



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

Case Number: 2023-01338

(1)	REPORTABLE: YES <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES <u>NO</u>
(3)	REVISED.
SIGNATURE	5 February 2025 DATE

In the matter between:

FORE ST HOLDING (PTY) LTD

First Applicant

BIG FIVE PROPERTY DEVELOPMENTS (PTY) LTD

Second Applicant

and

LEOLA SHARON MEYER N.O.

First Respondent

PAUL KOSKI N.O.

Second Respondent

HELEEN JEANNE MEYER N.O.

Third Respondent

LIEZEL ELIZABETH LATEGAN N.O.

Fourth Respondent

ANYA MÖLLER N.O.

Fifth Respondent

JG MEYER BOERDERY (PTY) LTD

Sixth Respondent

J.R. GAUTSCHI SC

Seventh Respondent

JUDGMENT

WINDELL, J:

Introduction

[1] This is a review in terms of section 33(1) of the Arbitration Act, 42 of 1965 as amended (the Act) of an award made by the seventh respondent (the arbitrator). The applicants, Fore St Holding (Pty) Ltd (Fore) and Big Five Developments (Pty) Ltd (Big Five), who were the claimants in the arbitration proceedings, contend that the arbitrator exceeded his powers as arbitrator and that he acted grossly negligently in failing to consider material and undisputed evidence advanced on behalf of the applicants.¹ Additionally, it is submitted that the arbitrator brought out an award with materially contradictory findings rendering the award confusing and unenforceable in material respects, constituting a gross irregularity. As a result, the applicants seek an order setting aside paragraphs 143.1, 143.3 and 143.4 of the award.

[2] The first to sixth respondents oppose the application and seek an order dismissing the application with costs on a punitive scale. They also brought a counterapplication that the arbitration award be made an order of court, together with costs.

¹ As provided for in section 33(1)(a) and (b) of the Arbitration Act, 42 of 1965.

Background facts

[3] On 23 November 2011 a joint venture agreement (JVA) was concluded between Big Five, a property development company, and two trusts, the Klipriviersberg Trust and the JGM Trust, (hereinafter referred to as 'the Trusts') as well as the sixth respondent, JG Meyer Boerdery (Pty) (Ltd) (JGM Boerdery), a private company that conducts farming operations on the immovable properties (the properties) owned by the Trusts. The first, second, third, fourth, fifth and sixth respondents are trustees of the Trusts involved and include a representative of JGM Boerdery.

[4] Pursuant to the conclusion of the JVA, Big Five ceded certain rights and obligations contained in the JVA to Fore. It is for this reason that Fore is also a party to these proceedings and was a party to the arbitration proceedings.

[5] The JVA was established with the objective of enhancing the value of the properties through the rezoning of residential and commercial areas.² Residential, commercial, hospitality, medical facilities, offices, and a substantial retail component were all intended to be integrated into a high-density mixed-use residential project. In order to facilitate the realisation of this vision, a team of experts was recruited to assist in the development of the area and the rezoning of the properties from agricultural to mixed-use.³ The JVA did not include an agreement of sale between the applicants and the Trusts.⁴ Any possible sale could only take place in the future to the 'realisation company' and thereafter the 'development company'. In terms of the JVA the Trusts

² *Meyer NO and Others v Big Five Developments (Pty) Ltd and Another* (1017/17) [2018] ZASCA 136 (28 September 2018) para 17.

³ *Ibid.* para 4.

⁴ *Ibid.* para 17.

gave the applicants the exclusive right to rezone and on-sell the properties to the development company on the terms and conditions contained in the JVA. In terms of clause 3.5 of the JVA the purchase price for the properties would be shared equally between the parties.

[6] Between 2013 to 2019 the parties became engaged in litigious proceedings, which culminated in a judgment of the Supreme Court of Appeal in 2018.⁵ During November 2021, further disputes between the parties led to the respondents issuing a breach notice to the applicants on 17 January 2022 ('the breach notice'). The applicants were informed, among other things, that they were in breach of the JVA in that they did not comply with their realisation performance obligations, specifically to attend to the rezoning of the properties (clause 3.2), establishing an SPV or more than one SPV for the purpose provided (clause 3.4); concluding an agreement of sale for the purpose of taking transfer of the properties (such agreement to include the purchase price for each portion of the properties held by each trust); and to comply with the obligations of Big Five to JGM Boerdery provided for in clause 4.

[7] The applicants' attorney responded to the breach notice. They denied that they were in breach and stated that the respondents were aware that the rezoning and/or proclamation of the properties as envisaged in terms of clause 3 of the JVA can only be performed by Fore once the approval to establish a township has been granted by the requisite authority. To apply for the establishment of a township on the properties, Fore required a competent power of attorney from the Trusts as landowners of the

⁵ *Meyer NO and Others v Big Five Developments (Pty) Ltd and Another* (1017/17) [2018] ZASCA 136 (28 September 2018). Leave to appeal to the Constitutional Court was refused in March 2019.

properties. This power of attorney had not been forthcoming from the Trusts and since the conclusion of the protracted litigation between them in March 2019, the applicants have been trying to obtain signed powers of attorney from the trustees of the Trusts authorising Fore to submit the application for the establishment of a township.

[8] The letter continued to state that despite not having been provided with the signed powers of attorney, and in anticipation of receiving same, Fore and the appointed professional team have proceeded to, inter alia, prepare the application to establish a township, commence the public participation proceedings in respect of the Environmental Impact Assessment and held numerous meetings with the Ekurhuleni City Planning Department. They informed the respondents that as the township approval had not been obtained yet, it was premature, alternatively, impossible for Fore to perform its obligations in terms of clause 3 of the JVA.

[9] On 3 March 2022 the respondents sent a letter of cancellation of the JVA ('the cancellation letter'). In terms of the JVA the disputes between the parties were referred for arbitration. In the arbitration proceedings the applicants sought: (1) a declaratory award that would render the respondents' cancellation of the JVA invalid, and (2) specific performance of the JVA by the respondents, specifically the provision of powers of attorney to the applicants to facilitate the process of zoning and development applications in respect of the Trusts' immovable properties. The respondents counterclaimed for awards, declaring their cancellation of the JVA for alleged breaches by the applicants as valid/lawful, and compensating JGM Boerdery for breach of a maintenance provision by the applicants.

The arbitration proceedings

[10] On 12 April 2022 a written reference ('the Reference') was sent to the arbitrator.

The relevant part of the Reference reads as follows:

'4. Disputes exist between the parties in relation to the purported cancellation of the joint venture agreement on 3 March 2022 concluded between the parties on 23 November 2011 and its implementation.

5. The disputes between the parties shall be further defined by the pleadings to be exchanged in the arbitration.

6.2. The powers of the arbitrator shall include, without limitation, the powers enumerated in Rule 11 of the AFSA Commercial Rules.

6.3. As agreed between the parties in the Joint Venture Agreement, clause 9.5, Rule 22 of the Commercial Rules of AFSA in respect of appeals shall be applicable.

27. This agreed recordal, read together with the dispute clause contained in the joint venture agreement, shall serve as the terms of reference for the arbitration.'

[11] The applicants filed their statement of claim on 21 April 2022. It is the applicants' case that they confined the issues and the remedies sought to only two matters: the lawfulness of the respondents' purported cancellation on 3 March 2022 for the reasons set out in the breach notice and that the respondents should provide such powers of attorney required to implement the JVA.

[12] The respondents filed their statement of defence on 11 May 2022. They pleaded that the defendants had validly cancelled the JVA on 3 March 2022 after the applicants

had failed to comply with the breach notice which they contended constituted both an *interpellatio* (a demand) and a notice in terms of the *lex commissoria* (cancellation clause) in terms of clause 10 of the JVA.

[13] The statement of defence referred at the outset, among other things, to the obligation of the developer responsible for designing the properties to co-operate with the landowners. Alternatively to their right to cancel under the cancellation letter, the respondents pleaded that the failure to reach an agreement on the terms of the shareholders' agreement, cooperation in the rezoning process, and the contents of the powers of attorney rendered the *pactum de contrahendo*⁶ unenforceable, thereby entitling the respondents to withdraw from the JVA. The arbitrator observed that those assertions were made without any formal alternative prayer in their statement of defence or counterclaim.

[14] The respondents also filed a counterclaim for contractual damages. In the counterclaim the respondents raised matters concerning the applicants' maintenance obligation in respect of JG Boerdery. These matters were addressed by way of correspondence and meetings and negotiation prior to the breach notice. The arbitrator's conclusions regarding the counterclaim are not contested.

The respondents' first amendment

[15] The respondents gave notice of their intention to amend their statement of defence on 22 July 2022 to include the so-called 'became impossible' defence or

⁶ A "pactum de contrahendo" in South African law refers to a contract that is designed to create the obligation to enter into another contract in the future. See *Hirschowitz v Moolman and Others* 1985 (3) SA 739 (A) at 765I-J.

'ancillary contracts' defence. The basis of this defence is an implied, alternatively, a tacit term of the JVA, that further ancillary contracts would be concluded to, among other things, give the JVA business efficacy. The respondents pleaded that failure to conclude the ancillary contracts would render the JVA incapable of being performed.

The proposed amendment provided for the following:

"17A.1. The JVA is a long-term relational contract which envisages a cooperative endeavour to achieve its main purpose, namely the 'Development' as defined in clause 1.2.2.7 thereof, which consists of the re-zoning and realisation of the property to the development company.

17A.2. The JVA is ambiguous and has to be interpreted, inter alia, against the background of the law and practice with regard to property development and trusts.

17A.3. It is an implied, alternatively a tacit term of the JVA that further ancillary contracts would be concluded between the parties thereto to regulate inter alia the following, or so much thereof as would give the JVA business efficacy:

17A.3.1 Details of the subdivision and/or consolidation of all three portions of the 'property' defined in clause 1.2.2.4 of the JVA (as rectified).

17A.3.2 The rezoning of the property and the establishment of a township or townships thereon and the details thereof including the timing or phasing thereof taking into account the interests of all the parties to the agreement.

17A.3.3 The establishment of one or more 'realisation company' in which the Trust and/or their nominees and Big Five and/or its nominees will hold equal shares for the purpose of controlling the process of rezoning and township establishment and the transfer of portions of properties to it from the Trust and

the 'on-sale' or 'realization' of these portions of property to the development company.

17A.3.4 The terms of the sale and transfer of the properties from the trusts to the realisation company/ies including but not limited to the allocation of a purchase consideration to each sale and property.

17A.3.5 The rights and obligations of the parties as shareholders in the realisation company on the basis of shareholder agreements between the two trusts (together holding 50% of the shares) and Big Five holding the other 50% as provided in clause 3.5.

17A.3.6 The indemnity to the trusts to be provided by Big Five against any loss of liability following from Big Five's action or inaction in terms of clause 3.1 and/or clause 3.2.

17A.3.7 The 'maintenance' of the Property and other obligations of Big Five pending and during the Development as well as the recognition of the rights of JGM Boerdery (Pty) Ltd, in terms of clause 4.

17A.3.10 The financial feasibility and continued financial feasibility of the project.

17A.3.11 An exit clause or the terms of termination of the project.

17A.4 Failure to conclude the ancillary contract(s) to regulate the above aspects, alternatively so much thereof as would give the JVA business efficacy, would render the JVA incapable of being performed to achieve the 'Development' as a collaborative endeavour.

179A In the alternative if it be held that for any reason the JVA has not been validly cancelled the JVA has lapsed for the following reasons:

179A.1 The defendants refer to the above and specifically to paragraphs 16.1.1.4, 17 A, 51, 52, 58, 111 and 135 hereof.

179A.2 The parties have failed to conclude the ancillary contracts referred to in paragraph 17 A, or so much thereof as would give the JVA business efficacy.

179A.3 The JVA has become incapable of being implemented as a cooperative endeavour and has accordingly lapsed.'

(Emphasis added)

[16] The applicants did not object to this amendment and the applicants filed the amended pages on 4 August 2022. The applicants consequently amended their replication to the respondents' amended statement of defence. The amendment was not opposed and was granted at the commencement of the hearing on 15 August 2022.

[17] On 1 August 2022, both parties filed witness statements. The applicants filed witness statements of Mr Glenn Crick and two experts, Buser and Dacomb. The respondents filed witness statements of the first and third respondents, and an expert Nagy. On 12 August 2022, the applicants filed a supplementary witness statement of Mr Crick. It was this supplementary witness statement which later became the reason for the second amendment and subject matter of the respondents' 'repudiation defence' notified on 22 August 2022 (discussed hereunder).

The respondents' second amendment

[18] On 22 August 2022, after the arbitration hearing had concluded, the respondents gave notice of their intention to amend their statement of defence and incorporate the repudiation defence: the applicants had repudiated the JVA through

the evidence provided by Mr Crick in his supplementary witness statement, which was subsequently confirmed under cross-examination.

[19] An amendment was sought in the following terms:

'17B In addition to paragraphs 17A.3 to 17A.4 the defendants plead that:

17B.1 If it is a legally implied term, alternative a tacit term, that each party should cooperate with the other and not frustrate the other party in the exercise of its rights.

17B.2 The import of the JVA in general and clause 3.2, in particular, is that the rezoning process will be part of the process of township establishment.

17B.3 Township establishment includes the development of land by way of the subdivision of selected portions of land, the registration of ownership of newly created cadastral portions, the vesting of new use rights, the installation of services and the transfer of proclaimed or unproclaimed portions.

17B.4 Clause 3.2.3 envisages agreement or agreements between the parties to the JVA about any other aspects concerning the purpose of the rezoning.

17B.5 Clause 3.4 envisages a sale agreement or agreements between the Trusts and the realisation company, including, by implication, the memorandum of incorporation and a shareholders' agreement.

17B.6 Clause 7.2 provides as follows:

'Each party undertakes to do all such things and sign all such documents as may be necessary and/or incidental to give effect to the terms, conditions and import of this Agreement'.

17B.7 On a proper interpretation of the JVA, in light of the foregoing, and clause 7.2 in particular, the Claimants are entitled and obliged to consult, engage and involve the

Trusts in any decision (save those relating to the day-to-day affairs of the project) relating to

17B.7.1 the nature and scope of the envisaged developments;

17B.7.2 the nomination, appointment of, and terms of engagement relating to any of the service providers and professional consultants;

17B.7.3 consultations and meeting held with the various departments of COE, SANRAL and other government departments relating to the envisaged development;

17B.7.4 site visits and meetings;

17B.7.5 the viability and feasibility studies; and

17B.7.6 general decision-making in respect of the intended development.

17C In his evidence (contained in his supplementary witness statement) confirmed as his evidence in chief delivered on the (court) day before the hearing in the arbitration, Mr Crick, on behalf of the Claimants, stated that the Trusts have not been consulted, engaged nor involved, in any decisions or matters relating to the aspects referred to above.

17D Mr Crick further stated that he has, in his sole discretion, appointed, consulted and/or arranged site meetings at the properties with various professional consultants and/or government departments. He stated that the 'representatives of the Trusts have never participated in these meetings'. Mr Crick also stated in paragraph 46 of his witness statement: 'Other than providing signed documents from time to time, such as the powers of attorney, no further input and/or co-operation is required from the Trusts'.

17E Mr Crick's evidence referred to above is a true reflection of the Claimants' conduct towards the Defendant from the inception of the implementation of the JVA in 2011.

17F The conduct of Mr Crick and the Claimants, together with the statement in his witness statement, confirmed in his oral evidence, constitute a frustration of the rights of the Trusts and constitute a repudiation of a fundamental obligation of the Claimants which entitle the Defendants to cancel the JVA summarily.

17G The Defendants hereby accept the repudiation of the JVA.

17H The Defendants hereby cancel the JVA.....

179 B In the further alternative the Claimants hereby cancel the JVA as pleaded in paragraphs 17B to 17B.7.6 above.

2B. It is declared that the Claimants have repudiated the JVA and the defendants have validly cancelled the JVA.'

(Emphasis added)

[20] The applicants objected to the intention to amend on 31 August 2022. Their fundamental argument was that the arbitrator's jurisdiction was being expanded by extending the scope of the disputes that were referred to him. The application was argued on 27 September 2022 and on 30 September 2022 the arbitrator allowed the amendment.

[21] The award was produced by the arbitrator on 28 February 2023. He concluded in paragraphs 143.1, 143.3, and 143.4 of the award that the applicants were not in breach of the JVA at the time of the cancellation letter (17 January 2022) and that the respondents' cancellation of the JVA was invalid. He found that time was not of the essence in the JVA and it did not specify any time limits for the various land development steps. '*Absent an interpellatio placing the applicants in mora prior to the*

17 January 2022 “notice of breach”, mere prior delay in taking steps in the process of the land development did not constitute a breach of the JVA.’ He further found that:

’64 The breaches alleged in paragraphs 4.3, 4.4 and 4.5 of the 17 January 2022 letter all related to steps which, in the terminology of clause 3.4 of the JVA, the parties “anticipated” would eventually be taken at some future stage. Those steps would involve the “anticipated” establishment of one or more companies as realisation companies to take transfer of “the relevant portions of the property” all of which were still uncertain, given that even the process was not obligatory, but merely “anticipated” and could conceivably end up differently depending on what might occur in future.’

[22] The arbitrator then continued to find that:

‘...Until the “relevant portions” of the property could be established, it seems to me that it would be a pointless and premature exercise to commence setting up an uncertain number of realisation companies and to determine the rights and obligations of shareholders in each of those realisation companies before it was even known which portions of which properties owned by which trust would form part of which townships with which rezoning rights. The defendant’s heads of argument in relation to the “became impossible” defence highlights the necessity for ancillary agreements to deal with these uncertainties

.....It follows that as 22 July 2022 when the defendants filed their notice to amend to introduce their “became impossible” defence as well as at the date of effecting that defence by filing the amended pages 4 August 2022, the JVA agreement was still extant. Consequently, the validity of the defendants’ “became impossible” defence needs to be considered...’

[23] In conclusion on this issue the arbitrator then proceeded to make no award on the validity of the cancellation of the JVA and found that the applicants were not entitled to an award for specific performance as the JVA had become impossible to perform and of no force and effect (void). Lastly, the respondents' counterclaim in respect of the JGM Boerdery maintenance claim could not be upheld.

[24] In other words, the outcome of the arbitration was that the arbitrator dismissed the applicants' claims, dismissed the respondents' maintenance claim and non-performance defence, upheld the respondents' became impossible defence and awarded costs in favour of the respondents.

What was referred to the arbitrator?

[25] There is a dispute between the parties as to what was referred to the arbitrator. The applicants aver that it is patently clear from the Reference (referred to above) that the parties referred only **existing disputes** to the arbitration, and not **future disputes**. According to the applicants, this means that the arbitrator's jurisdiction was confined to: One, the validity of the cancellation of the JVA by the respondents on 3 March 2022 (which the arbitrator referred to as the 'cancellation dispute' and/or 'non-performance dispute') and, two, the 'implementation dispute' which concerned the failure/refusal of the respondents to provide the applicants with the required power/s of attorney.

[26] More specifically the applicants assert that there were no disputes between the parties in existence as of 12 April 2022 (the date of the Reference) regarding the purported repudiation of the JVA by the applicants or a dispute as to whether the JVA

had become impossible to perform. It follows that the arbitrator had no jurisdiction to deal with these defences. Yet, so it is argued, the arbitrator, in error, pronounced on these matters in his award.

[27] The applicants further submit that the parties also did not refer disputes as **defined or specified in pleadings** to the arbitrator and pleadings played no role other than further defining the actual disputes referred. In other words, the pleadings did not serve to articulate or delineate the disputes. Their objective was secondary; specifically, to refine the disputes, rather than to establish or broaden the scope of the disputes. It is argued that the arbitrator failed to recognise this distinction and, as a result, assumed jurisdiction over disputes that were not included in the Reference, thereby exceeding his powers.

[28] To prove their point, the applicants referred the court to the arbitrator's finding on the cancellation dispute. The arbitrator held, after considering the evidence, that the applicants were not in breach of any obligations in terms of the JVA as at the date of the cancellation letter and that the respondents' non-performance defence cannot succeed. He however did not make any award and held that the validity of the respondents' 'became impossible' defence needed to be considered, which was introduced by the respondents during their first amendment on 22 July 2022.

[29] The arbitrator's reasoning for considering the became impossible defence was the following:

'36 *In the present case it is clear that the applicants are persisting in seeking an award of specific performance. Consequently, I am of the view that, by necessary inference, there are disputes between the parties as to whether the applicants are*

entitled to such an award having regard to the issues raised in the proposed amendments which will require adjudication in this arbitration.

37 *In the circumstances I conclude that I do have jurisdiction to allow the amendments now sought.'*

[30] The applicants submit that in adopting this approach, the arbitrator firstly strayed beyond his powers. No dispute regarding the '... validity of the respondents' 'became impossible' defence ...' had been referred to the arbitrator. And secondly, the arbitrator also exceeded his powers in considering a belatedly introduced repudiation defence by the respondents. This defence was allowed by the arbitrator pursuant to an amendment introduced by the respondents after the completion of the hearing, but without the consent of the applicants.

[31] The applicants further argue that the arbitrator misconstrued the point, as the question was not whether the amendments required adjudication, but rather whether the Reference empowered him to determine 'the issues' that the amendments sought to introduce. Furthermore, the issue was not whether he had jurisdiction to allow amendments, but whether he had jurisdiction to decide the new disputes that the amendments intended to introduce. These are distinct matters, and the arbitrator misinterpreted the points. Additionally, the arbitrator devoted substantial time in considering the repudiation defence despite having no powers to do so. Despite this, and in the end, the arbitrator made no operative award in respect of the repudiation defence.

[32] As a point of departure, reference must be made to section 1 of the Act. It defines an arbitration agreement as a 'written agreement providing for the reference

to arbitration of **any existing dispute** or **any future dispute** relating to a matter **specified in the agreement**, whether an arbitrator is named or designated therein or not (emphasis provided).'

[33] Arbitration can only be referenced in the event that there is a dispute between the parties involved. The term 'dispute' should be defined in its conventional sense. It does not possess any unique or distinctive significance that has been bestowed upon it by lawyers.⁷

[34] By submitting the dispute in writing in the form of pleadings, the parties are able to provide the arbitrator with a concise summary of the issues that must be resolved. In other words, the pleadings are intended to identify and define the issues that arise from the disputes that are referred. The arbitrator is obligated to render a decision on every issue in dispute, as the statements of claim and defence are included in the arbitrator's terms of reference. The issues delineated in the pleadings are lawfully before the arbitrator, provided that they fall within the disputes that are referred for arbitration. There is no procedural or other requirement that the 'issues' must exist when the 'disputes' are referred to arbitration. By definition, they do not exist at that stage.

[35] Consequently, the applicants obfuscate the concepts of 'disputes' referred and 'issues' arising from the pleadings. A statement of defence can raise any issue that arises from the interpretation of the agreement upon which a statement of claim is

⁷ Ramsden, "The Law of Arbitration" p 49-50.

based, provided that the issue falls within the dispute or disputes referred for determination by the arbitrator. The arbitrator ruled on all of the issues that were raised, including those that were derived from the amended pleadings, as he was bound to do. The sole inquiry is whether those issues are included in the two disputes that were referred.

[36] Paragraph 4 of the Reference stated that disputes exist between the parties in relation to (1) the purported cancellation of the joint venture agreement on 3 March 2022 concluded between the parties on 23 November 2011 **and** (2) the implementation of the JVA.

[37] The parties delineated the issues regarding the 'purported cancellation' and the 'implementation' of the JVA through the exchange of pleadings (the statement of claim and the statement of defence). The arbitrator's power is contingent upon the determination of whether the defences, and the resulting issues, fell within the concept of 'implementation' of the JVA.

The implementation issue

[38] In essence, the central issue between the parties was the 'implementation dispute', which was the right to regulate the development of the properties envisioned in clause 3 of the JVA. In other words, the question was whether the applicants' decision-making authority was intended to be shared with the respondents or was exclusive. It is evident from the correspondence between the parties that this issue had been alive for several years prior to 12 April 2022 and was still present when the

Reference was agreed upon on that date. It was also present in the original pleadings and in the subsequent amendments thereof, which were not objected to.

[39] The applicants acknowledged in their founding affidavit that the implementation dispute 'concerned the failure/refusal of the respondents to provide the applicants with the required powers'. Despite the absence of these terms in paragraph 4 of the Reference, they can be legitimately considered. This is because the Reference must be interpreted like any other written agreement, holistically, which includes taking into account the background context to its conclusion.⁸

[40] According to the arbitrator's references in paragraphs 129.1, 129.2, and 129.3 of the award to the correspondence between the parties since 2019, the implementation dispute appears to have been centred around the applicants' request for an unlimited power of attorney to oversee the development of the properties. This would have granted them the authority to make all decisions regarding the development. The respondents were unwilling to grant such extensive authority.

[41] This issue, which is inherent in the implementation dispute, was incorporated into the pleadings in the following manner: The applicants, among other things, claimed an order compelling the respondents to grant them an unlimited power of attorney. In other words, the claim for specific performance was predicated on the implied sole decision-making power of the applicants. Although the sole decision-

⁸ *Framatome v Eskom Holdings SOC Ltd* 2022 (2) SA 395 (SCA) at [30].

making power was not alleged expressly, the wording of the power of attorney suggested it and that was how the respondents understood it.

[42] The claimed sole decision-making power, disputed since 2019, became an issue on the pleadings. In paragraph 106 of their statement of defence, the respondents implored the parties to collaborate and reach a consensus on the unresolved matters regarding the realisation of the development. In paragraph 134.2 of the statement of defence it was pleaded that 'further agreement on the Power was required'. In paragraph 175.2 the respondents pleaded that the applicants were overreaching by demanding 'draconian PoAs (Power of attorneys)' to which they were not entitled and that these demands 'were made in March 2019 and September 2020.'

[43] The applicants did not raise any objections to the respondents' denial that they were obligated to grant the applicants unlimited powers to implement the JVA in the exchange of pleadings or subsequent proceedings. In other words, it was acknowledged as a legitimate concern regarding the implementation of the JVA. The converse of that denial is that the applicants did not possess the exclusive right to make decisions. Consequently, this matter was a well-established component of the pleadings prior to the respondents' amendments.

[44] The initial statement of defence set out the issue of consensus in the decision-making in general terms. However, the respondent's first amendment, specified the specific areas of implementation that necessitated consensus, and in the event that this was not achieved, the JVA would be unable to be implemented. This defence and the issues raised flowed directly from the implementation dispute.

[45] The first amendment was predicated on the interpretation of the JVA, which indicated that it contained a tacit term which visaged that ancillary agreements would be entered into in order to reach consensus on the implementation of the JVA. The applicants did not object to the introduction of the ancillary contract defence and the issue raised, and consequently, the arbitrator did not address the objection that is now raised belatedly in paragraph 23 and 24 of the applicants' heads of argument. The arbitrator only addressed the objection to the second amendment, which introduced the 'repudiation' defence. This objection was correctly rejected by the arbitrator. The arbitrator held that 'implementation' included the claim for specific performance and the defences thereto. The arbitrator was correct in coming to this conclusion.

[46] The respondents further pleaded that the JVA thus became impossible to implement due to the absence of ancillary agreements. Mr Crick submitted a supplementary witness statement on behalf of the applicants in response to the defence that ancillary agreements were necessary to ensure the JVA's business efficacy. In this statement, he emphasised that the respondents had no role to play in the development's decision-making process. It is noteworthy that paragraphs 41 and 42 of Mr Crick's statement provide this evidence under the heading "IMPLEMENTING THE AGREEMENT." His evidence is a complete denial of the necessity for any form of collaboration or collaborative decision-making. On a proper interpretation of the JVA, Mr Crick repudiated the essence of the JVA in its entirety. The 'implementation' dispute encompasses the repudiation defence and the issues it raised.

[47] There is therefore no merit in the applicants' submission that the pleadings extended the ambit of the disputes and that the arbitrator decided disputes not forming

part of the Reference. In formulating the became impossible defence and the repudiation defence, the applicants raised issues which had formed part of the implementation dispute since 2019. The arbitrator was correct in considering these defences despite finding that the JVA was not lawfully cancelled.

[48] Nevertheless, the refusal to provide unlimited powers of attorney also formed an issue in the 'cancellation' dispute. In paragraphs 47.1 to 47.4 of the statement of claim the applicants relied on the respondents' failure to provide powers of attorney as an excuse for not performing their (applicants) obligations.

[49] Consequently, the arbitrator was entirely justified in permitting the amendments and considering the defences. When the arbitrator refers to the issues arising from the ancillary agreements defence and the repudiation defence as 'disputes' in subparagraph 33 (of main paragraph 130) of the award, it is evident from the paragraph as a whole that he dealt with them as issues arising from the pleadings and defences to the claim for specific performance.

[50] The 'became impossible defence' and the 'repudiation defence', including the issues flowing from these defences, thus formed part of the 'implementation' dispute as it existed when the Reference was agreed upon on 12 April 2022.

Contradictory findings

[51] The applicants contend that the arbitrator failed to direct his mind to central issues in the matter, alternatively, to differentiate between them. To illustrate the point reference is made to the arbitrator's finding that '*as the date of effecting that defence*

by filing the amended pages [on] 4 August 2022 **the JVA agreement was still extant** and that the validity of the respondents' 'became impossible' defence needed to be considered. The arbitrator then concluded that:

'110. In conclusion therefore, in my view, by the time the amendment was effected on 4 August 2022, it was not possible to conclude the ancillary agreements pleaded and hence the JVA had by then become impossible as pleaded by the respondents, reinforced by the stance of the applicants' as evidenced by the contents of Mr Crick's supplementary witness statement filed just a week later on 12 August 2022.

111. Consequently, I am of the view that the respondents have succeeded in proving their "became impossible" defence. It also follows from this that the applicants' claims for a declarator and for specific performance cannot succeed.'

[52] The applicants submit that there are three aspects to this conclusion: first, that by 4 August 2022 it was not possible to conclude the ancillary agreements pleaded; second, by then (4 August 2022) the JVA had become impossible as pleaded by the respondents; and third, that this conclusion was reinforced by the stance of the applicants as evidenced by the contents of Mr Crick's supplementary witness statement filed on 12 August 2022.

[53] It is contended that this conclusion was incompetent in light of the arbitrator's previous conclusion that the JVA was in existence as of 4 August 2022, and, as a result, this finding constituted a gross irregularity. Having decided that the JVA was in existence on 4 August 2022, it was no longer open to the arbitrator to come to a different conclusion. The result of the arbitrator's approach, so it is argued, is that the applicants were deprived of a fair trial on this issue.

[54] Out of the applicants' argument, two issues become apparent that require resolution: Firstly, did the arbitrator conduct a 'gross irregularity' by issuing 'contradictory conclusions' regarding the JVA's continued existence on 4 August 2022? Secondly, if so, were the applicants denied a fair trial?

[55] In my view, there is no contradiction. The arbitrator initially determined that the applicants were not in breach of the JVA as of the 17 January 2022 breach notice and that the cancellation of the JVA on 3 March 2022 by the respondents was invalid. Consequently, **the JVA was still in existence when the amendment was implemented on 4 August 2022**, which introduced the 'became impossible' defence. Therefore, because the JVA was still in extant, the validity of the appellants' 'became impossible' defence needed to be considered.

[56] The arbitrator found that by the time the amendment was made on 4 August 2022—rather than on the date of the amendment—it was no longer possible to conclude the ancillary agreements as pleaded. Consequently, the JVA had, by then, become impossible, as asserted by the respondents. Hence the failure to conclude the ancillary agreements led to a situation where (at the latest on 4 August 2022) it had become impossible to implement the JVA.

[57] Consequently, the attack based on 'contradictory findings' is baseless and must be rejected. It is not predicated on any of the review grounds outlined in section 33 of the Act.

[58] But even if there was a contradiction, section 33(1)(b) of the Act requires that the gross irregularity must be in the 'conduct of the arbitration'. The contradiction relied

upon by the applicants is unrelated to the conduct of the proceedings. I am unable to find that the arbitrator misconceived the whole nature of the enquiry or its duties in connection therewith.⁹ At most, it forms part of the arbitrator's findings or conclusions, rather than the proceedings themselves.¹⁰ Consequently, I conclude that the applicants were not deprived of a fair trial.

The ancillary contracts/agreements

[59] In terms of the breach notice the respondents alleged that the applicants were in breach of the agreement by failing to comply with Big Five's 'realisation performance' obligations in terms of clause 3, in which mention was made to several agreements that needed to be concluded. Then, in their statement of defence, the respondents formally introduced the ancillary contracts defence. The applicants allege that if the breach notice is compared to the amendment to the statement of defence, the ancillary agreements pleaded in the amendment overlap those raised in the breach notice and the matters complained of in the amendment do not take the matters complained of in the breach notice further.

[60] The applicants further argue that paragraph 17A.4 of the amendment which states that *'the failure to conclude the ancillary contract(s) to regulate the above aspects, alternatively so much thereof as would give the JVA business efficacy, would render the JVA incapable of being performed to achieve the "Development" as a collaborative endeavour'*, leaves matters 'both open-ended and vague because it both

⁹ *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 551; *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) paras 69 - 85.

¹⁰ *Ellis v Morgan* [*Ellis v Morgan, Ellis v Dessan* 1909 TS 576]; *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 551.

qualifies and limits the ancillary agreements contended for to those that are supposedly required to give the JVA business efficacy ('... so much thereof as would give the JVA business efficacy ...').'

[61] It is argued that this is the case because the plea fails to specify which ancillary agreements are necessary to give the JVA business efficacy. Likewise, the arbitrator did not identify in his award which of the proposed ancillary agreements were necessary to achieve this. As a result, the award left the matter vague and open-ended. Consequently, the arbitrator failed to resolve this issue (assuming it fell within his powers), thereby failing to make a determination on it.

[62] The applicants were unable to explain how this constituted misconduct or a gross irregularity in the proceedings. In any event, the specific ancillary agreements that might have rendered the JVA void if left unconcluded are irrelevant, as none were concluded at all.

The became impossible defence

[63] In a nutshell, the respondents' became impossible defence was based on the following averments: One, the conclusion of ancillary agreements was required to give business efficacy to the JVA. Two, it was an implied or tacit term of the JVA that the ancillary agreements **would** (not should) be concluded by the parties. Three, the failure to conclude the ancillary agreements, alternatively, '... so much thereof as would give the JVA business efficacy ...', would render the JVA incapable of being performed.

[64] The applicants first complaint is that the respondents did not plead an obligation that the ancillary agreements **should** be concluded. This aspect was acknowledged by the arbitrator, and the respondents were at pains to point out that the ancillary agreements did not constitute contractual obligations.

[65] The applicants contend that this submission on behalf of the respondents, 'amounts to a fundamental disavowal of the legal efficacy of the respondents' impossibility defence'. The submission (and plea) is to the effect that the tacit terms pleaded for incorporation were not intended to have any contractual effect. It further raises the question as to whether it is at all feasible in law to import a tacit term which constitutes no obligation (or right) into a contract, because there would be no purpose to such an importation. It is submitted that it cannot be to lend business efficacy to a contract as it determines no contractual obligation or right.

[66] The applicants further argue that the problem, not recognised by the arbitrator, is that this approach by the respondents amounted to a legal absurdity for the following reasons: Terms are (whether impliedly or tacitly) imported into a contract only if they are terms in the normal sense, namely, they form part of the provisions which set out the nature and details of the performances due by the parties¹¹ (in other words, their rights, and obligations). If a purported tacit term is suggested that would not amount to an obligation, then the very basis for importation falls away in law. It is only when it is found that a tacit term (as any other contractual provision) has operational effect,

¹¹ LAWSA, Volume 9, Third Edition, para 352.

fundamental to the ambit of the obligations the parties undertake, that it can, in law, be imported as a term of the contract.¹²

[67] The applicants argue that the arbitrator found compelling reasons to import the tacit terms pleaded in relation to the ancillary agreements and that the JVA essentially constituted a framework that required the conclusion of further ancillary agreements, despite the fact that the applicants did not plead that the ancillary agreements be concluded as obligations and submitted in argument that the respondents' case is merely that the ancillary agreements would (not should) be concluded. The legal absurdity of incorporating tacit terms that the parties to a contract never intended to have contractual force was perpetuated by this approach. It is submitted that the arbitrator completely misinterpreted this central argument.

[68] Secondly, the respondents' statement of defence did not specify which agreements were at issue or allege a specific date on which the JVA allegedly became impossible to perform. It is argued that supervening impossibility, to the extent applicable, must both in law, in fact and in logic be capable of determination as from a date or event, because how else can the effect of impossibility be given application.

[69] Thirdly, it is argued that the failure to provide a specific date or event is material, as the contention advanced did not provide a focal point for a factual enquiry into the proposition put up, which rendered the proposition meaningless. It also meant that the proposition could not find application as supervening impossibility cannot be

¹² *Absa Bank Ltd v Swanepoel NO*, 2004 (6) SA 178 (SCA) para 7.

determined in a vacuum. As it turned out, the respondents' evidence did not clear up the vacuum and the applicants' evidence in point, namely, that of Mr Crick, was not considered by the arbitrator in this regard. The arbitrator thus made such an award without any factual basis therefor.

[70] Lastly, the respondents did not plead that by 4 August 2022 it was or had become impossible to perform the JVA. The award fails to provide an explanation or rationale for the conclusion that the JVA was rendered impossible to execute by the mere filing of amended documents on 4 August 2022. In stark contrast, the arbitrator's initial determination was that the JVA was still in existence on 4 August 2022. It is contended that the assertion that the contract was both void and in existence on the same date is 'absurd'.

The attack on the tacit terms

[71] The arbitrator found that compelling reasons existed to import the tacit terms and that the JVA essentially constituted a framework which required further ancillary agreements to be concluded. The applicants have raised various criticisms of this conclusion, but these amount to an appeal on the merits rather than allegations of misconduct or irregularities as defined in section 33 of the Act

[72] Nonetheless, I will address the challenge to the arbitrator's finding. As a starting point, it is necessary to restate the essence of the tacit terms pleaded. These terms formed part of the broader issue of implementation by consensus and were based on an interpretation of the JVA that envisioned a cooperative effort to achieve the development.

[73] As a typical long-term relational contract, the JVA set out only the broad framework of the enterprise, leaving the enforceable details to be negotiated and agreed upon later. While it was binding in outlining the joint venture and preventing the Trusts from granting development rights to another developer, the specific terms of the development remained subject to future agreement.

[74] It is undisputed that ancillary agreements were anticipated. The agreements proposed by the respondents encompass all aspects of the development and are detailed in paragraphs 17A.3.1 to 17A.3.11 of the statement of defence, as cited by the arbitrator in paragraph 68 of the award. The applicants, however, argue that only two ancillary agreements were necessary—one addressing the establishment of the development companies and the transfer of properties from the Trusts to these companies, and the other being a shareholders' agreement.

[75] I agree with counsel for the respondents, Mr du Plessis, that this distinction between the ancillary agreements contended for by the applicants and those contended for by the respondents, is of crucial importance for the proper appreciation of the argument of the applicants with regard to the alleged failure of the arbitrator to consider the evidence of Mr Crick.

[76] The respondents did not argue that the ancillary agreements had become impossible to conclude but rather that they had not been concluded, rendering the JVA impossible to implement. The fundamental issue was that the method of implementation had not been agreed upon, which was a direct consequence of the nature of the ancillary agreements.

[77] The applicants contend that because the respondents plead that it was a tacit term of the JVA that ancillary agreements **would** be concluded and not **should**, the term did not create an obligation and was therefore invalid. The contention is that a term that does not create an obligation 'cannot lend business efficacy to a contract as it determines no contractual obligation or right'.

[78] There is no legal foundation for this assertion. Numerous categories of terms in the law of contract do not establish obligations that must be fulfilled by a party. Suppositions are one such category. Conditions are an additional category. The respondents may plead the tacit term in either of those categories.¹³

[79] In this case, the terms were pleaded as implied or, alternatively, tacit, with the understanding that further ancillary agreements would be concluded. In other words, the parties anticipated that these agreements would be finalized—if they were, the JVA could be implemented; if not, implementation would be impossible. The term was legally valid, and there is no legal or logical absurdity in the respondents' approach, as alleged by the applicants. Even if the arbitrator's reasoning amounted to an error of law, it would not warrant review or setting aside under section 33 of the Act.

[80] An additional criticism of the tacit terms pertains to the absence of a specified date for the conclusion of the ancillary agreements. The criticism is however unwarranted, as the absence of a date is not an issue because the applicants claimed specific performance. This claim would be successful only if the JVA could support it.

¹³ *Van Rooyen Steel Pty Ltd v Smith and Another* 2002 (4) SA 264 (SCA) at para [8].

[81] The respondents pleaded the result of the failure to conclude the ancillary agreements in paragraph 179A.3 of the statement of defence: *'The JVA has become incapable of being implemented as a cooperative endeavour and has accordingly lapsed.'* No ancillary agreements had been concluded by the time the amended pages were lodged on 4 August 2022. In reality, no ancillary agreements were ever going to be concluded because, according to Mr Crick's evidence, he believed that the applicants had sole decision-making authority over the development. It was in this context that the arbitrator found the conclusion of the ancillary agreements to be impossible (to be distinguished from the doctrine of supervening impossibility defence (impossibility of performance)). There is thus no merit in the argument that no date was set for the conclusion of the ancillary agreements.

Evidence of Mr Crick not considered

[82] Mr Crick, the primary witness for the applicants (on the merits and the facts), summarised his evidence during the arbitration in the following manner:

'48. The effect of my evidence was that the time for the conclusion of ancillary agreements, to the extent necessary, had not arrived. Those agreements would be triggered, to the extent necessary, only once the development rights in respect of the properties had been granted. It is grossly negligent of the arbitrator not to have considered my evidence and to have taken the view that the non-conclusion of ancillary agreements had already caused the demise of the JVA. I am advised and state that the arbitrator's failure to consider my evidence is not only grossly negligent but also constitutes a gross irregularity, if not misconduct. My evidence was not contested and should have formed a cornerstone of the arbitrator's award. The arbitrator's failure to consider my evidence does not constitute an error. The only reasonable conclusion I

reach is that the exclusion of my evidence was deliberate. I maintain that if he had considered my evidence, he would have found that the JVA was extant at all material times and that the necessary ancillary agreements would be concluded in future.'

[83] The applicants assert that the very centre of the respondents' became impossible defence necessitated a thorough examination of the conclusion (or lack thereof) of the suggested required ancillary agreements. It is argued that Mr Crick's evidence, which was not disputed, was not only vital, but entirely destructive of the respondents' propositions. The applicants contend that the arbitrator failed to consider Mr Crick's evidence, which failure was, *'at the very least, grossly negligent (suggestive of partiality) and constituted misconduct, alternatively, a gross irregularity.'* This conduct by the arbitrator, in turn, led to an unfair hearing, as he failed to give proper consideration to this essential and critical issue. As a result, the applicants were deprived of a full and fair determination of their case.

[84] This is a serious but baseless attack on the arbitrator's conduct. The mere absence of a reference to certain evidence in the award does not mean it was not considered. It was the applicants' responsibility to demonstrate the relevance of Mr. Crick's evidence, which they failed to do. Mr Crick himself testified that the time for concluding the ancillary agreements had not yet arrived. Notably, he was referring only to a limited set of ancillary agreements—specifically, those concerning the establishment of the development companies and the pricing of the properties.

[85] Considering the evidence as a whole, Mr Crick's testimony had effectively become irrelevant. This is explained in detail in paragraphs 17 to 22 of the respondents' answering affidavit. Once the arbitrator found compelling reasons to

import the tacit terms and concluded that the ancillary agreements had become impossible, Mr Crick's claim that he alone had the authority to determine all aspects of the township development rendered the timing of his ancillary agreements entirely irrelevant. In other words, his own additional evidence—asserting his sole decision-making power—superseded any relevance his testimony on the timing of the ancillary agreements might have had, as those agreements were never going to be concluded.

Analysis of the operative awards

[86] The arbitrator dismissed claim 1, which concerned an order declaring the respondents' cancellation of the JVA on 3 March 2022 as invalid. The applicants submit that the dismissal is entirely incompatible with the arbitrator finding that as at both 22 July 2022 and 4 August 2022 the JVA agreement was still extant (in existence) and the applicants were thus not in breach of any of their obligations in terms of their obligations in terms of breach letter and that the respondents' 'non-performance defence' could not succeed.

[87] It is submitted that the arbitrator should have upheld claim 1 rather than dismissing it. And the dismissal was entirely inconsistent with the arbitrator's own analysis of the matter. As a result, the arbitrator was not competent to make such an award, rendering the operative award grossly irregular. Accordingly, the dismissal of claim 1 constituted, at the very least, a gross irregularity and should be set aside.

[88] I disagree. In claim 1, the applicants sought a declaratory order that the respondents' cancellation of the JVA was invalid, while in claim 2, they sought specific performance of the JVA. When considering the arbitrator's factual findings on claim 2,

the order on claim 1 is not inconsistent. The arbitrator essentially found that specific performance could not be granted because the JVA had become ineffective and was, in any event, repudiated and cancelled.

[89] In this context, a finding that the cancellation on 3 March 2022 was invalid would have no substantive effect. Issuing a declaratory order to that effect would not alter the parties' rights in any way. Courts and arbitrators do not grant declaratory orders that serve only to resolve abstract, academic, or hypothetical questions without producing any concrete or tangible legal consequences.¹⁴

[90] For the foregoing reasons the application for review and setting aside of the arbitrator's award [paragraphs 143.1, 143.3 and 143.4] is dismissed and the counterapplication granted.

Costs

[91] The respondents seek a punitive costs order against the applicants. In their heads of argument and during the hearing, the applicants described various sections of the arbitrator's award as 'misconduct' and 'gross irregularity'. It must be assumed that the terminology was intended to carry the meaning which the words have in the section 33 of the Act.

[92] In *Johan Louw Konstruksie (Edms) Bpk v Mitchell NO & Another*¹⁵ it was held that 'misconduct' has the connotation of moral turpitude in the sense of dishonesty,

¹⁴ *Preston v Vredendal Co-operative Winery Ltd & Another* 2001 (1) SA 244 (E), at 249 B-E; *Myburgh Park Langebaan (Pty) Ltd v Langebaan Municipality & Others* 2001 (4) SA 1144 (C), at 1151A - 1154.

¹⁵ *Johan Louw Konstruksie (Edms) Bpk v Mitchell NO & Another* 2002 (3) SA 171 (C), p 182, par 3[46].

partiality or bad faith. In *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*¹⁶ the court found that 'gross irregularity' relates to the conduct of the proceedings and must be such that it prevented a fair trial of the issue. The applicants further allege that the arbitrator deliberately excluded evidence, denied them a fair trial, perpetuated a legal absurdity advanced by the respondents, and acted with gross negligence in a manner suggestive of partiality.

[93] In *Hyperchemicals International v Maybaker Agrichem*¹⁷ Preiss J granted a punitive costs order against the applicants on similar grounds. He held as follows:

'In deciding upon an appropriate scale I do not lose sight of the fact that arbitrators, especially when they sit in matters of commercial confrontation where allegations of fraudulent misrepresentations are made, must anticipate robust and frank arguments. On the other hand, arbitrators are entitled to the protection of the Court where intemperate and unfounded allegations are made against them.

I have decided that the applicants should be ordered to pay attorney and client costs and my reasons are the following: (a) Although the applicants indicated that dishonesty was not to be imputed to the arbitrator, they used language which was calculated to impute incompetence of a serious character. The language was extravagant and, as I have found, constituted a basis for review which is unfounded in law. Phrases abound such as 'a departure from a judicial frame of mind', 'a total want of judicial capacity amounting to legal misconduct', no fair-

¹⁶ *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* 2008 (2) SA 24 (CC), p 112, par [265].

¹⁷ 1992 (1) SA 89 (W) 100 8 —E.

mindful man applying his mind judicially could have come to the conclusion indicated by the award', and 'gross carelessness'. These are vexatious accusations.'

[94] In the present matter the 'facts' relied upon by the applicants fall well short of establishing either misconduct or gross irregularity. Their allegations of incompetence and dishonesty against the arbitrator are vexatious. Furthermore, the applicants—who have had legal representation throughout—knew or ought to have known that their review of the arbitration award had no reasonable prospects of success. In the absence of credible evidence supporting any of the grounds for review under section 33, including misconduct, gross irregularities in the proceedings, or a lack of authority on the part of the arbitrator, their claims are unfounded.

[95] The review also delayed the enforcement of a valid award in favour of the trustees of Trusts with limited financial resources to cover legal expenses. The applicants further delayed the matter by engaging in dilatory tactics, further evidenced by their failure to prosecute the review in a timely manner, only filing heads of argument, practice notes, and chronology when compelled by court order. For these additional reasons, the review application was frivolous and pursued in bad faith. In the circumstances, the respondents are entitled to full indemnification for their legal costs, justifying a punitive costs order on an attorney and client scale.

[96] In the result the following order is made:

1. The application to review and set aside the award is dismissed.
2. Costs of the application to be paid by the applicants on an attorney client scale, jointly and severally, the one absolving the other, including the costs of two counsel where so employed.

3. The counterapplication to enforce the award is granted.
4. The arbitration award published by the seventh respondent on 28 February 2023, at paragraph 143 of the award, is made an order of court.
5. The costs of the counterapplication to be paid by the first and second respondents jointly and severally, the one absolving the other, including the costs of two counsel where so employed.



L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

(Electronically submitted therefore unsigned)

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 5 February 2025.

APPEARANCES

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Date of hearing:

19 August 2024

Date of judgment:

5 February 2025