

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

Case number: 2023-099445

2023-94229

Date of hearing: 29 April 2025

Date delivered: 26 May 2025

	(1) REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHERS JUDGES: YES/NO
	(3) REVISED
	DATE
	SIGNATURE

In the application between:

MAGALIES WATER

Applicant

and

**MAGOLOLA MOKOKA AND ASSOCIATES
CONSULTING ENGINEERS CC**

First Respondent

STUART RIDDLE N.O.

Second Respondent

JUDGMENT

SWANEPOEL J:

Introduction

[1] This matter features two linked applications. Firstly, the applicant seeks to review and set aside an interim award published on 23 February 2022 and a final award published on 20 May 2023, by the second respondent in his capacity as arbitrator. Secondly, the first respondent seeks an order making the award of 20 May 2023 an order of court. It is common cause that if the review application is

unsuccessful, then the award must be made an order of court. (I refer to Magalies Water as the applicant, as it is in case number 2023-099445, the review application, and to Mogolola Mokoena & Associates as the first respondent). The second respondent abides the outcome of the matter. Where I refer to “the parties” I refer to the applicant and the first respondent.

[2] The dispute between the applicant and the first respondent was initially referred to adjudication, but due to the complexity of the issues, it was later referred to arbitration to be conducted by the second respondent. A brief summary of the dispute (the disputes are not strictly relevant to these proceedings) is as follows:

[2.1] On 28 November 2013 the applicant appointed the first respondent as consulting engineer for the upgrade of the Brits water treatment plant. The relationship was governed by a Service Level Agreement (“SLA”) and an addendum thereto in which the scope of work was outlined.

[2.2] The project was substantially delayed, and was plagued by non-payment by the applicant. On 10 February 2021 the applicant gave notice to the first respondent that it had breached the SLA. Nine days later, the applicant terminated the agreement, notwithstanding that the SLA required 30 days’ notice of breach. The first respondent then sought payment of its unpaid invoices in the sum of R 7 596 297.03. The applicant counter-sued, alleging that there had been overpayment to the first respondent

[2.3] It was not disputed that the applicant had not complied with the breach clause. It was therefore required of the applicant to show that the first respondent had committed a material breach of the SLA that justified the cancellation of the agreement.

[2.4] It was agreed by the parties to separate the issues and to have them considered in two parts. Firstly, the second respondent was called upon to consider whether the termination of the SLA by the applicant was lawful. Once it had been decided that the termination of the SLA was not lawful (the first award), the matter continued on to the question of quantum on the first respondent’s claim for payment, and on the applicant’s counter-claim for alleged overpayment, which culminated in the second award.

[3] Section 33 of the Arbitration Act, 42 of 1965 (“the Act”) provides for the setting aside of arbitration awards. The relevant passage therein reads as follows:

“33 Setting aside of award

(1) Where –

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

The court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

(2) An application pursuant to this section shall be made within six weeks after the publication of the award to the parties:”

Condonation

[4] The applicant launched this application on 2 October 2023, some four months and 13 days after the second award was published. It was common cause between the parties that the application ought to have been launched by no later than 1 July 2023.

[5] Section 38 of the Act permits a court to extend any period fixed under the Act on good cause shown. In *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centreas Amicus Curiae)*¹ the Court held that the interests of justice are at the core of a condonation application, and that what is just depends on the facts and circumstances of each case. Importantly, the Court held that:

“[22] An application for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And what is more, the explanation given must be reasonable.”

[6] The applicant’s main explanation for the delay is that disciplinary steps were taken against some of its employees, and that the matter is important. The applicant says that it instructed its attorneys to obtain a transcript of the proceedings. It does

not say when the instruction was given. The transcript was only received on 31 July 2023. There is no explanation for the delay, and the applicant does not say what steps it took to expedite the preparation of the transcript.

[7] The applicant says that the matter is complex. It says that the delay “*was resultant from the internal engagements that culminated in a decision to institute review proceedings, as well as consultative processes between the accounting authority and the attorneys.*” The applicant says that following the “*necessary internal engagements*” an instruction was given to launch these proceedings. It does not say when the instruction was given.

[8] The applicant does not say who was involved in its internal discussions, what processes were followed to come to the decision, when meetings were held, when instructions were given to its attorneys, or when counsel was briefed. The applicant relies instead on vague averments that essentially amount to no explanation whatsoever. It is not sufficient for a party seeking condonation to rely on bromides. It has to specifically provide facts relating to the delay, and as is spelled out in *Van Wyk (supra)*, the entire period of the delay must be explained. Even if I accept that the applicant could only start considering its options once the transcript was received (which I do not believe), there is no explanation for the more than two months’ delay thereafter, save that the applicant was thinking about reviewing a complex matter. The applicant says that this is an important case for the public purse. I agree, and for that reason the applicant should have made haste in launching the application. It did not do so. The applicant has, in my view, failed dismally to make any case for condonation.

Merits

[9] However, if I am wrong in this finding, I shall deal with the applicant’s complaints regarding the arbitrator’s conduct. The applicant says that the arbitrator committed various gross irregularities. It seeks a setting aside of the awards under section 33 (1) (b). The complaints can be summarized as follows:

[9.1] That the arbitrator totally disregarded the evidence tendered in a forensic investigation and in cross-examination;

[9.2] That the arbitrator assisted the first respondent to prove its case, both on the lawfulness of the termination, and on quantum.

[9.3] That the arbitrator ignored evidence supporting the applicant's case;

[9.4] That the evidence of one Mr. Tshongo and of an attorney, Ms Mathopo, on behalf of the applicant, was disregarded;

[9.5] That the arbitrator failed to realize the materiality of Ms Mathopo's evidence.

[10] The applicant also complains that, at the outset, the arbitrator placed on record that he was not bound by the strict rules of evidence. Why that statement is incorrect is not clear, and how it affected the applicant's presentation of its case is also not spelled out. The arbitrator specifically dealt with the rules that were applicable to the proceedings in the first award. Those rules applied to all equally, and there is no indication that the applicant made any objection during the first proceedings before the arbitrator. I cannot find any fault with the arbitrator's view on the rules to be applied.

[11] When a party agrees to arbitration, it limits its remedies to have the award set aside. In *Telcordia Technologies Inc v Telkom SA Ltd*² the court said³:

"[50] By agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else. Typically they agree to waive the right of appeal. Which in context means that they waive the right to have the merits of their dispute re-litigated or reconsidered. They may, obviously, agree otherwise by appointing an arbitral appeal panel, something that did not happen in this case.

[51] Last, by agreeing to arbitration the parties limit interference by courts to the grounds of procedural irregularities set out in s 33 (1) of the Act. By necessary implication they waive the right to rely on any further ground of review, 'common law' or otherwise."

[12] The question is what gross irregularity is alleged here. The applicant's main complaint is that the arbitrator 'disregarded' the evidence of its witness, Ms. Mathopo and of Mr Tshongo. A simple reading of the first award shows that there is no substance to this averment. The arbitrator wrote the following:

[42] In a similar vein, the Claimant pointed out that the Respondent's witness, Ms Mathopo, was not involved in the project at the time of cancellation of the SLA and that she testified to the findings of an investigation by an independent engineer whereas the said engineer did not himself testify.

[43] Further, that the same witness was not qualified academically or experience wise to give expert evidence on engineering and project management matters.

[44] For the above reasons, the Claimant avers that the testimony of this witness should be deemed hearsay , inadmissible, and therefore disregarded.

[45] However, it was revealed in evidence that the witness was party to the drafting of the report, and I elected to allow her testimony as a result thereof.

[46] Having regard for the discussion relating to evidence above, it was my decision to allow the witnesses to present their evidence and to deal with the weight and materiality thereof accordingly."

[13] Having heard Ms Mathopo's evidence, and in considering what weight to place thereon, the arbitrator said:

"[84] The respondent's witness who gave evidence as to the contents of the DMS reort, Ms Mathopo, confirmed on a number of occasions during cross-examination that she was not a qualified engineer or project manager, but a qualified attorney.

[85] This was evidenced by the fact that her testimony, when referring to engineering principles and processes on construction sites, reflected a lack of understanding thereof by virtue of her qualifications and experience not being in this field.

[86] For this reason, her evidence cannot be deemed to be that of an expert and any opinions offered during testimony will be considered in this light."

[14] It is clear, from this extract from the first award, that the arbitrator did not disregard Ms Mathopo's evidence. He simply placed the appropriate weight (in his view) on it given her lack of expertise in the relevant field. In my view the arbitrator approached her evidence appropriately.

[15] The same allegation is made regarding the evidence of Mr. Tshongo, a witness for the applicant in the first leg of the proceedings. It is alleged that the arbitrator had a ‘total disregard’ for his evidence regarding the measurements that he made on the site. That contention is also incorrect. During the first leg of the proceedings the witness testified that the applicant had appointed him to measure the works on the project and to prepare a report as to his findings. He found that there was work that had been paid for that had not been completed.

[16] The arbitrator made the following finding with regard to Ms Tshongo’s evidence and his report:

“d. Considering the above, it is important to take cognizance of the fact that the preparation of the report produced by the expert witness in this regard was severely hampered by the specific exclusion of input from and denial of access to information from the claimant, as well as the fact that the project had commenced some seven years before his investigation began. The aforesaid situation resulted in 10 variation orders being simply omitted from the calculations. These actions cause one to question the accuracy of the report.”

[17] The arbitrator, therefore, fully considered Mr Tshongo’s evidence, but decided that it was not convincing. That does not mean that he disregarded the evidence. The applicant contends that by not accepting the evidence of Ms Mathopo and Ms Tshongo, the arbitrator misconceived the nature of the enquiry. There is no basis for such a conclusion. The arbitrator understood that his function was to hear and weigh up the evidence, and then to come to a finding. He did just that.

[18] In my respectful view, the best explanation for what constitutes a gross irregularity is to be found in *Rabinowitz v Levy and Others*⁴:

“The ‘gross irregularity’ required by s 33 (1) (b) must relate to the conduct of the proceedings, and not the result or outcome of the proceedings. Thus, if an arbitrator is guilty of conducting an arbitration in some form of high-handed or arbitrary manner, or dishonestly, he or she would be guilty of a gross irregularity. But a bona fide mistake in the merits, no matter how gross, will not

suffice. It is furthermore not every irregularity in the conduct of the proceedings that will afford grounds for review; the irregularity must have been of such a serious nature that it resulted in the aggrieved party not having his case fully and fairly determined.”

[19] Thus, gross misconduct is misconduct that goes to the manner in which the proceedings are conducted, which results in the aggrieved party not having its case fairly determined.⁵

[20] The applicant’s contention in this case is really that the arbitrator erred in not accepting the applicant’s evidence. That is not a gross irregularity. As the Court said in *Telcordia*⁶:

“The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the enquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator ‘has the right to be wrong’ on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the enquiry.”

[21] There is no evidence that the arbitrator preferred one party above the other, or that he assisted the first respondent in any manner. For the reasons set out above, the application to review the awards must fail, and the awards must be made an order of court.

[22] I make the following order:

[22.1] The application to review the arbitration awards dated 23 February 2022 and 20 May 2023 under case number 2023-099445 is dismissed.

[22.2] In case number 2023-94229 the award 20 May 2023 is made an order of court.

[22.3] The respondent in case number 2023-94229 (the applicant in case number 2023-099445) shall pay the costs of both applications on Scale C.

SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

Counsel for the applicant: Adv. O Mudimeli

Instructed by: Raphela Inc.

Counsel for the respondent: Adv. H de Wet SC

Instructed by: DC Robertson Inc.

Heard on: 29 April 2025

Judgment on: 26 May 2025

¹ Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae 2008 (2) SA 472 (CC)

² Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA); [2007] 2 ALL SA 243 (SCA)

³ At paras [50] to [51]

⁴ Rabinowitz v Levy and Others 2024 JDR 0220 (SCA); [2024] ZASCA 8 (26 January 2024), at para [15]

⁵ Bester v Easigas (Pty) Ltd and Another 1993 (1) SA 30 (C) at 42 G to D

⁶ *Supra* at para [85]