

REPUBLIC OF SOUTH AFRICA

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

Case Number: 2023/059056

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

15 December 2025

DATE

SIGNATURE

In the matter between:

IDS INDUSTRY SERVICE AND PLANT CONSTRUCTION

Applicant

SOUTH AFRICA (PTY) LTD

and

MHI POWER ZAF (PTY) LTD

First Respondent

ANDRE ROBERT GAUTSCHI N.O.

Second Respondent

JUDGMENT

WANLESS J

Introduction

- [1] This matter was managed and heard by this Court in terms of the practice directives of this Division pertaining to commercial matters. Ultimately, at the hearing of the matter, there was no appearance on behalf of the Applicant, namely **IDS INDUSTRY SERVICE AND PLANT CONSTRUCTION SOUTH AFRICA (PTY) LTD (“IDS”)**. However, IDS had filed comprehensive Heads of Argument which it requested this Court to take cognisance of.
- [2] The First Respondent, namely **MHI POWER ZAF (PTY) LTD (“MHI”)** was represented at the hearing and oral argument was presented on behalf of MHI to this Court. In addition thereto, MHI had also filed comprehensive Heads of Argument. The Second Respondent (*“the Arbitrator”*) took no part whatsoever in these proceedings.

Background

- [3] This matter consists of:

3.1 IDS’ application (*“the application”*) for the review and setting aside of the Arbitrator’s award (*“the award”*) to the extent of MHI’s counter-application (*“the counter-application”*) ;

3.2 the counter-application by MHI is to make part of the award (*in respect of MHI's counter-claim in the arbitration proceedings*) an order of court in terms of subsection 31(1) of the Arbitration Act, 42 of 1965 (*"the Act"*). IDS asks for the counter-claim to be remitted, in terms of subsection 32(2) of the Act. to a newly appointed arbitrator;

3.3 MHI's application to strike out certain matter from IDS' Founding Affidavit;
and

3.4 the application by MHI for a further affidavit to be admitted pursuant to IDS filing its Replying Affidavit.

[4] Initially, IDS invoked only subsection 33(1)(b) of the Act , which deals with gross irregularities committed by the arbitration tribunal in the conduct of the arbitration proceedings or where the said tribunal exceeds its powers. Thereafter, IDS amended (*with no objection from MHI*) the relief sought to include subsection 33(1)(c) of the Act which concerns an award improperly obtained.

[5] The disputes between the parties which were subjected to arbitration arose from certain works concerning the Medupi and Kusile Power Station Boiler Works projects in respect of which MHI was a main contractor to Eskom. MHI appointed IDS as a subcontractor on both projects and in terms of written subcontracts.

[6] In broad summary, the parties' respective claims placed before the Arbitrator at the arbitration proceedings, were:

6.1 by IDS, in respect of payments due for work done, together with ancillary amounts;

6.2 by MHI, counter-claims for recovery of an overpayment in respect of paid claims, subsequently found to have been unlawfully inflated by IDS.

[7] The arbitration proceedings, in terms of which IDS was the Claimant and MHI was the Respondent, unfolded as follows:

- 7.1 an arbitration agreement was concluded subjecting various disputes to arbitration. It was agreed that there would be no right of appeal in respect of the award;
- 7.2 a pre-arbitration meeting was held during which various procedural matters were agreed upon and a minute was thereafter produced;
- 7.3 there was an extensive exchange of pleadings, including certain procedural challenges;
- 7.4 the hearing was conducted over ten (10) court days, commencing on 27 February 2023, followed by oral argument on 3 and 4 April 2023;
- 7.5 both IDS and MHI called witnesses to give evidence, MHI additionally calling an expert witness from PricewaterhouseCoopers ("PwC");
- 7.6 on 9 May 2023 the Arbitrator delivered his award, setting out his determination in respect of the claims of IDS and the counter-claims of MHI;
- 7.7 the Arbitrator found in favour of MHI in the sum of R 140 000 000.00. In the award the Arbitrator (*in terms of counter-claim 1, having dismissed counter-claim 2*) directed IDS to pay that amount to MHI, interest thereon and costs;

7.8 after deducting from this amount the amounts which MHI was directed to pay to IDS, IDS is indebted to MHI in the capital sum of R 80 774 252.00, interest and costs. It is this part of the award that IDS seeks to challenge.

The further affidavit of MHI

- [8] As set out above, MHI requested that the further affidavit deposed to on 1 September 2023 and filed after IDS filed its Replying Affidavit in this matter, be accepted by this Court. It is convenient for this Court to deal with that request at this stage of the judgment.
- [9] A court may, in its discretion, allow the filing of further affidavits¹ so as to ensure that the matter is considered in light of all relevant facts.² A recognised ground for the admission of a further affidavit is when the applicant's replying affidavit raises new matter.³
- [10] It was submitted, on behalf of MHI (*and this is in fact common cause*), that IDS's Replying Affidavit introduced a significant amount of new matter and significantly altered the basis of its review. This, it was further submitted, is impermissible and IDS must make out its case in its Founding Affidavit. Whatever this Court ultimately decides in respect of the admissibility of and/or the weight to be attached to this new evidence, as set out in the Replying Affidavit of IDS, it is clear that the said Replying Affidavit necessitated a response from MHI.

¹ *Dickinson v South African General Electric Co (Pty) Ltd* 1973 (2) SA 620 (A) at 628D.

² *Erasmus: Superior Court Practice ("Erasmus")* D1 6-31.

³ *Africa Oil (Pty) Ltd v Ramadaan Investments CC* 2004 (1) SA 35 (N) 38J to 39A.

- [11] As correctly submitted by Counsel for MHI, this Court ought to be provided with all relevant facts, which includes MHI's responses to IDS' reliance on documents attached to the Replying Affidavit. In addition thereto, it was further submitted, on behalf of MHI (*correctly in the opinion of this Court*), that linked to the necessity for this Court to have all relevant facts before it is that, as MHI's further affidavit demonstrates, the new documents introduced by IDS were incomplete extracts of documents and MHI has sought to correct this in its further affidavit.
- [12] Also, a contention not relied upon by IDS in its Founding Affidavit but relied upon in reply, is that the Arbitrator exceeded his mandate by straying beyond the pleadings. This required a response from MHI, which it has provided in its further affidavit.
- [13] Moreover, a new factual basis for the review was introduced by IDS in reply. IDS contends that MHI and IDS agreed to use Eskom gate clocking records in 2015 as opposed to the contractually stipulated method for determining payment claims for hours worked. This obviously required a response from MHI, which has also been dealt with in the further affidavit.
- [14] In the premises, in the exercise of this Court's discretion, the further affidavit of MHI is admitted into evidence.

The application by MHI to strike out paragraphs of IDS's Founding Affidavit

- [15] It is also appropriate, at this stage of the judgment, to deal with a further procedural issue prior to dealing with the merits of the application and counter-application. That is, the application by MHI to strike out certain paragraphs of

IDS's Founding Affidavit on the basis that the averments set out therein are scandalous and vexatious.

[16] During the course of argument before this Court, it was conceded by Counsel for MHI that paragraph 159 of the said affidavit was not problematic. In the premises, the application by MHI was confined to paragraphs 20; 49.2 and 169.

[17] In the paragraphs in question, IDS alleges that MHI concealed evidence from the Arbitrator and instructed its experts from PwC not to have regard to such information; did so in order to derive an undue benefit and prepared witness statements that were "*misleading and false*". As submitted on behalf of MHI (*correctly in the opinion of this Court*) these allegations have been made in the context of MHI's presentation of its case to the Arbitrator during the arbitration proceedings and therefore also attribute the impropriety to MHI's legal representatives. Moreover, the allegations accuse MHI and its legal representatives of deliberate misrepresentation in the conduct of the arbitration. Since the undue benefit referred to by IDS is financial in nature the allegations are, in substance, allegations of fraud.

[18] In amplification of the foregoing, Counsel for MHI further submitted that the allegations under consideration had been recklessly made and made without proper foundation. The allegations concern the presentation of MHI's evidence during the arbitration when IDS had a full opportunity to consider and challenge MHI's evidence. All of the information relied upon by IDS existed at the time of the arbitration proceedings. Far from demonstrating fraud on the part of MHI, the documents (*primarily emails*) relied on by IDS could, at best, give rise to a reasonable dispute as to their meaning and effect. That would have been a

dispute to raise and ventilate before the Arbitrator. Instead, IDS elected not to investigate the issues properly for purposes of the arbitration proceedings but, rather, to accuse MHI of obtaining the award by fraudulent means in the present application.

[19] Following thereon, it was submitted that, relying on the emails in question to allege fraudulent conduct by MHI and, by extension its legal representatives, is clearly scandalous and vexatious. That the allegations impute fraud on the part of MHI is clearly prejudicial.

[20] In submitting that the offending paragraphs fall to be struck out, MHI relied upon the decision of the Constitutional Court in the matter of *Helen Suzman Foundation v President of the Republic of South Africa and Others* where the apex court provided the following guidance:

20.1 “*Scandalous*” means allegations which may or may not be relevant but which are so worded as to be abusive or defamatory;

20.2 “*Vexatious*” refers to allegations that may or may not be relevant but are so worded as to convey an intention to harass or annoy; and

20.3 “*Irrelevant*” refers to allegations that do not apply to the matter at hand and do not contribute one way or another to the decision of the matter. The test for determining relevance is whether the evidence objected to is relevant to an issue in the litigation.⁴

⁴ *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC) at para [27] – majority judgment. See also *Lawyers for Human Rights v Minister in the Presidency and Others* 2017 (1) SA 645 (CC) at para [19].

[21] MHI has delivered the requisite notice to strike out the abovementioned paragraphs and there has been no opposition by IDS thereto. This Court is in agreement with the submissions made on behalf of MHI. In the premises, this Court finds that paragraphs 20; 49.2 and 169 of IDS's Founding Affidavit (*together with the relevant annexures to that affidavit*) should be struck out on the basis that the averments set out therein are scandalous and/or vexatious.

The award

[22] The award reads as follows:

"I therefore make the following award:

1. The claimant's claims

1.1. *The Respondent is directed to pay the following amounts to the claimant.*

1.1.1. *R 46 169 730.84;*

1.1.2. *R 9 855 827.56;*

1.1.3. *R 166 045.22*

1.1.4. *R 3 034 146.69.*

1.2. *The claimant's claims 1.1 and 4 are dismissed.*

1.3. *Interest on the claimant's claims, including claims 1.2, 1.3, 2.1 , 5.2 and 5.3 to the extent applicable, is to be calculated following the findings and directives in this award and the parties are to revert to*

me either with an agreed amount of interest or, in the event of disagreement, for directions to resolve any disputes about interest.

2. The respondent's counterclaims

2.1 In respect of counterclaim 1, the claimant is directed to pay the amount of R 140 million to the respondent.

2.2 Counterclaim 2 is dismissed.

2.3 The claimant shall pay interest to the respondent on the amount of R 140 million at the prescribed rate of interest from 28 February 2022 to the date of payment.

3. Costs

3.1 The respondent shall pay the claimant's costs in respect of the claims in convention.

3.2 The claimant shall pay the respondent's costs in respect of the respondent's counterclaims.

3.3 The claimant shall pay the following reserved costs:

3.3.1 The costs reserved in the interim award dated 31 March 2022.

3.3.2 The wasted costs occasioned by the postponement granted on 29 August 2022.

3.3.3 The costs related to the claimant's withdrawn claims (claims 1.4, 2.15, 3 and 5.1).

3.3.4 The costs related to the respondent's procedural objection dated 26 November 2021 and the costs occasioned by the claimant's amended SoC delivered on 15 December 2021.

3.4 The reserved wasted costs of the matter standing down on 23 and 24 February 2023 shall be costs in the cause

3.5 All costs orders shall include:

3.5.1 Costs on the party-and-party scale.

3.5.2 The costs of two counsel, where two counsel were employed.

3.5.3 In the case of costs awarded to the claimant, the travelling and accommodation costs of Mr Vrca.

3.5.4 In the case of the respondent's counterclaim 1, the qualifying fees of Mr Hills.

3.5.5 The costs of the arbitrator, including his costs of preparation, attending the hearings and the costs of preparing and finalising the award.

3.5.6 All other costs ancillary to the arbitration proceedings, including but not limited to venue costs and the costs of recording and transcribing the proceedings."

The law

[23] Whilst it is always imperative for any court to establish the correct principles of law to be applied in respect of a particular matter, this is especially so with regard to this matter. By doing so, this Court will be able to identify the *real* issues which require determination, thereby avoiding having to deal with those "*issues*" which are not. In this manner, any danger of this judgment being unduly *prolix* and burdening this judgment unnecessarily, will be avoided.

[24] As noted earlier in this judgment, IDS relies upon subsections 33(1)(b) and (c) of the Act. These subsections read as follows:

"(33)(1) Where –

(a)

(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. ”

[25] Also of relevance, is subsection 31(1) of the Act, which states that:

“ 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. ”

[26] Further, subsection 32(2) of the Act reads:

“The court may, on the application of any party to the reference after due notice to the other party or parties made within six weeks after the publication of the award to the parties¹ on good cause shown, remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the court may direct.”

[27] In the matter of *Telcordia Technologies Inc v Telkom SA Limited*⁵ it was held:

“[72] It is useful to begin with the oft quoted statement from Ellis v Morgan⁶ where Mason J laid down the basic principle in these terms:

⁵ 2007 (3) SA 266 (SCA) at paragraphs [72]; [75] and [76].

⁶ *Ellis v Morgan*; *Ellis v Dessai* 1909 TS 576 at 581.

'But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.'

[75] *In all these cases the complaint was directed at the method or conduct and not the result of the proceedings.⁷ Where the legal issue is left for the decision of the functionary any complaint about how he reached his decision must be directed at the method and not the result. This is known as the Doyle v Shenker⁸ principle.*

[76] *It is wrong to confuse the reasoning with the conduct of the proceedings. Although the line may be fine and sometimes difficult to draw, I believe that the following example makes the difference clear. In Jooste Lithium⁹ the inspector had the authority to decide any dispute that could arise in regard to the validity of the pegging or beaconing of claims and to decide any dispute arising through over-pegging. Against that background O H Hoexter JA said:¹⁰*

'It is clear that in deciding the disputes which he is authorised to decide, there is entrusted to the inspector the duty not only of finding the relevant facts but also of deciding the legal issues involved (see Johannesburg City Council v Chesterfield House (Pty) Ltd 1952 (3) SA 809 at p 825 (AD). In deciding the legal issues involved it would also be the duty of the inspector to interpret the relevant sections of the Proclamation and the regulations.' "

[28] It is a fairly well-established principle in our law that when a party seeks to challenge alleged errors in an arbitration award which do not constitute irregularities, our courts will not easily disturb the free choice exercised by the parties in the choice of private arbitration.¹¹

⁷ *Bester v Easigas (Pty) Ltd* 1993 (1) SA 30 (C) at 42G-43D.

⁸ *Doyle v Shenker & Co Ltd* 1915 AD 233.

⁹ *Administrator, South West Africa v Jooste Lithium Myne (Edms) Bpk* 1955 (1) SA 557 (A).

¹⁰ At 564G.

¹¹ *Telcordia (supra)* at paragraph [4]; *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews & Another* 2009 (4) SA 529 (CC); *Phalaborwa Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Limited* [2018] ZASCA 23, at paragraph [8].

- [29] A gross irregularity in the conduct of the arbitration proceedings or an excess of powers exercised, is conduct which concerns the manner and method of conduct of the proceedings, which leads to a party being denied a fair hearing.¹²
- [30] Most importantly, it has been held that the advantages of arbitration which include flexibility, privacy and speed, require parties to accept that an arbitral award may be wrong on the merits, may adopt an incorrect interpretation of a contract or of a principle of law, or may incorrectly rely upon inadmissible evidence. None of these instances provide grounds for review.¹³
- [31] It is impermissible to relitigate issues ventilated before and decided by an arbitrator. This Court has reiterated the correct position in *Strategic Partners Group Concessions (Pty) Ltd v Bombela Operating Company (Pty) Ltd and Others*¹⁴ where it was held:

“This Court is not called upon and indeed, is not permitted, to determine the merits as to whether or not the terms [the applicant] contends for exist nor whether and how they apply. The parties agreed that a dispute of that kind is to be determined by way of arbitration. The sole question in this application is whether the Arbitrator in fact considered the implied, alternatively, tacit term and decided upon it (whether that decision was right or wrong being of no relevance whatsoever in the present matter).”

¹² *Telcordia (supra)* at paragraphs [75] and [76]; *Lufuno (supra)* at paragraph [223]; *Phalaborwa (supra)* at paragraph [8].

¹³ *Telcordia (supra)* at paragraphs [85], [86] and [87]; *Bandwidth Shipping Corporation v Intaari* [2007] EWCA Civ 998, at paragraph 38.

¹⁴ (2021/30068) [2023] ZAGPJHC 25 (17 January 2023) at paragraph [105]; *Leave to appeal against this Court’s decision in Bombela was refused by both the Supreme Court of Appeal and the Constitutional Court.*

[32] As held in the matter of *Enviroserv v Waste Management (Pty) Ltd v Wasteman Group (Pty) Ltd and Others* the structure of an award is an important factor in deciding what an arbitration tribunal decided and why.¹⁵

[33] In the matter of *City of Cape Town v Joint Venture between Little Mead No. 37 (Pty) Ltd and Firstex Engineering Holdings (Pty) Ltd*¹⁶ the court considered subsection 33(1)(c) of the Act and identified circumstances in which the said subsection may apply. These are where the award is obtained by fraud or where there was a deliberate concealment of documents that a party was bound to disclose.

The respective cases of the parties and findings of this Court in respect thereof

The case for IDS

[34] According to MHI, IDS has challenged the award on a number of grounds, namely:

- 34.1 the Arbitrator's performance of his mandate;
- 34.2 challenges to the Arbitrator's contractual findings;
- 34.3 the Arbitrator's acceptance of the expert report prepared by PwC;
- 34.4 MHI concealed evidence from the Arbitrator and misled him; and
- 34.5 the Arbitrator exceeded his mandate.

¹⁵ [2012] 3 All SA 386 (SCA) at paragraph [16]

¹⁶ 2015 JDR 0202 (WCC) at paragraphs [23] and [24]

[35] On behalf of IDS, it was submitted that the challenge to the award was premised on the following grounds:

35.1 MHI's misrepresentation of the facts relating to MHI's approval of payments to IDS during 2015;

35.2 the Arbitrator's failure to consider and determine that MHI's claims for damages and enrichment are precluded by MHI's version of the terms of the subcontracts;

35.3 the Arbitrator's failure to consider and determine all the facts relevant to prescription in relation to each of the alleged overpayments in counter-claim 1;

35.4 the Arbitrator's breach of his mandate by deciding MHI's entitlement on the basis of "*good faith*" instead of considering and determining each element of damages or impoverishment in relation to each of the alleged overpayments;

35.5 the Arbitrator's failure to consider and decide the factual pre-condition in paragraph 10 of counter-claim 1, in particular MHI's onus to prove that it applied during 2015 to July 2016, and to disregard PWC's report because the evidence showed the TDS was not always used and accessible to IDS;

35.6 the Arbitrator's approach to the hearing was misaligned with the facts which he had to establish, with reference to the manner in which he failed to consider and apply the onus, the law, the terms of contract and the Rules;

35.7 the Arbitrator failed to selectively consider all aspects of the PWC report, by instead accepting the totality of the PWC report, which was admitted by

PwC and MHI not to be an audit in terms of clause 5.6.2 of the subcontracts, in the face of undisputed evidence to the contrary in that the witness Stobbart alleged that such an audit was conducted, being the only contractual basis for success;

35.8 the Arbitrator failed to make a finding on the most pertinent allegation of MHI's cause of action, namely that IDS had allegedly "*inflated*" its timesheets;

35.9 the Arbitrator failed to consider the absence of essential evidence to determine the disputed proof of patrimonial loss and instead relied on un-established inferences or judicial notice and axiomatic reasoning.

[36] Whilst the description of the said grounds by the respective parties may not be identical (*and the parties having agreed that no practice notes would be filed by the parties prior to the hearing of this application*) it is the opinion of this Court that this "*deficit*" is not of such a nature as to render the delivery of this judgment nugatory. This is in light of, *inter alia*, the approach adopted by this Court when constructing same and, ultimately, the findings made herein.

The case for MHI

[37] In broad summary, MHI submits that none of the challenges made by IDS should be upheld. This is simply because, *inter alia*, IDS has sought to re-litigate issues finally determined by the Arbitrator, acting in accordance with the mandate conferred upon him, including that the award would be binding upon the parties and not subject to appeal.

[38] It is further submitted that IDS has impermissibly sought to introduce into the review application certain evidence, including documentary evidence, which was never placed before the Arbitrator during the arbitration proceedings. This evidence, it is submitted, was at all material times in the possession of IDS and IDS was at liberty to introduce that evidence at the said proceedings. It must follow, it was submitted on behalf of MHI, that IDS is not permitted to ask that this Court have regard to that new evidence when determining the present matter (*an application by IDS for review*).

[39] In the premises, MHI submits that IDS has failed to make out a case in terms of subsections 33(1)(b) or (c) of the Act that any part of the award should be set aside and that MHI is entitled to have certain parts of the award made an order of court in terms of subsection 31(1) of the Act.

The failure of the Arbitrator to perform in terms of his mandate

[40] IDS contends that the Arbitrator failed to decide the following material disputes, namely:

40.1 whether overpayments by MHI required a determination of what was approved by MHI;

40.2 failing to establish relevant facts and to decide all disputes, including giving effect to differences between the pre and post July 2016 payment provisions and failing to consider and give effect to the *onus* on MHI to prove paragraph 10 of counter-claim 1 before July 2016, where IDS did not

have use and access to the Time Data Sequel (“TDS”) time recording system;

40.3 failing to determine that as a result of the lack of use and access to the TDS system, MHI should have audited claims or contested invoices; failing to disregard the PwC report where undisputed evidence showed that TDS was not always used by and accessible to IDS; failing to disregard the evidential value of PwC report, which did not take account of factual differences pre and post July 2016; failing to resolve factual disputes on the basis that quantum could only be determined by comparing MHI payments to weekly approved timesheets, not to TDS records and failing to perform his obligations by not directing his mind to the central issue, namely whether MHI had proved that it suffered actual loss and, in consequence, damages.

[41] It was submitted, on behalf of MHI, that upon a proper consideration of the foregoing complaints made by IDS in respect of the award, it would be apparent that they do not relate to the failure of the Arbitrator to perform his mandate but, rather, is a general complaint about the outcome of the arbitration proceedings. As set out earlier in this judgment¹⁷ it was submitted by Counsel for MHI that this is not a valid ground upon which to premise a challenge to set aside the award. This Court is in agreement with the foregoing submissions.

Comparison between documents submitted to MHI prior to the submission of invoices and thereafter

[42] The Arbitrator identified the issue of contractual prior approval as central to IDS’s defence to the counter-claim based on breach of contract. In addition, the

¹⁷ Paragraph [37] *ibid.*

Arbitrator analysed the pre and post July 2016 payment provisions in detail, which he held was required when considering IDS's contentions regarding prior approval.

[43] It was submitted, on behalf of MHI, that the contentions made by IDS in respect of this issue were aimed at escaping liability for its inaccurate payment claims. As correctly pointed out by Counsel for MHI the Arbitrator roundly rejected this notion as creating a "*catch me if you can*" position where MHI carried the risk if it happened not to pick up inaccurate hours during the approval process.

[44] Arising from the foregoing, it must be accepted that the prior approval process was front of mind for the Arbitrator as it was this process that he found allowed MHI's representatives to "*reasonably have expected*" that checking had occurred and the claimed hours were accurate. As it turned out and as found by the Arbitrator, they were not accurate and IDS, as the party claiming payment, ought to have ensured that they were accurate.

The failure to give effect to the differences between the pre and post July 2016 payment provisions

[45] It is clear from the award that the Arbitrator analysed the contractual provisions pre and post July 2016 in detail. He commenced by setting out the features of the original clause and then examined the changes introduced in July 2016. Thereafter, the Arbitrator went (*point by point*) through the features of the clause that remained constant throughout the agreement and detailed the features that were altered in July 2016.

[46] The Arbitrator, in his award, made detailed findings regarding the contractual requirements and the evidence before him concerning the manner in which the parties had reconciled the IDS weekly timesheets with the TDS data.

The Arbitrator's failure to apply the onus on MHI to prove paragraph 10 of counter-claim 1 as it applied before July 2016

[47] The relevant allegation in paragraph 10 of counter-claim 1 was that:

"[a]t all material times the TDS system was operative and accessible and [IDS] had access to the TDS system and to the data stored on it in relation to the daily ingress and egress of its employees."

[48] The Arbitrator's finding was that the evidence of MHI's witnesses (*Platt and Monokoane*) "established in my view that the TDS system was at all times operative and accessible, and its data reliable." As correctly pointed out by Counsel for MHI the Arbitrator's finding was not confined to any particular period and covered "all times". In the premises, the submission made on behalf of MHI that the Arbitrator dealt squarely with this issue when finding against IDS, is a good one.

The failure to find that as a result of lack of use and access to TDS, MHI should have audited claims or contested invoices

[49] It was submitted by Adv Graves SC (*with him Adv Picas*), who appeared for MHI, that this contention cannot be upheld because it is premised on there being a lack of access to the TDS system. As set out above, the Arbitrator determined that question against IDS.

[50] Insofar as this contention rests on the premise of a lack of use of the TDS system, it was submitted that it must fail because it would then have, as its premise, a breach of the subcontract by IDS. This was because IDS was contractually obliged to use the TDS system. As correctly submitted on behalf of MHI, IDS cannot rely on its own election or failure to use the TDS system.

The failure to disregard the PwC report where undisputed evidence showed TDS was not always used and accessible to IDS

[51] It was submitted (*correctly in the opinion of this Court*) that this contention rests on the same faulty premise as the previous two contentions. The Arbitrator found that the TDS system was always available and accessible. Further, PwC's reliance on and use of the TDS data was not faulted by the Arbitrator. In light of the checking system in place, which involved the participation of the IDS representative upon which MHI was reasonably entitled to rely, the TDS data and timesheets ("*Monthly Manhours Overview*" or "*MMO*") ought to have been identical.

[52] As it transpired, they were not identical due to IDS using timesheets which had not been reconciled with the TDS data, giving rise to discrepancies between the TDS data (*the contractually prescribed source of hours for payment purposes*) and the MMO's accompanying the payment claims. All of the foregoing is contained in the award.

The failure to disregard the PwC report, which did not take account of factual differences pre and post July 2016

[53] The Arbitrator found that apart from a challenge to the nature of the enquiry conducted by PwC, there was no attack on the PwC calculations, findings or ultimate conclusions.

[54] In addition to the foregoing, it was submitted, on behalf of MHI (*once again, correctly in the opinion of this Court*), that IDS's contention must fail because it ignores the Arbitrator's express finding that the process of comparing TDS data to timesheets (*MMOs*) was consistent throughout the period (pre and post July 2016).

The failure to resolve factual disputes on the basis that quantum could only be determined by comparing MHI payments to weekly approved timesheets, not to TDS records

[55] As dealt with above the TDS data and the MMO's ought to have been identical, based on the evidence of IDS's witness ("*Zolo*") which evidence was accepted by the Arbitrator. These two sources would have been identical if IDS had followed the contractually designated procedure outlined by the Arbitrator in the award.

[56] TDS was the contractually prescribed method for capturing hours for payment purposes. PwC analysed these hours against the hours paid for by MHI and demonstrated an overpayment. This was upheld by the Arbitrator. It is not competent for this Court to interfere with that decision on review.

The Arbitrator failed to direct his mind to whether MHI had proved actual loss and, in consequence, damages

[57] It was noted, on behalf of MHI, that this criticism is apparently based upon the notion that MHI received a benefit from the hours that IDS claimed but which were not claimed according to the contractual provisions. In fact, IDS had no legitimate claim and there was no benefit to MHI because of the failure by IDS to comply with the contractual provisions.

[58] What was found by the Arbitrator at the arbitration proceedings was that IDS breached the subcontract by submitting payment claims that were not compliant with the subcontract. MHI erroneously paid IDS in respect of the non-compliant payment claims and, in so doing, paid amounts it ought not to have paid. The Arbitrator found that MHI's failure to detect the overpayment was "*reasonable or excusable*".

[59] In the arbitration proceedings, MHI pleaded and the Arbitrator agreed, that the subcontract contained a tacit term to the effect that "*in the event of an overpayment, [IDS] would be liable to refund such overclaimed amounts to [MHI]*".

[60] On behalf of MHI, it was submitted that IDS had misconceived the nature of the inquiry when regard is had to what was pleaded (*and indeed established by MHI at the arbitration proceedings*) as the basis upon which MHI was entitled to repayment. This Court is in agreement therewith and, even in the event that the Arbitrator was incorrect in finding as he did, this is not a valid ground for this Court to alter or set aside the award on review.

MHI's counter-application

[61] In the event of this Court dismissing the review application of IDS, there is no reason why the award, insofar as it relates to counter-claim 1 of MHI in the arbitration proceedings, should not to be made an order of court in terms of subsection 31(1) of the Act.

[62] As correctly pointed out by Counsel for MHI, the foregoing is confirmed by the contents of IDS's Answering Affidavit in the counter-application. The said answering affidavit is a repetition of the arguments and contentions that form the basis of the main review application. This demonstrates that, on IDS's own version, the grounds upon which the review is sought mirror the grounds upon which the counter-application is opposed and, therefore, should the former application fail, nothing of substance will stand in the way of the latter application.

Conclusion

[63] This Court has attempted to deal with most (*if not all*) of the main grounds relied upon by IDS to support the application for the review of the award.¹⁸ It is not the intention of this Court to burden this judgment unnecessarily by setting out and dealing specifically with the other numerous "*issues*" (*and indeed "sub-issues"*) raised on behalf of IDS in this application. These have been covered (*either expressly or implicitly*) herein when dealing with the various grounds relied upon by IDS in support of the review application. Where they have not, any additional

¹⁸ Paragraphs [34] and [35] *ibid.*

grounds and/or issues relied upon by IDS, must fail. This is in light of, *inter alia*, the fundamental misconception of the nature of these proceedings by IDS.

[64] In this regard, this Court aligns itself with the argument put forward on behalf of MHI that IDS has sought to re-litigate issues finally determined by the Arbitrator, acting in accordance with the mandate conferred upon him, including that the award would be binding upon the parties and not subject to appeal.¹⁹ Further, this Court finds that IDS has impermissibly sought to introduce into the review application certain evidence, including documentary evidence, which was never placed before the Arbitrator during the arbitration proceedings. This evidence was, at all material times, in the possession of IDS and IDS was at liberty to introduce that evidence at the said proceedings. In the premises, it must follow that IDS is not permitted to ask that this Court have regard to that new evidence when determining the present application for review.²⁰

[65] The relevant and applicable principles of law in this matter have already been dealt with earlier in this judgment.²¹ Those principles will not be repeated in order, once again, to avoid burdening this judgment unnecessarily. Suffice it to say, having applied the said principles to the facts of the present matter, this Court finds that none of the grounds relied upon by IDS for the review of the award can be sustained. It must follow that the application should be dismissed.

¹⁹ Paragraph [37] *ibid.*

²⁰ Paragraph [38] *ibid.*

²¹ Paragraphs [27] to [33] *ibid.*

[66] Once the review application is dismissed, there is no reason why the award, insofar as it relates to counter-claim 1 of MHI in the arbitration proceedings, should not to be made an order of court in terms of subsection 31(1) of the Act.²²

Costs

[67] It is trite that, unless unusual circumstances exist, costs should normally follow the result. Moreover, it is trite that a court has a general discretion, to be exercised judicially, when making an order in respect of costs.

[68] No unusual circumstances have been brought to the attention of this Court which would cause this Court to deviate from the principles referred to above. In the premises, costs will follow the result.

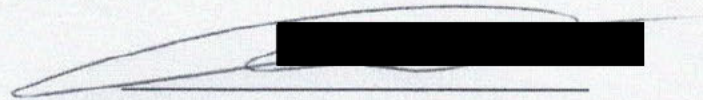
Order

[69] This Court makes the following order:

1. Paragraphs 20, 40, 49.2 and 169 of the Applicant's Founding Affidavit deposed to on 19 June 2023, together with the relevant annexures, are struck out.
2. The Applicant shall pay the costs of the striking out application on the scale as between attorney and client.
3. The Applicant's review application is dismissed with costs, such costs to include the costs of two (2) counsel, on scale C;

²² Paragraphs [61] and [62] *ibid.*

1. The First Respondent's counter-application is granted with costs, such costs to include the costs of two (2) counsel, on scale C;
2. The following sub-paragraphs 2.1; 2.2; 2.3, 3.2, 3.3; 3.5.1;3.5.2; 3.5.4;3.5.5 and 3.5.6 of paragraph 94 of the arbitration award published by the Second Respondent on 9 May 2023 in the arbitration between the Applicant and the First Respondent are made an order of court in terms of subsection 31(1) of the Arbitration Act 42 of 1965;

A handwritten signature in dark ink, which appears to be 'BC Wanless', is written over a solid black rectangular redaction box.

**BC WANLESS
JUDGE OF THE HIGH COURT
JOHANNESBURG**

Date of Hearing: 7 May 2025

Date of Judgment: 15 December 2025

Appearances

On behalf of the Applicant: No appearance

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