

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	NOT REPORTABLE
(2)	NOT OF INTEREST TO OTHER JUDGES

CASE NO: 2020-44579

DATE: 17 September 2025

In the matter between:

SELETJE CONSTRUCTION & MANAGEMENT CC

Applicant

and

CITY OF EKURHULENI METROPOLITAN MUNICIPALITY

Respondent

Neutral Citation: *Seletje Construction & Management v City of Ekurhuleni Metropolitan Municipality (2020-44579) [2025] ZAGPJHC ---*
(17 September 2025)

Coram: Adams J

Heard: 20 May 2025

Delivered: 17 September 2025 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 11:30 on 17 September 2025.

Summary: Arbitration – Arbitration Act 42 of 1965 – arbitral award declaring cancellation of building contract invalid and unlawful – cancellation set aside and specific performance of contract by respondent directed by the Arbitrator – application to have arbitral award made an order of court in terms of s 31(1) of the Arbitration Act – respondent opposing application on the basis that the contract terminated by the effluxion of time – further grounds of opposition raised in the form of a counter-application, such as the fact that the respondent was entitled to cancel the contract due to breach of contract by the applicant – further, respondent persisted with the defences raised during the arbitration – claims that the specific performance orders of the Arbitrator should be varied or set aside in terms of s 31(2) and s 33 of the Arbitration Act on the basis that the respondent breached the agreement – respondent contends that the specific performance order is against public policy –

Held that arbitral awards are binding on parties and should be set aside by a court only on very limited grounds – an arbitral award should, on application by any of the parties to the arbitration proceedings, be made an Order of Court, unless valid grounds exist on which such an award falls to be set aside as provided for in s 33 of the Arbitration Act – by agreeing to arbitration, the parties had limited the grounds of interference in their contract by the courts to the procedural irregularities set out in s 33(1) of the Act – they had waived the right to rely on any further grounds of review, whether at common law or otherwise – the Act did not allow for review on the ground of material error of law and that the general principle was that an irregularity related to the conduct of the proceedings rather than to the merits –

Application granted and counterapplication dismissed.

ORDER

- (1) The Arbitration Award dated 3 July 2021 by the Arbitrator, Mr P F Rossouw SC, and handed down / published by him on 1 September 2021, be and is hereby made an Order of this Court.
- (2) The respondent shall pay the applicant's costs of this opposed application, including the costs of Counsel on scale 'C' of the applicable tariff provided for in the Uniform Rules of Court.
- (3) The respondent's application for condonation be and is hereby dismissed with costs.
- (4) The respondent's counter-application be and is hereby dismissed with costs.
- (5) The respondent shall pay the applicant's costs of the opposed condonation application and the oppose counter-application, such costs to include the costs consequent upon the utilisation of Counsel on scale 'C' of the applicable tariff provided for in the Uniform Rules of Court.

JUDGMENT

Adams J:

[1]. Some six years ago on 4 April 2019, the applicant ('Seletje Construction') and the respondent ('City of Ekurhuleni' or simply 'the City') concluded a written agreement for the construction of the new Elandsfontein / Isando Fire Station in Kloppepark, Germiston. The agreement was constituted by the JBCC Principal Building Agreement, Edition 6.2 ('the JBCC Agreement'), the Contract Data and the 'General Preliminaries', and was concluded pursuant to and following a duly compliant public procurement process. 'JBCC' is an acronym for 'Joint Building Contracts Committee' and the Principal Building Agreement is a standard

agreement published by the said Committee in the interest of ‘... good practice, with an equitable distribution of contractual risks’. The contract price agreed upon was the total sum of R40 585 831.64 and the date for practical completion of the contract provided for was 17 January 2021.

[2]. Seletje Construction was given possession of the site on 19 March 2019, whereafter the works commenced. However, between April 2019 and March 2020 numerous disputes arose between the parties, culminating in a purported cancelation by the City of Ekurhuleni on 16 March 2020 of the agreement on the basis of alleged malperformance and breach of contract by Seletje Construction. From their side, Seletje Construction complained of non-payment by the City of amounts due to them as interim progress payments – duly certified as due and payable in terms of the contract. During March 2020, the works came to a standstill.

[3]. During January 2021, in terms of the alternative dispute resolution provisions of the agreement and an Order of this Court (per Yacoob J), the dispute between the parties were referred to arbitration. Advocate P F Rossouw SC, Senior Council at the Johannesburg Bar, was duly appointed as arbitrator, by agreement between the parties, to arbitrate the dispute.

[4]. On 1 September 2021, Advocate Rossouw, after the arbitration proceedings had proceeded before him, published his award dated 3 July 2021 (‘the arbitral award’) and directed as follows: -

‘(a) The City of Ekurhuleni must make payment to [Seletje Construction] of the following amounts:

- (i) R467 877.01 (excluding VAT) in respect of payment certificate number 11;
- (ii) R9 535.27 as interest on the late payment of payment certificate number 1;
- (iii) R32 637.19 as interest on the late payment of payment certificate number 2;
- (iv) R90 587.25 as interest on the late payment of payment certificate number 10;
- (v) R101 699.74 as interest on the outstanding payment of payment certificate number 11;

- (b) It is declared that [the City of Ekurhuleni] had no contractual basis or entitlement to terminate the agreement concluded between the parties on 4 April 2019 and the notice of termination dated 20 March 2020 is set aside;
- (c) It is declared that [Seletje Construction] may remain in possession of the construction site of the new Kloppepark Fire Station at 67 Welkom Street, Kloppepark, Germiston, and that it may proceed with the execution of the Works in terms of the agreement concluded between the parties on 4 April 2019;
- (d) It is declared that [Seletje Construction] is entitled to be compensated for work done during February 2020 (and not covered by payment certificate number 11) and March 2020;
- (e) The [City of Ekurhuleni] must pay the costs of the arbitral proceedings, including:
 - (i) the arbitrator's fees;
 - (ii) the costs of the venue of the hearing;
 - (iii) the costs of recording the proceedings and the transcription;
 - (iv) [Seletje Construction's] costs of reference, on the party and party High Court scale, including the costs of Senior Council.'

[5]. The City of Ekurhuleni has complied with the payment requirements of paragraphs (a) and (d) of the award and it has also made payment of the costs awarded against it in favour of Seletje Construction in terms of paragraph (e) of the award. That means that those portions of the award by the Arbitrator have, for all intents and purposes, been rendered moot, and I need not concern myself any further with those paragraphs of the award.

[6]. In this opposed application, Seletje Construction applies to have the award of the Arbitrator made an order of this court in accordance with the provisions of s 31(1) of the Arbitration Act 42 of 1965. In essence, what Seletje Construction prays for is an order that they be permitted to continue with the contract, which expired during 2021, through no fault on their part.

[7]. The City of Ekurhuleni opposes the application and has somewhat belatedly instituted a counter-application – supported by a combined affidavit in answer to Seletje's application and the founding affidavit in support of the counter-application – for an order declaring the agreement entered into between

the parties on 4 April 2019 to have terminated through effluxion of time. In the alternative, the City applies for an order correcting – in terms of s 31(2) of the Arbitration Act – paragraphs 60(b) and 60(c) of the arbitral award. In effect what the City prays for in the alternative is an order limiting paragraphs (b) and (c) of the award to provide specifically that the review and the setting aside of the cancellation of the contract was based solely on the basis of its non-payment of amounts due in terms of the contract during March 2020. There are prayers for further alternative relief by the City, which I will deal with later in this judgment insofar as that may be necessary. Suffice to state at this stage that the City applies for an order declaring that paragraph 60(c) of the Award cannot be enforced ‘... as, given the particular circumstances of the matter and the constitutional and statutory obligations of [the City of Ekurhuleni], enforcement thereof is against public policy’.

[8]. Seletje Construction’s main application to have the arbitral award made an Order of Court was delivered on or about 14 April 2022, and the City of Ekurhuleni delivered notice of its intention to oppose on or about 11 May 2022. The respondent’s answering affidavit was therefore required to be delivered in terms of the Uniform Rules of Court within fifteen days from that date, therefore on or before 1 June 2022. The combined answering / founding affidavit was delivered on or about 29 August 2022 – therefore, out of time by some three months. Some of the relief sought by the City in its counter-application, as will become apparent later, was also required to be brought within limited periods of time, which was not complied with by the City in its counter-application. All the same, the City, as it was obliged to do, applies for condonation for the late filing of its application and for the late filing of its answering affidavit. I deal with the application for condonation as part of my decision on the merits of the application and the counter-application.

[9]. Therefore, the issue in this application is simply whether, all things considered, Seletje Construction is entitled to an order for specific performance of the agreement, notwithstanding the fact that, on first principles, the agreement expired during January or June 2021. This issue is to be considered

by me having regard to the trite principles relating to arbitral awards in general and those relating to the making of such awards orders of court. Those principles are set out briefly in the paragraphs which follow.

[10]. Section 28 of the Arbitration Act provides as follows: -

'28 Award to be binding

Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms.'

[11]. Section 31 provides thus: -

'31 Award may be made an order of court

- (1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.
- (2) The court to which application is so made, may, before making the award an order of court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.
- (3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect.'

[12]. As was held by the Supreme Court of Appeal in *Telcordia Technologies Inc v Telkom SA Limited*¹, arbitral awards are binding on parties and should be set aside by a court only on very limited grounds. This implies, in my view, that an arbitral award should, on application by any of the parties to the arbitration proceedings, be made an Order of Court, unless valid grounds exist on which such an award falls to be set aside as provided for in s 33 of the Arbitration Act, which 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

¹ *Telcordia Technologies Inc v Telkom SA Limited* 2007 (3) SA 266 (SCA).

- (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: Provided that when the setting aside of the award is requested on the grounds of the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, such application shall be made within six weeks after the discovery of that offence and in any case not later than three years after the date on which the award was so published.
 - (3) The court may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.
 - (4) If the award is set aside the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court.'

[13]. In *Telcordia Technologies* the SCA explained the rationale behind the foregoing principle as follows. By agreeing to arbitration, the parties had limited the grounds of interference in their contract by the courts to the procedural irregularities set out in s 33(1) of the Act. By necessary implication, they had waived the right to rely on any further grounds of review, whether at common law or otherwise. The Court also held that the Act did not allow for review on the ground of material error of law and that the general principle was that an irregularity related to the conduct of the proceedings rather than to the merits. A qualification to that general principle is that a 'gross irregularity' was committed where the decision-maker misconceived the whole nature of the enquiry, namely he misconceived his mandate or his duties in connection therewith.

[14]. Importantly, it was held by the SCA that a wrong interpretation of an agreement, for example, also did not entail the arbitrator's exceeding his

powers. The power given to him was to, rightly or wrongly, interpret the agreement; determine the applicable law; and determine what evidence was admissible. Errors of this kind had nothing to do with his exceeding his powers but were errors committed by him within the scope of his mandate.

[15]. The question *in casu* is therefore whether the City of Ekurhuleni is entitled to object to the arbitral award being made an Order of Court on the basis of the defences raised by it. Put another way, do these grounds of opposition warrant a deviation from the above general principle?

[16]. All of the foregoing issues in this matter are to be decided against the factual backdrop. I deal with the facts in paragraphs which follow as and when I deal with a discussion and an analysis of the matter.

[17]. As already indicated, the agreement was concluded between the parties on 4 April 2019, Seletje Construction, as the contractor, having been given possession of the construction site before that on 19 March 2019. Between April 2019 and February 2020 numerous site meetings were held at which the City and/or its agents complained consistently as regards *inter alia* the slow progress made with the contract, poor performance and workmanship on the part of Seletje Construction and their failure to rectify defects. This ultimately resulted in a notice of termination of the agreement on 20 March 2020 from the City to Seletje, which cancellation was subsequently reviewed and set aside on 7 April 2020 by this Court, which also directed that the disputes between the parties be referred to arbitration.

[18]. The arbitration proceedings commenced on 24 May 2021, were concluded on 2 June 2021 and the arbitral award dated 3 July 2021, as detailed *supra*, was published on 1 September 2021.

[19]. Through its counter-application, the City of Ekurhuleni resists the application by Seletje on the basis of the grounds set out above. I now proceed to deal in turn with those grounds of opposition.

[20]. Primarily, the City contends that the arbitral award should be set aside because the agreement between the parties has terminated through the effluxion of time. As already indicated, the agreement expressly made provision for the 17th of January 2021 as 'the date for practical completion'. On 20 January 2020, the contract term was extended by the City to 30 June 2021 and the agreement, so the City contends, thus terminated through effluxion of time on 30 June 2021.

[21]. In terms of clause 23 of the agreement, Seletje is, however, 'entitled to a revision of the date for practical completion' with an adjustment of the contract price in a number of circumstances. One such circumstance provided for in clause 23.2.13 is 'Suspension of the works'. Importantly, clause 23.3 provides as follows:

'Further circumstances for which [Seletje Construction] may be entitled to a revision of the date for practical completion and an adjustment of the contract value are *delays to practical completion due to any other cause beyond [Seletje's] reasonable control that could not have reasonably been anticipated and provided for. The principal agent shall adjust the contract value where such delay is due to [the City of Ekurhuleni] and/or its agents*'. (Emphasis added).

[22]. In the alternative, the City applies for a declaratory order to the effect that the contract has previously been validly terminated, alternatively had been terminated upon the launching of its counter-application, consequent upon the anticipatory breach (repudiation) of the contract by Seletje.

[23]. The first difficulty with this ground of opposition is the fact that clause 23 of the agreement, referenced above, is a complete reply to the case by the City in that regard. The simple point is that, having regard to the circumstances in the matter, notably the protracted disputes and litigation between the parties, Seletje is fully entitled to apply for a revision of the date for practical completion. If nothing else, Seletje has the right to insist on a revision of the practical completion date on the basis that, at the instance of the City, the Works were suspended during March 2020 – approximately one year after the

commencement of the contract and about one year before the date of practical completion.

[24]. Moreover, the case on behalf of Seletje – which is not seriously disputed on behalf of the City – is that, following publication of the award, it attempted to resume performance in line with prayer (c) of the Award, including a formal request dated 10 November 2021. The City however failed to cooperate and filed a notice to oppose enforcement, which amounts, in my view, to an unequivocal refusal to comply with the award. For this reason too, the defence should fail. The City cannot benefit from the very delay it caused. It obstructed dispute resolution, unlawfully removed the contractor from site, and refused to implement the award. It cannot now rely on the passage of time – which it engineered – as a ground to argue that the contract expired.

[25]. What is more is that this issue is an issue which would have been before the Arbitrator when he adjudicated the dispute relating to the cancellation of the contract by the City. If it was not before him explicitly, it certainly was before him by implication in that by the time the arbitration proceedings were concluded and the Arbitrator scripted the Award in close proximity to the date for practical completion. He nevertheless directed specific performance of the contract by the City of Ekurhuleni. Howsoever one views this matter, it has to be accepted that this issue raised on behalf of the City is an issue which was before the Arbitrator and was decided against the City, who now desires to have that issue decided afresh as an appeal under the guise of an order setting aside the Arbitrator's Award.

[26]. There is accordingly no merit in this ground of opposition. As was held by the SCA in *Telcordia Technologies*², the parties had limited the grounds of interference in their contract by the courts to the procedural irregularities set out in s 33(1) of the Act. By necessary implication, they had waived the right to rely on any further grounds of review, whether at common law or otherwise. In any

² FN 1 supra.

event, if the City believes this issue to be a dispute between them at this stage, then they are required, in accordance with *Telcordia Technologies*, to refer this matter back to arbitration.

[27]. The City also contends that, even if this Court is of the view that the agreement did not terminate on 30 June 2021 through effluxion of time, its counter-application with its combined affidavit at the very least served as reasonable notice to Seletje of the termination of the agreement for the reasons mentioned in the said affidavit. In that regard, the City places reliance on an expert report dated 22 July 2022, that is after the date on which the Arbitrator's award was published. This report regurgitates the grievances complained of by the City in its notice of termination of the contract and which complaints were all raised by them in the arbitration. The Arbitrator rejected this defence and held that the City was not justified in cancelling the agreement.

[28]. The case on behalf of the City is that the agreement terminated through the effluxion of time. Additionally, so the contention continues, the arbitrator erred by holding that '... [the City of Ekurhuleni] relied on the wrong grounds for the purported termination of the agreement the Agreement was not validly terminated. [The City] remains obliged to give [Seletje] possession of the site and the contractor may proceed with the works to bring it to practical completion and eventually to final completion'. This, so the contention is concluded, also constitutes a patent error by the arbitrator as provided for under Section 31(2) of the Arbitration Act.

[29]. I do not accept this contention and I do so for the reasons already alluded to above. In particular, the City is bound by the findings of the Arbitrator and it cannot apply for a review of the Award on the basis that the Arbitrator made an error of fact or law. The point, which bears emphasis, is that even if the arbitrator had erred in assuming the contract remained extant, which in effect would amount to an error of law or interpretation, it is not a gross irregularity reviewable under section 33(1) of the Arbitration Act. As was held in *Telcordia Technologies* at para 86:

[86] Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly. Errors of the kind mentioned have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate. To illustrate, an arbitrator in a “normal” local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd.’

[30]. This principle, in my view, finds application *in casu*.

[31]. Moreover, the reliance by the City of Ekurhuleni on the provisions of s 31(2) of the Arbitration Act is misplaced. By no stretch can it be said with any conviction that the arbitral award contained a ‘clerical mistake or any patent error arising from any accidental slip or omission’, which require correction by this Court. There most certainly is no evidence before me in support of a finding to that effect.

[32]. The foregoing also apply to the other grounds of opposition raised by the City, in particular its claim that the arbitral Award should be set aside on the basis that making the Award an Order of Court would be significantly prejudicial and contrary to public policy. The City alleges that Seletje Construction has not only neglected to comply with its obligations under the agreement but is also clearly incapable of complying with those obligations. Therefore, so the contention goes, it would therefore be against public policy to compel the City to comply with its obligations in terms of the agreement. The foregoing is illustrated, so the City contends, through the expert evidence alluded to *supra*, which proves that Seletje is incapable of performing its obligations in terms of the agreement to render a fire station compliant with the standards and code of practice as referred to by the expert, Mr van Straten.

[33]. I reiterate that this defence has no merit. It is also an issue which should be arbitrated as prescribed by the agreement, as is the ground of opposition raised by the City as an application for the purported correction of prayers (b) and (c) of the arbitral award in terms of s 31(2) of the Arbitration Act, alternatively that these prayers (b) and (c) of the award be reviewed and set aside in accordance with the provisions of s 33(1)(b) and (2) of the Arbitration Act, with the period of six weeks to be extended in accordance with the provisions of s 38 of the Arbitration Act to date of service and filing of the City's counter-application.

[34]. I therefore conclude that the arbitration award issued on 1 September 2021 remains valid, final and binding. Seletje Construction has satisfied all the requirements of section 31(1) of the Arbitration Act for enforcement. There is no merit in any of the grounds of opposition raised by the City, whose opposition is, as submitted by Seletje Construction, nothing more than an appeal against the findings of the Arbitrator disguised as a review. It fails to meet the stringent threshold for relief under s 33(1), and its application is both procedurally defective and substantively unmeritorious.

[35]. Whilst it is so that there may have been compliance with certain parts of the Award, such as the orders relating to payment of monetary sums, it is so, as contended on behalf of Seletje Construction, that this does not prevent the Award from being made an Order of Court in terms of s 31(1). Compliance with one part of an award does not extinguish the award itself. The Arbitration Act does not envisage a 'partial enforcement' process. The Applicant is entitled to rely on the award as a whole and is not required to isolate portions that may have been informally or inadequately addressed.

[36]. Accordingly, Seletje Construction's application to have the Arbitrator's award made an Order of Court should be granted and the counter-application of the City of Ekurhuleni falls to be dismissed with costs. In view of my findings relating to the merits of the counter-application, which imply that the counter-

application had no reasonable prospects of success, the City's condonation application should also be dismissed.

Costs

[37]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*³.

[38]. I can think of no reason why I should deviate from this general rule. The applicant should therefore be granted its costs of its main application, as well as the costs relating to the respondent's counter-application.

Order

[39]. In the result, I make the following order:

- (1) The Arbitration Award dated 3 July 2021 by the Arbitrator, Mr P F Rossouw SC, and handed down / published by him on 1 September 2021, be and is hereby made an Order of this Court.
- (2) The respondent shall pay the applicant's costs of this opposed application, including the costs of Counsel on scale 'C' of the applicable tariff provided for in the Uniform Rules of Court.
- (3) The respondent's application for condonation be and is hereby dismissed with costs.
- (4) The respondent's counter-application be and is hereby dismissed with costs.
- (5) The respondent shall pay the applicant's costs of the opposed condonation application and the oppose counter-application, such costs to include the costs consequent upon the utilisation of Counsel on scale 'C' of the applicable tariff provided for in the Uniform Rules of Court.

³ *Myers v Abrahamson* 1951(3) SA 438 (C) at 455



L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	20 May 2025
JUDGMENT DATE:	17 September 2025 – Judgment handed down electronically
FOR THE APPLICANT:	D Thumbati
INSTRUCTED BY:	Ledwaba Zwai Attorney, Pretoria
FOR THE RESPONDENT:	J C Uys SC
INSTRUCTED BY:	Klopper Jonker Incorporated, New Redruth, Alberton