



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D13047/2024

In the matter between:

**CUNINGHAME CONSTRUCTION CC
t/a LADYSMITH CONSTRUCTION**

APPLICANT

and

HOMESTEAD HOSPITALITY HOLDINGS SA (PTY) LTD

FIRST RESPONDENT

**THE HONOURABLE RETIRED
JUSTICE FDJ BRAND**

SECOND RESPONDENT

**THE HONOURABLE RETIRED
JUSTICE GRAHAM LOPES**

THIRD RESPONDENT

ADVOCATE MAURICE PILLEMER SC

FOURTH RESPONDENT

**THE HONOURABLE RETIRED
JUSTICE MJD WALLIS**

FIFTH RESPONDENT

ORDER

It is hereby ordered that:

1. The application is dismissed with costs, on scale C, including the costs of two Counsel.

JUDGMENT

Ramdhani AJ

Introduction

The parties

[1] The applicant is Cuninghame Construction CC t/a Ladysmith Construction, which shall hereinafter be referred to as Ladysmith Construction.

[2] The first respondent is Homestead Hospitality Holdings SA (Pty) Ltd, which shall hereinafter be referred to as Homestead.

[3] The second to fourth respondents are identified as the Appeal Arbitrators, who shall collectively be referred to as *'the Appeal Tribunal'*.

[4] The fifth respondent is the Arbitrator and shall hereinafter be referred to as the Arbitrator.

The relief

[5] Ladysmith Construction has invoked the provisions of s 33(1)(b) of the Arbitration Act 42 of 1965 ('the Act'). Section 33(1)(b) of the Act provides as follows:

'(1) Where-

...

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

...

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.'

[6] Ladysmith Construction seeks an order that:

'1. The arbitration award of the Appeal Tribunal dated 12 September 2024 is reviewed and set aside.

2. The arbitral disputes:

2.1 are remitted to a new Appeal Tribunal who are to be agreed between the parties within 20 days; and

2.2 failing compliance with paragraph 2.1 above, are remitted to the Association of Arbitrators (Southern Africa) NPC for reconsideration by the Arbitration Appeal Tribunal

appointed by it to make a fresh award in accordance with Sections 32(2) of the Arbitration Act of 1965.’

[7] Ladysmith Construction avers that the Appeal Tribunal’s award falls to be set aside in terms of s 33(1)(b) of the Arbitration Act on the main and principal ground that the Appeal Tribunal exceeded its powers by determining the appeal beyond the ambit and four corners of the pleadings, by inter alia conflating the stoppage issue with the issue of an abandonment of the site/project; which was impermissible because the pleadings required that both be considered as distinct and separate questions. During the course of the submissions and interaction with the court in this review application, the applicants Counsel informed the court that the aforesaid ground of the Appeal Tribunal straying and not confining itself to the pleadings was not raised with the Appeal Tribunal during the appeal.

[8] In the appeal that served before the appeal tribunal, the appeal tribunal also made an analysis as to whether the arbitrator determined the termination issue outside of and beyond the pleadings.¹ In the appeal, Homestead contended that the arbitrator went beyond his mandate in treating the existence of the payment dispute as a basis for finding that Homestead did not establish that there was no lawful excuse for the intimation that the contractual performance was not going to be forthcoming. In this regard the appeal tribunal was in agreement with Homestead’s complaint and found that the award by the arbitrator did not deal with the fact that an objection was raised and dealt with on the basis that no reliance was being placed by Ladysmith Construction on the payment in dispute providing a lawful excuse for the refusal to comply with the contractual obligations.

The arbitration and the arbitrator’s separation directive

[9] The arbitration emanated from a settlement agreement in winding-up proceedings launched by Ladysmith Construction against Homestead. In terms of clause 2.5 of the arbitration agreement, the arbitration was broadened to determine which party validly terminated the construction contract and whether in effect, Homestead accrued a right of termination.

¹ Award by the Appeal tribunal, paragraphs 33,36 and 37

[10] Consequent upon the settlement agreement being concluded, the parties thereupon exchanged their respective pleadings in the arbitration which comprised of Homestead's initial statement of claim and thereafter Ladysmith Construction's statement of defence and claim-in-reconvention.

[11] Clause 2.5 of the settlement agreement is recorded as follows:

'The disputes between the parties, briefly summarized (and is subject to being fully ventilated in the exchange of pleadings in arbitration) are inter alia:

2.5.1 the termination of the contract/s by the respondent;

2.5.2 the final amount due to/due by Ladysmith Construction (applicant);

2.5.3 the alleged defects in the applicant's works;

2.5.4 which party is liable for the cost of the application and the cost of the arbitration.'

[12] In terms of clause 2.5.1 of the settlement agreement, the parties agreed that the dispute between the parties related inter alia to *'the termination of the contract/s by the respondent namely Ladysmith Construction'*. In terms of clause 2.5 more specifically the preamble thereto, the parties further agreed that the issues that arose for determination more particularly clauses 2.5.1 to 2.5.4 was *'subject to being fully ventilated in the exchange of pleadings in the arbitration'*.

[13] Clause 2.5 of the settlement agreement, more particularly clause 2.5.1 thereof clearly recorded and documented that one of the issues and disputes between the parties was in regard to *'the termination'* of the contract/s by Ladysmith Construction. Such termination would be ventilated in the exchange of pleadings in the arbitration.

[14] On 22 July 2022 the parties convened their first pre-arbitration meeting before the Arbitrator. It was agreed that the first issue which the Arbitrator was tasked to determine was whether the common cause termination of the contract concluded between Ladysmith Construction and Homestead was either a lawful termination at the instance of Ladysmith Construction, or a lawful termination at the instance of Homestead.²

² Annexure 'FA1', Ladysmith Construction's founding affidavit.

[15] After the parties exchanged their respective pleadings, Ladysmith Construction applied for a separation of issues, which was opposed by Homestead. On 4 March 2023 and pursuant to an opposed application for separation, the Arbitrator issued a directive³ on the termination issue. This directive was issued after the parties made submissions on whether the termination issue should be decided as a separated issue.

[16] Paragraph 2 of the directive issued by the Arbitrator recorded that the separated issue involved a determination of the following questions:

‘(a) whether the respondent abandoned the site on 9 May 2022 thereby evincing an intention no longer to be bound by the construction contract between the parties?

(b) whether the respondent’s conduct in lodging and serving the application for provisional winding-up order in relation to the claimant evinced an intention no longer to be bound by the construction contract between the parties?

(c) whether the abandonment of the site on 9 May 2022, if established, when taking together with the lodging and service of the application for provisional winding-up order evinced an intention of the respondent no longer to be bound by the construction contract between the parties?

(d) if the answer to any one of the three previous questions is in the affirmative, was the claimant’s cancellation of the contract by way of the emails of 11 and 12 May 2022 (annexure SOC5.1 and 5.2 to the statement of claim) a lawful cancellation of the contract?

(e) if the claimant was not lawfully entitled to cancel the contract, did the purported cancellation constitute a repudiation thereon, accepted by the respondent, that brought about the termination of the contract.’

[17] After the directive was issued by the Arbitrator, Homestead effected amendments to its pleadings by the incorporation and inclusion of paragraphs 27A, 27B and 27C. By way of paragraph 27 of Homestead’s amendment statement of claim, Homestead averred the following:

‘Before the final agreed completion date and from 9 to 11 May 2022 the respondent abandoned the Homestead project and left the site, alternatively was in the process of abandoning the Homestead project and leaving the site. The respondent then on 11 May 2022 instituted the final winding-up application referenced above. The conduct of the respondent in abandoning the Homestead project and instituting liquidation proceedings

³ Annexure ‘FA2’, Ladysmith Construction’s founding affidavit at 38–39.

constitutes a clear rejection of the agreement which repudiation the claimant accepted and cancelled the agreement with immediate effect by email addressed on 11 May 2022. Thereafter claimant reaffirmed its termination through its attorneys and again in the answering affidavit in the winding-up application. Copies of the letters of termination are annexed hereto marked SOC5.1 and SOC5.2.’

[18] Both the arbitration and the appeal proceeded on a very limited *‘termination issue’* which had been agreed upon between the parties. By way of further amendments to its statement of claim and in regard to the termination issue, Homestead pleaded as follows:

27A.

From 9 to 11 May 2022 the respondent abandoned alternatively was in the process of abandoning the Homestead project, abandon alternatively was in the process of abandoning the site, stopped work and removed both its equipment as well as materials belonging to the claimant. A list of equipment and materials belonging to the claimant which were removed by the respondent is annexed hereto marked as SOC5A.”

27B.

The conduct of the respondent in removing equipment and material belonging to the claimant, in circumstances where it had no lawful right to do so, constituted a material breach of the agreement.

27C.

In addition to the respondent’s repudiation of the agreement as recorded in paragraph 27 above, the respondent’s repeated and persistent material breaches of the agreement as recorded in paragraphs 27A – 27B were justification for the claimant’s termination of the agreement.’

The arbitrator’s award

[19] On 1 February 2024, the Arbitrator delivered his award in regard to the termination issue.⁴ In regard to the termination issue, the Arbitrator found inter alia that:

⁴ Annexure ‘FA8’, Ladysmith Construction’s founding affidavit.

- (a) Homestead's cancellation of the contract was not a lawful cancellation;
- (b) Homestead's cancellation constituted a repudiation of the contract concluded with Ladysmith Construction; and
- (c) Ladysmith Construction's acceptance of Homestead's repudiation brought about a lawful termination of the contract.

[20] Notably the parties were in agreement at the commencement of the arbitration and during the appeal that the separated issue had been expanded to include paragraphs 27, 27A, 27B and 27C of the statement of claim.

[21] The Arbitrator declared inter alia that Homestead's cancellation of the construction contract was not a lawful cancellation and that this purported cancellation constituted a repudiation of the construction contract, the acceptance of which Ladysmith Construction brought about the lawful termination of the contract.

[22] The Arbitrator, in summary, made the following findings:⁵

- (a) The evidence suggested that there was a slowing down of work between 25 April and 9 May 2022. That at least from the early part of May 2022 onward the rate of work being undertaken on the Homestead project slowed and this was a deliberate act on the part of the Ladysmith Construction;
- (b) That Homestead was aware that the reason for the slowdown in work was the issue of non-payment;
- (c) By 11 May 2022 in substance the work had stopped;
- (d) Homestead's view that the work stoppage and withdrawal from the site constituted an unequivocal intention not to be bound by the contract was not reasonable. The more natural conclusion would be that Ladysmith Construction had stopped work and left site because of the dispute over payments and that if that dispute could be resolved, there was no reason why they would not have returned to complete the project.

[23] In terms of the agreement between the parties, the right to appeal had been reserved. Homestead appealed the Arbitrator's award and the appeal was heard by

⁵ Vol 2, Annexure 'FA8', arbitration award at 103-111.

the Appeal Tribunal. Homestead accordingly delivered its appeal against the award by the Arbitrator, which appeal then served before the Appeal Tribunal.

The appeal tribunal's award

[24] On 12 February 2024 the Appeal Tribunal delivered its award.⁶ The Appeal Tribunal upheld Homestead's appeal against the Arbitrator's award and set aside and replaced such award with an interim award being that:

- (a) Homestead's cancellation of the construction contract by way of emails of 11 and 12 May 2022 was a lawful cancellation of the contract; and
- (b) Ladysmith Construction was ordered to pay the costs of the separated issue.

[25] By way of this application Ladysmith Construction seeks to review and set aside the arbitration appeal award delivered by the Appeal Tribunal. In furtherance of such relief, Ladysmith Construction seeks a further order that the arbitration appeal be remitted to a new Appeal Tribunal for a fresh award alternatively for such other purposes as the Court may direct.

Ladysmith construction's case and contentions

[26] Ladysmith Construction, in its founding affidavit stated inter alia that:⁷

- (a) The Appeal Tribunal exceeded its powers by granting the Appeal Tribunal award for reasons and on grounds outside of Homestead's pleaded case;
- (b) The directive that had been issued was never revisited;
- (c) The termination issue was confined to paragraph 27 of Homestead's statement of claim;
- (d) That the jurisdictional framework created by the pleadings required a determination as to whether the process of stopping work is the same as abandoning or was identified or pleaded by Homestead as being the same thing;
- (e) That the pleadings created a pleaded difference between stopping and abandoning and that by definition these courses of conduct were different;
- (f) *'[s]ave for abandonment, any other conduct which may or may not have given rise to a claim fell outside the termination issue';*

⁶ Annexure 'FA9', Ladysmith Construction's founding affidavit.

⁷ Vol 1, founding affidavit at 13-26.

- (g) *'[t]he Appeal Tribunal failed to consider the appeal within the parameters set by Homestead's pleadings and the Directive';*
- (h) The jurisdiction of both the arbitration and the appeal was confined to what was pleaded in paragraph 27 of the statement of claim;
- (i) The allegations in paragraph 27A to 27C were a different issue that needed to be addressed because they pertain to material breaches; and
- (j) The Appeal Tribunal made no finding on the issue of abandonment but went outside of the permissible parameters of the case by finding that a go slow and work stoppage amounted to a repudiation.

[27] Ladysmith Construction contends that the Appeal Tribunal exceeded and acted beyond their jurisdiction when they made their award by way of their arbitration appeal award and that the Appeal Tribunal decided the appeal outside and beyond the pleadings and pleaded issues more particularly Homestead's pleaded case.

[28] In seeking an order that the arbitral disputes be remitted to a new Appeal Tribunal, Ladysmith Construction contended that given the views expressed by the Appeal Tribunal in regard to inter alia the pleaded issues and the issues that arose for determination in the appeal, the interests of justice militate against the remittal of the appeal to the same Appeal Tribunal. It contended further that the interests of justice dictate that a new Appeal Panel will be best suited to determine the issues afresh *'without their minds clouded by the impermissible approach adopted by the Appeal Tribunal in their assessment of the appeal and their identification of what they saw as the fundamental issue in the appeal'*.

[29] Ladysmith Construction and Homestead were in agreement that both the arbitration and the appeal proceeded on a limited issue which had been agreed between the parties and they identified the limited issue as the *'termination issue'*. Ladysmith Construction contended that the framework for the jurisdiction of the Appeal Tribunal is delineated and defined by the pleadings read together with the directive. It averred that for the purposes of determining the jurisdictional framework created by the pleadings, it was important to determine whether the process of stopping work is the same as abandoning the site or project or was identified or pleaded by Homestead as being the same thing.

[30] In relying upon such a contention, it made specific and particular reference to the aforementioned paragraphs 27, 27A, 27B and 27C of Homestead's amended statement of claim. Ladysmith Construction argued that the pleadings created a pleaded difference between both causes of conduct and in this regard, the stopping of work as pleaded in paragraph 27A was an alleged persistent breach which occurred whilst Ladysmith Construction remained on the site and involved in the project. It contended that it was not an abandonment of either the project or the site, which were the only pleaded acts of repudiation as pleaded in paragraph 27 namely that Ladysmith Construction had abandoned the project and left the site and further that its act of instituting liquidation proceedings constituted a clear rejection of the agreement, which repudiation Homestead accepted and cancelled the agreement.

[31] The nub of Homestead's case was that save for an abandonment, any other conduct which may or may not have given rise to a claim fell outside the termination issue and in this regard, the directive issued by the Arbitrator dealt solely with the issue of the abandonment. In regard to the issue of the abandonment, the Appeal Tribunal did not independently interrogate the issue of abandonment and did not make any determination as to whether Ladysmith Construction had abandoned the construction site or the project.

[32] Ladysmith Construction contended although not expressly stated, that it having stopped work because of a pay dispute was considered by the Appeal Tribunal as sufficient to constitute a repudiation. However, this was not Homestead's pleaded case in respect of the repudiation and in this regard, paragraph 27C of the amended statement of claim made this clear.

[33] It contended that the Appeal Tribunal criticised Ladysmith Construction in its judgment for having referenced the pay dispute and having not pleaded the same as an answer to the abandonment issue, however, it averred that Ladysmith Construction was not obliged to plead the *exceptio non adimpleti contractus*, since that would have been an answer to a claim that stopping or slowing down work was the act of repudiation. It was not a defence to the claim of abandonment of the

project or site, and did not fall within the termination issue referred to for determination.

[34] Consequently, the Appeal Tribunal failed to consider the appeal within the parameters set by Homestead's pleadings read together with the directive. Thus, the jurisdiction of both the arbitration and the appeal was confined to what was pleaded in paragraph 27 of the amended statement of claim. Paragraph 27A and 27B were not the pleaded case for repudiation but instead were the pleaded case for the alleged material breaches that independently (and as alternative) justified the cancellation of the contract by Homestead.

[35] Ladysmith Construction averred that paragraph 27C fortified its case that paragraph 27A and 27B were not Homestead's pleaded case for repudiation but instead were the pleaded case for the alleged material breaches. Paragraph 27C so it contended, acknowledged this by contending that paragraphs 27A and 27B dealt with the issue of Ladysmith Construction's alleged '*repeated and persistent material breaches*' and consequently this is a different issue which needed to be addressed. The question of whether Ladysmith Construction had repudiated the agreement was pleaded as relying on two legs only namely whether Ladysmith Construction had abandoned the Homestead project and the site and whether the liquidation application amounted to a repudiation. Not only did the Appeal Tribunal make no finding on the issue of abandonment, but went outside of the permissible perimeters of the case by finding that a go-slow and work stoppage amounted to repudiation.

[36] The Arbitrator on the one hand, dealt with the question of whether Homestead was abandoning the site and looked at the full conspectus of the facts before him and in doing so, he acted within the jurisdiction afforded to him however the Appeal Tribunal on the other hand, decided the appeal on the basis that a work stoppage equated to abandoning of the project and the site which was not the pleaded case. Thus, it contended that the Appeal Tribunal failed to make a decision on the pleaded case of abandonment and in this regard the Appeal Tribunal acted beyond its jurisdiction when it granted the award in the appeal.

Assessment and analysis

The Law

[37] In the Supreme Court of Appeal ('SCA') judgment of *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others*,⁸ the SCA said the following:

'[28] Thebe argues that the appeal tribunal both exceeded its powers and was guilty of a gross irregularity. The same conduct, however, was relied on as giving rise to both grounds for the setting aside of the award. *The gravamen of the complaint is that the issues before the arbitrator, and thus before the appeal tribunal, were defined by the pleadings. The arbitration agreement said so expressly.* The agreement also made provision for amendments, and both parties amended and added to their pleadings during the course of the proceedings. Hosmed even introduced an amendment at the stage of appeal. The arbitration appeal tribunal *could not, it was argued, go beyond the pleadings and decide an issue not pleaded. Unlike a court, which has the inherent jurisdiction to decide a matter even where it has not been pleaded, an arbitrator has no such power.* It was common cause that the issue of unanimous assent was not pleaded at any stage.

...

[30] In my view it is clear that the only source of an arbitrator's power is the arbitration agreement between the parties and an arbitrator cannot stray beyond their submission where the parties have expressly defined and limited the issues, as the parties have done in this case to the matters pleaded. Thus the arbitrator, and therefore also the appeal tribunal, had no jurisdiction to decide a matter not pleaded ...

...

[35] In the circumstances the appeal tribunal exceeded its powers: it went beyond the terms of the arbitration agreement. This is a clear case where the arbitration appeal tribunal exercised a power that it did not have. This court recently referred with approval to the decision of the House of Lords in *Lesotho Highlands Development Authority v Impreglio spA* where Lord Steyn distinguished between cases where a tribunal mistakenly exercises a power that it does have, and those where a tribunal exercises a power that it does not have. In the latter type of case the tribunal exceeds its power, and, under our Arbitration Act, that warrants the setting aside of the order. This is the position stated earlier in *Dickenson & Brown v Fisher's Executors* applied by the court in *Telcordia ...*' (Footnotes omitted.) (My Emphasis.)

[38] In the SCA judgment of *Fischer and Another v Ramahlele and Others*⁹ the SCA held:

⁸ *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing and Consulting (Pty) Ltd and Others* [2007] ZASCA 163; 2008 (2) SA 608 (SCA) (*Hos+Med Medical Aid Scheme*).

[13] Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues ... (Footnote omitted.)

[14] It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues ...

[15] This last point is of great importance *because it calls for judicial restraint*. As already mentioned Gamble J “required” the parties to argue as a preliminary issue what he described as two issues of legality. Although he added that the parties were amenable to these proposals, counsel who appeared in this court and in the court below confirmed that the judge’s own description, that he “required” the points to be argued, was accurate. *They were not asked for their submissions on whether this was an appropriate approach to the matter, or even (which was more pertinent) whether either question was in issue in the case. Nor were they asked whether their clients agreed to broaden the issues to encompass these points ...* It is a far cry from that for a court to raise issues *that do not emerge from the papers and have not been canvassed in the affidavits* and require that those be argued instead of hearing oral evidence and deciding the issues raised by the parties.’ (Footnotes omitted.) (My Emphasis.)

[39] In terms of clause 2.5.1 of the settlement agreement, the parties agreed that the dispute between the parties related inter alia to *‘the termination of the contract/s by the respondent namely Ladysmith Construction’*. In terms of clause 2.5 more specifically the preamble thereto, the parties further agreed that the issues that arose for determination more particularly clauses 2.5.1 to 2.5.4 was *‘subject to being fully ventilated in the exchange of pleadings in the arbitration’*.

[40] After the Arbitrator issued the directive for the separation of issues, Homestead effected amendments to its statement of claim. Paragraphs 27, 27A, 27B and 27C of its statement of claim formed the central feature of Ladysmith Construction’s basis in contenting that the Appeal Tribunal exceeded their powers by straying beyond the pleaded and defined issues.

⁹ *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA).

[41] During the course of the submissions that were made to this Court, the parties were in agreement that the pleadings comprised of three components¹⁰ namely:

- (a) Clause 2.5 of the settlement agreement (in the liquidation application);
- (b) The Arbitrator's directive, more specifically paragraph 2(a) to 2(e); and
- (c) The pleadings comprising of inter alia Homestead's amended statement of claim and Ladysmith Construction's statement of defence.

[42] Consequently, the parties agreed and accepted during the course of submissions that were made to the Court, that the Appeal Tribunal were bound to adjudicate and determine the arbitration appeal predicated on clause 2.5 of the settlement agreement, paragraph 2 of the Arbitrator's directive and the pleadings.

[43] It is significant to note that Homestead amended its statement of claim by the incorporation of paragraphs 27A, 27B and 27C after the Arbitrator issued the directive.

Clause 2.5 of the settlement agreement more particularly clause 2.5.1 thereof recorded that one of the issues and disputes between the parties was in regard to '*the termination*' of the contract/s by Ladysmith Construction. Such termination would be ventilated in the exchange of pleadings in the arbitration, thus it was clearly within the contemplation of the parties that '*the termination of the contract/s*' by Ladysmith Construction would be ventilated and dealt with in the arbitration.

[44] In regard to Homestead's amended statement of claim, more particularly paragraphs 27, 27A, 27B and 27C, the Court makes the following observations, namely: paragraph 27 of Homestead's statement of claim documented inter alia Homestead's contention and pleaded case that the conduct of Ladysmith Construction having abandoned the Homestead project and instituting liquidation proceedings constituted a clear rejection of the agreement which repudiation Homestead accepted and cancelled the agreement by way of the email addressed on the 11 May 2022. It further records that Homestead thereafter reaffirmed its

¹⁰ Homesteads Senior Counsel sought to argue that the notice of appeal also formed part of the pleadings, for obvious reasons this approach is untenable.

termination via its attorneys of record and again in the answering affidavit in the winding-up application.

[45] At the heart of Ladysmith Construction's case is its contention that save for the abandonment, any other conduct which may or may not have given rise to a claim fell outside of the termination issue and thus so it contends, the Appeal Tribunal strayed beyond the pleaded issues that arose for determination more particularly, the issues pleaded in paragraphs 27, 27A, 27B and 27C.

[46] It is apparent that Ladysmith Construction's main bone of contention is the averments pleaded by Homestead in paragraphs 27A and 27C, more particularly paragraph 27 of Homestead's statement of claim. In my judgment, I find that paragraphs 27A, 27B and 27C has to be read in context with and together with paragraph 27 and in regard to the averment in paragraph 27A, that Ladysmith Construction '*stopped work*' and that such averment and act falls within Ladysmith Construction's act of having abandoned the site alternatively the project.

[47] In regard to paragraph 27C, which has to be read in together with and in conjunction with paragraphs 27, 27A and 27B and in context , more particularly that and having regard to the aforementioned paragraphs, the reference to repeated and persistent material breaches was the reference to the averments pleaded in paragraphs 27 and 27A. Namely that Ladysmith Construction had abandoned the site alternatively abandoned the project and had in this regard, removed its equipment and that such acts would have invariably, have entailed stopping work. Paragraph 27A must also be read in its totality and with reference to the concluding words namely '*were justification for claimant's termination of the agreement*'.

[48] Ladysmith construction denied that it abandoned the site but did not plead in the alternative that if it's conduct in stopping work and moving from the site was established, that it had a lawful excuse because of nonperformance by Homestead. Ladysmith construction disavowed reliance on the *exceptio non-adimpleti contractus*.¹¹

¹¹ Award by the appeal tribunal, paragraph 34

[49] The Appeal Tribunal found that Ladysmith constructions act of stopping work, moving equipment from the site and declaring the site to be unsafe¹², amounted to a repudiatory breach.¹³ The defence pleaded and advanced by Ladysmith construction in the arbitration hearing was that it had not stopped work or taken steps to the established the site. The arbitrator rejected such a contention based on the evidence that served before him namely that work had slowed and by 11 May 2022 the work had stopped, which was confirmed in the letter by Ladysmith constructions attorney. It is apparent from the evidence in the arbitration that work had effectively stopped and materials and equipment were being moved off site. On this topic the arbitrator accepted the submission by Homestead's counsel that with the construction contract, the contractor's action in stopping work and disestablishing from the site is a substantial pointer towards a repudiation of the contract.¹⁴

[50] Clause 2.5.1 of the settlement agreement documented that one of the issues and disputes between the parties was in regard to '*the termination*' of the contract/s by Ladysmith Construction and that such termination would be ventilated in the exchange of pleadings in the arbitration. Therefore, the *ratio* in Hos+med Medical Aid Scheme finds application *in casu*. Accordingly, the appeal tribunal confined itself to the issues that emanated from the 3 components of the pleadings and specifically in terms of the separation directive. The case that Ladysmith Construction came to meet was defined by the issues pleaded between the parties, read together with Clause 2.5.1 of the settlement agreement and the separation directive. Further evidence was adduced in this regard. Therefore, the appeal tribunal did not exceed his powers as contemplated by s 33(1)(b) of the Arbitration Act.

[51] I am not in agreement and aligned with Ladysmith Construction's contention that the Appeal Tribunal exceeded its powers by deciding and adjudicating the matter without reference to the pleadings which comprised of the aforementioned three components. An Arbitrator's power or jurisdiction to deal with the issues placed before him or her is regulated by the arbitration agreement between the parties. The

¹² Which was confirmed in writing by Ladysmith constructions attorney

¹³ Award by the appeal tribunal, paragraphs 25 and 26

¹⁴ Award by the arbitrator, paragraph 41

validity of the termination of the contract by Homestead is a dispute identified in terms of paragraph 2.5 of the settlement agreement.

[52] Thus, I am not persuaded with Ladysmith Constructions argument that the Appeal Tribunal was confined to considering only one pleaded ground of repudiation located in paragraph 27 of the statement of claim, and that the other termination related to allegations located in paragraph 27A to 27C of the statement of claim were excluded from the appeal.

[53] It is common cause that both the Arbitrator and the Appeal Tribunal dealt with the arbitration in terms of the amended and amplified pleadings *vis-à-vis* paragraphs 27 and 27A to 27C. Ladysmith Construction contended inter alia that because Homestead failed to plead the stopping of work as a repudiation of the contract but pleaded it as a material breach, the Appeal Tribunal exceeded its powers or committed a gross irregularity in finding the stopping of work was a repudiation.

[54] Paragraphs 29 and 30 of the appeal award demonstrates that the Appeal Tribunal did not make such a finding but merely agreed that the conduct of Ladysmith Construction was a substantial pointer to repudiation.

[55] Ladysmith Construction contended that during the course of the adjudication of the appeal before the Appeal Tribunal, the Appeal Tribunal considered in its view that a stoppage of work even temporarily constituted an abandonment in the contract of construction law. In this regard, this is a finding which is unimpeachable and is not reviewable.

[56] An Arbitrator would no doubt exceed his powers when he purports to exercise a power which he did not have. If an Arbitrator erroneously exercises powers available to him, then the Arbitrator does not exceed his powers and a jurisdictional challenge on that basis should fail.¹⁵

¹⁵ *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266 (SCA) (*Telcordia*) paragraphs 52 and 86.

[57] Harms J in *Telcordia*,¹⁶ held that for all intents and purposes, an Arbitrator has the right to be wrong on the merits of a case, and *‘it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry-they may be misconceptions about meaning, law or admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the enquiry’*.

[58] In my judgment, the Appeal Tribunal did not misconceive the nature of the enquiry and in adjudicating the issues at hand, identified the issues predicated on the three components namely clause 2.5.1 of the arbitration agreement, the separation directive, and the pleadings; consequently, Ladysmith Construction was afforded a fair hearing and the Appeal Tribunal’s conduct did not amount to a gross irregularity.¹⁷

[59] Harms J correctly held in *Telcordia* more specifically at paragraph 86 that where an Arbitrator engages in the correct enquiry but errs either on the facts or the law, that is not an irregularity and does not constitute a basis for setting aside an award.

[60] What Ladysmith Construction fails to appreciate is that the Arbitrator made a factual finding that the works had stopped and equipment was being removed from the site. The Arbitrator then found that Homestead would not have considered that to be a repudiation of the contract because of the dispute about payment.

[61] Even if the Appeal Tribunal was incorrect on such a construction, that does not constitute a gross irregularity, nor does it mean that the Appeal Tribunal exceeded its powers. The attempt to separate paragraph 27 from paragraphs 27A to C, ignores the fact that in the pre-arbitration minute, the agreement was that the dispute regarding termination would be adjudicated by arbitration. The Appeal Tribunal exercised its powers in terms of that agreement.

¹⁶ Ibid para 85.

¹⁷ *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2009] ZACC 6; 2009 (4) SA 529 (CC) para 219.

The abandonment issue: The appeal tribunal

[62] In *Telcordia*, the SCA said the following:

‘L. The meaning of s 33(1)(b): “gross irregularity” and “exceeding powers”

[52] The term “exceeding its powers” requires little by way of elucidation and this statement by Lord Steyn says it all:

“But the issue was whether the tribunal “exceeded its powers” within the meaning of s 68(2)(b) [of the English Act]. This required the courts below to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have. *If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under s 68(2)(b) is involved.* Once the matter is approached correctly, it is clear that at the highest in the present case, on the currency point, there was no more than an erroneous exercise of the power available under s 48(4). The jurisdictional challenge must therefore fail.”

...

[85] 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 inquiry 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 inquiry* - they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry. To adapt the quoted words of Hoexter JA: it cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by a court.

[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.' (Footnotes omitted.)

[63] Ladysmith Construction contended that a repudiation is pleaded in paragraph 27 and that the only ground upon which the Appeal Tribunal and indeed the Arbitrator could have relied upon to conclude that Ladysmith Construction repudiated the agreement was if it had abandoned the site/project.

[64] It demarcated a clear distinction between a material breach and a repudiation, stating that only the latter was to be considered by the Appeal Tribunal and that the Appeal Tribunal was prohibited from finding that the pleaded material breaches – stopping work and decamping from site – amounted to a repudiation of the agreement. It alleged that only the abandonment issue was to be considered a repudiation, and the further pleaded material breaches could not also be a repudiation because they were not pleaded as such.

[65] In *Minister of Safety and Security v Slabbert*¹⁸ the SCA said the following in regard to the purpose of pleadings:

'[11] The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.

[12] There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. *This occurs where the issue in question has been canvassed fully by both sides at the trial.* In *South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd*, this court said:

"However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue."

¹⁸ *Minister of Safety and Security v Slabbert* [2009] ZASCA 163.

[13] The issue on which the court below relied as a basis for liability was not fully canvassed at the trial presumably because it was not pleaded and the parties' attention was not drawn to it. It was fleetingly touched upon during Magoxo's cross-examination. The response elicited was that the plaintiff was still drunk at the time his wife made the request. The issue was not pursued and furthermore the plaintiff's wife did not testify to support the contention.' (Footnotes omitted.) (My Emphasis.)

[66] The main and substantial issue that served before both the arbitration and the Appeal Tribunal was the '*termination issue*' and in this regard as is referenced in the award by the arbitrator, extensive oral testimony was adduced in regard to inter alia the '*termination issue*'. Prior to the Arbitrator issuing the separation directive on the '*termination issue*', it was clearly within the contemplation of the parties (duly documented in terms of clause 2.5 of the settlement agreement) that '*the dispute between the parties, briefly summarised (and is subject to being fully ventilated in the exchange of pleadings in the arbitration) inter alia: 2.5.1. the termination of the contract/s by the respondent*'. Even if Homestead's amended statement of claim is not a model of absolute clarity (which I make no finding on) the termination issue was fully canvassed by both parties during the course of the testimony that served before the Arbitrator.

[67] Homestead averred that the persistent material breaches justified the cancellation and formed part of the '*termination issue*'. The Appeal Tribunal dealt with the question as to whether there was a repudiation, this is apparent from paragraphs 27 to 29 of its award:

'[27] The defence pleaded and then advanced by LC in the arbitration hearings was that it had not stopped work or taken steps to disestablish the site. That was rightly rejected by the arbitrator on the evidence as it was plain that work had slowed and by 11 May 2022 had stopped, which was confirmed in the letter that the site was unsafe in circumstances where Mr Cunningham had agreed that one of LC's principal obligations after taking control of the site was to be responsible for safety.

[28] The arbitrator accepted the submission by Counsel for Homestead that with a construction contract, the contractor's action in stopping work and disestablishing from the site is a substantial pointer towards a repudiation of the contract, but added that this will depend on the context in which this is done.

[29] The arbitrator asked himself the question: would a reasonable person in Homestead's position have concluded that by LC packing up and leaving the site they were walking away from the contract ...¹⁹

[68] The allegations that abandonment could be both a repudiation and a material breach, but stoppage of work could only be considered as a material breach because of the way Homestead pleaded paragraphs 27A to 27C, is untenable and does not find application under s 33(1)(b).

[69] It is a question of law as to what constituted a repudiation and the factual basis was the evidence that served before both the Arbitrator and the Appeal Tribunal. For purposes of this review application that serves before the Court, it is irrelevant and not within the ambit of this Court within the purview of a review, whether the term abandon encompasses stopping work and disestablishing from site or whether stopping work and disestablishing from site is a material breach.

[70] Ladysmith Construction contends that the Appeal Tribunal made an error in fact and law by finding that Ladysmith Construction abandoned the site by equating a stoppage of work and disestablishment from site with an abandonment. Such a course of approach is impermissible on review.²⁰

[71] Homestead pleaded an abandonment and the Appeal Tribunal found that stopping work even on a temporary basis was an abandonment. However, even if it was not the correct position, that would not found a basis upon which Ladysmith Construction would be permitted to review the Appeal Tribunal's award.

[72] I am not persuaded that the Appeal Tribunal exceeded their powers by straying beyond the pleadings that served before it. In any event and as per the *Telcordia dictum* and in regard to Ladysmith Construction's contention that the Arbitrator inter alia made no finding on the issue of abandonment and finding that 'a go – slow and work stoppage amounted to a repudiation' failed to inter alia define

¹⁹ Vol 2, Appeal Tribunal award, at 125.

²⁰ *Telcordia* paras 85-86.

abandonment, an Arbitrator *'has the right to be wrong on the merits of the case'*. Ladysmith Construction's contention and criticisms in this regard is unfounded and amounts to a misconception of the nature of the enquiry and the issues that the Appeal Tribunal were tasked to determine. Even if the Appeal Tribunal decided the appeal on the basis that a work stoppage equated to abandoning the project and the site, this did not and could not prevent the Appeal Tribunal from fulfilling their agreed function or considering the issues that arose for determination. Consequently, this does not afford any ground for review by this Court.

[73] It is a misconception to categorise the aforesaid complaints and criticisms by Ladysmith Construction as a transgression of the limits of the power of the Appeal Tribunal. The parties agreed to empower the Appeal Tribunal to determine the *'termination issue'* as expanded by the pleadings. Errors of the kind averred and alluded to by Ladysmith Construction have nothing to do with the Appeal Tribunal exceeding their powers, such errors as alleged by Ladysmith Construction were (if any) committed within the scope of the mandate of the Appeal Tribunal. As Harms J in *Telcordia* stated:

'[86] ... 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.'

Conclusion

[74] I am satisfied that the Appeal Tribunal did not exceed its powers by straying beyond the pleadings which comprised of the aforementioned three components, namely the clause 2.5 of the arbitration agreement, the arbitrator's separation directive and the pleadings as amended.

Order

[75] Thus, the following order is made:

1. The application is dismissed with costs on scale C, including the costs of two Counsel.

Appearances

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Date of hearing:

12 September 2025

Date of judgement:

4 December 2025