

REPUBLIC OF SOUTH AFRICA



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

Case Number: 112/2022

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

21 November 2025

DATE

SIGNATURE

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION

Applicant

and

TIRHANI TRAVEL & TOURS (PTY) LTD

Respondent

In re:

TIRHANI TRAVEL & TOURS (PTY) LTD

Applicant

and

SOUTH AFRICAN MUNICIPAL WORKERS UNION

Respondent

JUDGMENT

BRICKHILL AJ:

Introduction

- [1] This is an application for leave to appeal against the order and judgment that I delivered in this matter on 2 September 2025. The facts are set out in my main judgment and I do not repeat them.
- [2] The main matter involved three applications, namely (i) an application by Tirhani Travel & Tours (Pty) Ltd ("Tirhani Travel") to have the arbitration award handed down by Cassim SC on 18 November 2021 made an order of court in terms of section 31(1) of the Arbitration Act 42 of 1965; (ii) a counter-application by SAMWU to review and set aside the arbitration award; and (iii) a further counter-application by SAMWU to review and set aside the Service Level Agreement concluded by the parties on or around 29 June.
- [3] I granted Tirhani Travel's main application to make the arbitration award an order of court and dismissed SAMWU's two counter-applications, ordering SAMWU to pay the costs.
- [4] Although the application for leave to appeal delivered by SAMWU is framed in the usual language of seeking leave in respect of the "whole judgment and orders", on the face of them the grounds of appeal set out in the application relate to the main application to have the arbitration award made an order of court.
- [5] The grounds for leave to appeal set out in SAMWU's application for leave to appeal for the most part concern its primary argument advanced to oppose the main application. They rely on an order made by Mohammed AJ (as she then was), *after* the arbitration award was handed down, setting aside as an irregular step a notice of withdrawal of the action instituted in this court by Tirhani Travel against SAMWU in respect of the same claim.
- [6] The grounds of appeal all relate to that issue and the order of Mohammed AJ, and are all in the nature of legal arguments. Without restating the full facts, which

are more fully set out in my main judgment, it is helpful to recall the sequence of material events relating to this court order:

- a. Tirhani Travel originally instituted action proceedings in this court.
- b. It reconsidered its position and instituted arbitration proceedings in terms of its agreement with SAMWU. It delivered a notice of withdrawal of the High Court action but did not tender costs in the notice.
- c. SAMWU delivered a notice of irregular step.
- d. SAMWU enrolled the irregular step application in this court and the arbitrator initially postponed the arbitration proceedings.
- e. When the application was not heard on the set-down date, the arbitrator informed the parties that he would conduct the arbitration unless any party obtained a court order interdicting him from doing so. SAMWU did not seek an interim interdict.
- f. The arbitration proceedings ran, notwithstanding SAMWU's objection, and the arbitrator delivered an arbitration award.
- g. After the award was delivered, SAMWU obtained an order from Mohammed AJ on the unopposed roll setting aside the notice of withdrawal of the action as an irregular step on the basis that it did not include a tender of costs.

[7] The grounds of appeal set out in the application for leave to appeal are as follows:

- a. First, that the court erred in holding that the order of Mohammed AJ had no effect on the arbitration proceedings in light of the facts and having regard to section 165 of the Constitution;
- b. Second, that the court erred in holding that the order of Mohammed AJ had no effect on the arbitration award;
- c. Third, that the court erred when "separating the arbitration award from the order of Mohammed AJ and making it [the order] a toothless document";

- d. Fourth, that the court misunderstood the basis for the order of Mohammed AJ and its content;
- e. Finally, that the court erred because the arbitrator was aware that the Rule 30 application was pending, the arbitrator had “directed that a court order must be obtained” and the arbitrator therefore acted against his own directive.

[8] There is substantial overlap in the five grounds of appeal and SAMWU does not address the grounds separately in its heads of argument, treating them rather as all part of a composite argument in support of leave to appeal. It is nevertheless appropriate to address each ground in turn before considering them cumulatively.

First ground of appeal

[9] The first ground of appeal is that the court erred in holding that the order of Mohammed AJ had no effect on the arbitration proceedings, despite the communications of the arbitrator to the parties.

[10] SAMWU does not contend that any of the facts set out in the judgment entail an error of fact. The first ground of appeal appears to be based on an argument that the order of Mohammed AJ had legal effect on the arbitration proceedings which the arbitrator and this court ignored.

[11] SAMWU does not address its central difficulty on the facts, namely that the arbitration proceedings were already concluded and the arbitration award issued before Mohammed AJ made the Rule 30 order setting aside Tirhani Travel’s notice of withdrawal of the High Court action. The order of Mohammed AJ did not exist when the arbitrator conducted the arbitration and delivered the award. It therefore could never affect the arbitration proceedings at that time.

[12] Could the order of Mohammed AJ be argued to *retrospectively* affect the arbitration proceedings?

[13] The order of Mohammed AJ did nothing more than set aside Tirhani Travel’s notice of withdrawal of the action in the High Court, and only on the basis that it

had not tendered costs. The order was not directed at the arbitration proceedings or award at all, either as an interdict or review. It could therefore not have any retrospective effect directly on the arbitration proceedings or award.

[14] In the circumstances, there is no reasonable prospect of success on the first ground.

Second ground of appeal

[15] The second ground of appeal is that the court erred when concluding the order of Mohammed AJ had “no impact on the arbitration award”. The second ground of appeal largely restates the first ground of appeal. SAMWU again invokes the communications between the arbitrator and the parties, in particular his statement advising, “Please obtain a court order if any party desires to avoid a hearing”. SAMWU also refers to section 165(5) of the Constitution, which vests the judicial authority of the state in the courts.

[16] SAMWU appears to contend that the arbitrator, by proceeding with the arbitration despite SAMWU informing him of pending Rule 30 proceedings to set aside the notice of withdrawal, violated section 165 of the Constitution and that this impugns the arbitration award.

[17] The arbitrator informed SAMWU that it should interdict the proceedings, failing which he would proceed. It did not do so and instead absented itself. There was no court order preventing the arbitrator from proceeding and he bore a statutory duty to discharge his functions as arbitrator.

[18] For these reasons and the reasons given in relation to the overlapping first ground of appeal, this ground also has no reasonable prospect of success.

Third ground of appeal

[19] The third ground of appeal is framed as the court having erred, SAMWU argues, in ‘separating’ the arbitration award from the order of Mohammed AJ. SAMWU argues under this ground that the order of Mohammed AJ, though made after the arbitration award, had the effect of reversing the entire process of withdrawal of the High Court action and reviving the action proceedings. SAMWU argues that

the order of this court then created an impression that court orders are not binding or can be flouted with impunity. This, SAMWU argues, threatens the rule of law and the “future of the judiciary”.

[20] The argument is meritless. The order of Mohammed AJ was made *after* the arbitration award was handed down, and was therefore not ignored by the arbitrator. Further, all that the order did was to set aside Tirhani Travel’s notice of withdrawal of the action, and only on the basis that it had not tendered costs.

[21] SAMWU signed a valid agreement committing to refer disputes with Tirhani Travel to arbitration. SAMWU does not challenge that finding in its application for leave to appeal, therefore accepting (correctly) that Tirhani Travel had the right to refer the dispute to arbitration, as it did.

[22] The hyperbolic claims that the order of this court threatens the rule of law and the very future of the judiciary take matters no further. This is not a matter in which a prior court order has been ignored by the parties. It is entirely distinguishable from the authorities on which SAMWU relied, *Pheko*¹ and *Tasima*.² *Pheko* involved an application to hold the respondent municipality and its officials in contempt of an *earlier* order made by the Constitutional Court. *Tasima*, similarly, involved alleged non-compliance with an earlier court order directing that administrative action be implemented. It has no application in the current context where the court order was made *after* the arbitration award. It was not ignored by the arbitrator, nor by Tihrani Travel, because it did not exist when the arbitration proceedings were conducted and the arbitration award was handed down.

[23] In any event, it is worth restating that the order of Mohammed AJ did not affect the arbitration proceedings at all. It did not interdict or set aside the arbitration process or outcome, and did not decide that the dispute must be litigated in the High Court. All it did was to set aside a notice of withdrawal of action because

¹ *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10; 2015 (5) SA 600 (CC).

² *Department of Transport and Others v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC).

costs were not tendered. At most, it revived SAMWU's procedural entitlement to seek its wasted costs of the abandoned High Court proceedings.

[24] SAMWU developed this argument further in argument, contending that once an order setting aside an irregular step has been set aside, the other party may take no further steps until it has rectified the irregularity. SAMWU argues further that Tirhani Travel took a further step by instituting the application to have the arbitration award made an order of court, ignoring the Rule 30 order. In response, Tirhani Travel submitted that the principle under Rule 30(5) applies to taking further steps in the same proceedings, in this matter in the High Court action and that in any event the application to have the arbitration award made an order of court was instituted before Mohammed AJ made the order.

[25] Tirhani Travel did not take any further steps in the High Court action following Mohammed AJ's order. There is accordingly no basis for this additional complaint by SAMWU.

[26] There is no reasonable prospect that a court on appeal could find differently on this ground.

Fourth ground of appeal

[27] The fourth ground of appeal largely restates the third ground. SAMWU argues that this court misunderstood the basis and content of the order of Mohammed AJ, which SAMWU argues "revived the entire process and not the issue of costs".

[28] The unstated premise of SAMWU's argument appears to be that, once Tirhani Travel instituted proceedings in the High Court, it could not withdraw and refer the dispute to arbitration. There is no authority for such a proposition. The other unstated premise appears to be that the order of Mohammed AJ, reinstating the action proceedings as SAMWU would have it, retrospectively invalidates the arbitration award that had in the meantime been handed down. SAMWU does not explain how reviving the action proceedings has any legal effect on an arbitration award already handed down.

[29] Could the order be argued to provide a legal obstacle to this court making the arbitration award an order of court? SAMWU has not identified any section of the Arbitration Act that would preclude making the arbitration award an order of court in the circumstances.

[30] Even assuming, for the sake of SAMWU's argument, that the order of Mohammed AJ retrospectively revived the action proceedings, so that in law the action in this court was pending when the arbitration proceedings ran, it does not follow that SAMWU was entitled to insist that the arbitration be abandoned or stayed and that the dispute be decided in the High Court. SAMWU had agreed to arbitration and does not challenge that finding in this application for leave to appeal. A party is not entitled *as of right* to a stay based on a plea of *lis alibi pendens*. The court (or in this case, arbitrator) has a discretion to stay the proceedings or not, and may allow the action to proceed if it is just and equitable and the balance of convenience favours it.³

[31] Here, where the parties had agreed to arbitrate their disputes, the High Court proceedings were at the early stages of pleading, and the claimant confirmed that they had abandoned those High Court proceedings, it would not have been just and equitable for the arbitrator to stay the arbitration and insist that the parties return to this court. In any event, those are not the facts. The High Court action had been withdrawn when the arbitration ran and Tirhani Travel had unambiguously conveyed its election to arbitrate the dispute and abandon the court action.

[32] This ground of appeal, too, lacks prospects of success.

Fifth ground of appeal

[33] The fifth ground of appeal is effectively that the arbitrator ignored his own directive. In its heads of argument, SAMWU relied on an e-mail from the arbitrator on 12 August 2021 in which he stated, "the parties must resolve the High Court matter".

³ *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC 2013 (6) SA 499 (SCA) para 36.*

[34] SAMWU appears to read this directive as a final determination by the arbitrator that the parties must resolve the Rule 30 application, failing which he would not conduct the arbitration. There is no basis on the facts to understand this to have been the arbitrator's decision. It is clear that he initially postponed to enable SAMWU to move the Rule 30 application but without making any final determination or 'directive' that he would suspend the arbitration proceedings indefinitely until the Rule 30 application was decided.

[35] There is also no plausible argument that the arbitrator acted unlawfully. The arbitrator at that stage afforded SAMWU an opportunity to have its Rule 30 application decided and postponed the proceedings. When its Rule 30 application was not heard and instead was removed from the roll because it had been set down on the incorrect roll, the arbitrator resumed and concluded the arbitration proceedings. His conduct in doing so was lawful, reasonable and indeed appropriate in light of the duties of an arbitrator under the Arbitration Act.

[36] On 28 October 2021, the arbitrator informed the parties to "obtain a court order if any party desires to avoid a hearing", conveying that unless interdicted, he would now conduct the arbitration proceedings. This is a common and appropriate approach of an arbitrator, enjoined by the Arbitration Act or another law to conduct and complete arbitration proceedings, who informs parties that they should secure an interdict if they wish to stay the proceedings.

[37] To the extent that SAMWU invokes this later 'directive' of 28 October 2021, the arbitrator also clearly did not act against it. To the contrary, he did exactly what this statement indicated: in the absence of a court order interdicting the arbitration, he conducted the arbitration proceedings.

[38] The arbitrator did not make any directive binding himself not to proceed and did not breach any of his own directives as argued by SAMWU. This ground of appeal has no prospects of success.

Cumulative assessment

[39] The test for leave to appeal is governed by section 17 of the Superior Courts Act 10 of 2013. SAMWU seeks leave on the basis both that the appeal would have

a reasonable prospect of success in section 17(1)(a)(i) and on the basis that there are compelling reasons to grant leave under section 17(1)(a)(ii). The court “may only” grant leave if of the opinion that these jurisdictional facts are present, namely that the appeal “would” have a reasonable prospect of success or that there is another compelling reason why the appeal should be heard.⁴ I need not decide whether the introduction of ‘would’ in the Superior Courts Act introduced a stricter test than previously applied under the Supreme Court Act 59 of 1959.⁵ Nothing turns on it.

[40] In a recent judgment in this division, Friedman AJ held:

Of course, it is human nature to cling to the correctness of one’s views. But if rational humans could not be persuaded by argument, the whole system of litigation would be pointless. It is a duty of a judge (or acting judge) when deciding whether to grant leave to appeal to have the humility to realise when his or her findings are subject to reasonable disagreement, and to approach the matter as objectively as possible. Good judges, in a sensible legal system, should easily be able to identify which points are arguable and which are not. Just as, I dare say, good people, in a sensible society, should be able to take a position while recognising the reasonableness (or unreasonableness) of the differing views of others.⁶

[41] I have borne this salutary injunction in mind. I have given the application for leave to appeal careful consideration, assessing each ground of appeal in its best light and considering their cumulative effect with a view to assessing the possibility that another court could come to a different conclusion.

⁴ See *Mont Cheveux Trust (IT) v Tina Goosen*, unreported decision of the Land Claims Court, case no LCC14R/2014 dated 3 November 2014 and see Van Loggerenberg *Erasmus: Superior Court Practice* RS 5, 2025, D-103 to D-105 and the cases cited at fn 8.

⁵ *MEC for Public Works, Eastern Cape v Ikamva Architects CC* 2023 (2) SA 514 (SCA) para 3.

⁶ *Baphalaborwa 72 Construction and Civil Engineering CC v T and L Civil Electrical Contractors CC* [2024] ZAGPJHC 1046 para 3.

[42] Equally, however, judges bear a duty not to grant leave to appeal if a matter bears no reasonable prospect of success, as doing so benefits neither the parties nor the administration of justice.

[43] I conclude that there is no ground advanced by SAMWU on which the appeal would have a reasonable prospect of success. Nor is there any other compelling reason to grant leave. SAMWU has not referred the court to any conflicting judicial decisions or other compelling reason to grant leave.

[44] The parties voluntarily concluded an arbitration agreement, the validity of which is not challenged in this application for leave to appeal. Tirhani Travel was entitled to refer the dispute to arbitration and to abandon the High Court claim that it had initiated in preference for arbitration under that agreement. SAMWU's only remaining potential entitlement was to wasted costs in the High Court, an issue that is not before me. Setting aside the notice of withdrawal of the High Court action for failure to tender costs, *after* the arbitration award was made, provided no basis retrospectively to undo the arbitration award.

[45] Costs appropriately follow the result, and I grant those costs on the same scale as in the main matter, being Scale B, for the reasons given in the main judgment.

[46] The following order is granted:

1. The application for leave to appeal is dismissed.
2. The applicant is ordered to pay the respondent's costs including the costs of counsel on Scale B.

J BRICKHILL
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 21 November 2025.

DATE OF HEARING: 28 October 2025

JUDGMENT SUBMITTED FOR DELIVERY: 21 November 2025

APPEARANCES:

For the Applicant: Mr A Mayet (attorney with rights of appearance)
Instructed by Mayet Attorneys Inc

For the Respondent: Adv BM Khumalo, instructed by Dlamini Legal Inc

