

REPUBLIC OF SOUTH AFRICA

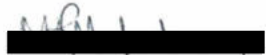


**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 10409/2022

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

22 July 2024



N V PROPERTIES (PTY) LIMITED

Applicant

and

GARY STEPHEN MYBURGH N.O

First Respondent

RADON PROJECTS (PTY) LIMITED

Second Respondent

JUDGMENT

Mdalana-Mayisela J

Introduction

[1] This is an application to review and set aside the arbitration award made by the first respondent and published on 2 February 2022 (“final arbitration award”) in his capacity as the arbitrator in arbitration proceedings between the applicant (employer and defendant in the arbitration proceedings) and second respondent (contractor and claimant in the arbitration proceedings). The ground of the review is that the first respondent committed a gross irregularity in the conduct of the arbitration proceedings and/or exceeded his powers as contemplated in section 33(1)(b) of the Arbitration Act, No. 42 of 1965 (“the Arbitration Act”).

[2] The applicant also seeks the order replacing the first respondent as the arbitrator in the arbitration proceedings with another arbitrator to be appointed in accordance with the method specified in clause 41.7.4 of the construction contract which is the subject of the arbitration proceedings; and the order correcting the arbitration award.

[3] The second respondent is opposing the review application and has filed a counter - application in terms of Rule 6(7) of the Uniform Rules of Court seeking the order that the Court in terms of section 31(2) of the Arbitration Act corrects the clerical mistake or patent error in the calculation of VAT in paragraph 44(a) of the final arbitration award; and the order making the final arbitration award an order of court in terms of section 31(1) of the Arbitration Act.

[4] The applicant is opposing the counter - application and has raised a plea of *lis alibi pendens* on the ground that on 21 February 2022 the second respondent instituted an application to make a final arbitration award an order of court in the East London Circuit Local Division of the High Court and the aforesaid application is still pending.

[5] The applicant has also brought a conditional interlocutory application for an order granting the applicant a one-day extension in terms of section 38 of the arbitration Act, of the six-week period which it had under section 33(2) of the

Arbitration Act within which to make the review application, being an extension from 16 March 2022 to 17 March 2022. The aforesaid order is sought only in the event of the Court finding that publication by the first respondent of the final arbitration award to the parties in the arbitration proceedings which is the subject matter of the review application took place on 2 February 2022 and not on a subsequent date; and that the applicant made the review application on 17 March 2022 and not on 16 March 2022.

[6] At the commencement of the proceedings I was advised by the parties that they have reached an agreement that the publication of the final arbitration award was made on 2 February 2022, and the applicant brought the review application on 17 March 2022. It follows that the conditional interlocutory application for a one-day extension of time should be granted by agreement between the parties. The parties also agreed that the applicant be ordered to pay the costs of the conditional interlocutory application, including the costs of two counsel on a party and party scale. They requested that the terms of their agreement be included in the main judgment.

Background

[7] The background facts are common cause between the parties. During November 2017 the applicant and second respondent concluded a written construction contract ("the contract") comprising of a standard form JBCC Series 2000 (4th Edition, code 2101, March 2014) Principal Building Agreement ("the PBA") plus the following Annexures thereto: Annexure A (the agreed revisions/qualifications to the tender), Annexure B (the provisional Bill of Quantities), Annexure C (the contract award document), Annexure D (the revised preliminary program documents), Annexure E (the site possession certificate), and Annexure F (the waiver of the contractor's lien document). The contract was for the construction of a two (level) storey Convention Centre, including an Exhibition Hall, on the rear portion of erf 39719 in East London and was signed by the second respondent on 6 November 2007 in East London and was countersigned by the applicant on 22 November 2007 in East London.

[8] The original contractually agreed date for the practical completion of the works to be carried out by the second respondent in terms of the contract was 17 October 2008. Possession of the site was given to the second respondent on 6 November 2007 whereafter it commenced with the works. During the construction period the second respondent was granted various revisions of the date for practical completion from 17 October 2008 to 9 March 2009. On 14 December 2009 a certificate of practical completion of the works was issued.

[9] Clause 40 of the PBA provides for a 2-phase disagreement/dispute process. Any disagreement between the applicant or its agents, on the one hand, and the second respondent, on the other, arising out of or concerning the PBA is processed as a "*disagreement*" in terms of clauses 40.1 to 40.3 thereof. If a disagreement becomes an (unresolved) "*dispute*" as contemplated in clause 40.3 thereof, it is thereafter processed as a "*dispute*" in terms of clauses 40.4 to 40.7 thereof.

[10] After practical completion of the works had been certified, the second respondent referred 20 disputes contemplated in clause 40.4.3 of the PBA to arbitration which, in terms of clause 40.5 thereof, had to be dealt with in terms of the JBCC dispute resolution procedures in clause 41.7 of the PBA. In terms of clause 41.7.4, the parties had agreed that the arbitrator to be appointed for the purposes of dispute resolution under clause 40.4.3 thereof would be a mutually agreed arbitrator appointed by the Association of Arbitrators who was suited to the nature of the dispute. The first respondent was mutually appointed by the parties as the arbitrator in terms of these provisions on 14 November 2010. The matter before the first respondent concerned several claims for extensions of time for practical completion and additional remuneration arising out of the contract.

[11] During the course of the arbitration the parties reached an agreement on claims 8, 17 and 41 which was made an interim award by the arbitrator on 15 August 2014. By that stage, the second respondent had withdrawn claims 1, 5, 9, 10, 11, 12, 15, 16, 18, 19, 25 and 29, and the arbitrator was required to

determine the merits of claims 2, 4 and 27 (treated as one claim), 24, 35 and 39 and quantum thereof. On 7 September 2015 and during a further hearing of the arbitration, the second respondent abandoned/withdrew claim 2, which at that stage reduced the number of claims for merits determination to four.

[12] The evidence was led and concluded on the merits of the four remaining claims at a hearing from 15 to 26 February 2016. The first respondent made the award on the merits on 6 March 2017, wherein the second respondent was granted an overall revision of the date of practical completion from 9 March 2009 to 7 August 2009, plus a further 4 working days revision to 13 August 2009 in respect of claim 39. All penalties imposed upon at the time and including such revised date were reversed. The applicant was directed to cause an account to be drawn in accordance with the merits award and to submit same to the second respondent for consideration. The second respondent was directed to respond to such account.

[13] What remained was the determination of the financial entitlements that accrued to the second respondent as a consequence of the revision of practical completion date. The second stage of arbitration commenced to determine the financial consequences of the revisions of the date for practical completion agreed to and granted during the first stage of the arbitration, being from 9 March 2009 to 13 August 2009. The applicant duly delivered an account as directed by the first respondent, albeit in the nature and form of submissions. In that account the applicant also asserted that it would be inappropriate for the first respondent to make an award for payment of money and that he should instead direct that certain entries be made in the next interim payment certificate. The second respondent also responded by way of submissions. It asserted that it was entitled to an award sounding in money. The parties were unable to reach agreement on the form of the award and the first respondent was requested to make a determination in respect of the outstanding issues. Correspondence thereafter ensued between the parties, of which I do not intend to refer to in this judgment, save for the relevant correspondence which will be referred to under hereunder.

[14] On 2 February 2022 the first respondent published his final award, in which he ordered the second respondent: (i) to pay an amount of “R6 442 59.34” plus VAT at the standard rate of 15%; and (ii) to pay the second respondent interest at the rate prescribed in terms of the Prescribed Rate of Interest Act reckoned from 28 February 2018 to date of payment.

Issues

[15] It is common cause between the parties that in terms of the provisions of the construction contract, and as a consequence of the aforesaid revision of the date for practical completion from 9 March 2009 to 21 August 2009, financial entitlements totaling R6 442 593.39 accrued to the second respondent, which amount represents the total of the following three amounts: (i) ‘Preliminaries’ in the amount of R2 793 326.58 excluding VAT; (ii) reversal of ‘Penalties’ in the amount of R1 774 509,91 excluding VAT; and (iii) default interest in the amount of R1 874 760.90 including VAT.

[16] The issue in dispute in this review application relates to the form of the final award the first respondent made in relation to the aforesaid financial entitlements. The second respondent submitted that it was entitled to an award sounding in money for payment of the aforesaid amount together with interest thereon to date of payment.

[17] The applicant submitted that the appropriate method by which the first respondent should have given effect to the financial consequences of the revisions of the date for practical completion agreed to and awarded was to give an effective award to ensure that such financial consequences were processed by way of interim and/or final payment certificates issued in terms of the payment provisions of the contract. It submitted that the first respondent in making the award sounding in money for payment of the financial entitlement accrued to the second respondent committed a gross irregularity in the conduct of the arbitration proceedings and/or exceeded his powers as contemplated in ss 33(1)(b) of the Arbitration Act.

[18] Furthermore, the applicant submitted during the arbitration proceedings, that it had already given effect to the financial consequences of the first respondent's award dated 6 March 2017 and that it had done so in interim payment certificates 35, 47 and 48 and their accompanying recovery statements.

Did the first respondent commit any gross irregularity and/or exceed his powers

[19] The applicant has brought the review application on the ground that the first respondent committed a gross irregularity in the conduct of the arbitration proceedings and/or exceeded his powers. The applicant bears the onus of persuading the Court to review and set aside the final arbitration award. Section 33(1) of the Arbitration Act sets out the grounds for review as follows:

- (i) where any member of the arbitration tribunal has misconducted himself in relation to his or her duties as arbitrator or umpire;
- (ii) where an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; and
- (iii) where an award has been improperly obtained.

[20] In *Rabinowitz v Levy and Others*¹ the Supreme Court of Appeal in relation to the interpretation of the provisions of section 33(1) stated:

“[14] The provisions of section 33 of the Act are exhaustive of the grounds of review of awards in consensual arbitrations. [16] An aggrieved party wishing to successfully review an arbitration award must bring his or her case squarely within the four corners of the relevant provisions of s33 of the Act. The primary principle is that material errors in an award, that is, errors which lead to a party being unsuccessful, are not reviewable,

¹(1276/2022)[2024] ZASCA 8 (26 January 2024).

otherwise the distinction between appeals and reviews would be eroded[17] and s 33 of the Act impermissibly becomes a right to appeal arbitration decisions[18]

[15] The 'gross irregularity' required by s 33(1)(b) must relate to the conduct of the proceedings, and not the result or outcome of the proceedings.[19] Thus, if an arbitrator is guilty of conducting an arbitration in some form of high-handed or arbitrary manner, or dishonestly, he or she would be guilty of a gross irregularity. But a bona fide mistake in respect of the merits, no matter how gross, will not suffice.[20] it is furthermore not every irregularity in the conduct of the proceedings that will afford grounds for review: the irregularity must have been of such a serious nature that it resulted in the aggrieved party not having his case fully and fairly determined.[21]

[16] In Lufuno Mphaphuli and Associates v Andrews[22] the Constitutional Court held:

'At Roman-Dutch law, it was always accepted that a submission to arbitration was subject to an implied condition that the arbitrator should proceed fairly or, as it is sometimes described, according to law and justice. The recognition of such an implied condition fits snugly with modern constitutional values. In interpreting an arbitration agreement, it should ordinarily be accepted that when parties submit to arbitration, they submit to a process they intend should be fair.'

O'Regan ADCJ cautioned that:

'It seems to me that the values of our Constitution will not necessarily best be served by interpreting s 33(1) in a manner that enhances the power of courts to set aside private arbitration awards ... In my view, and in the light of the reasoning in the previous paragraphs, the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If courts are too quick to find fault with the manner in which an arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a

gross irregularity within the meaning of s 33(1), the goals of private arbitration may well be defeated.’[25]”

[21] In *Telcordia Technologies Inc v Telkom SA Ltd*² the Supreme Court of Appeal held”

“[52] The term ‘exceeding its powers’ requires little by way of elucidation and this statement by Lord Steyn says it all:

‘But the issue was whether the tribunal “exceeded its powers” within the meaning of s 68(2)(b) [of the English Act]. This required the courts below to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have. If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under s 68(2)(b) is involved. Once the matter is approached correctly, it is clear that at the highest in the present case, on the currency point, there was no more than erroneous exercise of power available under s 48(4). The jurisdictional challenge must therefore fail.”

[22] The applicant stated that the first respondent committed a gross irregularity and/or exceeded his powers by making a final arbitration award for the payment of the amount sounding in money which was incompetent as it was inconsistent with his ruling of 21 August 2015 (“2015 ruling”) and confirmed on 25 November 2017, and also by making an award sounding in money which the Practical Agent could not have made and which was not permissible under the provisions of the PBA.

² 2007 (3) SA 266 (SCA).

[23] The second respondent contended that the 2015 ruling was not a ruling and it was not binding as it had the words “*any order which I may make*” thus describing something in the future. It has also contended that if the Court finds that it is a ruling, then the applicant must fail on the basis that by unconditionally participating in the final leg of the arbitration (in 2020 – 2022) which culminated in the final arbitration award, it forfeited the right to challenge the final arbitration award on the basis of gross irregularity or exceeding of powers. Even if it is entitled to bring a review application despite entrusting the first respondent with the decision, it must fail for not proving any of its grounds of review on either gross irregularity or exceeding of powers.

[24] The starting point in determining whether the first respondent committed a gross irregularity and/or exceeded his powers is to interpret the 2015 letter to determine whether it is a decision and it is binding. Clause 40.4.4 of the PBA provides that ‘*the arbitrator’s decision shall be binding on the parties who shall give effect to it without delay.*’

[25] In *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc and Others*³ the Appellate Division held:

“*The general approach to the interpretation of a judgment or order of Court was stated in Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) as follows (at 304D-H): ‘The basic principle applicable to construing documents also apply to the construction of a court’s judgment or order: the court’s intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well - known rulesThus, as in the case of a document, the judgment or order and the*

³1996 (3) SA 355 (A) at 362E-I.

court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it.... Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise - see infra. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court a quo and its reasons therefore, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts of evidence are admissible to resolve it. (Per Trollip JA.) (See also Administrator, Cape, and another v Ntshwa-qela and Others 1990 (1) SA 705 (A) at 715F – 716C; Weber – Stephen Products Co v Alrite Engineering (Pty) Ltd and Others 1992 (2) SA 489 (A) at 494E-H.) The correction of a judgment is dealt with more fully by Trollip JA in the Firestone case at 306F – 307E. It is to this passage that the notation 'see infra' refers. (See also Friedman v Mandes 1976 (4) SA 734 (W) at 736C – F; S v Wells 1990 (1) SA 816 (A) at 819J – 820G.) I am of the view that in general the same principles apply to the interpretation of an arbitrator's award, particularly where, as in this case, the award has been made an order of Court (cf Friedman v Mendes (supra))"

[26] The 2015 ruling reads as follows:

".....

Subject: Radon Properties, RULING: Financial consequences.

Importance: High

Good morning gentlemen,

I have again reviewed the competing submissions which I have received regarding the claimant's financial entitlement/s arising out of the extension which has so far been granted. I have also reviewed the pleadings and the relevant authorities.

As the position currently stands it seems to me that there is consensus save in relation to the form which the award should take.

The claimant seeks an award in a fixed amount of money whereas the defendant contends that I ought to make an award which is more in the nature of a declarator.

*Having reviewed the authorities and, as I say, the pleadings, the view which I have reached is that it would not be proper for me to make an award which could be construed as creating a debt outside of the ambit of the contract. That is to say, I am in agreement that any order which I may make would essentially be in the nature of directives as to how matters had to be dealt with in the final account and related documentation as opposed to a "free standing" award which could be enforced outside of the contractual framework. As I have previously pointed out, authority for this approach is to be found in several decisions, in particular see the Shelagatha case and also *Oua Oua Ree..... v Martin Harris & Sons OFS 2000 (3) SA 353*.*

To this I would add that the claim in the pleadings is not for a lump sum but rather for reversal of penalties, additional time related costs, additional escalation and the like.

The claimant is hereby requested to prepare a draft award following the principles outlined above and to submit same to the defendant for consideration.

If the parties are able to reach agreement, then I will make a partial award by agreement. Alternatively, to the extent that the parties may not be able to agree the terms of the order I will then decide whatever issues remain and make a further partial award.

....."

[27] The intention of the first respondent is to be ascertained primarily from the language of the document. The heading of the document is "*RULING: Financial consequences*". At the beginning he refers to the competing submissions made by the parties on the form of the award to be made in relation to financial entitlement/s. Then he stated that he has reached a view that it would not be proper for him to make an award which could be construed as creating a debt outside of the ambit of the contract. That is to say, he is in agreement that any order which he may make would essentially be in the nature of directives as to how matters are to be dealt with in the final account and related documentation. He gave reasons supported by authorities for his view. He concluded by directing the second respondent to prepare a draft award following the principles outlined in the ruling and to submit same to the defendant for consideration.

[28] The meaning of the abovementioned document is clear and unambiguous, and it requires no extrinsic evidence for its interpretation. From its language, it is clear that the view that the first respondent has reached is not prima facie and it is not a guideline. In my view the first respondent has made a decision in relation to the form which the award should take. The words "any order which I may make" relates to the award to be made in future in relation to financial entitlement/s and not the form of the award. It is clear from the language of the abovementioned document that the first respondent intended it to be a ruling and accordingly it remains binding on the parties.

[29] The first respondent has confirmed his decision on the form of the award in the letter to the parties dated 25 November 2017, wherein he stated:

"... In a letter received from the claimant representatives dated 18 October 2017 I was requested to issue an interim award on the "crisp issue" of whether I consider myself to have the jurisdiction to make a "final award sounding in money".

I do not believe that the question posed can properly form the subject matter of an interim award; However, I do believe that it would facilitate the final resolution (my emphasis) of this matter if I were to indicate what I consider the extent of my jurisdiction to be – with specific reference to the issue in question. That then is the purpose of this letter.

Having again reviewed the competing submissions and having researched the authorities I have to advise that I do not consider that I have the jurisdiction to make an award sounding in money which would be capable of being enforced independently of the payment in accounting mechanisms provided for in the contract. While I do not think it necessary to adumbrate at length given the nature of this communication I believe it appropriate to record that the suggestion that claims for payment arising in the course of a contract of this kind can arise independently of the payment regime or not be susceptible to discharge by way of latter certificates runs directly contrary to established jurisprudence, including decisions of the Supreme Court of Appeal - by way of example the decision in the Shelagetha case.

..... So that there should be no misunderstanding, I do consider my jurisdiction and powers to extend to directing the defendant to include certain amounts in subsequent interim certificates and/or a final account and/or payment certificate - this even though I do not have jurisdiction to consider the validity of any entries which may appear in those documents which do not form the subject of any of the disputes which form the subject of this reference.

I trust this will assist the parties in reaching a final settlement....."

[30] Having made a finding that the 2015 letter is a ruling and binding on the parties, I now turn to the question whether the applicant has proved that the first respondent committed a gross irregularity in the conduct of the arbitration proceedings. The applicant contended that the first respondent committed a gross irregularity in making an award for payment of the amount sounding in money contrary to his 2015 ruling and November 2017 view. The applicant has not tendered any evidence showing that the first respondent committed a gross irregularity in the conduct of the arbitration proceedings. Its complaint does not relate to the method of arbitration proceedings but to the result thereof. Such complaint cannot support a review application on the ground of gross irregularity in the conduct of the proceedings.⁴ In the result this ground of review must fail.

[32] I now deal with the question whether the first respondent has exceeded his powers in making an award for payment of amount sounding in money in the final arbitration award. The first respondent stated in his 2015 ruling and November 2017 letter that he did not have a jurisdiction to make a “*free standing*” award which could be enforced outside of the contractual framework and that he considered his jurisdiction and power to extend to directing the applicant to include certain amounts in subsequent interim certificates and/or a final account and/or payment certificate.

[33] He added that the second respondent’s claim in the pleadings is not for a lump sum but rather for reversal of the penalties, additional time

⁴ Bester v Easigas (Pty) Ltd and Another 1993 (1) SA 30 C at 43B-D.

related costs, additional escalation and the like. He made the award on the merits of the remaining claims in accordance with the aforesaid ruling.

[34] The award of payment of a lump sum and an amount sounding in money is inconsistent with the 2015 ruling which was binding on the first respondent, and November 2017 letter. Furthermore, the first respondent could only award that which was in accordance with the terms of reference. He does not have inherent jurisdiction to decide matters which are not pleaded.⁵ By making the aforesaid award the first respondent purported to exercise a power that he did not have. The jurisdictional challenge must therefore succeed.

[35] The second respondent has argued that the applicant was supposed to raise its objection to the first respondent's jurisdiction at the outset. It could not simply proceed to participate in the arbitration proceedings with a view to raising the jurisdictional point should the arbitration turn out unfavourably. This argument is without merit. The jurisdictional challenge by the applicant is related to the result of the arbitration proceedings. There was no ground for the applicant to raise an objection to the first respondent's jurisdiction before the final arbitration award was made. Furthermore, it is common cause that the applicant has always taken a position during the arbitration proceedings that the first respondent could only make an award in the form of a declarator or directive in relation to the second respondent's financial entitlement/s.

⁵ Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others 2008 (2) SA 608 (SCA) at paras 28 & 30.

[36] For the reasons stated above, I conclude that the first respondent exceeded his powers in making a final arbitration award for a payment of a lump sum and an amount sounding in money in relation to the second respondent's financial entitlements. Accordingly, the final arbitration award stands to be reviewed and set aside.

[37] In prayer 2 of the notice of motion the applicant has sought an order replacing the first respondent as the arbitrator in the arbitration proceedings with another arbitrator to be appointed in accordance with the method specified in clause 41.7.4 of the contract. Section 33(4) of the Arbitration Act provides that if the award is set aside the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court. Considering the reasons for reviewing and setting aside the final arbitration award stated above, I am inclined to grant prayer 2 of the notice of motion.

[38] The applicant in prayer 3 of the notice of motion has sought an order correcting the final arbitration award. In effect, the applicant has sought the substitution order recording that during the course of the arbitration proceedings, it had already given effect to the financial consequences of the first respondent's award dated 6 March 2017 and that it had done so in interim payment certificates 35, 47 and 48 and their accompanying recovery statements. The applicant relied on the aforesaid documents in its heads of argument and final draft order filed in the arbitration proceedings.

[39] I am not inclined to grant the substitution order for the following reasons. The second respondent objected to the applicant leading

evidence on the aforesaid interim payment certificates in the arbitration proceedings on the basis that they are irrelevant, inadmissible and prejudicial to the second respondent, and as a result the evidence on the aforesaid documents was not led. The aforesaid documents were not before the first respondent, and they could not be considered in making the final arbitration award. It is common cause between the parties that the relief sought in prayer 3 was not pleaded in the arbitration proceedings. It is trite that the parties are limited to their pleadings and are bound by them.⁶

Costs of the review application

[40] The applicant is substantially successful in the review application and is accordingly entitled to costs of the review application on a party and party scale.

Counter - application

[41] The second respondent has sought an order, in terms of s 31(2) of the Arbitration Act, correcting the clerical mistake or patent error in the final arbitration award to reflect the corrected VAT calculation. It has also sought an order for the final arbitration award to be made an order of the Court in terms of section 31(1).

⁶ Hanger v Regal and Another 2015 (3) SA 115 (FS) at para 10-11.

[42] Considering the conclusion I have reached in the review application, the counter - application has become moot and it stands to be dismissed. The applicant has not sought the costs of the counter – application.

Order

[43] In the premises, the following order is made:

1. The arbitration award made by the first respondent and published on 2 February 2022 in his capacity as the arbitrator in the arbitration proceedings between the applicant and second respondent is hereby reviewed and set aside.
2. The first respondent is replaced with another arbitrator to be appointed in accordance with the method specified in clause 41.7.4 of the contract.
3. The second respondent is ordered to pay the costs of the review application on a party and party scale.
4. The counter – application brought by the second respondent is dismissed.
5. The conditional interlocutory application for extension of time in terms of section 38 of the Arbitration Act 42 of 1965 is granted.
6. The applicant is ordered to pay the costs of the conditional interlocutory application on a party and party scale.


MMP Mdalana-Mayisela J
Judge of the High Court
Gauteng Division,
Johannesburg

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date for hand-down is deemed to be on 22 July 2024.

Appearances:

For the Applicant: Adv M A Crowe SC

Instructed by: Bax Kaplan Russell Inc

For the Second Respondent: Adv C H J Badenhorst SC
Adv D J Joubert

Instructed by: Klagsbrun Edelstein Bosman Du Plessis Inc