

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: J922/2011

In the matter between:

SACCAWU

First Applicant

MEMBERS OF FIRST APPLICANT EMPLOYED
BY FIRST & SECOND RESPONDENTS

Second & further Applicants

and

PICK 'N PAY RETAILERS (PTY) LTD

First Respondent

PICK 'N PAY BUTCHERIES (PTY) LTD

Second Respondent

REDDING, A.I.S, N.O

Third Respondent

Date of hearing: 11 August 2011

Date of judgment: 16 August 2011

JUDGMENT

VAN NIEKERK J

Introduction¹

[1] This is an application to review an arbitration award issued by the third respondent (the arbitrator) brought in terms of section 33 of the Arbitration Act, 42 of 1965, read with section 157(3) of the Labour Relations Act, 66 of 1995 (the LRA). At the request of the parties and in terms of the Consolidated Directive of 2010, the

¹ I am indebted to both counsel for their comprehensive heads of argument. I have made liberal use of their heads in preparing this judgment.

Deputy Judge President approved the fast-tracking of the application. The primary reason for the joint request was the arbitration award impacted directly on a retrenchment process that the respondents have triggered. The application was heard on that basis.

[2] The award was issued consequent on an arbitration agreement concluded between the parties on 17 January 2011. In the agreement, the parties recorded that they had concluded a collective agreement on 21 October 1994, termed the Supplementary Agreement covering Job Security, Flexibility and Mobility of Labour. This agreement is referred to in the arbitration award and is known by the parties as the “F&M agreement”. Clause 3 of the agreement provides: “This Agreement shall remain in force indefinitely or until such time as the parties negotiate amendments to this Agreement provided that such amendments are put in writing and are signed by the parties in a similar manner to that used in this Agreement.” On 6 August 2011, the respondents gave notice of their intention to cancel the F&M agreement and all other agreements included in the notice of cancellation. Clause 6.2 of the F&M agreement required the parties to conclude an agreement for the formula to establish staffing levels and shift patterns at the first and second respondent’s stores and operating units. This agreement, entitled “Review of Formulae/Criteria to Establish and Review Staffing Levels”, was initially concluded in 1994 but replaced in 2001, and was referred to in these proceedings as the “2001 formulae agreement”. The formulae agreement is an attachment to the F&M agreement, and as its title suggests, the purpose of the agreement is to list the formulae and criteria to be utilises to review staffing levels. contained a provision to the following effect:

“3. This collective agreement shall come into with

effect from 15 March 2001 and shall continue to operate until such time that it is replaced or amended by another agreement provided that the such replacement or amendment are put in writing and is signed by the parties in a similar manner to that used in this agreement.” (sic).

[3] The arbitrator was appointed to determine whether the F&M agreement was lawfully terminated by the first and second respondents. He was empowered to make “any appropriate order” and to award costs in accordance with the law and fairness. An additional element of the dispute between the parties concerned the reasonableness of the notice period given, but this is not germane to this application.

[4] In his award, issued on 18 April 2011, the arbitrator made the following findings:

“55. In the circumstances, I find that the notice period was not an unreasonable one in the circumstances.

56. On the main question which I was requested to decide, I determine that the agreement was lawfully terminated by the Company.

57. On the remaining issue of costs, in the light of the continuing relationship between the parties and the material importance of the issue referred to arbitration, I determine that there shall be no award as to costs.”

The grounds for review

[5] The applicant submits that the arbitrator was called upon to apply his mind to the validity of the cancellation of both the F&M agreement and the 2001 formulae

agreement and that he failed to consider the applicant's self-standing submissions regarding the latter. In particular, there is no analysis of the wording of the duration clause in the 2001 formulae agreement, in stark contrast to the detailed analysis of the wording of the duration clause in the F&M agreement. The reference to the 2001 formulae agreement is made in for the purposes of the interpretation of the F&M agreement, and not for the purposes of any determination whether the 2001 formulae agreement could be cancelled unilaterally.

[6] It is apparent from this formulation of three grounds for review that the applicants do not attack the arbitrator's determination, at least insofar as it relates to the body of the F&M agreement and all supplementary agreements save for the 2001 formula agreement. The review is based solely on the contention that the arbitrator committed a latent gross irregularity by failing to determine independently the validity of the cancellation of the 2001 formula agreement ('the 2001 formula agreement issue'). In that sense, the application is for what may be termed a review for non-determination.

The relevant legal principles

[7] The specific grounds upon which a private arbitration award can be reviewed on account of the conduct of the arbitrator are those grounds (strictly interpreted) set out in section 33(1)(a) and (b) of the Arbitration Act, i.e. misconduct; gross irregularity; or excess of powers.² Neither section 33 (just administrative action) nor section 34 (access to courts) of the Constitution apply directly to private arbitrations,

² See *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at para 51; *Stocks Civil Engineering (Pty) Ltd v Rip NO and Another* [2002] 3 BLLR 189 (LAC) at paras 73-74; *NUM obo 35 employees v Grogan NO and Another* [2010] 8 BLLR 799 (LAC) at para 33; *Volkswagen (SA) (Pty) Ltd v Koorts and Others* [2011] 6 BLLR 561 (LAC) at paras 8-10.

and thus cannot serve as a basis for extending the grounds upon which a private arbitration award can be reviewed.³ In *Lufuno Mphaphuli and Associates (Pty) Ltd (supra)*, O'Regan J, writing for the majority, set out the policy basis for the limited scope of intervention in private arbitrations:

"Courts should be respectful of the intention 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 arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of section 33(1), the goals of private arbitration may well be defeated"⁴

This cautionary sentiment is reflected in the conclusion reached by Van Dijkhorst AJA in *Stocks Civil Engineering (supra)*:

'A court is entitled on review to determine whether arbitrator in fact functioned as arbitrator in the way that he upon his appointment implied 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 is

³ See *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another* 2002 (4) SA 661 (SCA) at para 24; *Telcordia (supra)* at para 45; *Lufuno Mphaphuli Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) at para 215.

⁴ *Lufuno Mphaphuli Associates (Pty) Ltd v Andrews and Another* at para [236] .

appointed. His award will then be tainted 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 reason leading to an incorrect result, In short, material malfunctioning is reviewable, a wrong result per se (unless it evidences malfunctioning). If the malfunctioning is in relation to his duties, that would be misconduct by the arbitrator as it would be breach of implied terms of his appointment.'

In short: in the case of a review of a private arbitration award, there exists little scope for a review going to the merits, as a private arbitrator has the right to be wrong.⁵

[8] The applicants rely solely on the ground of review of a (latent) gross irregularity. In order for there to be a gross irregularity warranting interference on review, two conditions must be met: firstly, the omission on the part of the arbitrator must involve him or her having misconceived the nature of the enquiry or his or her duties in connection with the enquiry, and thus result in him preventing a fair trial of the matter.⁶ Secondly, there must not exist material that would serve to justify the arbitrator's decision, because '*if there was material before the [arbitrator], justifying the action taken, the court would not be entitled to interfere even if an irregularity had been committed*'.⁷ Put differently, if an arbitrator was caused by inappropriate means to reach one conclusion whereas if he had adopted appropriate means he might have reached another conclusion favourable to the applicant, then the award is reviewable.

5 *Telcordia* above n2 at para [85]

6 (see *Goldfields Investment Ltd v City of Johannesburg* 1938 TPD 551 at 560-561 – referred to and discussed in *Telcordia (supra)* at para [73], and in *Tao Ying Metal Industry (Pty) Ltd v Pooe NO and Others* (2007) 28 ILJ 1949 (SCA) at para [126]).

7 See *Tao Ying Metal Industry* above n6 at 1980D.

[9] Mr. Myburgh SC, who appeared for the respondents, referred to a number of English authorities in relation to the test to be applied in a review for non-determination. Section 68(2) of the UK Arbitration Act, 1996 lists a number of grounds upon which an award can be challenged on review if the court considers that it “caused or will cause substantial injustice to the applicant”. Amongst the listed grounds (ground (d)) is the “failure by the tribunal to deal with all the issues that were put to it”. Sutton *et al*, *Russell on Arbitration* (23rd ed, Sweet & Maxwell (2007)) comment as follows on section 68(2) (d):

“An irregularity will only result where the tribunal has not dealt at all with a critical aspect of the case of a party. In other words, it “is concerned with a failure ... where the tribunal has not dealt at all with the case of a party so that substantial injustice has resulted ... In the former instance the tribunal has not done what it was asked to do, namely to give the parties a decision on all issues necessary to resolve the dispute or disputes (which does not of course mean a decision on all the issues that were ventilated but only those required for the award)”. The tribunal certainly does not have to deal with every point which was raised in the proceedings. If an award expresses no conclusion at all as to a specific claim or defence then that is a clear failure to deal with the issue. The ground will also be triggered where the decision cannot be justified as a key issue has not been decided which is crucial to the result. It is certainly the case however that an award does not have to set out each step by which a conclusion is reached. The courts shy away from conducting a narrow textual analysis in an

attempt to pick holes in the reasoning. Once a party is reduced to alleging that particular sub-issues have not been properly explained in the award then the challenge is very likely to fail” (at 8-094).

And further:

“Ground (d) is also not triggered just because the tribunal’s reasoning is compressed, confusing or unsatisfactory. If a court can deduce from the award and the other available material before it, which may include extracts from evidence and the transcript of hearings, the thrust of the tribunal’s reasoning then no irregularity will be found” (at 8-095).

[10] In his commentary on section 68(2) (d), Merkin *Arbitration Law* (LLP (2004)) states as follows:

‘The point has arisen under the 1996 Act, in *Husmann (Europe) Ltd v Al Ameen Development and Trade Co*⁸, where it was alleged that the arbitrators failed to deal with a series of matters, including: (a) whether the buyer was entitled to discount for prompt payment; and (b) whether commission was payable under a distributorship agreement. Thomas J was satisfied, as to (a), that the award (by reason of its analysis of the negotiations between the parties) implicitly decided that there was no entitlement to a discount, and as to (b), that although the reasoning was not as clear as it might have been the outcome made it clear that the issues as to commission had been comprehensively dealt with in the award.

8 [2000] 2 Lloyd’s Rep 83.

Thomas J stated in the course of his judgment that an award cannot be challenged simply because the arbitrator has failed to set out each step and each point by which the conclusion was reached. A deficiency of reason in a reasoned award is not capable of amounting to a serious irregularity. It follows that if a fair reading of the award shows that the arbitrator had in fact considered and rejected the arguments put to him then the absence of specific references to individual issues will not taint the award. ... In *Al Hadha Trading Co v Tradigrain SA*⁹ ... [the court] held that the decision to extend time [for a claim to be brought] was an implicit rejection of the argument put forward [that a default award should be issued, which defence was not referred to in the award] and it followed that the arbitrators had dealt with all the matters put to them. In *Checkpoint Ltd v Strathclyde Pension Fund*¹⁰ ... [it was held that] it was not open to a party to challenge an award by pointing to subsidiary matters which had been raised but which did not require to be resolved in the course of the arbitrator's ultimate decision. In much the same vein it was made clear ... in *Weldon Plant Ltd v Commissioner for the New Towns*¹¹ that s 68(2) (d) is concerned with ensuring that the arbitrator did not reach his award by disregarding important issues, and that it was "not to be used as a means of launching a detailed inquiry into the manner in which the tribunal considered the various issues" (at 871-872).

[11] The decision in *Middlemiss and Gould (a firm) v Hartlepool Corporation* [1973]

1 All ER 172 (CA) is of particular relevance for present purposes. In this matter, in

⁹ [2002] 2 Lloyd's Rep 512.

¹⁰ [2003] EWCA Civ 84.

¹¹ [2000] BLR 496.

opposition to an application for the enforcement of an arbitration award in favour of a number of building contractors, the corporation contended that the award was unenforceable because the arbitrator had not decided a key issue, namely its defence that no further payments were due under the contract by virtue of clause 25(4) (d) thereof. The court *a quo* found for the corporation. In dismissing the ensuing appeal, Lord Denning MR held as follows:

“But counsel for the corporation then suggested that the arbitrator had not decided the point under cl 25(4) (d) at all. He contended that the arbitrator had only decided the way in which the certificates should be calculated. It is true that the arbitrator did not expressly say anything about cl 25(4) (d) in his award. But the point was distinctly raised by the corporation in para II of their defence. By implication the arbitrator rejected their contention. ... If a point is raised for decision and by implication has been decided, that is final. The parties cannot be allowed thereafter to re-open it. This has been applied to arbitrations. It is stated in Russell on the Law on Arbitration:

‘The award will be sustained even though the arbitrator has omitted to notice some claim put forward by a party, if, according to the fair interpretation of the award, it is to be presumed that the claim has been taken into consideration’”. (at 176).

This *dictum* by Lord Denning is described by Merkin (*supra*) at 712 as giving rise to a rebuttable presumption, in favour of the validity of the award, that arbitrators have taken account of all the issues properly before them.

[12] In his concurring judgment in *Middlemiss (supra)*, Lord Edmund Davies cited *Harrison v Creswick* (1853) 13 CB 399 at 416, in which it was held that:

”where an award is made de praemissis, the presumption is, that the arbitrator intended to dispose finally of all the matters in difference; and his award will be held final, if by any intendment it can be made so” (at).

The learned judge then continued:

“In the present case it is unchallenged that the operation and impact of cl 25(4)(d) of the building contract was one of the issues referred to the arbitrator, being expressly raised by the corporation in their points of defence as a ground for their assertion that no further payments were due to the claimants. It is to be observed that the arbitrator virtually adopted the language used by the corporation themselves in his summary of their contentions under two heads saying: “The [corporation] claim (1) that they have paid all moneys due to the claimants.” But, contrary to such contention, he made an award that in point of fact £7,957 was due from them. In my judgment, it would be bordering on the mischievous if in circumstances such as are here present this award could now be impeached on the ground that the arbitrator of high qualifications and I have no doubt great experience failed to bear in mind the matter which had thus been expressly raised and referred to him. In line with the authorities, I prefer to make the assumption that he fully considered cl 25(4)(d) of the building contract in

coming to his conclusion” (at 177).

[13] These authorities are instructive in relation to the meaning of “gross irregularity” for the purposes of s 33(1) (b) of the Arbitration Act. They affirm that potentially at least, a failure to determine an issue constitutes a latent gross irregularity and thus a basis on which an arbitration award might be set aside, and also the limits of gross irregularity as a ground of review. The approach is consistent with the analysis of the concept by the Supreme Court of Appeal in *Telcordia (supra)*, and the court’s caution against confusing an arbitrator’s reasoning with the conduct of the proceedings (see paragraph [75]). Two passages from the judgment warrant mention:

“The failure to have dealt with a particular factual subissue does not mean that the arbitrator misunderstood the nature of the inquiry. It also does not mean that the arbitrator ignored them. It is equally conceivable that he thought that the issue was not worth pursuing in the light of some of his other findings ... (at paragraph [125]); and

‘If one considers the length of the proceedings, the arbitrator’s active involvement in defining and refining the issues, and the detailed and reasoned award, it was as presumptuous as it was fallacious for the Court to have held that the arbitrator did not apply his mind properly to the issues at hand’. (at paragraph [99]).

The approach to be adopted by the court

[14] Mr. Myburgh submitted that as a point of departure, on the basis of the above authorities, the court should presume (on a rebuttable basis) that the arbitrator took account of all issues before him and, insofar as possible, uphold the award as being final. Secondly, Mr. Myburgh submitted that the court should be alive to the fact that this is a very narrow review – one that is based exclusively on the alleged non-determination of an issue by the arbitrator (as opposed to a review going to the merits). The court should therefore not conduct “a narrow textual analysis”, but rather undertake a holistic enquiry with a view to determining whether the issue was dealt with. In this context, the fact that an arbitrator’s ‘reasoning is compressed, confusing or unsatisfactory or even patently wrong, that an arbitrator failed to set out “each step and each point by which the conclusion is reached”, and that the arbitrator did not approach or analyse the matter in the manner contemplated by one of the parties (for he may have ‘thought that the issue was not worth pursuing in the light of some of his other findings’) does not serve to establish that the issue was not determined. Thirdly, Mr. Myburgh submitted that regarding the mode of the scrutiny of the award, the court should identify what is recorded in the award about the 2001 formula agreement, whether there is any reference to the applicants’ contentions in relation to the issue in question, what findings may be implied from the findings made by the arbitrator, and whether the award made by the arbitrator is capable of encompassing a determination of the issue. In order to place the relevant contents of the award in context, the court is entitled to have regard to the events of the arbitration itself. Finally, Mr. Myburgh submitted that even if the court comes to the conclusion that the award does not expressly deal at all with the 2001 formula agreement issue, this, in itself, not a sufficient basis to sustain a review for non-determination. The question that would then arise is whether it can be reasonably

implied or presumed from a reading of the award overall that the arbitrator rejected the applicants' case in point. The key considerations here would be whether the issue in question was distinctly raised by the applicants, whether the point is recorded in the award, and whether a rejection of the claim can be implied from the arbitrator's award.

The 2001 formula agreement issue

[15] In order to place the findings made by the arbitrator (dealt with below) in context, it is necessary to track how the 2001 formula agreement issue came to light and was dealt with during the arbitration. [Right up until oral argument, the case pursued by the applicants at the arbitration (leaving aside their pleaded alternative causes of action which are not relevant for present purposes) was that, on their interpretation of clause 3 of the F&M agreement, the company was not entitled to terminate the F&M agreement unilaterally by giving notice. This was their pleaded case; this is what was stated in opening address; and this is what was pursued during the cross-examination of the company's witnesses.

[16] In the process of the cross-examination of the respondents' witnesses, Mrs. Delight and Mr. Van der Walt, counsel for the applicants put to them that clause 3 of the 2001 formula agreement served to clarify the parties' intention in relation to the termination of the F&M agreement, and demonstrated (so it was contended) that the F&M agreement could not be terminated unilaterally. In effect, the applicants sought to use the terms of clause 3 of the 2001 formula agreement as an aid to the interpretation of clause 3 of the F&M agreement (both of the aforesaid clauses being duration clauses).

[17] In their main heads of argument, which were filed before the company filed its heads of argument and before the presentation of oral argument, the applicants persisted with this approach. In this regard, it was *inter alia* submitted on behalf of the applicants that: (a) the subsequent conduct of the parties in including clause 3 in the 2001 formula agreement supported the applicants' interpretation of clause 3 of the F&M agreement, i.e. it informed the meaning thereof; and (b) the effect of clause 3 of the 2001 formula agreement was that neither party could resile unilaterally from the F&M agreement. In the result, the relief prayed for by the applicants in their heads of argument was an award that the termination of the F&M agreement was unlawful.

[18] At the presentation of oral argument, and having received the company's heads of argument in advance thereof, counsel for the applicants handed up his "submissions in reply" to the company's heads. In these submissions, the applicants advanced two points: firstly, that the termination of the 2001 formula agreement was *in itself* unlawful because clause 3 of that agreement did not permit unilateral termination; and, secondly, that the *subsequent conduct* of the parties in concluding clause 3 of the 2001 formula agreement shed light on the interpretation of clause 3 of the F&M agreement and supported the applicants interpretation thereof. The first point, which is referred to above as the "2001 formula agreement issue", had hitherto not been advanced by the applicants. The second point was the point relating to the 2001 formula agreement that had been advanced in evidence and in the applicants' main heads of argument (see above).

[19] In oral argument before the arbitrator, counsel for the applicants submitted, in relation to the 2001 formula agreement issue, that the termination of the agreement was unlawful because it continued indefinitely, that this was being dealt with separately, and that, whatever was decided in relation to the F&M agreement, the company could not get out of the 2001 formula agreement.

[20] Turning then to the F&M agreement, counsel for the applicants submitted that it did not make practical sense to deal with it differently from the 2001 formula agreement – ‘they either all stay or they all go’; it thus made practical sense to give ‘indefinitely’ in clause 3 of the F&M agreement the meaning “in perpetuity”; and the subsequent conduct of the parties in concluding clause 3 of the 2001 formula agreement should be used as an interpretative tool in determining the intention of the parties when concluding clause 3 of the F&M agreement.

[21] During the course of the respondents’ submissions in reply, counsel for the company submitted that if the F&M agreement fell, then all supplementary agreements (including the 2001 formula agreement) would fall with it because they were supplementary to the main agreement. The company’s counsel went on to submit that the situation was analogous to a fixed agreement on rental price falling with the termination of the underlying lease agreement though it had initially been pointed out that the issue in question fell outside of the applicants’ pleaded case, the company’s counsel placed on record that the company did not require the applicants to amend their statement of claim. (This in circumstances where the 2001 formula agreement issue fell within the arbitrator’s terms of reference and where, as far as the company was concerned, the issue was essentially a matter of law.)

[22] In his replying submissions, the applicants' counsel submitted that one of two things happened in relation to the 2001 formula agreement – either: (a) it is a self-standing agreement and survived cancellation of the F&M agreement; or (b) it is subordinate to the F&M agreement (as the company had submitted) and introduced a competing duration clause, which, so it was submitted, must apply to the termination of the F&M agreement because the specific trumps the general. The relevant passage from the record reads as follows:

“ADV BODA: There's one of two things that happened with the 2001 agreement. Whether it's a self standing agreement, in which case it has a self standing duration clause which on no-one's interpretation, I can't see how one could read, in the light of the principles in the SAA case, one could read the duration clause as allowing or giving room for termination of reasonable notice, in which case it still survives. Or, it's, my learned friend says it's subordinate to the main agreement but if it's subordinate to the F&M agreement, then there are potentially two duration clauses but then you apply the principle, the special overrides the general”. (at p 168 of the record, lines 12 -21).

The arbitrator's award: key findings

[23] The arbitrator dealt with the 2001 formula agreement in paragraphs 35-42 of his award. These bear quoting in full:

“35. I have had regard to the contextual arguments

raised by Mr. Boda on behalf of the Union. However, I cannot find anything in the wording of clause 3 of the F&M Agreement helpful. The words “or until such time as the parties negotiate amendments to this agreement” present an equally sensible alternative to either the Company’s construction or the Union’s. They do not, in my view, shed light on the interpretation of the word “indefinitely”.

36. He places particular reliance on the subsequent supplementary agreement reached in 2001. This supplementary agreement was the product of a review of the formal dealing with staffing levels. It, in effect, replaces the provisions of annexure “A” to the F&M Agreement by a new Annexure “A” which reflected a different formula which could be used to establish staffing levels at stores and operational units. This 2001 amendment stated the following at paragraph 3 concerning duration:

‘This collective agreement shall come into effect from 15 March 2001 and shall continue to operate until such time that is replaced or amended by another agreement provide that the such replacement (sic) or amendment are put in writing (sic) and is signed by the parties in a similar manner to that used in this Agreement.’

37. The thrust of the Union’s argument was that this provision concerning duration made no reference to the duration being indefinite and stated expressly that the agreement “shall continue” until such time as it was replaced by another agreement.

38. It was submitted that the 2001 agreement was not capable of being terminated unilaterally. Further,

insofar as it was a subsequent agreement, the provision on duration constituted a later manifestation of the parties' common intention when the main F&M Agreement was entered into. The subsequent conduct of the parties can be used as an interpretative guide to the parties' intention in concluding the main agreement ...

39. The subsequent agreement varied the formula. It provided that the formula would not be varied again except by agreement.

40. However, the formula is merely a factor to be used in determining the main issues in the F&M agreement- the staffing levels and shift patterns. It is the equivalent to the exchange rate in a transaction involving foreign currency. The formula is variable upon which the main operative factors in the agreement can be determined. An agreement not to change the formula or variable is not the same as an agreement not to change the main operative factors which are the substance of the agreement.

41. Therefore a subsequent supplementary agreement that a formula will not change does not lead to a conclusion that the main agreement has now been rendered immutable. It is simply agreed that the variable (the formula) will not again be changed without agreement.

42. The subsequent decision of the parties to make the subordinate issue of the formula immutable except for agreement is neither a strong or decisive indication of the parties' intention at the conclusion of the agreement. I am not sure whether I should have regard to the subsequent agreement at all...but even if I do, it is not inconsistent for the parties to have a main agreement terminable by notice, but say that a variable

or factor within that agreement will not be terminable except on notice. It is not inconsistent with the general intention of a party that a subordinate aspect of the agreement will remain unchanged, while the main portion of the contract may be terminable on notice. Certainly, if the main body of the agreement falls, the agreement concerning the formula falls with it.

[24] In my view, paragraph 42 of the award amounts to a rejection of the applicant's contention that the formulae agreement was not capable of being terminated unilaterally, in that the arbitrator found that "[c]ertainly, if the main body of the agreement [i.e. the F&M agreement] falls, the agreement concerning formula falls with it. The overall conclusion arrived at by the arbitrator, consistent with the terms of reference located in the arbitration agreement, was this: "On the main question which I was required to decide, I determine that the agreement was lawfully terminated by the company" (at para 56 of the award). This determination is plainly wide enough to encompass a determination that the 2001 formula agreement (being part and parcel of the F&M agreement) was lawfully terminated.

[25] The fact that the arbitrator did not pose the question of the 2001 formulae agreement issue and that he made no specific reference to the authority relied on by Mr Boda to advance his submissions regarding the self-standing nature of the formulae agreement is not in itself an indication that he failed to address the issue and thereby committed a gross irregularity. It clearly follows from his award that the arbitrator did not consider the 2001 formula agreement to be a self-standing agreement and instead preferred the alternative construction, i.e. that it was subordinate and supplementary to the F&M agreement. That being the case, the

question that consequently arose, which had also been identified by applicant's counsel, was how to reconcile the competing duration clauses in the F&M agreement and the 2001 formula agreement. Mr Boda submitted in this regard that clause 3 of the 2001 formula agreement should override clause 3 of the F&M agreement. The arbitrator arrived at a different conclusion, namely that clause 3 of the 2001 formula agreement did not operate so as to render the F&M agreement immutable (this being in line with what had been argued by the company). The arbitrator then went on to find that the F&M agreement was lawfully terminated, and that – arising from this – the 2001 formula agreement (being a supplementary agreement akin to an agreement setting an exchange rate) fell with it. It would only have been if the arbitrator had found that the 2001 formula agreement was a self-standing agreement that an analysis separate and independent from the F&M agreement would have been called for. But, as stated above, the arbitrator construed the 2001 formula agreement as being subordinate and supplementary to the F&M agreement, and thus analysed the two agreements together – in coming to the conclusion that the F&M agreement was not immutable, and that the 2001 formula agreement fell with it. Thus the key question – whether the 2001 formulae agreement was supplementary and subordinate or self-standing and overriding- was asked, addressed and answered. As I have indicated, whether the answer was right or wrong is immaterial for the purposes of these proceedings. What matters is whether the question was asked and addressed. In my view, for the reasons stated above, it was.

[26] In relation to costs, the parties were agreed that costs should follow the result. Despite this agreement, and in the exercise of the discretion conferred on the court by s 162 of the LRA, in my view, it is appropriate to make no order as to costs. The parties are engaged in a collective bargaining relationship. They will soon embark on discussions, foreshadowed by this application, which will have a profound effect on both of them and on the lives of the company's employees. An adverse order as to costs in these circumstances would not be a happy start to this process, and may potentially turn what ought to be a meaningful search for consensus conducted on a constructive basis into an adversarial confrontation. I intend therefore to make no order as to costs.

In the result, I make the following order:

1. The application is dismissed.
2. There is no order as to costs

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Appearances:

For the applicant: Adv F Boda, instructed by Dockrat Attorneys

For the respondents:

Adv A Myburgh SC, instructed by Bowman Gilfillan Inc.