially granted:

The amount to be paid by the Defendant, to the Claimant, as full settlement against Claim A is R 15 769,08 (Fifteen thousand seven hundred and sixty-nine rand and eight cents) which amount results from the Claimant's alternative claim, as per clause 17 of the Claimant's response to the Statement of Defence, plus interest thereon, at 10% per annum up to and including 11th January 2021.

- Claim B by the Claimant against the Defendant, amounting to R 54 808.00 (Fifty-four thousand eight hundred and eight Rand) is granted plus interest thereon at 10% per annum, up to and including, 11th January 2021.*
- As the Claimant did not declare the commencement date from which interest should accrue, the arbitrator awards that such interest should accrue only as from 20th February 2020, such being the date, the Claimant's original was submitted to AFSA.*
- The cost, as claimed by the Claimant 'on attorney – client scale is awarded in full.*
- In this regard, the Claimant must present in writing, to the Defendant, by latest close of business on Friday 18th December 2020, full details of the cost of suit on the attorney-client scale (and for the sake of good order, provide a 'soft copy' of such to AFSA and a soft copy to the arbitrator.*

[16] The applicants are seeking to have the partially granted Claim A of the award made an order of court. The applicants submit that several defences were raised against the claim, and while they do not agree with the finding, they accept the arbitration award as binding. In terms of the applicable legal precepts the concession is well made.

[17] Interestingly, the applicants still submit that any indebtedness in terms of the award was extinguished by set-off. This aspect will be dealt with later when the court considers prayer 6 of the notice of motion being the declarator.

[18] The applicants are challenging the award in respect of Claim B. As we now know Claim B is based on an alleged breach of the exclusivity clause in the transport agreement. According to the Statement of Claim the first respondent suffered

damages when it had to employ alternative transport to ferry its goods. The applicants dispute this allegation and further argue that even if there was such a breach, no damages were suffered. The first respondent quantified its damages to be an amount of R 54 808.00.

The nature of the arbitrator's mandate and duties

[19] Applicants' disconcert regarding Claim B of the award is based on the allegation that the arbitrator exceeded his powers and went beyond his mandate in respect thereof. Consequently, so it was argued, the court is at liberty to set aside the award. It was proffered that the arbitrator had found that no damages were suffered and that such claim should have been dismissed.

[20] The second respondent is criticised for awarding what is referred to as '*monetary penalty*' for the alleged breach of contract. It was argued that the agreement did not contain a penalty clause and that the penalty clause issue was not before the arbitrator. As a result, the arbitrator exceeded his powers and that this constituted gross irregularity and Claim B falls to be set aside.

[21] The first respondent strongly argued that the arbitrator acted within his mandate and that Claim B related to special damages. It explained that such damages were for loss of profit and that the use of the word '*penalty*' as opposed to the word '*damages*' makes no difference and does not give rise to the proposition that the arbitrator exceeded his mandate. First respondent attributed this to a different use of nomenclature. According to the First respondent, the word "*penalty*" should be construed within the context used.

[22] The first respondent submitted that the quantification of the amount damages was proved through the oral and documentary evidence submitted during the hearing. It was argued that such evidence was not contradicted by the witnesses of the applicants.

The legal framework

[23] Application to set aside an arbitrator's award is permissible in terms of section 33 of the Act which provides that:

(1) Where- (a) any member of an 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 has 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.

[24] As correctly submitted by both counsels an arbitration award can be set aside where the arbitrator has misconducted him/herself in relation to his/her duties as arbitrator alternatively where the arbitrator has committed a gross irregularity in the conduct of the arbitration, or where the arbitrator has exceeded his/her powers; or where the award was improperly obtained.

[25] The courts have held that the basis upon which an award by an arbitrator can be set aside is narrow and confined to what is enumerated in Section 33: *Amalgamated Clothing & Textile Workers Union of SA v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A) at page 169 provides the following exposition in that regard 'Before considering these grounds, it is as well to emphasize that the basis upon which a court will set aside an arbitrator's award is a very narrow one. The submission itself declared that the arbitrator's determination 'shall be final and binding on the parties'. And s 28 of the Arbitration Act provides that an arbitrator's award shall –

'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'.

It is only in those cases which fall within the provisions of s 33(1) of the Arbitration Act that a court is empowered to intervene. If an arbitrator exceeds his powers by making a determination outside the terms of the submission that would be a case falling under s 33(1)(b). As to misconduct, it is clear that the word does not extend to bona fide mistakes the arbitrator may make whether as to fact or law. It is only where a mistake is so gross or manifest that it would be evidence of misconduct or partiality that a court might be moved to vacate an award: *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 174-81. It was held in *Donner v Ehrlich* 1928 WLD 159 at 161 that even a gross mistake, unless it establishes mala fides or partiality, would be insufficient to warrant interference."

[26] It is accepted that once the parties have identified and appointed an arbitrator as the judge of fact and law in their case, the award is final and conclusive, irrespective of how erroneous, factually, or legally, the decision was. 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 arbitration. See *Total Support Management (Pty) Ltd and Another v Diversified Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA) at para 21.

[27] A similar principle was enunciated in *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at para 85: "The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator 'has the right to be wrong' on the merits of the case'.

Did the Arbitrator misconduct himself in relation to his duties?

[28] The first issue to be determined is whether the arbitrator misconducted himself in relation to his duties. It has been held that an error does not amount to misconduct unless the mistake was gross and manifest that it could not have been made without some degree of misconduct or partiality. See *Dickenson & Brown v Fischer* 1915 AD at 176.

[29] It has been held that *bona fide* mistake of either law or of fact cannot be characterised as misconduct. The court in *Bester v Easigas (Pty) Ltd and Another* 1993 (1) SA 30 (C) at 38E-G stated that: '*In my opinion, an applicant can therefore only succeed on the ground under consideration if he can show that there was some improper, mala fide conduct on the part of second respondent in relation to his duties as arbitrator. Applicant does not rely on any direct evidence of 'misconduct' (in this sense) by second respondent. What applicant therefore has to prove is not only that second respondent made a mistake, but that these mistakes were so gross or manifest as to justify the inference of mala fides on the part of the second respondent. This place the applicant in the difficult position where he had what was described in a similar context a 'a hard row to hoe', particularly since 'one does not lightly infer dereliction of duty and untruthfulness from a responsible body' per*

Holmes JA IN Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd 1976 (1) SA 887 (A) at 895B-F’.

[30] The applicants did not present any direct evidence of gross misconduct on the part of the second respondent (the arbitrator).. They instead quoted a passage from the award to make a case for such conclusion. It is conceded in the heads of argument at paragraph 25 that the arbitrator correctly stated in paragraph 7.6.6. that one of the questions to be decided was the following: *‘What actual financial damages did the claimant suffer, resultant from the breach of the exclusivity clause, if it were found that such clause was in fact breached’.*

[31] I conclude that the aforesaid evinces that the second respondent understood his mandate. The arbitrator accepted that there was a breach of the exclusivity clause as the applicants admitted having transported the molasses for the family lot. The arbitrator stated that *‘even although the Claimant did not provide any evidence of any specific financial loss that it had incurred (such as not meeting minimum tonnage requirements with its suppliers, or buyer) and such resulting in a specified financial loss.*

[32] The applicants argued the fact that the second respondent referenced *‘penalty’* is enough demonstrate that the arbitrator misconducted himself. In my view these are mere linguistical gymnastics and to accept the applicants’ proposition would be setting an elusive criterion which is inimical to the succinctly established legal principles. Misconduct in the required sense should not be readily inferred on the part of an arbitrator. Therefore, the court accepts that that the use of the word *“penalty”* should be construed in the context of “financial damages” referred to by the arbitrator.

Did the Arbitrator commit a gross irregularity in the conduct of the arbitration?

[33] As a point of departure an irregularity contemplated is one which relates to the conduct of the proceedings and not the ultimate outcome thereof. The irregularity must be such that the applicant’s case was not-fully and fairly ventilated with the result that it impeded a fair hearing.

[34] The contention by the applicants is that whilst the general principle is that an arbitrator cannot be attacked, there is qualification to that principle. The arbitrator who

misconceives the nature of the mandate renders the hearing unfair and gross irregularity can be inferred.

[35] The applicants proceeded to quote extensively from the judgment of *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 561 at 560-561 where the following is stated: *'it is not merely the high-handed or arbitrary which is described as a gross irregularity; behaviour which is perfectly well-intentioned and bona fide, though mistaken may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of issues, then will amount to a gross irregularity. Many patent irregularities have this effect'*. It bears noting that these remarks were made in relation to a magistrate, who is a judicial officer. The factors for consideration are certainly distinguishable.

[35] The case which is quoted with approval in *Goldfields Investment* is ~~the case of~~ *Ellis v Morgan; Ellis v Desai* 1909 TS 576 at 581 where the court explained that: *'But irregularity in proceedings does not mean an incorrect judgment; it refers not to the result but the method of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined'*.

[36] The applicants spent a considerable time dealing with the fact that arbitrator acted irregularly and did not appreciate his mandate and thus granted damages in respect of Claim B. A holistic reading of the award including the reasons provided for the conclusion reached points differently. I am satisfied that the arbitrator acted within the boundaries of his mandate, and that there is no indication the arbitrator acted grossly irregular in any manner.

The setting aside of R 50 000.00 punitive costs order

[37] That the applicants are aggrieved by this particular award is clear. They complain that the awarding of punitive cost order amounts to gross irregularity and a duplication. This is exacerbated by attorney client costs which were ordered and falls to be set aside. According to the applicants the arbitrator was not competent to grant this order.

[38] As correctly submitted by the applicants the purpose of cost order in favour of a successful litigant is to indemnify the party for the expenses related to the litigation.

[39] The argument of gross irregularity regarding R 50 000.00 punitive costs is adequately and comprehensively answered by the arbitrator himself at paragraph 9 of the award. The applicant contended that the costs recoverable by the successful party are sufficiently catered by a cost order on attorney and client scale. I propose to quote the comments verbatim in this regard as I believe it will put paid to any argument suggesting irregularity on the part of the arbitrator. Under the heading: *'9.0 Claim for R 50 000.00 (Fifty Thousand Rand) by the Claimant, for punitive against the Defendants.*

9.1. The arbitrator found that the punitive cost order presented by the Claimant on 28th October 2020 against the Defendant to the amount of R 50 000.00 was indeed justified.

9.2. The Claimant claimed that additional time and costs had been incurred by the Claimant, resulting from the late submission of the Defendant's Witness Statement, together with the additional time and costs already incurred, and likely to potentially still be incurred in future, in relation to a contract by the Defendant which, the Claimant stated to be fraudulent, was indeed justified. Such contract as presented by the Defendant was only withdrawn at the hearing itself.

9.3. Such amount claimed was R 50 000.00 (Fifty Thousand Rand).

9.4 The Defendants should be appreciative that the arbitrator himself did not likewise raise any punitive cost order against the Defendant, for their continuous late presentation of information, throughout the whole arbitration process, which had also caused him inconvenience and additional allocation time.

In this regard at the pre-arbitration meeting the parties themselves, and their legal representatives, selected the dates that suited each of them, for the proper submissions of all applicable information. The arbitrator did not impose any dates on the parties for the submission of such information-they agreed to the dates the parties themselves elected.

The parties were clearly advised of such dates, and the format for the proper presentation of such information, in the minutes of the pre-arbitration meeting.

9.5. The Defendant should likewise be grateful that the arbitrator did not charge for all the time he wasted prior to, and in preparation for the hearing, considering the ramifications, and possible processes that might have needed to be followed, which

resulted specifically from presentation, on behalf of the Defendants, of a contract which only near to the end of the first day of the actual hearing itself, was advised to be erroneous, and which was only then at that point, actually withdrawn by the Defendants witness'.

[40] The above quoted findings of the arbitrator categorised the conduct of the First applicant as being egregious and warranting a censure. Section 35 of the Act gives the arbitrator a wide discretion as far as awarding of costs is concerned. The section states: (1) *Unless the arbitration agreement otherwise provides, the award of costs in connection with the reference and award shall be in the discretion of the arbitration tribunal, which shall if it awards costs, give directions as to the scale on which such costs are to be taxed and may direct to and by whom and in what manner such costs or any part thereof shall be paid and may be taxed or settle the amount of such costs or any part thereof and may award costs as between attorney and client'.*

[41] The comments of the arbitrator do not in any manner point to any misdirection on his part. Instead, one gets the feeling of a conscientious arbitrator who appreciated the importance of the task he was called upon to discharge. He appreciated the contractual obligations that parties owed to each other. The truncated timelines were self-imposed by the contracting parties on themselves. The efficacy of the arbitration process can only benefit the parties if the abridged and agreed timelines are observed.

[42] The industry specific benefits including the general benefits of arbitration were emphasized in *Crompton Street Motors CC v Bright Idea Projects 66 (Pty) Ltd* [2012] ZACC 24 (03/09/2021) at para 44 where the court endorsed its earlier judgment of *Lufuno*. In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) at para[197] where the court expressed the benefits as follows: *'Some of the advantages of arbitration lie in its flexibility (as parties can determine the process to be followed by an arbitrator including the manner in which evidence will be received, the exchange of pleadings and the like), its cost-effectiveness, its privacy and its speed (particularly as often no appeal lies from an arbitrator's award, or lies only in an accelerated form to an appellate arbitral body). In determining the proper constitutional approach to private arbitration, we need to bear in mind that litigation before ordinary courts can be rigid, costly, and time-consuming process and that is not inconsistent with our constitutional values to permit parties to seek a quicker and cheaper mechanisms for the resolution of disputes'.*

[43] The contention that arbitrator had no power to fix the costs in the manner he did or that it amounted to a duplication with the attorneys and client scale is not sound as it will be demonstrated below.

Costs on attorney and client scale.

[44] The applicants further sought relief in the form of declarator (prayer 4 of the notice of motion) that the items and amount set out in the bill of costs are not recoverable in terms of attorney and client cost award as contained in the arbitration award. In this regard the applicant argued along the same lines that the second respondent misconceived the nature of the enquiry and exceeded his powers.

[45]. According to the applicants any costs awarded by the second respondent can only include legal fees charged by a legal practitioner and permissible disbursements.

[46] In terms of Section 35 the Act Costs of arbitration proceedings:

(1) Unless the arbitration agreement otherwise provides, the award of costs **in connection with the reference and award** shall be in the discretion of the arbitration tribunal, which shall, if it awards costs, give directions as to the scale on which such costs are to be taxed and may direct to and by whom and in what manner such costs or any part thereof shall be paid and may tax or settle the amount of such costs or any part thereof, and may award costs as between attorney and client.

(2) If no provision is made in an award with regard to costs, or if no directions have been given therein as to the scale on which such costs shall be taxed, any party to the reference may within fourteen days of the publication of the award, make application to the arbitration tribunal for an order directing by and to whom such costs shall be paid or giving directions as to the scale on which such costs shall be taxed, and thereupon the arbitration tribunal shall, after hearing any party who may desire to be heard, amend the award by adding thereto such directions as it may think proper with regard to the payment of costs or the scale on which such costs shall be taxed.

(3) If the arbitration tribunal has no discretion as to costs or if the arbitration tribunal has such a discretion and has directed any party to pay costs but does not forthwith tax or settle such costs, or if the arbitrators or a majority of them cannot agree in their taxation, then, unless the agreement otherwise provides, the taxing master of the court may tax them.

(4) If an arbitration tribunal has directed any party to pay costs but has not taxed or settled such costs, then, unless the arbitration agreement provides otherwise, the court may, on making the award an order of court, order the costs to be taxed by the taxing master of the court and, if the arbitration tribunal has given no directions as to the scale on which such costs shall be taxed, fix the scale of such taxation.

(5) Any taxation of costs by the taxing master of the court may be reviewed by the court.

(6) Any provision contained in an arbitration agreement to refer future disputes to arbitration to the effect that any party or the parties thereto shall in any event pay his or their own costs or any part thereof, shall be void.

[47] The general principles are that the arbitral tribunal is not only competent, but also required to decide on costs. An arbitrator is obliged to award costs on the same basis as a court and in exercising the discretion he/she must act judicially. In *Harlin Properties (Pty) Ltd v Rush & Tomkins (SA) (Pty) Ltd* 1963 (1) SA 187 (D) at page 198 the court stated that: 'I can see no reason to doubt that our law is in this respect the same as the English law, which requires an arbitrator to exercise his discretion judicially in awarding costs. When he gives reasons showing that he exercised his discretion upon improper grounds, the Court may interfere'.

[48] To borrow from the words of the honourable Goddard LCJ in the English decision of *Lewis v Haverford West Rural District Council* (1953) 2 All ER 1599 that '...judicially exercised...mean that an arbitrator must not act capriciously and must, if he is going to exercise his discretion... show a reason connected with the case and one which a court can see is proper reason'. In *Cathrada v Arbitration Tribunal and another* 1975 (2) SA 673 the court pronounced on this aspect as follows; "The discretion...must be exercised judicially upon a consideration of all the relevant facts and in accordance with recognized principles...Where the award as to costs is vitiated by irregularity or misdirection, or is disquietingly inappropriate, a court of law will on review set aside the order'. Therefore, the discretion to be exercised is fettered. On the information disclosed I am persuaded that the arbitrator exercised his discretion judicially in ordering costs on attorney and client scale.

[49] The only remaining aspect for determination is the argument by the applicants that there was a duplication with the R 50 000.00 punitive costs order. If regard is had to the arbitrator's reasoning in justifying his award of punitive costs order, I found these

grounds echoing those relied upon for awarding costs on attorney client scale. There can only be one costs order arising from any judicial proceedings. The argument that the costs awards were duplicated is found to be well-substantiated.

[50] The First respondent retorts that the R 50 000.00 punitive costs order was the arbitrator's expression of displeasure attributable to the applicants' reprehensible conduct. It is true that if the second respondent found the conduct of the applicants egregious to merit a punitive costs order, he had the discretion to order costs on the punitive scale of attorney and client scale.

[51] However, this is not the end of the matter. As stated *Interciti Property Referrals CC v Sage Computing (Pty) Ltd and Another* 1995 (3) SA 723 (W) at page 728G-729A 'Upon a proper construction of annexure 'E' to the applicant's founding affidavit, I do not believe that the arbitrator has travelled beyond his terms of reference. In my view it is apparent from a proper reading of the document, and particularly the 'decision' appearing at para 6 thereof, to which I have referred, especially if regard is had to the concluding portion thereof, where the arbitrator states that he agrees 'with the standpoint of the applicant', that he answered both the questions referred to in para 1.2 of the reference (annexure 'D' para 1.2) in the negative and, in other words, against the first respondent. If the first respondent was dissatisfied with the award made by the arbitrator as set out in annexure 'E', it was required to act in terms of s 33 of the Act. Even if it can be said that the arbitrator's reasoning in arriving at his award might have been 'flawed', a matter upon which I express no opinion, this of itself is no bar to the award being enforced. (See, for example, *RPM Konstruksie (Edms) Bpk v Robinson en 'n Ander* 1979 (3) SA 632 (C) {cons} at 636A-B; *Hyperchemicals International (Pty) Ltd and Another v Maybaker Agrichem (Pty) Ltd and Another* 1992 (1) SA 89 (W) at 100 and *The Law of South Africa* (op cit paras 445-6 at 291-3)'. In this case the reasoning of the arbitrator can be characterized as flawed but that is not bar to refuse to not enforce the award.

Application of the wrong procedure

[52] The first respondent submitted that to the extent that the award was ambiguous, the first port of call was to remit the award to the second respondent (arbitrator) to clear any perceived ambiguities. According to the first respondent this should have been done prior to launching the present proceedings.

[53] I am persuaded by this argument. The submission is premised on the provisions of Section 30 of the Act which states that a correction may be effected in regard to clerical mistake, or patent error arising from any accidental slip or omission.

[54] In *Firestone South Africa (Pty) Ltd v Gentinuco AG* 1977 (4) 298 (A) at page 306F-307D the court stated that: 'There are, however, a few exceptions to that rule which are mentioned in the old authorities and have been authoritatively accepted by this Court. Thus, provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter, or supplement it in one or more of the following cases:

(i) The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the Court overlooked or inadvertently omitted to grant (see the *West Rand* case, *supra*).

This exception is clearly inapplicable to the present case, for Firestone does not seek any such supplementation.

(ii) The Court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous, or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order (see the *West Rand* case, *supra* at pp. 176, 186 - 7; *Marks v Kotze*, 1946 AD 29).

Here the relevant parts of the orders of the T.P.D. and this Court relating to para. (8) are clear and unambiguous and reflect the true intention of both Courts, i.e., that the Fourth Schedule should not apply to counsel's fees. Moreover, Firestone has applied for the deletion of the word "counsel's" from para. (8) the effect of which would be to render the dispensation from the Fourth Schedule applicable to all fees, including those for the patent agents or attorneys. That is not a clarification but a variation of the orders. Counsel for Firestone ultimately conceded that, and rightly desisted from pressing the prayer for clarification, for this exception is clearly inapplicable.

(iii) The Court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention (see, for example, *Wessels & Co. v De Beer*, 1919 AD 172; *Randfontein Estates Ltd. v Robinson*, 1921 AD 515 at p. 520; the *West Rand* case, *supra* at pp. 186 - 7). This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance. KOTZÉ, J.A., made this distinction manifestly clear in the *West Rand* case, *supra* at pp. 186 - 7, when, with reference to the old authorities, he said:

"The Court can, however, declare and interpret its own order or sentence, and likewise correct the wording of it, by substituting more accurate or intelligent language so long as the sense and substance of the sentence are in no way affected by such correction; for to interpret or correct is held not to be equivalent to altering or amending a definitive sentence once pronounced."

I agree with the submission that the applicants should approach the arbitrator to correct any perceived uncertainty in the award.

Declaration in respect of the quantification of the awarded costs.

[55] The applicants submit that the bill of costs which amounted to R 85 850.00 includes time spent by an employee of the first respondent. The applicants submit that these costs are costs paid or payable to a practising attorney. As a result, the court is requested to issue a declarator to the effect that the first respondent is not entitled to recover the amounts set out in the bill of costs.

[56] It is my considered view that the remedy of the applicants lies somewhere other than in this court. The taxing master has a discretion, when taxing any bill of costs, to depart from the tariff based on what is fair and reasonable, and in particular with reference to the express provisions of Rule 70(5). In the absence of an agreement regarding fees between an attorney and his client, the taxing master shall exercise his discretion to determine what constitutes fair and reasonable fees, which may in any given case be identical to or higher than the tariff.

[57] It must be accepted that there were costs incurred during the arbitration process. There were preparation costs. The first respondent is not seeking to recover costs of its employee as though it was an independent attorney. As already indicated the matter is clearly within the purview of the taxing master. The taxing master is endowed with the discretion to either allow or dismiss an item included in the bill of costs. The court declines an invitation to issue declarator in this regard.

The first applicant's claim for payment against first respondent.

[58] In prayer 6 of the notice of motion the applicant seeks payment of R 440 141.94 against the first respondent. It is alleged that this is for transport services rendered in terms of the agreement concluded on 29 November 2018. According to the applicants, payments have become due and payable and that despite demand, the first respondent has refused or neglected to pay.

[59] According to applicants the first respondent has not disputed the debt except for three invoices totalling R 77 000:00 and has therefore reduced the amount of the indebtedness to R 362 695. The applicants contend that they are entitled to recover this debt in motion proceedings as there is no dispute of facts or at best there is no bona fide dispute of facts.

[60] The first respondent has raised two defences against the claim. The first defence is that of prescription. According to the first respondent the agreement between the parties is regulated by the overriding standards of SAGOS which is to the effect that if there is dispute between the parties then such must be pursued within certain timeframes. As the applicants failed to act within that timeframe, the debt has prescribed.

[61] The SAGOS contract provides that 'any dispute between the parties arising from or in connection with the contract shall be finally resolved by way of a dispute procedure administered by AFSA. This is provided in clause 19 of the SAGOS contract. The clause also lays down the procedures to be followed in prosecuting that process and provides that there will be no right of appeal unless parties have in writing agreed prior to the pre-arbitration meeting.

[62] The first respondent bases its defence of prescription on the fact that agreement between the parties to be governed by certain terms and conditions applicable within the industry they were operating. In terms of one such industry practice is that disputes must be submitted for arbitration within prescribed timeframes.

[63] Furthermore, the first respondent relies on the provisions of clause 20 of the SAGOS contract which provides that 'the parties affirm that it is necessary that any dispute between them should be notified without delay and then pursued promptly. They therefore agree that, unless a party making a claim does so in accordance with the time limits specifically

relating thereto, as set out elsewhere in this document, or if no specific time limits apply, then in accordance with the requirements as set out below, such claim shall be barred and deemed to have been waived and abandoned for all purpose whatever'.

[64] The timelines are set as follows: 'any claim for any other failure to perform in terms of this contract, shall be notified in writing to the other party within 28 consecutive days from the date on which the other party could reasonably have become aware of such failure. Thereafter referred in writing to the Secretariat of AFSA within 21 consecutive days from the date of such notification to the other party. The arbitrator/tribunal shall determine whether there has been compliance with the provisions of this clause, but only if, and to the extent that any party in the arbitration proceedings raises the issue'.

[65] The applicants on the other hand contend that there is no dispute regarding the debt and therefore there was no need to refer an undisputed fact for arbitration.

[66] The first task is accordingly to identify if indeed there is no dispute of facts as alleged by the applicants. The case *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) 1155 (T) defined what is to be regarded as bona fide dispute of facts.

[67] *Room Hire* was followed with approval in *Wightman t/a JW Construction v Headfour (Pty) Ltd* (66/2007) [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) (10 March 2008) (SCA) para 13 where it was held: 'A real, genuine, and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will

only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter’.

[68] The court in *Wightman* continued at para 12 ‘Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter’s allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C’.

[69] As it can be discerned from the papers, the first respondent is not denying that it did not pay the amount of money claimed by the applicants. The first respondent relies on prescription. The applicants fail to apprise the court on the happenings around the period the claim arose and reason it did not act in terms of the procedure laid down in the SAGOS contract. It is also important to note that the SAGOS agreement refers to ‘any claim’. On plain-reading of the clause this includes failure by the first respondent to pay for services rendered.

[70] Both clauses 19 and 20 of SAGOS quoted above are couched in peremptory terms. This is clear from the use of the word ‘shall’ and ‘must’. It follows that the procedure is mandatory as well as the timeframes. The contention that clause 20 should be interpreted to mean that such reference is only necessary if there is real dispute between the parties is not supported by the objective and aims of the agreement. The parties are seeking a speedy resolution of their disputes outside of protracted legal process. Any other interpretation will strain the plain language used in the agreement.

[71] As indicated elsewhere in this judgment some of the advantages of arbitration is flexibility as parties can determine their own process. In this case the contracting parties determined the process to be followed and set it out in clauses 19 and 20 of the agreement. It is apparent the said clauses are industry specific and are accepted as such by role players in the industry.

[72] The parties are bound to honour their contract. In the case of *Basson v Chilwan* 1993 (3) SA 742 (A) at 762h the court commented that 'the importance of upholding the sanctity of contracts without which all trade would be impossible....' Further 'if there is one thing that is more than public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts when entered freely and voluntarily shall be held sacred and shall be enforced by court of justice. Therefore, you have this paramount public policy to consider- that you are not lightly to interfere with this freedom of contract'.

[73] In *Ferreira v Levin NO: Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) at para 26 described it as 'a central consideration in a constitutional state. These statements aim for reasonable certainty, so that parties can go about their business knowing the rule of the game; constitutional integrity is vital'. And in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) the importance of principle of sanctity of contract at para [98] Moseneke J (as he then was) pointed out that 'public policy cannot be determined at the behest of the idiosyncrasies of individual contracting parties. If it were so, the determination of public policy would be held ransom by the infinite variations to be found in any set of contracting parties'.

[74] The principle is clear and was enunciated in *Amalgamated Clothing and Textile Workers Union v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A) at 169F-H that 'When the parties agreed to refer the matter to arbitration, unless the submission provides otherwise, they implicitly ... abandon the right to litigate in courts of law and accept that they will finally be bound by the decision of the arbitrator.... In my opinion the Court should in no way discourage parties from resorting to arbitration and should deprecate conduct by a party to an arbitration who does not do all in his power to implement the decision of the arbitrator promptly and in good faith'.

[75] I am satisfied that any refusal to pay a demand as alleged by the applicants was in the context of their agreement a claim that needed to be addressed within timeframes of the agreement and failure to so act, resulted in the applicants being time barred. I therefore, find that the defence of prescription is valid and is hereby upheld.

[76] Having found in favour of the first respondent in this point, the finding is dispositive of the relief sought for a set-off in terms of prayer 6 of the notice of motion and as such nothing further will be said on this point. Same goes for the question of the settlement agreement between the first applicant and the third respondent. It is, however,

apposite to state that the settlement agreement is an order of court, and that the party in whose favour the order was granted is entitled to execute based on such order.

The delay in bringing application to set aside the award.

[77] It is common cause that the applicants are out of time in bringing this application. The Act provides that an application to set aside of an award must be brought within 6 weeks from the date the award was issued. This is provided for in terms of section 33(2) of the Act. Section 38 provides that 'the court may, on good cause shown, extend any period of time fixed by or under this Act, whether such period has expired or not'.

[78] The court is required to consider the reasons for delay in bringing the application and prospects of success of the applicant. In *Kroon Meubele CC v Wittstock t/a JD Distributors; Wittstock t/a JD Distributors v De Villiers and Another* 1999 (3) SA 866 9 E) the court stated that at page 874B- 875E 'Respondent does not explain why during that time he failed to obtain legal advice regarding his position. It seems to me that the time limits laid down in the Act hit at precisely such unconcerned inaction'. Further the court stated 'Also relevant to the question of good cause which the respondent must show for the relief of extension of the time periods in terms of s 38 are the merits of the application itself. In considering that issues it is necessary to have regard to s 28 of the Act' 'Award to be binding.

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

[79] The reasons given by the applicants are that they were unaware of the requirement of the time periods and only became aware when advised by their attorney. It was on the 20 January 2021 and instead of launching the application, the attorneys sent a letter to the first respondent and took issue with the costs that the first respondent was seeking to recover.

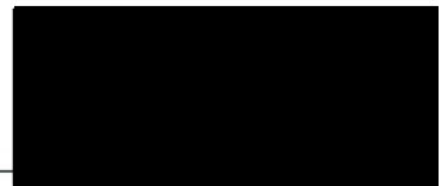
[80] The applicants admit that they were alerted through correspondence from the first respondent about being time barred. There was correspondence between two sets of attorneys and the application was only served on the 31 March 2021. This was 4 months after the award was issued. As already mentioned, the award was issued on 14 December 2020.

[81] The applicants have not dealt in any detail or provided sufficient information regarding the delay. There appears to be a reluctance on the part of the applicants to explain the delay. This is evident from the founding as well as the replying affidavits. Since the award was issued the applicants have been more concerned with challenging the correctness of the award than applying to have it set-aside. This can be deduced from the correspondence emanating from their attorneys. Very little consideration was given to the provisions of section 28 of the Act as adumbrated in *Kroon Meubele* quoted above.

[82] This attitude is further demonstrated by the fact that the relief seeking condonation for the late application was dealt with in the end and in a cryptic fashion. The applicant failed to appreciate that they were seeking an indulgence from the court and such an indulgence was not for the mere asking. However, in view of the order that the court intends making the matter is academic and moot at this stage.

Order

1. Application is dismissed.
2. Applicants ordered to pay costs including costs of counsel.



THUPAATLASE AJ

ACTING JUDGE OF THE HIGH COURT

Heard on: 24 October 2023

Judgment delivered on: 20 November 2023

For the first and second Applicants: Adv. D Marais

Instructed: Marnewick & Greyling Attorneys

For the first respondent: Mr Zimmerman (Attorney with right
Appearance In the high court)

Instructed by: Taitz & Skinner Attorneys