

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 65994/2020

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED.

22 June 2021

.....
DATE

A handwritten signature in black ink, appearing to be "J. Joubert", is written over a dotted line.

.....
SIGNATURE

In the matter between:

TSHWANE UNIVERSITY OF TECHNOLOGY
(registration number: 1924/002602/07)

Applicant

and

THONDONI PROPERTIES

First Respondent

MR C.J. STOLP N.O.

Second Respondent

JUDGMENT

JOUBERT AJ

1. The Tshwane University of Technology (referred to herein as “*TUT*”) seeks to set aside what is referred to as an “*interim arbitral award*” (“*the award*”) made by CJ Stolp, the Second Respondent in these proceedings (“*the Arbitrator*”), in terms of Section 33 of the Arbitration Act, 42 of 1965.
2. The bases on which it is sought that the award be set aside are that:
 - 2.1. the Arbitrator misconducted himself in relation to his duties as an arbitrator; and/or
 - 2.2. the Arbitrator committed a gross irregularity in the conduct of the arbitration proceedings.
3. TUT and Thondoni Properties CC (the First Respondent, referred to herein as “*Thondoni*”) had entered into a written lease agreement in respect of a commercial property known as Plot 9, Roodepoort, Polokwane, Limpopo Province (referred to herein as “*the Property*”) to be used by TUT as student accommodation.
4. In terms of the lease agreement, the agreement commenced on 1 April 2011 and expired on 31 December 2014, with the possibility of an extension for a further year.
5. The rent payable was R203,000.00 per month for a total of 140 students, which rental amount included utilities namely water, electricity and maintenance costs.

6. The TUT students did not, however, occupy the Property on 1 April 2011 as, so TUT claims, it was still under construction and not yet ready for human occupation. The students only occupied the Property during July 2011.
7. It is TUT's case that, pursuant to the students' occupation of the Property, numerous complaints regarding the suitability of the Property were lodged and numerous shortcomings were found regarding the suitability of the Property for student accommodation.
8. On 30 November 2011, TUT addressed a demand to Thondoni, requesting it to rectify certain defects (annexure "S7" to the founding affidavit). This letter was not addressed to Thondoni, but to "*Ndivho Consulting Engineers and Project Managers, Attention: Jonas Tshikundamalema*". TUT claims, however, that the addressee of the letter is of no consequence as Mr Tshikundamalema is the principal of Thondoni. The content of this letter is quoted below:

"Dear Sir,

NOTICE OF BREACH OF RENTAL AGREEMENT

We refer to the rental agreement signed between the Tshwane University of Technology and Thondoni Properties on 1 April 2011, for the renting of the property identifies as Plot 9 Roodepoort, Polokwane.

Add 1 Following previous correspondence and telephonic conversations between yourself and representatives of TUT, matters that renders the renting

of the properties absolute were brought under your attention. However you failed to correct those issues.

Add 2 A number of delegations from TUT visited the property on various dates and discovered that this property was not habitual for occupation by our students.

Add 3 At some stage, TUT had no other choice than to find alternative accommodation for the students since there was no provision of water or electricity.

Add 4 Despite various communications and discussions with you, the premises are still not in a condition for human occupation.

Add 5 Notice is hereby provided in terms of clause 22 of the referred to agreement that Thondoni Properties are in breach of the agreement. The breach items are captured on page 2 of this notice. You are afforded, despite the terms of the agreement, up to 31 December 2011 to remedy the breach. Failure will result in immediate termination of this agreement without further notice.

“With reservation of rights and without prejudice of rights.” (Sic)

9. The next page then contains the following list:

“List of items that render performance in breach:

- 1. Faulty electricity for the premises and not electricity certificate is available.*
- 2. There is no certificate indicating the quality of the borehole water and whether it is fit for human consumption.*
- 3. The fire protection equipment and fire plan is not according to standards.*
- 4. The number of required geysers was not installed and some were faulty.*
- 5. Septic tanks and drainage is not according to standards.*
- 6. No provision has been made for people with disabilities.*

7. *Entrance points from the tar road are not completed.*
8. *Only two refuse dust bins are provided for the whole residence.*
9. *There are no SHE bins provided in the ladies toilets.*
10. *No approved building plans are available.*
11. *No occupation certificate or Zoning Certificate is available.*
12. *No certificate for the quality of the borehole water is available.” (Sic)*

10. TUT’s attorneys addressed a further demand to Thondoni, on 5 December 2011 (annexure “S4” to the founding affidavit). The following is an extract from that letter:

“We have been instructed to place on record as follows:

1. *At all material times prior to, and upon the conclusion of the lease, it was common cause between the parties that the property identified in the lease would be used by our client for the accommodation of students. As such, it was within the contemplation of all parties concerned that the property and all structures and fittings thereon would be fit for human habitation, would comply with all relevant legislation and would be safe in all respects.*
2. *You at all times assured our client that the property would, immediately prior to alternatively upon occupation, further alternatively immediately thereafter, be fit as described above.*
3. *In the almost 8 months that have lapsed since the signing of the agreement, alternatively the occupation date as referred to therein, you have been unable to deliver to our client a property which is safe for human occupation and use.*
4. *Without limiting the general nature of your non-compliance, our client (as it has done before) wishes to record as follows:*

- 4.1 *the building plans for the property do not conform to the national building regulations and Building Standards Act Nr. 103 of 1977, in that they have not been approved by the relevant Local Counsel;*
- 4.2 *the septic tanks and drainage systems used on the property are insufficient for the amount of people within the property houses. The current septic tank is sufficient for 16 to 20 people while the lodge houses or was intended to house 140 students;*
- 4.3 *there are no facilities for persons with disabilities;*
- 4.4 *there is insufficient fire protection and- extinguishing systems in place;*
- 4.5 *there is no certificate of electrical compliance and the electrical installation on the premises is unsafe.*

Under the circumstances it is clear that you are unable to perform in terms of the agreement by providing a property which complies with legislation, is fit for human use and is safe.

In the circumstances our client submits that the contract should by mutual agreement be cancelled. All payments made by our client should be refunded.

Kindly respond to our client's submission on or before close of business this coming Friday the 9th of December 2011, failing which our client will proceed in terms of the agreement..." (Sic)

11. Yet a further letter was addressed to Thondoni on behalf of TUT on 20 January 2012 (annexure "S6" to the founding affidavit), requesting the following documentation:

“Aforementioned matter as well as our letter of the 5th of December 2011 refers. We confirm again that we act herein on behalf of the Tshwane University of Technology (‘TUT’).

We place on record that you have failed to adhere to our client’s demands as contained in the aforementioned letter and further failed to respond to the contents thereof.

Our client maintains its position as set out in the aforementioned letter and in amplification thereof demand that you provide our client with the following documents by close of business Monday the 23rd instant failing which our client will immediately cancel the agreement, remove all persons holding occupation of the building through them and institute action for recovery of damages including consequential damages:

- 1. the certificate of electrical compliance;*
- 2. the local city counsel’s approval of the building plans; and*
- 3. a valid occupational certificate.*

In general our client’s rights remain reserved.”

12. Following this correspondence addressed by TUT to Thondoni, TUT cancelled the lease agreement with Thondoni on 30 January 2012.
13. TUT instituted a claim against Thondoni for a refund of TUT’s deposit in the amount of R609,000.00.
14. Thondoni disputed the validity of TUT’s cancellation of the lease agreement and further instituted a counterclaim against TUT for the recovery of damages which Thondoni alleged it suffered as a result of the alleged unlawful cancellation of the lease agreement by TUT.

15. During 2014, the dispute between TUT and Thondoni was referred to arbitration, with the Second Respondent being appointed as the Arbitrator.
16. In the course of this arbitration, Thondoni requested a separation of issues which had the effect that the parties only proceeded on arbitration with TUT's claim and that the counterclaim was postponed.
17. The Arbitrator was called upon in the arbitration, to decide the following issues (as quoted from the award):

"9.1 Whether the conclusion of the Lease was induced by a material misrepresentation on the part of Thondoni;

9.2 If that cannot be found, whether Thondoni committed a breach of the contract;

9.3 And if so, whether TUT was entitled to legitimately cancel the Lease when it purported to do so;

9.4 And whether it effectively did so;

9.5 With regard to the counterclaim and only if the claim fails;

9.5.1 Whether TUT's actions, by exiting the premises and indicating that they regarded the Lease as cancelled, was a repudiation of the agreement;

9.5.2 Whether Thondoni is entitled to recover rent from TUT."

18. The findings made by the Arbitrator in respect of these issues were as follows:

18.1. On the issue of material misrepresentation:

- “17. TUT do not, in their statement of claim, rely on a representation consisting of a nondisclosure. There is no suggestion to be found, either in the pleadings, or the trial bundle of documents or the evidence of Mr Sibanda, that Thondoni concealed the fact that there were no building plans, occupational certificate or electrical compliance certificate, when the agreement was being negotiated. Quite to the contrary, from Mr Sibanda’s evidence, and the documentation and e-mails exchanged between the parties prior to the conclusion of the agreement, it appears that TUT called for those documents but nevertheless signed the Lease without any of these documents having been provided. At best there seems to have been an undertaking to provide these at a later stage when they became available. The non-disclosure, to the extent that there was one, never induced TUT into concluding the Lease.
18. The representations relied upon and supported by the evidence of Mr Patson Sibanda do not relate to statements of fact, but rather a promise or undertaking by Thondoni that the student accommodation at the leased premises would, at some future point, once completed, be fit for human occupation and safe for use for occupation and that services would function correctly and safely. TUT was fully aware that the premises were not ready for occupation by 1 April and the students only moved in towards the end of July.
19. I am also unable to find that the representations were false or would have influenced or induced TUT (or any reasonable person for that matter) to enter into the contract. From the

evidence, including documentary evidence, it is more than obvious that TUT signed the agreement under pressure of their own management and student body, and despite the fact that to their own knowledge, their own internal rules for entering into lease agreements, had not been complied with, and that the buildings on the lease premises were still under construction.”

18.2 In respect of the terms of the lease:

“22. The Claimant pleaded the relevant express, alternatively tacit or implied terms of the lease agreement in paragraph 21 of its amended statement of claim. The Defendant admitted the alleged terms to the extent that they are reflected in writing in the annexed Lease and accord with them. This has the effect that the only alleged terms that remained in dispute were the terms pleaded in the following paragraphs of the statement of claim:

22.6 ‘The premises shall, in all respects, be suitable for the lawful occupation and use as student accommodation premises’.

22.6(a) ‘The premises shall, in all respects, be fit for the purpose for which the premises were intended to be used by the Claimant, namely, student accommodation’.

22.7 ‘The Defendant undertook to attend to execute certain structural and external repairs within a reasonable time after notice had been given to the Defendant that such structural and external

repairs be done. In addition, the Defendant was obliged, in terms of paragraph 16.2 of the agreement, to rectify and repair any defect of which the Defendant was informed of in writing by the Claimant.'

22.8 *'That the Claimant's students would be able to occupy the premises lawfully, and that an occupational certificate would have been issued by the local authority, authorizing the occupation of the premises, and that all other services available at the premises for the students, such as, inter alia, water and electricity, would be safe and in such a state that the said services can be used both lawfully, effectively and practically, by the students.'*

23. *These alleged terms cannot be found expressed in the written lease agreement and must therefore be taken to be alleged, tacit or implied terms.*

.....

27. *The obligation of a lessor to deliver to a lessee, premises suitable for occupation and intended use and fit for the purpose of intended use, is a term implied by common law and can readily be found to be implied terms of a lease contract.*

28. *With regard to the implied terms pleaded in paragraphs 21.6 and 21.6(a) of the statement of claim, namely that the premises are suitable for occupation and intended use and fit for purpose, I find them to be implied terms of the Lease and part and parcel of the lessor's common law obligations to deliver the thing let to*

the lessee corresponding to the description in the contract and to place and maintain the property in a condition fit for purpose. The Defendant moreover, accepted, in its heads of argument, those terms to be common cause.

29. *I cannot, however, find that the imputation of lawfulness of the occupation is a term implied by law.*

30. *From the expressed terms of the Lease and from the surrounding circumstances gleaned from the evidence presented, I am unable to make a finding that both parties considered and agreed about the issue of the lawfulness or otherwise of the occupation and use of the premises at the time of conclusion of the Lease, but did not bother to express their agreement on this particular point. The lawfulness requirement is therefor not an actual tacit term.*

31. *I do find, however, that the question as to whether the premises would have been lawfully fit for use or occupation to be an imputed tacit term. I find that had the question been posed to the parties at the time as to whether the premises would have been lawfully fit for use or occupation, the answer seems inevitable that it would have been 'of course, we didn't trouble to say that, it is too clear' and obvious.*

.....

33. *As far as the terms alleged in paragraph 21.8 of the particulars of claim are concerned, I have concluded that it was a tacit term of the lease that the TUT students would be able to occupy the leased premises lawfully.*

34. *I am unable to find that it was a tacit or implied term of the Lease that an occupational certificate would have been issued*

by the local authority authorising the occupation of the premises. From the expressed terms of the Lease in conjunction with the surrounding circumstances prevailing at the time of the conclusion of the Lease (as gleaned from the evidence presented), an implication of a stipulation that an occupational certificate would have been issued by the local authority does not necessarily arise that the parties must have intended that the suggested stipulation should exist. Neither can I find any authority to the effect that such a term is implied by law or put differently that such a term would be a naturalia of an agreement of lease. Reading in such an implied term would also fly in the fact of the SCA decision in Wierda Road West Properties (Pty) Ltd v SizweNtsalubaGobodo Inc 2018(3) SA 95 (SCA).

35. *Finally, with regard to the Claimant's contention that it was a tacit or implied term of the Lease that all other services available at the premises for the students, such as, inter alia, water and electricity, would be safe and in such a state that he said services could be used both lawfully, effectively and practically by the students, I, by parity of reasoning, I find these terms to be implicit or tacit terms."*

18.3 In respect of a possible breach of those terms on the side of Thondoni:

- "37. *The Claimant claims that the Defendant breached the terms of the Lease in the following respects:*

- 37.1 *Failing to ensure that the premises were habitable and fit for human accommodation.*

37.2 *Failing to ensure that the premises are suitable and safe for lawful occupation and use by students on the premise that:*

37.2.1 *building plans for the premises (student accommodation) have not been approved by the relevant local authority;*

37.2.2 *the structures which the students occupied, were effected in violation of section 4(1) of the National Building Regulations and Buildings Standards Act 103 of 1977 (Building Regulations Act);*

37.2.3 *the septic and drainage systems on the premises were substandard and insufficient in their capacity for the number of students which needed to be accommodated at the premises;*

37.2.4 *there were insufficient fire protection and fire extinguishing systems in place as required by law;*

37.2.5 *the electrical installation on the premises was unsafe and of a substandard;*

37.2.6 *there was no valid occupation certificate as contemplated by section 14 of the Building Regulations Act.*

....

39. *The residence may not have been entirely to the satisfaction of the students who occupied the residence, but that, in itself, does*

not go anywhere near indicating that the residence was not habitable and fit for human occupation.

40. *With regard to the second alleged breach, namely, failure to ensure that the premises are suitable and safe for lawful occupation and use:*

40.1 *the lack of building plans; and/or*

40.2 *the premises having been erected in violation of section 4(1); and/or*

40.3 *the substandard and insufficient septic and drainage systems on the premises; and/or*

40.4 *the insufficient fire protection and fire extinguishing systems on the premises; and/or*

40.5 *the unsafe and substandard electrical installation on the premises; and/or*

40.6 *the absence of a valid occupation certificate;*

do not make the occupation and use of the premises by TUT or its students, unlawful.

Wierda Road West Properties (Pty) Ltd v SizweNtsalubaGobodo Inc 2018(3) SA 95 (SCA).

41. *The alleged failure by Thondoni to deliver the leased premises to TUT in a condition suitable and safe for occupation and use as student accommodation, on the basis of the substandard nature and incapacity of the septic and drainage systems, the insufficiency of the fire protection and fire extinguishing systems in place, and the unsafe and substandard electrical installation, may constitute a breach of a term of the Lease by Thondoni.*

42. *The uncontradicted evidence adduced by the witnesses for the Claimant, and the absence of any countervailing evidence on*

behalf of the Defendant, is sufficient to justify the conclusion that on delivery of the premises to TUT, there existed the alleged shortcomings with regard to the septic and drainage, fire protection and electricity systems in the leased premises, and that Thondoni therefore may have committed a breach of the Lease.”

18.4 As to whether TUT was entitled to cancel the lease:

- “45. *The Claimant pleaded that it was entitled to summarily cancel the Lease on the premises that the Claimant’s continued use and occupation of the premises would be a violation of the provisions of section 4 of the Building Regulations Act which would entitle the Claimant to summarily terminate the Lease. The reported decision of the SCA in Wierda Road West Properties (Pty) Ltd v SizweNtsalubaGobodo Inc 2018(3) SA 95 (SCA) found that continued use and occupation of leased premises by a lessee, where there were no approved building plans, would not be illegal. I accordingly find that the Claimant was not entitled to terminate the Lease summarily as a result of there being no approved building plans for the premises.*
46. *The breach of contract by Thondoni, namely that Thondoni failed to deliver the leased premises to TUT in a condition suitable and safe for occupation and use, I find not to be of a sufficiently serious nature as to justify summary cancellation by TUT. The breach patently does not go to the root of the contract or affect a vital part or term of the contract, or relate to a material or essential term of the contract, or relate to a material or essential*

term of the contract, or was a substantial failure to perform. TUT and its students did, after all, occupy the premises and seemed content to continue to use the premises pending the rectification of the complaints. TUT did retain the use and occupation of the premises from 18 July until the end of January of the following year. The evidence provides a clear picture of Thondoni actually remedying or attempting to remedy whatever complaints TUT or its students may have levelled and for the rectification of which Thondoni was responsible. The defective, inadequate or incomplete performance by Thondoni, nevertheless constituted some performance which TUT accepted by allowing their students to occupy the student accommodation. Ultimately, I find that the breach is not as serious as would allow TUT to summarily cancel the contract. After occupation TUT would have had to act in terms of clauses 16 and 22 if there were any defects that needed to be rectified or repairs that needed to be done.”

18.5 The Arbitrator then turned to a consideration of the question whether the lease contained a cancellation clause:

“48. The Lease contains a cancellation clause in clause 22.1 thereof which reads as follows:

‘It is deemed to be a breach of contract, (1) if one of the parties fails to comply with any term or condition of this agreement, and (2), furthermore fails to comply with the said term or condition within 7 days of being notified in writing by the other party about such breach, and (3), the

latter party is then entitled to cancel the agreement in full, including all incomplete assignments and tasks, without infringing any right of the party who cancels, which right should exist in terms of this agreement or could have been obtained otherwise.'

49. *In order for TUT to acquire a right of rescission (and entitlement to cancel the agreement), TUT would have had to notify Thondoni in writing of Thondoni's breach of the Lease and demanded of Thondoni, compliance with the term allegedly breached, within 7 days of being notified thereof."*

18.6 The Arbitrator then considered whether TUT had acquired the right to cancel the agreement:

- "50. TUT pleaded that the letters of demand dated 5 December 2011 and 20 January 2012, attached to the statement of claim as annexures B1 and B2, constituted written notification of the breach of a term or condition of the Lease and a demand to rectify and repair the defects (which constituted such breach) within 7 days, whereby TUT would acquire a right to cancel if Thondoni failed to rectify its breach within the 7 day notice period.*
51. *A simple reading of annexure B1 indicates a recordal of certain allegations pertaining to the suitability and fitness for purpose of the leased property, and that Thondoni had by then, not been able to deliver a property safe for human occupation and use, and followed by a statement 'that it is clear that (Thondoni) are unable to perform in terms of the agreement by providing a*

property which complied with legislation, is fit for human use and is safe'. No mention is made of any specific breach in order for Thodoni to be able to identify the alleged breach or to correct its alleged breach. Most importantly, the letter is not a demand at all. At most it is an invitation to agree to a cancellation of the Lease.

52. *On a reading of annexure B2, the Claimant confirms its contention that the Defendant failed to adhere to the demands contained in B1 demand of Thondoni to provide certain documents (certificate of electrical compliance; approved building plans and occupational certificate) by 23 January, failing which the Lease would be cancelled.*
53. *However, clause 22.1 of the Lease requires a 7 day notice period and the 3 day notice is patently inadequate to trigger the right to cancel.”*

18.7 The Arbitrator ultimately found that:

- “56. *This inevitably leads me to finding that the Claimant did not acquire an accrued right to cancel the contract and that the Claimant failed to establish that it legally cancelled the lease by means of the letter attached to the particulars of claim as annexure ‘C’.*”

19. Although the Arbitrator’s findings on the first two issues were not found in favour of TUT, it does not appear to take issue with those particular findings and only seeks to attack the findings as to whether TUT was entitled legitimately to

cancel the lease agreement and whether it effectively did so, specifically that in paragraph 56 of the award, quoted above.

20. The application is opposed by the Thondoni, who chose not to file an answering affidavit, but delivered a notice in terms of rule 6(5)(d)(iii), wherein Thondoni gives notice of its intention to raise the following points of law:

20.1. that the application constitutes an abuse of process whereby TUT, under the guise of a review, endeavors to prosecute an appeal;

20.2. the application does not disclose a cause of action;

20.3. there is no basis to aver that the Arbitrator misconducted himself and/or committed a gross irregularity in the conduct of the arbitration proceedings;

20.4. TUT's assumption that the lawfulness of the students' occupation depended on an occupancy certificate or approved building plans, is incorrect;

20.5. TUT incorrectly avers that the Arbitrator misdirected himself by "*completely ignoring the demand dated 30 November 2011*".

21. Counsel for TUT chose to criticise the use by Thondoni of the phrase "*the application does not disclose a cause of action*", as seeking to insert into application proceedings what, in essence, constitutes an exception. Whilst the

use of the phrase might be inappropriate, the contention counsel for Thondoni clearly sought to get across, was that in its view, TUT had not made out a case for the relief sought. This contention it is clearly entitled to make.

22. The Arbitrator did not participate in these proceedings.

23. Section 33 of the Arbitration Act, 42 of 1965 provides the grounds on which an arbitration award may be set aside. This section provides as follows:

“33. (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; and*

(c) *an award has been properly 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 or set aside....” (Emphasis added.)

24. In Palabora Copper (Pty) Limited v Motlokwa Transport & Construction (Pty) Ltd 2018 (5) SA 462 (SCA), the Supreme Court of Appeal stated (at paras [7] – [8]):

“[7] *The legal principles that govern the circumstances in which a court can set aside an arbitration award are reasonably clear, although their*

application in any particular instance may be problematic. The statutory provision invoked in the present case is s 33(1)(b) of the Act, which reads as follows:

‘(1) Where —

(a)

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

(c)

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.’

[8] This provision was the subject of detailed consideration by this court in Telcordia. 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 Wallis JA (Dambuza JA, Van der Merwe JA, Plasket AJA and Schippers AJA concurring) 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. The attack on the award must be measured against these standards.”

25. A mere dissatisfaction with the outcome of an arbitration does not constitute reason to seek to set the award aside.

26. TUT contends that in making his finding, the Arbitrator:

26.1. misconducted himself in relation to the duties as an arbitrator; and/or

26.2. committed a gross irregularity in the conduct of the arbitration proceedings.

27. The case advanced by TUT on paper is that it would constitute a ground for misconduct when an arbitrator ignores relevant evidence, alternatively makes findings unsupported by evidence before the Arbitrator.

28. TUT's case is that the Arbitrator ignored the demand contained in the letter dated 30 November 2011 (which I have quoted above).

29. TUT claims that, whilst this letter is not addressed to Thondoni, the person who it is addressed to the natural person responsible for Thondoni and further that Thondoni responded to this letter. These contentions have not been denied by Thondoni.

30. Mr Eastes (for TUT) argued that the Arbitrator should not have ignored the letter of 30 November 2011 for at least the following reasons:

30.1. the letter had been addressed to the natural person who represented Thondoni;

- 30.2. there is no indication that if the letter had been addressed to Thondoni, the reaction would have been different;
- 30.3. it is fundamentally wrong to expect from a party to put in his pleadings all material evidence. The evidence that the letter of 30 November 2011 had been sent, received and responded to formed part of the evidence the Arbitrator was required to have regard to, to make his findings, and
- 30.4. the letter was further specifically referred to in an exchange of better particulars prior to the arbitration.
31. Mr Eastes argues that in ignoring the 30 November 2011 demand (as TUT contends) or at the very least and not have regard to that demand, the Arbitrator shirked his duty and reneged on his agreement with the parties to arbitrate the matter. This would amount to the type of conduct referred to in Stocks Civil Engineering (Pty) Ltd v RIP N.O. and Another 2002 (3) BLLR 189 (LAC) at para [52]. The relevant extract from this judgment is set out below:

“52. In my view the following principles emerge: A court is entitled on review to determine whether an arbitrator in fact functioned as arbitrator in the way that he upon his appointment impliedly undertook to do, namely by acting honestly, duly considering all the evidence before him and having due regard to the applicable legal principles. If he does this, but reaches the wrong conclusion, so be it. But if he does not and shirks his task, he does not function as an arbitrator and reneges on the agreement under which he was appointed. His award will then be

tainted and reviewable. It is equally implicit in the agreement under which an arbitrator is appointed that he is fully cognizant with the extent of and limits to any discretion or powers he may have. If he is not and such ignorance impacts upon his award, he has not functioned properly and his award will be reviewable. An error of law or fact may be evidence of the above in given circumstances, but may in others merely be part of the incorrect reasoning leading to an incorrect result. In short, material malfunctioning is reviewable, a wrong result per se not (unless it evidences malfunctioning). If the malfunctioning is in relation to his duties, that would be misconduct by the arbitrator as it would be a breach of the implied terms of his appointment.”

32. It is further contended on behalf of TUT that the failure by the Arbitrator to take into account the 30 November 2011 demand indicates a latent defect in the thought process of the Arbitrator.
33. Reliance was placed on the statement made by Van Dijk AJA in Stocks Civil Engineering (Pty) Ltd (*supra*) at paras [53] – [55]:

“53. In Goldfields Investments Ltd v City Council of Johannesburg & another 1938 TPD 551,560 (a case according to Corbett CJ in Hira’s case 87A dealing with the first and narrowest species of review, not common law review) Schreiner J distinguished between gross irregularities that are patent – and occur during the course of the trial – and those that are latent – that occur in the mind of the judicial officer . These are only ascertainable from the reasons given by him. In neither case need there be intentional arbitrariness of conduct or any conscious

denial of justice. The crucial question is whether the irregularity prevented a fair trial of the issues. A wrong conclusion on law or fact does not necessarily lead to a conclusion that there has not been a fair trial. But if a mistake of law leads to a material misconception of the nature of the inquiry or of the court's duties in connection therewith, then the losing party has not had a fair trial.

54. *The concept of irregularity in the proceedings was dealt with by the Full Court in Ellis v Morgan and Dessai [1909 TS 576](#), 581 which remarked that “..an irregularity in the proceedings does not mean an incorrect judgment; it refers not to the result but to the methods 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.” Mala fides is therefore not a prerequisite and the bottom line is: has there been a fair trial? See also Paper, Printing, Wood and Allied Workers Union v Pienaar NO [\[1993\] ZASCA 98](#); [1993 4 SA 621](#) (A) 638H. In this case Botha JA expressed doubts whether the approach to errors of law in the context of common law reviews as summarized in Hira's case, can be accommodated under section 24(1) (c) of the Supreme Court Act 59 of 1959 which grants the power of review in the case of gross irregularity in the proceedings (639D). In so far as errors of law relate to the functions of an arbitrator, I do not share the doubts. Such errors, if material, amount to a gross irregularity in the sense this phrase has acquired.*
55. *The meaning of the phrase ‘gross irregularity’ has therefore been widened to include latent thought processes in the mind of the arbitrator which adversely impact upon the fairness of the proceedings. It must be accepted that the legislature was aware of this when the Arbitration Act was passed.”*

34. In this regard, Mr Eastes' heads of argument state:

"14. The arbitrator grossly misdirected himself and the facts and his assessment of the law was also fundamentally wrong which amounts to a latent defect and his thought process was tainted and it is a gross irregularity that he is tantamount to a latent thought process in the mind of the arbitrator. It is so defective in this matter that it adversely impacts upon the fairness of the proceedings."

35. Counsel for TUT further contents that the failure by the Arbitrator to have due regard to the letter of 30 November 2011 goes to the heart of the case. The argument is that the Arbitrator ignored that letter.

36. In response, Mr de Wet SC for Thondoni relied on the judgment of the Supreme Court of Appeal in Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 at paras [55] to [57], where (Thondoni contends) the test in Stocks Civil Engineering (Pty) Ltd (*supra*) at para [55] as relied on by TUT was specifically rejected.

37. Reliance was placed on footnote 52 of the Telcordia (*supra*) judgment. This footnote states as follows:

"52. A much wider statement by Van Dijkhorst J in Stocks Civil Engineering (Pty) Ltd v Rip NO (2002) 23 ILJ 358 (LAC) para 38 is contrary to all authority. Obviously, the supposition underlying any arbitration

agreement is that the arbitrator has to apply the law of the land; it does not follow that if he errs his award can be set aside.”

38. The award dealt with the letter in the following manner:

“55. In argument, TUT attempted to introduce a letter by TUT dated 30 November 2011 addressed to Ndivho Consulting Engineers & Project Managers, attention Jonas Tshikundamalema, as a further letter of demand which would have brought about the right to cancellation. This was, however, not the TUT’s case on the pleadings, and in any event does not unambiguously indicate what Thondoni has breached and what TUTU required of Thondoni to do to perge its breach.

56. This inevitably leads me to finding that the Claimant did not acquire an accrued right to cancel the contract and that the Claimant failed to establish that it legally cancelled the lease by means of the letter attached to the particulars of claim as annexure ‘C’.” (Sic)

39. On a proper reading of the Arbitrator’s award, it is clear to me that it cannot be said that he ignored the letter of 30 November 2011. The findings contained in para [55] of the award make clear reference to this letter and it is obvious to me that the Arbitrator had regard to the letter.

40. The fact that TUT may be of the opinion that the Arbitrator came to an incorrect finding as to the import of this letter, is of no moment. The authorities are clear that a mere incorrect finding on the law and facts is not reviewable.

41. From the authorities quoted by both counsel for TUT and Thondoni, it is clear that an arbitrator's decision can only be sought to be set aside if his finding on the facts or law is of such nature that it resulted in a procedurally unfair hearing. This is clearly not the case *in casu*.
42. I can find no evidence of gross misconduct or dishonest conduct or any conduct of the kind which would render the findings of the Arbitrator reviewable.
43. In these circumstances, I make the following order:
- 43.1. the application is dismissed, with costs.



I JOUBERT

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants: *Adv Jacques Eastes*

Instructed by: *JJR Incorporated Attorneys*

Counsel for the Respondent: *Adv Henk de Wet DC*

Instructed by: *DC Robertson Attorneys*

Date heard: *3 May 2021*

Date of judgment: *22 June 2021*