

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2023-079557

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
6 May 2025	
DATE	SIGNATURE

In the matter between:

CIVIL AND POWER GENERATION PROJECTS (PTY) LTD

Applicant

and

MHI POWER ZAF (PTY) LTD

First Respondent

ANDRE ROBERT GAUTSCHI N.O.

Second Respondent

JUDGMENT

CRUTCHFIELD J

- [1] The applicant, Civil and Power Generation Projects (Pty) Ltd, seeks a review and the setting aside of the awards of the arbitrator, the second respondent before me, in terms of section 33(1)(a), (b) and/or (c) of the Arbitration Act 42 of 1965 ("the Act"). The first respondent, MHI Power ZAF (Pty) Ltd, seeks the dismissal of the applicant's review application and an order in terms of the first

respondent's counterapplication, that various awards of the second respondent be made orders of court and that the award of a cost consultant also be made an order of court under s31(1) of the Act, being:

- a. The interim award made on 6 July 2021;
- b. The merits award made on 4 March 2022;
- c. The final quantum award made on 30 June 2023; and
- d. The bill of costs taxed and dated 13 June 2023.

- [2] The second respondent, the arbitrator, Mr André Robert Gautschi *N.O.*, did not participate in the review application and abides the decision of this court.
- [3] Paragraph 1 of the applicant's notice of motion provides for an order reviewing and setting aside all aspects of the award of the second respondent dated 30 June 2023, in terms of s33(1)(b) and/or (c) of the Act.
- [4] Two alternatives, as well as ancillary relief, are also claimed by the applicant together with costs of the application in terms of the notice of motion.
- [5] The second respondent's award dated 30 June 2023, is referred to in the papers as the "quantum award," this being the award in respect of which the applicant seeks the review and setting aside in terms of paragraph 1 of the applicant's notice of motion.
- [6] The second respondent in fact issued four awards through the process of the arbitration between the parties, being the retention award dated 10 February 2021, the clarification award dated 5 March 2021, the merits award dated 4 March 2022 and the quantum award dated 30 June 2023.
- [7] Whilst the applicant attacks the clarification and merits awards in these proceedings, it is only the quantum award that the applicant seeks to be reviewed and set aside.
- [8] The applicant's application stands on two legs – firstly; that the arbitrator, the second respondent, did not have jurisdiction to entertain and determine the

first respondent's counterclaim, and secondly, that the arbitrator made himself guilty of misconduct and gross irregularities and that he exceeded his powers in terms of s33(1)(a), (b) or (c) of the Act. The applicant contends that the second respondent did not have jurisdiction to entertain and determine the first respondent's counterclaim and that the onus remains on the first respondent to prove that the second respondent had jurisdiction to deal with the counterclaim.

- [9] The applicant opposes the first respondent's counterapplication that the awards aforementioned, be made orders of court, and contends that all of the awards made after the retention award on 10 February 2021, must be set aside. As stated by me already, whilst the applicant attacks the clarification and merits awards, the notice of motion seeks that only the quantum award be reviewed and set aside.
- [10] The essence of the applicant's argument is that the first respondent's counterclaim was not included in the disputes that were referred to arbitration by the High Court under case number 90571/2019. The applicant, in argument before me, disputed the second respondent's jurisdiction to deal with the counterclaim. The applicant contended that the retention award, in any event, determined the first respondent's counterclaim raised in the arbitration, after which the arbitrator was *functus officio*, that the arbitrator did not have jurisdiction to permit the first respondent to pursue its counterclaim on grounds that did not form part of the High Court application under case number 90571/2019, and that the arbitrator had no jurisdiction to allow a new basis to pursue a counterclaim in the arbitration.
- [11] The first respondent raised three separate and self-standing grounds as bases for the dismissal of the applicant's attack on the arbitrator's jurisdiction to determine the first respondent's counterclaim. Firstly, that the arbitrator was clothed with the necessary jurisdiction and power to determine the first respondent's counterclaim. Secondly, that the application was brought by the applicant outside of the six week time period provided by the Act, in the absence of an application to extend the time period on cause shown. Thirdly, that the applicant is perempted from raising the jurisdiction defence because

the applicant acquiesced, by its objective conduct, in the jurisdiction of the arbitrator to determine the first respondent's counterclaim. I shall deal with the first respondent's grounds as necessary in due course.

[12] I turn to deal with the issues before me.

[13] The applicant's attack on the arbitrator's jurisdiction in respect of the first respondent's counterclaim is framed as the absence of a counterclaim by the first respondent in the papers before the High Court, which application resulted in the court order referring the matter to arbitration. According to the applicant, the issues referred to arbitration in terms of the court order did not include the counterclaim by the first respondent. The applicant contends that the dispute that the High Court referred to arbitration comprised only one issue – being whether the first respondent, MHI, could set off against the retention amount due to the applicant and claimed by the applicant.

[14] The applicant's application was aimed at claiming payment of retention funds from the first respondent. The latter, the first respondent, resisted the applicant's claim to payment of the retention monies with reference to the first respondent's significantly larger claim, against the applicant. The notices issued by the first respondent to the applicant prior to the High Court application demonstrate that the first respondent was contemplating a claim, indeed potentially a counterclaim, against the applicant.¹

[15] The origins of the applicant's attack on the second respondent's jurisdiction to determine the first respondent's counterclaim, lie in the court order granted by Fabricius J referring the matter to arbitration ("the order").

[16] The order referred the "disputes" in terms of clause 20 of the conditions of subcontract, to arbitration. The order did not define the disputes or the issue or issues or the claim or the defence that were being referred to arbitration in terms of the order. The referral to arbitration was achieved in essentially broad

¹ See in this regard annexure D at CaseLines 1-130; annexure E at CaseLines 1-137; and annexure F at CaseLines 1-138.

strokes, with reference to the disputes on the papers before the High Court, being the applicant's claim for payment of the retention monies, and, the first respondent's claim in respect of the standardisation of wages overpayment (the "SOW overpayment").

- [17] There is no dispute between the parties before me that what served before the High Court were disputed claims by both parties, the one against the other. It is irrelevant how these competing claims were formulated, the first respondent's claim being one premised on a set-off.² The applicant, importantly, acknowledges the first respondent's claim in the High Court proceedings.³
- [18] Furthermore, it is evident from the arguments before me that the applicant did not object to the first respondent's counterclaim being part of the arbitration proceedings, being included in the arbitration and decided by the arbitrator.
- [19] The applicant's objection to jurisdiction raised in reply to the first respondent's statement of defence,⁴ reflects that the applicant's objection was limited to defences that were raised. No objection was brought to the first respondent's counterclaim. Furthermore, the applicant in its statement of defence,⁵ repeated paragraph 5 aforementioned of its reply.
- [20] Clearly, the applicant's objection did not comprise an objection to the arbitrator's jurisdiction in respect of the first respondent's counterclaim. The applicant's argument was that no counterclaim of the first respondent could be determined, but such an objection was not raised by the applicant in the pleadings.
- [21] Additionally, the applicant requested the separation of the applicant's claim and the first respondent's counterclaim. This was due, allegedly, to the complexity of the first respondent's counterclaim as against the relative simplicity of the applicant's claim for payment of the retention monies. Be that as it may, the arbitrator granted the separation and the arbitration proceeded accordingly.

² CaseLines 01-12 paragraph 23.

³ CaseLines 03-33 paragraph 97.3.

⁴ CaseLines 01-351 paragraph 5 up to and including paragraph 5.3.

⁵ CaseLines 01-358.

- [22] The arbitrator, in dealing with the retention award, was not asked to deal with the first respondent's counterclaim or any aspect of the first respondent's counterclaim. Furthermore, the arbitrator, in determining the retention award, did not deal with any aspect of the first respondent's counterclaim. The arbitrator was not asked to deal with any aspect of the counterclaim during the course of the proceedings that culminated in the retention award. The counterclaim remained outside and separate from the retention award proceedings. That serves to reflect the parties' mutual understanding that the counterclaim was alive and proceeding in due course, outside of the retention award.
- [23] The retention award kept the counterclaim undecided. That serves to put an end to the applicant's arguments of *res judicata* and the arbitrator being *functus officio*. Those arguments have no merit in the light of the counterclaim being determined separately from the retention award.
- [24] The retention award did not deal with or declare the notice in terms of clause 2.7 ("the clause 2.7 notice") to be invalid. The clarification award made it apparent that the arbitrator dealt with the sufficiency of the clause 2.7 notice for purposes of considering whether set-off should apply in respect of the first respondent's counterclaim.
- [25] The arbitrator, whilst invited by the applicant to dismiss the first respondent's counterclaim in terms of the clarification award proceedings, declined to do so. The arbitrator stated that the counterclaim, although brought in terms of an incorrect process, effectively could live on.
- [26] The objective fact that the applicant invited the arbitrator to dismiss the first respondent's counterclaim in terms of the clarification award proceedings and that the arbitrator declined to do so, stating that the first respondent may yet have a valid counterclaim and merely utilised a misguided process, did not serve to nonsuit the first respondent. That demonstrates unequivocally that the counterclaim remained extant and that both parties considered it to be valid and alive.

- [27] The arbitrator indicated in terms of the clarification award that the counterclaim was active and could proceed.
- [28] Accordingly, the arbitrator assumed and the parties assumed, and relied upon the arbitrator's obligation to decide the counterclaim. It was the arbitrator's job and it was within the arbitrator's powers conferred on him by the parties, to determine and decide the first respondent's counterclaim. The arbitrator was required and clothed with jurisdiction to determine the counterclaim.
- [29] As to the applicant's argument that the arbitrator impermissibly extended his jurisdiction, that argument is wrong in law. The first respondent referred to *Lebashe Investment Group (Pty) Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd & Others*,⁶ particularly paragraphs 27 and 28 thereof. The court dealt with an extension by an arbitrator of his powers and reiterated that an arbitrator "exceeds his powers' only by purporting to exercise a power (that) he did not have: the erroneous exercise of a power that (the arbitrator) did have does not involve an excess of power. An error of interpretation does not involve an arbitrator exceeding his powers."⁷
- [30] Accordingly, the erroneous exercise of a power that an arbitrator does have, does not equate to an impermissible extension of power, as relied upon and argued by the applicant before me. See in this regard the judgment of the SCA in *Telcordia Technologies Incorporated v Telkom SA Ltd*⁸ and referred to in *Lebashi*.⁹
- [31] An error of interpretation by an arbitrator does not amount to an impermissible extension by an arbitrator of his jurisdiction.
- [32] Thus, whether the arbitrator was incorrect or not in respect of his interpretation of the clause 2.7 notice requirements, and whether those requirements were met or not, and complied with the contractual requirements or not, is simply not an issue before me.

⁶ *Lebashe Investment Group (Pty) Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd & Others* [2024] ZAGPJHC 117 (9 February 2024) ("*Lebashe*").

⁷ *Telcordia Technologies Incorporated v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266 (SCA) ("*Telcordia*") at para [52].

⁸ *Id.*

⁹ *Lebashi* note 6 above footnote 20.

- [33] The arbitrator was of the view that the clause 2.7 notice was sufficient to survive the clarification award proceedings and thus, the determination in respect of the counterclaim did not reflect an impermissible extension by the arbitrator of his jurisdiction.
- [34] The counterclaim was brought by the first respondent and referred to arbitration under the order of Fabricius J. Furthermore, it was within the power and the jurisdiction of the arbitrator, as tasked by the parties, to decide the counterclaim, as he duly did. Accordingly, the applicant failed to distinguish between the arbitrator's power to decide, and, the arbitrator deciding his powers incorrectly.
- [35] The arbitrator, in deciding on the sufficiency of the clause 2.7 notice, did not widen his jurisdiction. The first respondent's amendment of its statement of defence was in line with the arbitrator's decision in the clarification award. The first respondent continued to rely on the same clause 2.7 notice dated 17 December 2019. The first respondent did not rely on a new or a supplemented clause 2.7 notice. The applicant pleaded to the amended statement of defence and did not object to the arbitrator's jurisdiction to determine the first respondent's counterclaim as formulated.
- [36] Thereafter, the first respondent requested a separation of the merits and quantum in respect of the counterclaim. At that stage, the applicant's claim in respect of the retention was already determined under the retention award and the first respondent had already received payment of its monies. All that was left before the arbitrator was the first respondent's counterclaim. In those circumstances the applicant agreed to the first respondent's request for a separation of the merits and the rand value of the counterclaim. The parties requested the arbitrator to make the award in respect of the separation by agreement between them. There was no objection by the applicant to the arbitrator's jurisdiction in respect of the counterclaim. The arbitrator heard the merits of the first respondent's counterclaim without any objection thereto by the applicant to his jurisdiction to do so, and without any reservation by the applicant of the applicant's rights in that regard.

- [37] It was only subsequent thereto, for the first time, after the applicant changed its legal representatives, that the applicant raised the jurisdiction issue sought to be advanced before me.
- [38] It is evident from the statements made by me above, that the first respondent's counterclaim was among the disputes that were referred by the High Court to arbitration in terms of the order. The parties and the arbitrator accepted that the counterclaim was before the arbitrator as a dispute for determination by the arbitrator and the parties and the arbitrator proceeded with the arbitration accordingly.
- [39] The fact that the counterclaim was premised on a setoff and that that setoff was found to be a misguided procedure, is irrelevant. A setoff requires an underlying liquidated claim. The point being that the first respondent advanced a counterclaim and the fact that that claim was subsequently found not to be liquidated, is irrelevant.
- [40] In the circumstances, it is not necessary for me to deal any further with the first respondent's arguments in respect of pre-emption, as I find that the disputes referred to arbitration in terms of the order of Fabricius J, included the first respondent's counterclaim. Nor do I need to deal with the first respondent's argument that the applicant's review application was brought outside of the time periods provided in s33(2) of the Act.
- [41] Turning to the second basis of the applicant's claim in respect of the conduct of the arbitrator, s33 of the Act limits the grounds upon which an arbitral award may be set aside. Courts are loathe to intervene in arbitral awards and in arbitration proceedings. Litigants' autonomy in choosing to resolve their disputes by arbitration and in doing so, should be respected.¹⁰
- [42] The grounds for intervention are limited to misconduct, gross irregularity by the arbitrator and that the arbitrator exceeded his powers. The first respondent referred to an article by former SCA judge of appeal Brandt JA, in which the Learned Judge reiterated that even a gross mistake of fact or law by an

¹⁰ *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & Another* 2009 (4) SA 529 (CC) at paras [219] and [235].

arbitrator does not constitute misconduct envisaged in terms of Section 33(1)(a) of the Act. A court is not entitled to disturb the outcome of an arbitration unless there is moral turpitude or *male fides* on the part of the arbitrator. Deliberate dishonesty is required. A *bona fide* mistake, no matter how gross, will not suffice to overturn the arbitrator's decision.

- [43] Gross irregularity does not mean an incorrect judgment. Gross irregularity refers not to the result but to the method of a trial such as an approach that deprived the aggrieved party from adequately presenting its case, from having its case fully and finally determined. The applicant before me assured me in argument that it did not seek to impugn the arbitrator's integrity, that the impugned conduct, however, amounted to "mistakes" on the arbitrator's part, sufficient for the outcome to be reviewed.
- [44] The applicant did not allege, and, there certainly was no basis for any allegation or even for a suggestion of the arbitrator having been deliberately dishonest or having been *male fide*.
- [45] The attack on the arbitrator by the applicant amounts to nothing more than criticisms of the manner in which the arbitrator conducted and regulated the arbitration proceedings before him, and arrived at the decision that he reached.
- [46] The applicant enjoyed a full and proper opportunity to ventilate its case fully, and as it considered appropriate and was not prevented from doing so.
- [47] The fact that the arbitrator dismissed the applicant's arguments does not provide a basis for the arbitrator's quantum award to be reviewed and set aside.
- [48] In respect of the gross irregularity complaint against the first respondent for failing to disclose documents, the applicant sought documents from the first respondent and the first respondent resisted that disclosure. The parties argued the issue before the arbitrator who found in the first respondent's favour. Properly articulated arguments resulting in a judgment either in favour or against one or other of the parties, cannot be described as a gross irregularity by the losing party, as contended by the applicant regarding the first

respondent's conduct. There is no merit in the alleged gross irregularity complaint against the first respondent.

- [49] In my view, there is no substance to the applicant's claims in respect of the conduct of the arbitrator and the second leg of the applicant's argument in respect of the review application must fail.
- [50] That, in effect, puts paid to the applicant's application.
- [51] I have found already that the attack on the arbitrator's jurisdiction was of no merit and the attack on the arbitrator's conduct in terms of s33 of the Act, similarly, must fail. There is no reason why the costs of the applicant's application should not follow the order on the merits.
- [52] As to the first respondent's claim for condonation, the first respondent was late in filing its answering affidavit by one week and late in respect of delivering its replying affidavit in the counter-application by three weeks. The first respondent duly requested extensions from the applicant in respect of the late delivery but those requests were denied. The delay in respect of both affidavits was adequately explained by the first respondent. The delays were for short periods and it is evident that no prejudice was caused to the applicant as a result of the first respondent's delays, which were not deliberate. This because the applicant did not take steps to progress the matter. The first respondent was the party who took the necessary steps to bring the application to a hearing. Accordingly, the first respondent's late delivery of its answering affidavit in the main application and its replying affidavit in the counter-application is condoned.
- [53] As to the first respondent's counter-application that the awards aforementioned be made orders of court, there is no merit in the applicant's opposition in terms of the attack on the arbitrator's jurisdiction and the attack in terms of s33 of the Act.
- [54] The awards of the arbitrator are valid and provide a proper basis for a court order. Given that I have found against the applicant in terms of the applicant's review application and that the awards of the arbitrator are proper and form an

adequate basis for a court order, there is no reason for me not to order that those awards be incorporated into a order of court.

- [55] In respect of the bill of costs, the first respondent relied on a separate arbitration agreement appointing a costs arbitrator. The first respondent appointed a cost consultant and the applicant also appointed a cost consultant. Those two cost consultants, on behalf of the parties respectively, appointed one Mr Burt Coetzee to hear and determine the disputes between the parties in relation to the first respondent's bill of costs. The said Mr Coetzee accepted the appointment, effectively to act as a cost arbitrator. The agreement was reduced to writing in terms of various emails exchanged between the parties' respective cost consultants and Mr Coetzee. The applicant did not object to the appointment of Mr Coetzee and the applicant's representative as well as the representative of the first respondent participated fully in the taxation process.
- [56] Mr Coetzee duly ruled on the disputes heard before him and issued a signed ruling. The outcome of the taxation process before Mr Coetzee constitutes a valid arbitration award pursuant to the appointment of Mr Coetzee, by agreement between the parties, as a cost arbitrator.
- [57] In the circumstances there is no cogent basis as to why the ruling of Mr Coetzee should not be incorporated in an order of this court.
- [58] Accordingly, by reason of the aforementioned, I grant the following order:
1. Condonation is granted in favour of the first respondent in respect of the late delivery by the first respondent of its answering affidavit in the main application and its replying affidavit in the counter-application.
 2. The applicant's review application is dismissed with costs, including the costs of two counsel where two counsel were employed, with junior counsel on scale B and senior counsel on scale C.
 3. The first respondent's counter-application is upheld; the interim award of the second respondent made on 6 July 2021, the merits

award made on 4 March 2022, the final award made on 30 June 2023 and the bill of costs dated 13 June 2023 are incorporated in terms of orders of this court.

4. The applicant is to pay the costs of the counter-application, including the costs of two counsel where two counsel were employed, with junior counsel on scale B and senior counsel on scale C.

I hand down the judgment.



CRUTCHFIELD J
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the Applicant:	Adv L J Van Tonder SC and Adv D J Joubert instructed by Liesel de Lange Inc.
For the First Respondent:	Adv JJ Reyneke SC and Adv CT Picas instructed by Pinsent Masons Africa LLP.
Date of Hearing:	2 and 3 December 2024.
Date of Judgment:	6 May 2025.