

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2023-113014
2024-022755
2023-089092

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
<u>28 August 2024</u>	
DATE	SIGNATURE

In the matter between:

MUNICIPAL EMPLOYEES' PENSION FUND

Applicant

and

**ADAMAX PROPERTY PROJECTS
MENLYN (PTY) LTD**

First Respondent

GERALD FARBER N.O.

Second Respondent

JUDGMENT

This judgment has been delivered by being uploaded to the CaseLines profile on and communicated to the parties by email.

[1] The Municipal Employees Pension Fund ("the Pension Fund") and Adamax Properties Projects Menlyn Pty) Limited ("Adamax") are co-owners of three shopping centres with which they conduct a letting enterprise. Disputes arose between these parties which disputes culminated in arbitration proceedings.

[2] On 14 July 2022 an arbitrator, Advocate Ginsburg SC, held for Adamax and handed down an award ("The Ginsburg SC award").¹ The award stands and remains final.² The relevance of this award shall be referred to below.

[3] There is some reference in the heads of argument and practice notes referring to the late filing of papers in the matters before me. Neither party presented any argument in relation thereto during the hearing. There was no prejudice indicated by either party due to such late filing and the matter was fully canvassed.³

[4] At the outset I highlight what the issues were before the second respondent, the arbitrator, Adv Farber SC ("the arbitrator"), in this matter. Adamax sought two declaratory orders:

1. declaring that the Pension Fund breached the provisions of the Co-Ownership agreement concluded between them on 9 November 2011 ("the Co-Ownership agreement") and
2. declaring that the Co-Ownership agreement was terminated on 18 October 2022.

[5] The background to this matter is well illustrated in the final award issued by the arbitrator:

- "2. Up and until 9 November 2011, Adamax was the owner of three community shopping centres situate at the intersection of Olympus Drive and Solomon Mahlangu Road in Faerie Glen, Pretoria, from which shopping centres Adamax concluded a letting enterprise.

¹ "73.1 The decision to embark on the present redevelopment of the Glen Village North and South Shopping Centres is a Prescribed Matter in terms of clause 7 of schedule 1 of the Co-Ownership agreement between the claimant and the defendant.

73.2 The claimant did not consent to the present redevelopment of the Glen Village North and South Shopping Centres as required by clause 11.9 of the Co-Ownership agreement read with clause 7 of schedule 1 thereto."

² "Arbitration Act 42 of 1965 section 28: "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."

³ *Pangbourne Properties Ltd v Pulse Moving CC* 2013 (3) SA 140 (GSJ).

3. On 9 November 2011 a 55% share in the properties and the letting enterprise conducted from them was sold by Adamax to the Pension Fund, with the result that Adamax's holding therein was reduced to 45%. The Pension Fund now held a 55% interest in the properties and the letting enterprise.
4. Adamax and the Pension Fund on the same date concluded a co-ownership agreement. Under the co-ownership agreement Adamax and the Pension Fund were entitled to share in the net income derived from the shopping centres in their respective *pro rata* shares. "Net income" was defined in clause 1.1(17) thereof to mean:-

'The net amount available for distribution after payment of all property related expenses due by the Co-Ownership or approved by the Management Committee to be calculated as per the draft statement attached hereto as Schedule 3, detailing the income and expenditure items in calculating the Net Income.'

This concept was accorded a similar meaning under the Property Management Agreement which was concluded by the parties on 13 August 2013.

5. The control and management of the affairs of the co-ownership was to vest in a management committee which was to comprise of two representatives appointed to it by Adamax and of three representatives appointed to it by the Pension Fund. The co-owners were each entitled to a proportionate vote equal to its *pro rata* share. It will thus readily be appreciated that the Pension Fund exercised control over the management committee, save that resolutions concerning 'Prescribed Matters' as set out in schedule 1 of the co-ownership agreement, whether passed at a management committee meeting or otherwise, would not be valid and binding unless unanimously assented to. Schedule 1 of the co-ownership agreement lists fourteen matters in respect of which unanimity was required. One such matter is that embodied in clause 7 of the schedule which provides as follows:

'To enter into any contract, arrangement or commitment involving expenditure on capital account or the realisation of capital assets if the amount, or the aggregate amount, of such expenditure or realisation by the Co-Ownership would exceed R1,000,000.00 (One Million Rand) in any one year or in relation to any one project and for the purpose of this paragraph, the aggregate amount payable under any agreement for hire, hire purchase or purchase on credit sale or conditional sale terms shall

be deemed to be capital expenditure incurred in the year in which such agreement is entered into.'

6. At all relevant times with effect from 18 February 2019 Metroprop (Pty) Limited ('Metroprop') acted as the sub-manager of the letting enterprise under delegation from the duly appointed manager, namely Akani Retirement Fund Administrators (Pty) Limited ('Akani'). Despite Akani having delegated its managerial rights and obligations to Metroprop it seemingly continued to play a role in the administration of the co-ownership. It is perhaps well to remember that Akani was at all material times the Pension Fund's administrator.
7. One of Metroprop's duties as the sub-manager related to 'the production of statements and variance reports, including inter alia the submission of Management Tax reflecting details of all rentals collected and Operating Costs and the Sub-Manager's Fee deducted' On this score, it was Metroprop's function to collect the rentals, to pay monthly expenses and to then distribute the net income to the co-owners in their respective *pro rata* shares, i.e. 45% to Adamax and 55% to the Pension Fund. Payments were to be made monthly to the co-owners, unless there were no funds available in any given month to do so.
8. During the period 2013, 2014 and 2015 Adamax and the Pension Fund agreed to redevelop the Glen Village Shopping centre and effect was given thereto by the then sub-manager, Christodoulou Real Estate (Pty) Limited.
9. On 2 April 2019 Mr Christodoulou, a representative of Adamax, wrote to Mr Joubert, the Chief Executive Officer of Metroprop, asking when payment might be expected by Adamax of its *pro rata* share of the net income for the month of February of that year. Mr Joubert responded on the same day stating that the Pension Fund had been requested to provide Metroprop with written instructions in relation to the payment and that it would be made as soon as those instructions have been received. It thus seems plain that had the three representatives of the Pension Fund on the Management Committee instructed Metroprop in writing to make payment Mr Joubert would have had no difficulty in doing so.
10. At a meeting of the Management Committee held on 9 October 2020, a majority decision was taken to undertake the development of Glen Village North & South Shopping Centres ('the redevelopment'). The representatives of the Pension Fund on the Management Committee supported the decision. The

representatives of Adamax were however not prepared to do so and refused to assent thereto.

11. Following thereon, several disputes between Adamax and the Pension Fund arose. One such dispute related to the validity of the resolution of 9 October 2020, the nature of which dispute is summarised in paragraph 47 of the award returned by Adv P Ginsburg SC in the arbitration which was convened to resolve it.

'47. It is common cause that the 2020 redevelopment was approved at a management committee meeting by a majority vote of the MEPF only and not by unanimous assent as required by clause 11.9 of the COA. Mr Letjane said that the vote taken at the co-ownership meeting of 9 October 2020 was merely the execution of the decision that was taken in 2013, 2014 and 2015 to redevelop Glen Village. There is a dispute whether a majority decision of the management committee is sufficient to justify a decision to undertake the 2020 redevelopment. The MEPF contends that a majority decision is adequate. It does so on the basis that the earlier decision to approve the 2014/2015 redevelopment was still extant, and all that was necessary to approve the 2020 redevelopment was the majority vote. Adamax disputes this and contends that unanimous assent was required to approve the 2020 redevelopment.'

- 12 This dispute (among others) was referred to an arbitral Tribunal comprised of Adv Ginsburg SC. In the interim Metroprop had given effect to the so-called resolution of 9 October 2020. Contractors and the like were appointed and costs and expenses are incurred. Adamax's *pro rata* share of its nett income was from time to time reduced to make provision for the payment of those costs and expenses ('the redevelopment costs').
- 13 On 2 November 2020, Ms Sunelle Eloff, of Malatji & Co, Adamax's attorneys, raised a complaint in an email to Mr Mabasa and Mr Letjane, representatives of the Pension Fund, and to Mr Joubert, concerning the deduction of the redevelopment costs from Adamax's profit share. She said that 'neither the MEPF nor Akani can lawfully give an instruction to Metroprop to withhold payments to Adamax.'

There was no response.

- 14 On 20 November 2020, Ms Eloff, acting on behalf of Adamax, declared a dispute with the Pension Fund, which disputes related, *inter alia*, to the deduction of the redevelopment costs from Adamax's profit share. She referred the dispute to arbitration, *inter alia*, intimating that an award would be sought compelling the Pension Fund to instruct Metroprop to pay over all the rental income due to Adamax, free of any in deductions relating to the redevelopment costs.
- 15 Up and until 30 June 2020, Metroprop had deducted the sum of R6 609 145,40 from Adamax's *pro rata* share of the net income. As at that date, an amount of R8 077 844,37 had been deducted by Metroprop from the Pension Fund's *pro rata* share of the net income.
- 16 The money so deducted was used to fund the redevelopment costs.
- 17 On 3 November 2021, Mr. T Malatji (Ms Eloff's, co-director at Malatji & Co) and Ms Eloff, addressed a letter on behalf of Adamax to the Board of the Trustees of the Pension Fund, the Pension Fund, Akani and the Pension Fund's attorneys, Webber Wentzel, recording the following in paragraphs 31 to 43 thereof:
31. In terms of clause 12.1 of the Co-Ownership Agreement, every Co-Owner is entitled to share in the Net Income derived from the Shopping Centres in its Pro Rata share colon:
- 31.1. Subclause 12.1 provides that:
- 'every Co-Owner is entitled to share in the Net Income derived from the Shopping Centres in its Pro Rata Share.'
- 31.2 Net income is defined in sub-clause 1.1 (17) to mean:
- Net Income means the net amount available for distribution after payment of all properly related expenses due by the Co-Ownership or approved by the Management Committee to be calculated as per the draught statement attached hereto as Schedule 3, detailing the income and expenditure items in calculating the net income.'
- 31.3 Pro Rata Share is defined in sub-clause 1.1(23) brackets to mean:
- 'Pro Rata share means the pro rata share of the Co-Owners in the Letting Enterprise, which will be as follows

- (a) The Fund: 55% (FIFTY FIVE PERCENT);
- (b) Propco: 45% (FORTY FIVE PERCENT);

32. In terms of clause 8.3 of the Property Management Agreement:

'The Net Income shall be payable to the Owner once a month. The Net Income shall be payable at the end of the Submanager's monthly financial cycle into such bank account as may be nominated by the Owner in writing from time to time.'

33. Adamax became aware that Metroprop had impermissibly deducted the amounts detailed in Annexure 'C' hereto from the Net Income due to Adamax in respect of:

33.1. Glen Village North - R627 637 as at month end September 2021;

33.2 Glen Village South - R363 476 as at month in September 2021;

33.3 Parkview – R3 237 958 as at month end September 2021.

34 These deductions are impermissible in terms of the Co-Ownership Agreement in that they:

34.1 Do not fall within expenses allowed for in Schedule 3; and/or

34.2 Constitute expenses relating to Prescribed Matters which Adamax has not agreed to.

35 The aforementioned impermissible deductions are causing Adamax and its subsidiaries irreparable harm as, to the knowledge of the MEPF, Adamax and its subsidiaries are dependent on the Net Income to operate the business of Adamax including but not limited to servicing its bond registered over the common properties.

36 The aforesaid impermissible deductions are being made with approval and acquiescence of the MEPF and the MEPF is hereby notified in terms of clause 28 of the Co-Ownership Agreement that, as a result, it is in breach of its contractual obligations under the Co-Ownership Agreement.

37 Adamax hereby demands that the MEPF forthwith issues instructions, alternatively consents that Adamax may issue instructions, to Akani and/or Metroprop to reverse these impermissible deductions and forthwith make payment thereof to Adamax.

- 38 Should the MEPF fail or refuse to issue alternatively fails or refuses to consent that Adamax may issue instructions to Akani and/or Metroprop to reverse these impermissible deductions, then Adamax intends, upon the expiry of 21 date of this letter, referring the dispute to arbitration.
- 39 In addition, we hereby notify you in terms of clause 28 of the Co-Ownership Agreement that our client intends approaching the Gauteng Division of the High Court for urgent interim relief to protect it and its subsidiaries from irreparable harm pending either compliance by the MEPF with Adamax's demands or resolution of the dispute that will otherwise arise by way of arbitration.
40. We remind you that your client has previously directed that impermissible deductions be made from the Net Income due to our client and only caused those impermissible deductions to be reversed once the matter had been referred to arbitration. The MEPF's conduct in this regard is a transparent attempt at financially starving our client for its own ulterior purposes.
41. Our client's rights in respect of each of the aforesaid breaches of contract by the MEPF are reserved in the event of the MEPF persisting with breaching its contractual obligations, which rights include cancelling the Co-Ownership Agreement.
- 42 We place on record that our client will hold the Trustees personally liable for any damages suffered by our client as a result of the Trustees' gross, negligent and/or reckless actions and dereliction of their duties.
- 43 We await your clients respond to the above demands.

There was no response.

18. On 30 November 2021, Mr Joubert wrote to both Adamax and the Pension Fund recording that the co-owners had resolved to undertake the redevelopment with a total capital outlay of the project amounting to R221 000 000.00. He stressed that the co-owners were liable to contribute thereto based on their *pro-rata* shares.
19. On 14 July 2022, Adv Ginsburg SC published his award in the arbitration. He, in relation to Adamax's claim, *inter alia* made the following determinations:

- 73 The following award is made:

73.1. The decision to embark on the present redevelopment of the Glen Village North and South Shopping Centres is a Prescribed Matter in terms of clause 7 of schedule 1 of the Co-Ownership Agreement between the claimant and the defendant.

73.2 The Claimant did not consent to the present redevelopment of the Glen Village North and South Shopping Centres as required by clause 11.9 of the Co Ownership agreement and, with clause 7 of Schedule One there too.

20. On five August 2022, Ms Eloff wrote to Mr Joubert as follows:

'As you are no doubt aware by now, the arbitrator found that the development of' . . . 'was a Schedule 1 of the Co-Ownership Agreement event, and required consent from Adamax, which they never gave. The result is that the development is unlawful, and the appropriation of our client's rental income was in turn also irregular and unlawful. We have demanded from the Pension Fund that the unlawfully deducted funds be paid over to client within 7 days. We bring this to your attention as Metroprop is implicated in the unlawful appropriation of funds and we hold instructions also to proceed against Metroprop for recovering thereof, and also too lodge complaints at the various professional and regulatory bodies relating to the misappropriation of Trust Funds.'

21. Mr Joubert did not respond, seemingly, so he said when he later testified, because no demand had been made of him to make payment. He moreover did not even consider it necessary to submit the email in question to the Pension Fund for its consideration.

22. On five August 20/20/22 Ms Eloff addressed an e-mail to Webber Wentzel in the following terms:

'Following the arbitration award by Ginsburg SC, it has now been established that the MEPF's unilateral use of the rental income to fund the Glen Village unlawful development, is irregular and amounts to unlawful use of our client's rental income.

We attach it to a detailed breakdown of the capital expenditure on the GV development as extracted from the cashflows our client received from Metroprop.

You will note from the summary that MEPF unlawfully spent R6 609 145,40 of our client's rental income on the unlawful development.

We hereby demand on behalf of our client, that the R609 145,40 must be paid over to our client within 7 days hereof. In the event that the MEPF fails to repay the rental income they unlawfully appropriated, we will proceed with steps to recover it and laying further complaints with the FSCA and the EAAB.'

23. On 19 August 2022, Mr Christodoulou on behalf of Adamax, wrote to Mr Joubert as follows:

'Please confirm that we will receive our portion as co-owners for the July 2022 rental income collected by Metroprop? Please confirm that we will get our share without any capital deduction?'

24. On 24 August 2022, Webber Wentzel responded to Ms Eloff's email of 5 August 2022, in the following terms:

- '1. We refer to your email of 5 August 2022, in terms of which your client demands payment from our client in the amount of R6 609 145,40, which amount allegedly comprises your client's share of the rental income derived from the Glen Village properties and expended on the redevelopment thereof ('the claim').
2. Our client notes, however, that the claim fails to take into account several factors which impact on its proper quantification. Most importantly, the claim includes rental income received from the tenants whose leases have persisted because of the redevelopment and whose tenancy was secured on the basis of the redevelopment proceeding. In other words, without the redevelopment, the rental income derived from the co-owners and thus your client's share in the rental income, would be materially reduced.
3. More generally, the Letting Enterprise has been enhanced by and become more profitable as a result of the redevelopment thus directly impacting on the valuation of not only the Glen Village properties, but the Letting Enterprise itself. Your client has thus commercially benefited and been enriched, and continues to benefit from the redevelopment (both from an income and valuation point of view).
4. In light of the foregoing considerations, we note that our client is in the process of preparing a detailed presentation to the co-ownership, in terms of which our client intends to set out the relevant financial figures related to the redevelopment, including, inter alia, the increased rental income from and profitability of the Glen Village properties, expected return on

investment, as well as details concerning tenant interest and commitments arising out of the redevelopment.

5. Our client intends to make the aforesaid presentation to the co-ownership by the middle of September 2022. Following such presentation, the co-owners can then decide how to proceed, including the proper quantification of benefit and enrichment, and whether to ratify the redevelopment and approve its continuation by way of a vote. On a proper legal analysis, no amounts are owing to your client.
 6. Our client's rights in relation to the alleged claim are, of course, reserved, as all its rights in relation to the arbitral award handed down by Mr Ginsberg SC in July 2022. Nothing in this correspondence or any other conduct by our client should be construed as any waiver or abandonment of any rights.'
25. Strikingly, Webber Wentzel in its response did not dispute the allegation that the Pension Fund had spent R6 609 145,40 of Adamax's profit share on the development which advocate Ginsburg SC determined had not been assented to by Adamax. It in justification of Pension Fund's conduct recorded that Adamax had overlooked certain ancillary benefits which it had derived from the redevelopment.
26. Malatji & Co responded thereto on 5 September 2022 when it in a letter addressed both Webber Wentzel and the Pension Fund's board of trustees in the following terms:
- '1. We refer to our e-mail to you on 5 August 2022 and your response of 24 August 2022 in which you made it clear that your client, the Municipal Employees Pension Fund ('the MEPF'), opposes and resists the payment of the past unlawful deductions ('the unlawful deductions') to our client, Adamax Property Projects Menlyn (Pty) Limited.
 2. We do not intend to deal with each and every allegation in your letter and our failure to deal with it should not be construed as an admission thereof. Our client's right to deal fully with the contents of the letter at the appropriate juncture is reserved.
 3. At the outset, we note that there is no basis in law and/or in fact for your client to refuse that the unlawful deductions be paid to Adamax. In addition, as you are no doubt aware, your client is impermissibly

attempting to set-off an opposed, illiquid claim against a liquid amount owing to Adamax.

4. Based on your client's instructions, the Manager, Akani Pension Fund Administrators (Pty) Limited ('Akani') and the Submanager, Metroprop (Pty) Limited ('Metroprop'), have refused to effect payment of the unlawful deductions to Adamax.
5. The MEPF's conduct constitutes:
 - 5.1. a breach of clause 6 of the Co-Ownership agreement in that it is acting in bad faith; and
 - 5.2. a breach of clause 12.1 of the Co-Ownership Agreement in that the MEPF is actively depriving Adamax of its share of the Net Income to which it is entitled (in the form of the unlawful deductions).
6. The MEPF is accordingly hereby notified in terms of clause 28 of the Co-Ownership Agreement as set out in paragraph 5 above and that if it fails to ensure that payment of the unlawful deductions reflects in Adamax's bank account as demanded within 21 (twenty one) days of receipt of this written notice, our client intends cancelling the Co-Ownership Agreement and referring the breach and termination of the Co-Ownership Agreement to Arbitration as provided for in clause 28, read with clause 19.7 of the Co-Ownership Agreement. Our client's rights to take such other steps as may be called for in the circumstances to compel payment of the unlawful deductions are also reserved.
7. Take note further that:
 - 7.1. Should the MEPF fail to remedy its breach in the time provided and Adamax terminate the Co-Ownership Agreement, then Adamax will also request that the appointed Arbitrator make an award for the dissolution of the Co-Ownership in terms of previously ordered by De Villiers AJ in the South Gauteng Division case NO 2018/14155.Semi; and
 - 7.2. Our client is now compelled to apply to the High Court that the award of Adv Ginsburg SC be made an award of court in order to ensure that your client abides the award. Should your client persist in breaching the Co-Ownership Agreement by instructing or causing that unlawful deductions are retained, now or in the

future, in contravention of the award, our client will then proceed to bring the necessary content of court proceedings.

8. Lastly, we take note of your client's intention to make a presentation to the Co-Ownership on the matters outlined in paragraph 4 of your letter. Our client cannot prevent your client from making a presentation if it so wishes, however, your client should take note that our client will not ratify the unlawful redevelopment, nor can it be compelled to do so.
9. We await your client's payment.'
27. The Pension Fund did not comply with the demand and on 18 October 2022 the co-ownership agreement was terminated by Adamax.
28. On 24 November 2022, Webber Wentzel in a letter to Malatji & Co recorded that:

'Our clients denies that your client has any right or entitlement to cancel the co-ownership agreement on the basis of the allegations set forth, in the statement of claim, that it is or was in breach material or otherwise of the Co- Ownership Agreement. In any event, the purported termination of the Co- Ownership Agreement does not necessary equate or give rise to the dissolution of the underlying ownership and Letting Enterprise.'

This letter went on to record the following:

'Moreover, the award rendered by Mr Ginsberg does not have the effect of entitling your client to payment in the amount of its share of the rental income expanded on the redevelopment. In terms of the award, Mr Ginsberg decided only that the redevelopment was pursued in the absence of unanimous assent between the co-owners. The fact remains that our client, as the majority co-owner, voted in favour of the redevelopment, whereas your client voted against it in such circumstances there is a clear deadlock between the parties in respect of the redevelopment which deadlock ought to be resolved in accordance with the mechanism provided in clause 21.'

Strikingly, the contents of paragraph 4 of Malatji and Co's letter of 5 September 2022 were not addressed.

29. Following the letters of demand of 5 August and 5 September 2022, the Pension Fund sought to convene management committee meetings on 19

September, 29 September and on 7 October 2022 in an endeavour to persuade Adamax that it had been enriched by the redevelopment and that it was only proper for it to contribute to the expenses which had already been and which would in the future be, incurred on account of it. No such meeting ever took place. It is plain that Adamax had no interest in participating in any such meeting.

30. It is perhaps well to mention that Metroprop on a recurring monthly basis fully and meticulously accounted for its administration to both at Adamax and the Pension Fund. The Pension Fund was thus aware that monies were being deducted from Adamax's *pro rata* share of the net income, which monies were used to pay the redevelopment costs.
31. Mr Joubert declined to assist Adamax in the preparation of its case in the current arbitration. He refused to consult with it and to testify on its behalf. He moreover refused to provide it with the documents which it considered necessary for the proper presentation of its case."

[6] Prior to the final award, the Pension Fund launched two review applications against the arbitrator's award. Save for the review of the final award now before me, these were review applications as follows: the first award was a refusal to postpone the arbitration proceedings regarding certain issues;⁴ and the second, an award disallowing the Pension Fund from leading inadmissible evidence.

[7] The Pension Fund approached a court for a stay of proceedings due to the award in paragraph A that certain issues were to proceed, but Moorcroft AJ issued an order dismissing the application for a stay. The result was that the section 3 application, to refer the matter to a court instead of it being dealt with in arbitration proceedings, remains alive before me.

[8] The first difficulty that arises is the Pension Fund's reliance on both section 3(2)(b) and (c) of the Arbitration Act for the relief sought in this matter.⁵ What is

⁴ "A. Save for what is set out in paragraph B thereof, the arbitration is postponed sine die, pending the final outcome of the application instituted by the Municipal Employees' Pension Fund under section 3 of the Arbitration Act of 1965.

B. The following matters will be determined at the hearing of the arbitration to commence on 22 November 2023:

1. The first Special Plea embodied in the Statement of Defence of the Municipal Employees' Pension Fund;

2. Prayers 1 and 2 embodied in Statement of Claim of Adamax Property Projects Menlyn (Pty) Limited."

⁵ "(2) The court may at any time on the application of any party to an arbitration agreement, on good cause shown-

(a) ...

immediately apparent is that subsection (c) can have no application after the completion of the arbitration proceedings. The words that arbitration agreement “shall cease” to have effect can only refer to the court’s power *ex nunc* and not *ex tunc*. It cannot, in my view, be retrospectively applied to arbitration proceedings which have been concluded. The dispute is no longer alive and has been determined. If this section is interpreted to allow for a dissatisfied party to approach the court for order after completion of the arbitration proceedings, it will open the doors to an abuse by parties dissatisfied with awards finally issued by arbitrators. I find nothing in the wording of the subsection that would allow a court to declare that the arbitration agreement should cease to have effect retrospectively. The words are expressed in the future tense.⁶

[9] A similar difficulty arises with the relief sought under section 3(2)(b). The arbitration in *casu* is a done thing. A final award has been made. Any order that a dispute shall not be referred to arbitration would be ineffective. The subsection foresees that it could apply prior to the arbitration proceedings being finalised and an award issued. The words “shall not be referred . . .” similarly refers to the future conduct of the matter. It could never have been the intention of the legislator to allow a finalised dispute not to be “referred” to arbitration after the completion of proceedings. Such interpretation would be non-sensical. The words such as “should not” or “should not have” could have been employed if the legislator intended any relief after the finalisation of the arbitration proceedings. Again, granting relief based on this subsection after the completion of the arbitration will, in my view, lead to an abuse where disgruntled parties will attempt to avoid that which had properly and validly occurred at arbitration proceedings. I am of the view that there is no room, after the completion of arbitration proceedings, for reliance on section 3(2)(b) or (c). Counsel for the Pension Fund argued that the words in subsection 2 “at any time. . .” allow for an interpretation that is open for an applicant to seek relief also after the completion of the arbitration proceedings. I disagree. If the legislator intended that to be the case, a court may well after completion of proceedings, also invoke section 3(2)(a) by setting aside the arbitration agreement. I do not deal with the limited grounds upon which a

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

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

⁶ Oxford Concise Dictionary definition of “shall”.

court may invoke section 3(2)(a) but repeat, that the abuse that will be unleashed to have arbitration agreements set aside by the dissatisfied parties after the event, cannot stem from the wording of the section. In my view, the relief provided for in section 3(2) is available to a party prior to the completion of arbitration proceedings and, in any event, only prior to a final award.

[10] Much argument was advanced by the Pension Fund that centred around the fact that there is pending litigation in the Pretoria High Court (“the Pretoria action”) and that the disputes should be consolidated in that action. I deal with the Pretoria action below and for the reasons that I find that the Pretoria action has no bearing on the declaratory relief sought in the arbitration proceedings, that argument too must fail also in relation to the relief sought under section 3.

The Pretoria Action

[11] In these and other proceedings, the issue that was raised was referred to as the Pretoria action or that certain matters were *lis pendens* in the Pretoria court. The result aimed at by the Pension Fund was to consolidate the declaratory orders sought in the arbitration with the action which has been pending in the Pretoria High Court since 2016. In order to evaluate this argument which found the basis of relief sought in terms of section 3 of the Arbitration Act. I keep in mind that the Pension Fund based its case for a postponement of the arbitration proceedings on the very issue that the matter was *lis pendens* in Pretoria or should be referred to that court for determination. The invitation to the arbitrator to decide the issue was squarely raised before him. He had to determine whether there was merit in the application to postpone the matter due to it being *lis pendens* in the Pretoria High Court. Counsel for the Pension Fund agreed that the arbitrator “would have to consider the reasons for the postponement”. When asked as to how the arbitrator was to word his award dealing with the issue specifically raised before him, counsel for the Pension Fund suggested that the arbitrator should have issued some or other award without reference to the *lis pendens* issue because it was also an issue pleaded by the Pension Fund as a substantive defence. This submission has no merit. If a party raises an issue before an arbitrator, the latter is (and was in this case) obliged to deal with the merits of the issue. A failure to do so, may, in itself, lead to the arbitrator failing to consider that which was placed before him and it, on that basis, leading to review proceedings. I find that the arbitrator

was obliged to consider and deal with the question of *lis pendens*, it having been raised and argued before him for purposes of the postponement application. It was the very foundation of the Pension Fund's application for a postponement, and it was the mainstay of the submission in support of the postponement.⁷

[12] The Pension Fund's review, based on the so-called irregular conduct of the arbitrator to consider the *lis pendens* issue, must fail. I need not find that the arbitrator correctly concluded that the matter was not *lis pendens* as that is not the issue.⁸

[13] It is per chance so that, if regard is had to reasons furnished by the arbitrator and the facts relied upon by the Pension Fund, the *lis pendens* question argued before the arbitrator had no merit. The arbitrator was, consequently, obliged to make a finding in order to consider whether the application to postpone, based on this question, had any merit. It can never be classified as an irregularity, less so a gross irregularity, nor that the arbitrator exceeded his powers.

Admissibility of evidence ruling

[14] The further ground of review is against the interim ruling by the arbitrator that excluded certain evidence which was being led before him. Two matters were common cause. The Ginsburg SC award and that Metroprop had deducted R6.6 million of the costs of the redevelopment from the net profit share of Adamax (thus the Adamax declaratory relief sought before the arbitrator⁹). Adamax did not seek payment.

[15] The Pension Fund called Mr Joubert, the Chief Executive Officer of Metroprop, to give evidence. The evidence centred around the benefits of the development and eventually, the joint letting enterprise of the Pension Fund and Adamax. Counsel for Adamax objected to the evidence as being irrelevant if regard was had to the Ginsburg SC award. To counter this, counsel for the Pension Fund explained that the relevance

⁷ See the following passages in Caselines:

- A803 line 22 to A804 line 9;
- A805 line 14 to A808 line 4;
- A811 lines 4 to 11;
- A821 line 19 to A823 line 25;
- A827 lines 8 to 25;
- A830 line 8 to A832 line 25; and
- A861 line 14 to A866 line 24

⁸ See *OCA Testing and Certification South Africa (Pty) Ltd v KCEC Engineering Construction (Pty) Ltd and Another* (1226/2021) [2023] ZASCA 13 (17 February 2023).

⁹ Paragraph 4 above.

of the evidence was in Pension Fund's special defence.¹⁰ However, the evidence of Mr Joubert regarding the benefits of the redevelopment did not impact on the special defence. Firstly, the defence in paragraph 27.2 was a contradiction of the Ginsburg SC award, which was binding on the parties. Secondly, the plea in paragraph 27.3 that the "Adamax owners" had commercially benefitted from the redevelopment was irrelevant. This was also accepted by the Pension Fund in its founding affidavit for the final review:

"This notwithstanding, the (Pension Fund) was given the opportunity to ventilate only one of the above defences in the arbitration, namely, special defence 3 (which, in any event did not require any evidence but only argument concerning the interpretation of the COA)."¹¹

Counsel for the Pension Fund submitted, correctly in my view, that the question of whether the arbitrator was right or wrong in his finding is not a review question.

[16] An award of the nature as given by the arbitrator is not reviewable even if it was incorrect. In *Telecordia Technologies v Telkom SA* ("*Telecordia*")¹² the court said as follows¹³:

"A statutory provision such as that contained in s28, that unless the arbitration agreement provides otherwise, an award is, subject to the provisions of the Act, final and not subject to appeal, and that each party to the reference must abide by and comply with the award in accordance with its terms, clearly indicates that the Legislature intended the arbitral tribunal to have exclusive authority to decide whatever questions were submitted to it, including any question of law. That is what the parties agreed.

[17] In *Dexgroup v Trustco Group International* ("*Dexgroup*"), Wallis JA also said the following:¹⁴

"In my view the modern demands of arbitration dictate that arbitrators should be free, in the absence of anything in the arbitration agreement to the contrary, to determine the admissibility of evidence without being shackled by formal rules of evidence. The correct approach is that arbitrators may follow such procedures in regard to the

¹⁰ Final review B199 at B207 paragraph 72.2 to 72.4.

¹¹ Final review B12 at paragraph 26.

¹² 2007 (3) SA 266 (SCA).

¹³ At para 65.

¹⁴ At paragraph 21.

admissibility of evidence as they deem appropriate, provided always that the parties are afforded a fair hearing.”

[18] There is no allegation that the Pension Fund did not receive a fair hearing. The review ground is stated thus in the heads of argument:

He decided the merits of certain of the MEPF’s key pleaded defences before hearing evidence or final argument in the matter.”

[19] Again, due to the argument placed before him, the arbitrator was obliged to rule on the issues so argued. I find that the arbitrator correctly considered the exclusion of the evidence. It, too, cannot be classified as a gross irregularity or a matter where the arbitrator exceeded his powers.

Final award

[20] The arbitrator’s final award is also under attack, but only because of the so-called irregularities in the context of the postponement award and the admissibility ruling. I have found that these two issues are not reviewable, and it results in the final review having no valid grounds.

Removal of arbitrator

[21] The Pension Fund also sought the removal of the arbitrator pursuant to the provisions of section 33(4) of the Arbitration Act. The relief is, again, also dependent on the two review grounds succeeding and being upheld.¹⁵ Reliance on the grounds for review has failed and the consequent relief for the removal of the arbitrator also fails.

[22] In addition, the heads of argument, but not argued, submitted that, based on *Altech Radio Holdings (Pty) Ltd v Aeonova 360 Management Services (Pty) Ltd and Another* (“*Altech Radio*”),¹⁶ the arbitrator should be removed due to gross irregularities and the exceeding of his powers. This submission too is based on the “impugned awards” and has no merit as the awards stand.

¹⁵ *Hos+Med Medical Aid Scheme v Thebe ya Pelo Healthcare and Others* 2008 (2) SA 608 (SCA) at para 30.

¹⁶ 2023/032374) [2023] ZAGPJHC 631 paragraph 79.

[23] In a counter-application, Adamax seeks that the final award of the arbitrator be made and order of court.¹⁷ Although there is some objection to this relief contained in the heads of argument, the opposition was not argued before me, and I can see no reason why Adamax is not entitled to have its award made an order of court.

[24] I issue the following order:

1. The Applicant's application under case number 2023-089092 is dismissed with costs.
2. The Applicant's application under case number 2023-113014 is dismissed with costs.
3. The Applicant's application under case number 2024-022755 is dismissed with costs.
4. In respect of the First Respondent's counter-application:
 - 4.1 The arbitrator's Final Award dated 15 January 2024 is made an order of court.
 - 4.2 The Applicant is ordered to pay the costs of the counter-application.
5. Costs are to be paid by the Applicant on Scale C as set out in Rule 67A of the Uniform Rules of Court, including the costs occasioned by the employment of two counsel.


Wepener J

Heard: 19 August 2024

Delivered: 28 August 2024

¹⁷ Arbitration Act section 31.

For the Applicant:

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