

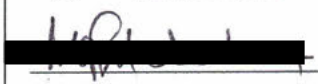
REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2023-029979

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO


17 November 2025

In the matter between

ROYAL HASKONINGDHV (PTY) LTD

Applicant

And

AIRPORTS COMPANY SOUTH AFRICA SOC LTD

First Respondent

BERNARD MAKGABO NGOEPE (J) N.O

Second Respondent

JUDGMENT

Mdalana-Mayisela J

Introduction

[1] Before this court is an application to review and set aside an arbitration award dated 2 March 2023 ("award"), rendered by the second respondent, retired Honorable Mr. Justice Ngoepe ("the arbitrator"). The application is brought under section 33(1) of the Arbitration Act 42 of 1965 ("the Arbitration Act"). The applicant, Royal HaskoningDHV (Pty) Ltd (hereinafter referred to as "RHDHV"), was the claimant in the arbitration, and the first respondent, Airports Company South Africa SOC Ltd (hereinafter referred to as "ACSA"), was the defendant.

[2] The core of the dispute in the arbitration was whether RHDHV was entitled to an extension of time and an additional payment of R2,165,019.84 for professional services rendered in a construction project at OR Tambo International Airport. The arbitrator dismissed RHDHV's claim. Aggrieved by the arbitrator's award, RHDHV has approached this court for an order reviewing and setting aside the award on the ground of gross irregularity. The arbitrator has filed a notice to abide by the decision of this court. The application is opposed by ACSA, which filed an answering affidavit accompanied by a condonation application for the late filing thereof.

Background

[3] RHDHV concluded a written contract with ACSA on or about 26 February 2016 for the provision of certain specified services by RHDHV to ACSA. Essentially, RHDHV was appointed as a multi-disciplinary consulting engineer to ACSA in respect of a project known as "Additional Baggage carousel in Terminal A, Arrivals project at OR Tambo International Airport.

[4] The parties were bound by a professional services contract based on the CIDB standard form. A critical provision was clause 3.9, which entitled RHDHV to apply for a change in the contract price or period of performance upon the occurrence of certain events, such as delays caused by ACSA or others (clause 3.9.1). Crucially, clause 3.9.2 stipulated that any such proposal had to

be submitted to ACSA within six weeks of becoming aware of an event described in clause 3.9.1 occurring; failing this, the right would be forfeited.

[5] On 28 November 2019, RHDHV submitted its claim. ACSA rejected it. The contract provided for the resolution of disputes arising from the contract or its interpretation through private arbitration, with the parties to agree upon an arbitrator. In the event of disagreement, the dispute would be referred to an arbitrator appointed by the chairperson of the Johannesburg Society of Advocates ("Johannesburg Bar Council"). The dispute between RHDHV and ACSA proceeded to arbitration. Retired Justice Ngoepe was appointed as arbitrator by agreement between the parties.

The arbitral proceedings and the award

[6] At the arbitration, the parties exchanged pleadings in the form of a statement of claim and a statement of defence. RHDHV's statement of claim relied on clause 3.9 but did not expressly plead the date on which it became aware of the events triggering its claim. ACSA's statement of defence included a special plea, pleading that the claim was time-barred under clause 3.9.2. In paragraph 3.11 of its plea, ACSA contended that even on the claimant's own version the expiry date was 31 December 2019 and the claim of 28 November 2019 fell outside the six-weeks period from that date, a contention that, on its face, misapprehends the clause, which runs from awareness of an event, not from an expiry date.

[7] During the arbitration, the evidence of RHDHV's witness, Ms. Nabagala, was that she became aware of the need for the claim in November 2019, upon receiving an email on 22 November, and submitted the claim on 28 November. Under cross-examination, she was questioned about when she became aware, but was not challenged on the basis that her awareness may have arisen as early as May 2019.

[8] ACSA's witness, Ms. Sisilana, testified that a key contractor had been appointed in May 2019, from which she inferred that RHDHV should have been aware of delays at that time. This May 2019 date had not been

mentioned in the ACSA's pleadings or witnesses' statements. It was first elicited by RHDHV's counsel during the cross-examination of Ms. Sisilana.

[9] In paragraph 17 of his award, the arbitrator made two crucial findings:

[9.1] The primary finding (onus): he held that the onus was on RHDHV, as the party invoking clause 3.9, to prove that it had submitted its claim within the six-week window. He found that RHDHV had failed to discharge this onus because Ms. Nabagala's evidence did not provide a clear answer as to when RHDHV first became aware of the need for the claim.

[9.2] The alternative finding (*obiter dictum*): the arbitrator added, "*in any case, even if the onus were on the defendant to show claimant's non-compliance with the demands of the clause, the defendant would have discharged it.*" He based this alternative finding on the evidence of Ms. Sisilana regarding the May 2019 date, which he found was based on undisputed milestones.

[10] The parties did not agree on an appeal prior to the commencement of the arbitration. The effect of this was that the arbitrator's award was final and binding and could, in accordance with the provisions of the Arbitration Act, be made an order of the court, unless reviewed and set aside in accordance with section 33 of the Arbitration Act.

The parties' contentions in the review

[11] RHDHV's case is that the arbitrator committed a gross irregularity. It argues that the arbitrator decided the case on a basis, the May 2019 date, that was not pleaded by ACSA, and upon which RHDHV's witness was never cross-examined. This, it contends, constituted a failure to afford it a fair hearing and amounted to the arbitrator straying beyond the issues defined by the pleadings, thus exceeding his powers.

[12] ACSA's defence is twofold. First, it contends that the review is a disguised appeal. It asserts that the award stands on the unchallenged, primary finding that RHDHV failed to discharge its onus. The comments regarding May 2019

were merely obiter and irrelevant to the outcome. Second, ACSA contends that even if the court finds for RHDHV on the time-bar point, the arbitrator made an independent finding that the RHDHV's claim letter did not comply with the substantive requirements of clause 3.9.1, which provides a separate and valid basis for the award.

The legal framework

[13] The test for review under section 33(1) of the Arbitration Act is narrow. As stated in *Telcordia Technologies Inc v Telecom SA Ltd*¹, a court does not sit as a Court of Appeal. An arbitrator has the right to be wrong on the merits. The inquiry is into the conduct of the proceedings, not the result.

[14] A gross irregularity occurs when an arbitrator fails to apply his mind to the issues, conducts the proceedings in a manner that is fundamentally unfair, or exceeds his powers. A fundamental principle reiterated in *Hos+Med Medical Aid Scheme v Thebe ya Pelo Healthcare and Others* is that an arbitrator's jurisdiction is determined by the parties' pleadings. While evidence may supplement a pleaded case, an arbitrator cannot make an award on an issue not contemplated by the pleadings, as this denies a party a fair opportunity to address that issue.

[15] Furthermore, the right to a fair hearing includes the right to have a version contradicting one's own put to one's witnesses, as encapsulated in the rule in *Browne v Dunn*.²

Evaluation

[16] The central question is whether the arbitrator's primary finding on the onus is sufficient to sustain the award, insulating it from review, regardless of any irregularity in the alternative finding.

¹ 2007 (3) SA 266 SCA.

² (1893) 6 R. 67 (H.L).

[17] I agree with ACSA that the arbitrator was correct in his primary finding on the onus. The legal principle is clear; a party seeking to rely on a contractual right must prove the fulfillment of any conditions precedent to that right. Clause 3.9.2, with its strict time bar, is such a condition. RHDHV, as the claimant, bore the onus to allege and prove that it submitted its claim within six weeks of becoming aware of a triggering event. Its failure to plead this date with specificity and the perceived vagueness in Ms. Nabagala's testimony provided a sustainable, rational basis for the arbitrator to find that this onus was not discharged.

[18] This finding would indeed be unassailable on review. An error in this finding would be an error of law or fact, not a gross irregularity.

[19] The primary finding on who bore the onus has not been challenged. In fact, RHDHV accepted its legal duty of discharging the onus of proof on the disputed issue. It only sought to challenge the alternative finding that followed in paragraph 17 of the award after the main finding had been made. The alternative finding based on the May 2019 date was an *obiter dictum*. It was not an integral part of his justification for rejecting the claim. The *obiter dictum* was of no legal consequence to the award and did not alter the outcome.

[20] The primary finding by the arbitrator remains intact even in the absence of the *obiter*. The *obiter's* presence is superfluous to the issue already determined by the arbitrator. There is no gross irregularity committed by the arbitrator, and the application should fail on this basis.

[21] The same applies to the allegation that the arbitrator has curtailed the cross-examination of ACSA's witness by counsel for RHDHV on the evidence of Ms Sisilana about the May 2019 date. The record does not establish such curtailment. However, this was a non-issue because it did not find expression in the primary finding, which is not the subject of a challenge in this court. It becomes unnecessary to deal with ACSA's alternative defence on the status of the letter of 28 November 2019.

Condonation

[22] ACSA sought condonation for the late filing of its answering affidavit. I am satisfied that ACSA has made out a proper case for the court to condone the late filing of the answering affidavit. Among the factors I considered was the importance of the matter to the parties and finality in litigation, so that certainty is achieved by both parties. I also considered that RHDHV was not substantially prejudiced by the delay. Also, the application for condonation was not vigorously opposed on substantive grounds. Accordingly, condonation is granted with no order as to costs.

Costs

[23] Regarding the main application, I see no reason why costs should not follow the event. ACSA has shown substantial success in opposing the review application, and it should thus be entitled to the costs of the application.

ORDER

[24] In the premises, the following order is made:

1. The first respondent's application for condonation for the late filing of its answering affidavit is granted.
2. The application to review and set aside the arbitration award is dismissed with costs inclusive of counsel's costs on scale C.



MMP Mdalana-Mayisela
Judge of the High Court
Gauteng Division

Digitally delivered by uploading to Caselines and emailing to the parties.

Date of hearing: 31 July 2025

Date of delivery: 17 November 2025

Appearances:

For the applicant: Adv A Govender SC

Instructed by: Mortimer Govender Attorneys

For the first respondent: Adv L Sisilana

Instructed by: Mncedisi Ndlovu & Sedumedi Attorneys