REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2024-118405

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
20/03/2026	[redacted]
DATE	SIGNATURE

In the matter between:

SIGC (PROPRIETARY) LIMITED Plaintiff/Applicant

and

3SIXTY HEALTH (PROPRIETARY) LIMITED Defendant/Respondent

JUDGMENT

WENTZEL-THOMPSON J:

Introduction

[1] This matter concerns an application in terms of s 31(1) of the Arbitration Act 42 of 1965 ("the Act") to make an arbitration award an order of court, coupled with a counter-application in terms of s 33 of the Act to review and set aside the award. The award was issued by the second respondent, Advocate Schalk Aucamp N.O., acting as arbitrator under the auspices of the Arbitration Foundation of Southern Africa ("AFSA").

[2] The application and counter-application are inextricably linked. If the award is valid and enforceable, the applicant is entitled, subject to any residual discretion that I may have, to have it made an order of court. If, however, the first respondent establishes that the award is invalid or reviewable under s 33 of the Act, the main application cannot succeed and its counter-claim must be granted.

[3] The dispute before me requires consideration of two principal questions. The first is whether the arbitrator retained jurisdiction to deliver the award more than 30 days after the finalisation of the matter without an extension. The second is whether, in making the award, the arbitrator determined a dispute that did not arise from the pleadings and the arbitration agreement, thereby exceeding his powers or committing a gross irregularity as contemplated in section 33 of the Act.

[4] For the reasons that follow, I conclude that the first respondent's counter-application must succeed, that the award falls to be set aside, and that the application under s 31 of the Act for enforcement of the award must accordingly be dismissed.

The parties and the background

[5] The applicant, SIGC (Pty) Ltd, concluded a written consultancy agreement with the first respondent, 3Sixty Health (Pty) Ltd, on 7 September 2022. The agreement provided for the rendering by the applicant of defined consultancy services and for payment of mobilisation consultancy fees, RFP award consultancy fees, and revenue consultancy fees, the latter framed as consideration for the rendering of the services set out in clause 6.2 of the consultancy agreement. The agreement also incorporated an arbitration clause which invoked the rules applicable to expedited arbitration proceedings.

[6] It is common cause that the first respondent paid the mobilisation consultancy fees and the RFP award consultancy fees. However, a dispute arose between the parties after the award of the RFP whether the applicant was entitled to the revenue consulting fees. This dispute was referred to arbitration under the AFSA Rules. The arbitrator issued an award on 2 October 2024 directing the first respondent to pay the revenue consultancy fees as claimed by the applicant in the amount of R2 694 068.12 together with interest and costs.

[7] During October 2024, the applicant launched these proceedings to make the award an order of court and to compel compliance with it. The first respondent opposed the relief and delivered an answering affidavit opposing enforcement, and simultaneously brought a counter-application to review and set aside the award sought to be enforced by the applicant.

The legal framework

[8] In *Dickenson,*[1] the then Appellate Division emphasised the importance of the finalisation of awards. In *Veldspun,*[2] this principle was reaffirmed by the Supreme Court of Appeal ("SCA"), where it was stated:

"…when parties agree to refer a matter to arbitration, unless the submission provides otherwise, they implicitly, if not explicitly (and, subject to the limited power of the Supreme Court under s 3(2) of the Arbitration Act), abandon the right to litigate in courts of law and accept that they will be finally bound by the decision of the arbitrator. … In my opinion the Courts should in no way discourage parties from resorting to arbitration and should deprecate conduct by a party to an arbitration who does not do all in his power to implement the decision of the arbitrator promptly and in good faith."

[1] *Dickenson & Brown v Fisher's Executors* 1915 AD 166
[2] *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd (97/92)* [1993] ZASCA 158; 1994 (1) SA 162 (AD); [1994] 1 All SA 453 (A) (30 September 1993).

[9] More recently in *Telcordia,*[3] the SCA emphasised that courts should seek to preserve the autonomy of the forum selected by the parties and that they should seek to minimise judicial intervention in such awards.

[10] That being said, the applicant who seeks enforcement bears the onus of establishing, at least, a valid arbitration agreement and that the dispute decided falls within the tribunal's jurisdiction. That proposition was stated in *The World Food Programme*, [4]a case relied upon in the first respondent's counsel's heads of argument.

[11] Section 31(1) of the Act provides that an award may, on application to a competent court, be made an order of court. But that remedy presupposes an award that is valid and enforceable. A court does not merely act as a rubber stamp and is required to apply its mind as to the validity and enforceability of the award. That is not to say that the court is entitled to reconsider the merits of the award; it is not: The court's powers are limited to the circumscribed grounds of review set out in section 33 of the Act and it may not act like an appeal court.

[12] The principles governing judicial interference with arbitration awards are settled. Arbitration is founded on the respect for party autonomy and their agreement to resolve their dispute by way of arbitration, finality in arbitration proceedings as well as limited court intervention. A review under s 33 is not an appeal and courts will not interfere merely because the arbitrator erred on the merits. That much emerges from the authorities referred to in applicant's heads of argument, including *Dickenson,*[5] *Veldspun,*[6] *Telcordia*,[7] *Stocks Civil Engineering*,[8] *Lufuno*[9] and, more recently, *Altech,*[10] and *Mabra Construction*.[11]

---

[3] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA)
[4] *The World Food Programme v Massoudi Emille And Another* [2011] ZAGPJHC 141
[5] *supra*
[6] *supra*
[7] supra
[8] *Stocks Civil Engineering (Pty) Ltd v Rip NO* 2002 (4) SA 705 (SCA)
[9] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC)
[10] *Altech Radio Holdings (Pty) Ltd v Aeonova 360 Management Services (Pty) Ltd* [2023] ZAGPJHC 475 (15 May 2023)
[11] *Mabra Construction (Pty) Ltd v Ecolab (Pty) Ltd* [2023] ZAGPPHC 660 (8 August 2023)

[13] Section 33(1) of the Act only permits a court to set aside an award where an arbitrator has misconducted himself in relation to his duties, committed a gross irregularity in the conduct of the proceedings, or exceeded his powers.

[14] However, where an arbitrator determines a dispute beyond the bounds of the arbitration agreement or the pleaded issues, or misconceives the nature of the enquiry so as to deny a party a fair hearing on the true issues, the court is obliged to intervene. That is also clear from the authorities referred to in the first respondent's heads of argument, including *Sidumo*,[12]*Lufuno*,[13] *Palabora*,[14]and Eskom Holdings,[15] all cited in support of counsel's contention that the arbitrator exceeded his powers and/or committed a gross-irregularity because he denied a party a fair hearing.

[15] It is well established that arbitration is consensual in nature and that an arbitrator derives his powers from the arbitration agreement.[16] Where an arbitrator acts outside the limits of his mandate, the court is obliged to intervene.[17]

[16] I will now deal with the two main issues in the proceedings before me.

The timing of the award and the arbitrator's mandate

[17] The first respondent's case in this regard is that the arbitration was conducted under the AFSA Rules for Expedited Arbitration. Those Rules required the arbitrator to publish the award within 30 days after finalisation of the proceedings. The parties presented oral and written submissions on 31 July 2024. The award was delivered on 4 October 2024, well beyond the prescribed 30 day period. As the arbitrator published the award long after the expiry of the agreed period, it is submitted by the first respondent that the arbitrator's

[12] *Sidumo And Another v Rustenberg Platinum Mines Ltd And Others* 2008 (2) SA 24 (CC) paras 263-264
[13] *supra*
[14] *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd* 2018 (5) SA 462 (SCA).
[15] *Eskom Holdings Limited v The Joint Venture of Edison Jehano (Pty) Ltd and KEC International Limited And Others* [2021] ZASCA 138
[16] *Telcordia* supra
[17] *Lufono* supra

mandate lapsed by effluxion of time and the award is consequently invalid and unenforceable.

[18] The first respondent further contends that the arbitrator could depart from the agreed timeframe only with the consent of the parties or by extension from the AFSA Secretariat, and that no such extension was granted. It is thus further submitted that the delivery of the award after the agreed period was not merely an irregularity but a jurisdictional fact that had not been complied with. This it was argued was necessarily fatal to the applicant's claim for enforcement.

[19] The applicant's answer is that the 30-day period did not run from 31 July 2024. It says the arbitrator was entitled to withhold delivery of the award until the arbitration fees had been paid; that the first respondent repeatedly failed to pay its portion of the fees; that the applicant ended up paying them; and that the final payment occurred on 4 September 2024, with the result that the award was delivered within 30 days thereafter and was accordingly valid and enforceable.

[20] The applicant emphasises that the delay in delivering the award was caused by the first respondent's non-payment of fees, and argues that the period for delivery should run from the date when all fees were paid, namely 4 September 2024.The applicant further submits that, in practice, the release of an award is often linked to the payment of fees, and this should be considered when interpreting the Rule under consideration. Finally, the applicant maintains that the arbitrator acted within a reasonable time in the circumstances and that the intent of the Expedited Rules was substantially met.

[21] The applicant also relies on a provision of the AFSA rules concerning default in payment of fees and on correspondence from AFSA stating that the arbitrator would release the award only once the outstanding fees had been paid.

[22] There are, however, several difficulties with the applicant's position.

[23] The first is that rule 10.1 of the AFSA Expedited Rules provide that the arbitrator must give his or her award within 30 days "*after the finalisation of the proceedings unless the parties otherwise agree or unless the AFSA Secretariat permits an extension of time*". On that wording, the operative event is the "*finalisation of the proceedings*", not the later payment of fees.

[24] The applicant attempts to align "*finalisation of the proceedings*" with full payment of fees. But that is not what the Rule says. The non-payment of fees may have a bearing upon the release or publication of the award; it does not, however, in and of itself serve to extend the time when as a matter of fact the proceedings were finalised.

[25] Section 10 of the AFSA Expedited Rules expressly provides in relevant part:

"10.1 The ARBITRATOR must give his/her award within 30 (thirty) days after finalisation of the proceedings unless the parties otherwise agree or unless the AFSA Secretariat permits an extension of that time."

10.2 The ARBITRATOR's award must be published to the parties in an appropriate fashion as determined by the AFSA Secretariat."

[26] The Rule is expressed in mandatory terms and requires that the award be delivered within 30 days unless an extension is granted. The rule is disjunctive and not conjunctive; it requires only that either the parties or the Secretariat grants an extension, not both.

[27] The applicant relies upon the email from the Secretariat to the applicant's attorneys dated 4 September 2024, in which Ms Zambella stated on behalf of the Secretariat:

"*Dear Moeketsi*

I refer to our telephone conversation yesterday and advise that the defendant has not paid its share of the arbitrator's further fees.

I confirm that the arbitrator will not release his award once both parties have paid the outstanding fees.

You advised that you wish to pay the defendant's share to facilitate the release of the award. Please quote the following reference when making the payment: S.387/SLZ4314"

[28] This email, however, does not establish, with the necessary clarity, any formal extension granted by AFSA Secretariat under rule 10.1. The applicant says in effect that AFSA accepted payment on 4 September 2024 and that the period should therefore be treated as running from then. But acceptance of payment, or even an indication that the award would be released once fees were paid, is not the same thing as proof that AFSA Secretariat formally extended the time for delivery of the award in terms of the governing rule.

[29] The second difficulty is that the aforementioned email from the Secretariat was only provided on 4 September 2024, more than 30 days after the expiry of the initial thirty day period, and was thus not capable of further extending the mandate of the arbitrator.

[30] The third difficulty is that the applicant's reliance on non-payment by the first respondent, while factually significant, does not fully answer the jurisdictional objection. It may well be factually correct that the award was delayed because of the first respondent's non-payment of the arbitrator's fees and that it should not benefit from its recalcitrance; but I regrettably cannot see how this translates into lawful authority to extend the mandate conferred upon the arbitrator to determine the dispute between the parties.

[31] The arbitrator's powers derive from the agreement read with the institutional rules applicable to the arbitration. Once those parameters are fixed, one party's obstructive conduct cannot confer jurisdiction on the arbitrator as defined in the rules surrounding his appointment.

[32] *Dickenson*[18] is authority for the proposition that the arbitrator must act within the limits of his jurisdiction and within the limits of his submission. *West Rand Estates*[19] made it plain that the arbitrator's powers are confined to the agreement and its limits, including the time periods prescribed in the agreement (which are to be read together with the AFSA Rules incorporated into the agreement).This principle has been reaffirmed in *Telcordia,*[20] where Harms JA ruled that an arbitrator must act within the powers conferred upon him.

[33] It goes without saying that the first respondent's dilatory behaviour and non-payment of its share of the arbitrator's fees does not endear it to the court. This is also an issue that ought properly to have been raised prior to, if not immediately after delivery of the award, and it reflects badly on the first respondent that it awaited until the applicant sought enforcement of the award before this was raised as a substantive defence to enforcement of the award. Regrettably, the issue before this Court is not whether the first respondent acted opportunistically; it is whether the award was made within the arbitrator's mandate as conferred by the parties' agreement and the applicable rules. That is a matter of jurisdiction, not discretion.

[34] The first respondent's heads place considerable emphasis on the notion that the arbitration agreement itself, under the expedited regime, contemplated that the process would come to an end by effluxion of time if the award was not delivered within the stipulated period. Whether one expresses the point as lapse of mandate or expiry of consensual authority, the essential submission by the first respondent is that an award delivered outside the agreed timeframe, without a proper extension, is not one rendered under the arbitration clause in the contract between the parties and thus is invalid.

[35] In dealing with the principles concerning the enforcement of an arbitration award, the court in *World Food Programme*[21] made it clear that the party seeking enforcement must establish a valid arbitration agreement and that the dispute fell within the tribunal's jurisdiction. If, when

---

[18] *supra*
[19] *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173
[20] *SI*
[21] *The World Food Programme v Massoudi Emille And Another* [2011] ZAGPJHC 141.

the award was delivered, the arbitrator's authority under the expedited agreement had already expired, the applicant cannot satisfy that threshold requirement.

[36] There is no provision in the rules as to the effect of non-compliance with the 30-day rule without an extension, and neither counsel for the parties before me could refer me to case law dealing with whether the 30-day period could be validly extended in the event that the award is validly withheld by the arbitrator in view of non-payment of fees. There is nothing in the plain wording of Rule 10 tying finalisation to payment of fees or publication of the award.

[37] Counsel for the applicant argued that the effect of non-compliance with Rule 10 contended for by the first respondent is contrary to the very purpose of arbitration proceedings, and that is to have an expedited hearing. Were the arbitrator' jurisdiction to lapse should he not timeously deliver his award, this would require the proceedings to commence *de novu* with a new arbitrator, protracting the proceedings and causing the incurrence of unnecessary costs. The applicant was also not prejudiced by the late delivery of the award and manifestly was responsible for the withholding of the award by refusing to pay his share of the arbitrators fees. The strict application of Rule 10 in such circumstances would appear to be patently unfair to the applicant.

[38] The first respondent's counsel, on the other hand, referred to several foreign cases that are both persuasive and I am enjoined to consider in terms of section 39(1)(c) of the Constitution. In the English case of *K/S Norjarl A/S v Hyundai Heavy Industries*,[22] it was held that time limits in arbitration proceedings can have jurisdictional and not only procedural consequences unless extended. In the result, an award delivered outside the stipulated time limits will be invalid. *Margulead Ltd v Exide Technologies*[23] was cited as authority for the proposition that an arbitrator's authority may expire by the effluxion of time; an award delivered outside of the stipulated period will be invalid unless the period was extended.

[22] [1992] QB 863
[23] [2004] EWCA Civ 402

[39] Where an arbitrator acts beyond his powers, his decision is reviewable.[24] Enforcement of an arbitration award requires the proper exercise by the arbitrator of his jurisdiction.[25]

[40] After considerable thought, and having considered all the authorities cited, I cannot conclude that the failure by the arbitrator to seek a formal extension of time to deliver his award can in the current circumstances be fatal to his jurisdiction, particularly where the Secretariat itself appears to have allowed an arbitrator to withhold his award until his fees have been paid. This is common practice in arbitration proceedings conducted under the ASFA Rules. The email from the Secretariat relied upon by the applicant could be construed as an implicit extension of the time frame within the arbitrator's award was to be delivered.

[41] Fairness dictates that a recalcitrant respondent should not benefit from its own wrongdoing to avoid an arbitration award against it. In view of the Constitutional court's injunction that the courts develop the common law in the pursuit of justice, I feel I have some latitude and discretion in rejecting a over-technical defence that would cause injustice. This is all the more so as courts are encouraged to interpret legislation purposefully and this applies equally to the AFSA Rules which are to be interpreted in the context of the arbitration process as a whole and how it may be expedited, whilst at the same time ensuring fairness to the parties. It would also be contrary to public policy and unconscionable to allow a litigant to rely on delays caused by its own non-compliance to invalidate an award. To hold otherwise would permit a party to frustrate the arbitration process by refusing to pay arbitration fees and then relying on the resulting delay to challenge the award.

[42] Although it is accepted that the English courts and foreign jurisdictions have found that time limits for the delivery of an arbitration award are jurisdictional and not procedural, I must find in this matter that the purpose of the time limit is to expedite the proceedings, which is procedural; to refuse to enforce the award where an extension would have clearly been granted by the Secretariat had the arbitrator formally applied for it cannot be right in law.

[24] *Stocks supra*
[25] *Total Support Management (Pty) Ltd v Diversified Health Systems* 2002 (4) SA 661 (SCA)

[43] At the end of day, however, my views in this regard are academic as the second ground upon which the second ground upon which the first respondent's defence to the enforcement of the award is based is firmly supported by law. I set out my reasoning below.

Whether the arbitrator exceeded his powers or committed a gross irregularity

[44] The first respondent's case is that the dispute referred to arbitration was clearly pleaded by the applicant in the statement of claim as one for payment based on its own performance of the consultancy services required by the agreement. In the pleadings the applicant alleged, in substance, that despite its performance in accordance with the terms of the consultancy agreement, and in particular clause 6.2 of the consultancy agreement, the first respondent failed or refused to pay the revenue consultancy fees when due. On that pleaded case, performance by the applicant of its reciprocal obligations formed part of its cause of action.

[45] The first respondent says that the arbitrator nevertheless determined the matter on a different footing, namely that the applicant was entitled to payment even if it had not rendered consultancy services in the sense contemplated by clause 6.2 of the consultancy agreement. The first respondent stresses that this was not the applicant's pleaded case, was not the dispute referred to arbitration, and was not an issue the first respondent was called upon to answer. On that basis, the respondent contends that the arbitrator exceeded his powers and/or committed a gross irregularity substantially impacting upon the fairness of the proceedings.[26]

[46] In assessing this ground of objection, it is important to have regard to the express provisions of clauses 6.2 and 9 of the Consultancy Agreement.

[47] Clauses 6.2 the Consultancy Agreement provide:

---

[26] *Close-Up Mining (Pty) Ltd And Others v The Arbitrator Judge Phillip Boruchowitz And Another* [2023] ZASCA 43; *Hos+Med Medical Aid Scheme v Thebe ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd And Others* 2008 (2) SA 608 (SCA); *Lugedlane Developments (Pty) Ltd and Another v Mjejane Parent Game Reserve Homeowners Association And Others* [2024] ZAGPJHC 391

"*6.2. Without limiting the provisions of clause 6.1, services to be rendered by the Consultant in terms of this Agreement to the Principal shall include the following-*

6.2.1. analysing the RFP for the purposes of the preparation of the RFP Response of the Principal;

6.2.2. providing the Principal with such strategic and commercial insight as the Consultant may deem appropriate for the purposes of ensuring that the RFP Response of the Principal is highly competitive;

6.2.3. providing general advice and support to the Principal in relation to the management of the process to prepare and submit the RFP Response of the Principal;

6.2.4. if invited by the Principal, attend such meetings and presentations with SAB Medical Scheme as may be required from time to time;

6.2.5. support and lead, where required or necessary, the discussions with strategic partners and key suppliers in respect of the RFP Response of the Principal;

6.2.6. provide overall support in the preparation of the strategy of the Principal to prepare and submit the RFP Response that will be successful;

6.2.7. <u>if the Principal received written notice from SAB Medical Scheme that it is the RFP Successful Bidder</u> -

6.2.7.1. <u>providing all assistance that the Principal will require from time to time in the negotiation of the RFP Agreements; and</u>

6.2.7.2.assisting the Consultant to resolve any issues between the Principal and SAB Medical Scheme during the subsistence of the RFP Agreements;

6.2,8 any other service that the Consultant may consider necessary and providing the Principal with any other assistance that the Principal may require, in relation to the above and matters ancillary to the above." (emphasis added)

[48] Clause 9.1 provides for ongoing payments to the applicant throughout the subsistence of the contract at a fixed rate of 10% of the gross monthly turnover excluding VAT and reads;

9.1 In addition to the Mobilisation Consultancy Fees and the RFP Award Consultancy Fees, as additional consideration for rendering the Consultancy Services, the Principal shall pay to the Consultant an amount equivalent to 10 % (ten percent) of the Gross Monthly Turnover, excluding VAT ("Revenue Consultancy Fees").

[49] The first respondent argues that "consultancy services" are defined by reference to clause 6.2; that consultancy fees are payable as consideration for the rendering of those services; that clause 9.1, dealing with revenue consultancy fees, must be read in the same contractual context; and that there is no contractual room for payment divorced from the rendering of services. The first respondent also points out that certain categories of services to be rendered prior to the award of the RFP were indisputably rendered and paid for on the basis of services rendered, namely the mobilisation consultancy fees and the RFP award consultancy fees.

[50] It was argued by the first respondent that, like the mobilisation and RFP award consultancy fees were dependent upon a set outcome, the revenue consultancy services were equally dependent upon the services set out in clause 6.2.7 being rendered during the subsistence of the RFP agreements.

[51] The respondent further relies on what it says was the applicant's acknowledgement during the hearing of the arbitration that the issue ultimately answered by the arbitrator did not arise from its pleaded case. This admission is indeed significant. The first respondent also relies upon an admission in the replying affidavit in the current proceedings that the applicant was entitled to a retainer of 10% of the first respondent's gross earnings, irrespective of whether or not the services set in clause 6.2 were rendered, was not pleaded. However, whatever the applicant may have said in its replying affidavit was not before the arbitrator and cannot support a finding of gross irregularity on his part. I will thus not have regard to this. However, the admission made by the applicant during the course of the proceedings is part of the record and ought properly to have been considered.

[52] *Lufuno,*[27] emphasises that parties to arbitration proceedings are entitled to a fair process. *Altech*[28] stresses that a gross irregularity is one that prevents a party from having its case properly heard and thus substantially impacts upon the fairness of the proceedings. *Sidumo*[29] is to the same effect. The first respondent's counsel relies on *Palabora*[30] for the proposition that an arbitrator who misconceives the nature of the enquiry and thereby denies a party a fair trial of the issues commits a gross irregularity.

[53] The applicant, for its part, characterises the respondent's complaint as a disguised appeal on the merits. It says the arbitrator simply interpreted the agreement, decided the real dispute between the parties, and that the respondent cannot convert its dissatisfaction with the result into a review. The authorities cited by the applicant in its heads of argument support a number of propositions which favour this approach: *Dickenson*[31], *Veldspun*[32] and *Telcordia*[33] establish the narrowness of the review power and the finality of arbitration. Likewise, *Telcordia*[34] underscores that mere errors of reasoning are not enough to set aside an award by an arbitrator.

---

[27] *supra*
[28] *supra*
[29] *supra*
[30] *supra*
[31] *supra*
[32] *supra*
[33] *supra*
[34] supra

[54] These general propositions are indeed correct, and in many cases it would be dispositive. However, arbitration proceedings are distinct from court proceedings and arbitrators do not have the latitude or discretion to decide the real issues in the interests of justice and are confined to the pleadings unless the parties confer broader powers on him in terms of the arbitration agreement.

[55] In my view, the first respondent's complaint is not merely that the arbitrator interpreted the contract incorrectly; it is narrower and more fundamental: It is that the arbitrator answered a different question from the one referred to him by the pleadings, and thus treated the first respondent unfairly.

[56] In consensual arbitration, the pleadings serve not only to define factual disputes but also to delineate the arbitrator's jurisdiction in respect of the particular dispute submitted for decision. While arbitral pleadings may sometimes be approached less formalistically than court pleadings, they still set the bounds of the case to be met. An arbitrator is not at liberty to substitute a new basis of claim for the one advanced in the pleadings before him.

[57] The applicant's pleaded basis for payment in its statement of claim was predicated upon its performance of its obligations under clause 6.2 of the Consultancy Agreement. It did not plead in its statement of claim an entitlement to payment absent the rendering of services, nor an entitlement to a retainer of 10% of the gross earnings after the contract had been awarded to the respondent, regardless of whether or not it rendered any of the services set out in clause 6.2. In so far as the arbitrator awarded relief on this this basis which had not been pleaded, he made findings beyond the pleaded dispute and exceeded his powers and/or committed a gross irregularity.

[58] The significance of the arbitrator's departure, however is twofold; not only did he exceed his jurisdiction by deciding the matter before him on the basis of an issue not referred to him, but the first respondent was denied the opportunity to meet a case which had not been pleaded but was found to be the case by the arbitrator he was called upon to meet. This seriously impacted upon the fairness of the proceedings which in itself warrants the setting of the award made.

[59] Whilst I accept that the allegation that the applicant was entitled to payment of the revenue consulting fees as a retainer in the amount of 10 percent of the gross revenue was indeed raised by the applicant in its replication. However, it is trite that a claimant's cause of action needs to be set out in the pleadings and may not be amplified in a replication. The first respondent is correct that should the applicant have wished to amplify its cause of action it needed to amend its statement of claim or include an alternative cause of action.

[60] The first respondent cannot be said to have waived its right to object to this in filing its rejoinder as there it made it plain that the applicant was not entitled to extend the basis of its claim by way of replication and needed to do so by way of amendment. This notwithstanding, the applicant took no steps to amend its claim in line with the new stance taken that it was entitled to a retainer of 10% of the gross earnings of the respondent from the award of the RFP, irrespective of whether or not it rendered any services.

[61] Without such an amendment, the arbitrator was not empowered to entertain the new cause of action raised by the applicant in its replication. This is particularly so as when the applicant's counsel sought to adduce this evidence in cross-examination, an objection was immediately taken that this case had not been pleaded. After this objection was raised, it was conceded that the new formulation of the claimant's claim had not been pleaded. This ought properly to have presented a red flag to the arbitrator and should have immediately been addressed. Despite the objection raised and the concession made, the arbitrator went on to define the issues and decide the matter on the basis that no consultancy services needed to be rendered in order to entitle the applicant to revenue consultancy fees.

[62] The first respondent has shown, and the applicant has not disputed in its answering affidavit to the counter-application, that the award rested on a contractual premise materially different from that pleaded.

[63] In these circumstances, I find that the arbitrator exceeded his powers because he determined a dispute not submitted to him as defined in the pleadings. He also committed a

gross irregularity because he misconceived the nature of the enquiry and thereby deprived the first respondent of a fair hearing on the true issues.

[64] I have taken cognizance of the fact the first respondent's *bona fides* in raising this defence have also been called into question. In this respect, reference was made to the email sent by the first respondent to the applicant on 28 August 2023 in which it is made plain that it had honoured its obligations under the contract in so far as payment of the mobilisation consultancy fees and the RFP award consultancy fees were concerned, but felt it unfair that it should continue to pay the revenue consultancy fees now that the RFP had been awarded to it.

[65] Three complaints were raised by the first respondent to the continued payment of the revenue consultancy fees The first was that there was a possibility of overpayment. The second was that 34% of the total contract values was paid in the first seven months of the 60 month contract. It was argued that if the first respondent had to continue paying at the rate of 10% of the gross revenue of the first respondent, it would end up having to pay the applicant an additional R12 million in 2023. This meant that the first respondent would have paid the applicant 41% of the contract value in year one. The final issue raised was one of fairness, it being pointed out that the scheme membership numbers had declined and it anticipated reduced earnings. The first accordingly proposed that a monthly fee of R50 000 plus VAT be paid to the applicant going forward from August 2023 until December 2024.

[66] There was no complaint raised by the first respondent that the applicant had claimed revenue consultancy fees without having rendered any services as was pleaded in the arbitration. This tends to suggest that the current objection to the enforcement of the award is yet a further technical defence to try avoid having to pay the award when, in truth and in fact, the first respondent itself did not believe that the payment of consultancy fees was linked to the rendering of services.

[67] This is supported by the plain reading of clause 9.1 quoted above which, if not read in conjunction with clause 6.2.7, which provides for the payment of 10% of the monthly gross turnover of the applicant with no reference to further services being rendered. In terms of clause 9.1 it was made plain the applicant's entitlement to a monthly fee equivalent to 10%

of the first respondent's gross turner was said to be over and above the payment of the mobilisation consultancy fee and the RFP award consultancy fee.

[68] For convenience a requote the relevant clause. It says:

"In addition to the Mobilisation Consultancy Fees and the RFP Award Consultancy Fees, <u>as additional consideration for rendering the Consultancy Services</u>, the Principal shall pay to the Consultant an amount equivalent to 10 % (ten percent) of the Gross Monthly Turnover, excluding VAT ("Revenue Consultancy Fees"). (emphasis added)

[69] What makes the provision ambiguous perhaps is the reference to the rendering of "the Consultancy Services", which arguably are all of the services listed in clause clause 6 of the agreement; these include not only the mobilisation consultancy services and the RFP award consultancy services but the services said to be provided on an ongoing basis after the award of the RFP for the duration of the contract. This certainly is how the applicant's case had been pleaded; it is not how the arbitrator interpreted clause 9.1 and in this respect it is arguable that the objection raised by the first respondent is not one of jurisdiction but rather the arbitrator's interpretation of the provisions of the agreement, that goes to the merits and cannot be challenged.

[70] In the recent Supreme Court of Appeal decision in Rabinowitz,[35] this was said:

"[19] A review in terms of s 33(1)(b) of the Act will include where an arbitrator has exceeded his or her powers. The focus is on whether the arbitrator purported to exercise a power he or she did not have. An erroneous exercise of a power that the arbitrator has does not amount to a ground for review. As much as an award going beyond the terms of an arbitrator's reference may result in a successful review of an award, it is a 'fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or

[35] *Rabinowitz v Levy and Others* (1276/2022) [2024] ZASCA 8 (26 January 2024)

an incorrect reliance on inadmissible evidence' by the arbitrator, as a transgression of the limits of the arbitrator's power…"[36] (footnotes omitted)

[71] Although the Court went on to say that an arbitrator may exceed his power if he decides and issue beyond the pleadings, a more liberal approach was recommended. This was set out in paragraph [20] thus:

"[*20] An arbitrator might also exceed his or her jurisdiction if a matter is decided on a basis not covered by the pleadings. This will depend on the nature and ambit of what was referred to the arbitrator to determine. Whether an arbitrator has strayed beyond the pleadings, and possibly exceeded his or her powers requiring under s 33(1)(b) that the award be set aside, is a question to be decided on the facts of each case. Courts, however, generally remain reluctant to interfere with an arbitrator's award and are prepared to adopt 'a rather generous approach to the pleadings'."* (footnotes omitted)

[72] Such a generous approach to the pleadings may have persuaded me to accept that the issues to be decided were those defined in the pleadings as a whole, including the replication in order to ensure that the real issues were decided. Had such an approach been taken, I may have been inclined to find that the arbitrator was entitled to take cognizance of the fact that the general entitlement to a monthly fee of 10% of the gross turnover was payable irrespective whether or not services were rendered. This is particularly so as this was an issue raised in the replication and dealt with in the rejoinder. Such an approach may well have been appropriate in this case were it not for the fact that the first respondent expressly took issue with the fact that a new case was being pleaded in the replication that conflicted with the case set out in the applicant's statement of claim and enjoining the applicant to apply to amend its statement of claim should it wish to rely upon this new cause of action. The applicant decided not to do so but nevertheless put what was to all intense and purposes an entirely different basis for its claim in cross-examination to a witness. When he did so this immediately caused counsel for the first respondent to object, and counsel for the applicant conceded this issue had not been pleaded. The difficulty was thus squarely raised in the

[36] At paragraph [19]

arbitration proceedings which make this a case where it would not be appropriate to take a more generous approach to the pleadings.

[73] Where an arbitrator exceeds his power and decides an issue manifestly and admitted to be outside of the pleadings, I feel I have less latitude to come to the first respondent's assistance and have no option but to find that the arbitrator committed a gross irregularity that vitiated the proceedings.

[74] I also must mention that I question whether clause 6.2.7 of the consultancy fee agreement quoted above was not purposefully drafted to create the impression that services were required to be rendered, when in truth and in fact both parties knew that they were not. I have a suspicion that this was to ensure that the revenue consultancy fees were not regarded as entitling the applicant a percentage of the monthly earnings of the first respondent for the duration of the contract, over and above the vast sum of R6 million rand already to be paid to the first respondent as a "*reward*" for securing the contract (the reward consultancy fees) not linked in any manner at all to services rendered. The reason I say this because the payment of so-called "*consultancy fees*" are often disguised bribes for securing a contract, particularly in the government sector.

[75] I am somewhat fortified in by suspicions by the fact that nowhere in the consultancy fee agreement is any fee structure set out for the post award services to be rendered. The meaning sought to be ascribed to the contract in the arbitration was that the first respondent was obliged to render the services set out in clause 6.2.7, but irrespective of how many of those services were rendered and regardless how much time was spent rendering those services, the applicant was entitled to a monthly fee of 10% of the gross monthly turnover. This is why the applicant describes the revenue consultancy services to which he alleges he was entitled as a retainer-that is fee paid to him for making himself available to render services if ever required of it (and even of no services were rendered.)

[76] Thus, the contract was in fact not a contract for reward for the rendering of consultancy services as its name suggest but rather a lump sum payment in the event of the RFP award being secured and an ongoing share of revenue for the duration of the contract,

notwithstanding that to earn these amounts no services at all were required to be rendered. Despite this both the RFP award lump sum payment and the guaranteed share of the revenue stream were described as "consultancy services." In truth, the only consultancy services expected to be rendered were the mobilisation consultancy services for which the relatively negligible amount of R 150 000 was payable . The real revenue was earned simply as a reward for the securing of what must have been an extremely lucrative contract to administer the SAB Medical Scheme, for which no further services had to be rendered. To the extent that my suspicions are founded, the contract was a sham disguised to appear as if it was contract for the rendering of services. The term for the ongoing share of revenue, "revenue consultancy fees", says it all.

[77] Agreements in terms of which a party undertakes under the guise of consultancy services to procure the award of a contract through the exercise of influence, and is remunerated by way of lump sum or a continuing share of the revenue derived therefrom, are inimical to public policy and unenforceable. Payments structured as "*consultancy fees*" but which in substance constitute consideration for the exertion of influence or the securing of contractual benefits have repeatedly been condemned by the courts as unlawful. Such arrangements, particularly in the context of public procurement, undermine the constitutional imperatives of transparency and fairness, and fall to be struck down as *contra bonos mores*.

[78] By way of example, so-called "*influence peddling*" was considered in *S v Shaik*[37] as well as in *AllPay;*[38] *Maseko*[39] made it plain that *"[a] transaction which is designed to conceal its true nature… is contrary to public policy and unenforceable;*[40] and ongoing revenue-based payments in a government contract were declared invalid and unenforceable in *Gobela*[41]

[79] As I said at the outset of this judgment, a court is not obliged to act as a "*rubber stamp*" when requested to make an arbitration award an order of court . On the contrary, it is obliged to

---

[37] *S v Shaik and Others* 2008 (2) SA 208 (CC)

[38] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer* 2014 (1) SA 604 (CC)

[39] *Maseko v Maseko* 1951 (3) SA 590 (T)

[40] At 593H–594A

apply an independent mind to the matter and cannot permit contracts which are *contra bonus mores* or contrary to public policy to be enforced. The contract before be sought to be enforced smacks of a simulated, disguised transaction or a sham. Had it not been for my finding that the arbitrator exceeded his power by deciding an issue not pleaded in the statement of case, I would have found it difficult to enforce the current award. In the absence of evidence of undue influence, I may have had to. It is, however, unlikely that such evidence would have been led by either party as if I am correct in my suspicious, both parties would have been complicit in making the unlawful arrangement. My suspicions are thus based solely on the plain meaning of the text of the so-called "consultancy agreement" set out above and do not form the *ratio* for my decision in this matter. I have felt constrained to mention my suspicions, *albeit obiter*, as what to me appears to be a manifest sham should not go un-noted by the court.

[80] There is one remaining issue that I need to canvass which I do as a postscript, as it warrants no better attention.

The applicant's contention that there was no separate answer to the counter-application

[81] In the first respondent's heads of argument it is also argued that the applicant filed no separate answering affidavit to the counter-application and that, for that reason, the counter-application ought to be granted. That submission is entirely without merit. The applicant's replying affidavit in the main application was also framed as an answering affidavit in the counter-application. One must therefore consider its substance, not merely its label as a replying affidavit.

[82] That said, the first respondent is correct that the applicant's answering affidavit did not squarely meet the central grounds for review set out in its answering affidavit and counter-application. In particular, it did not identify any formal extension of time under the AFSA rules, and it did not satisfactorily answer the respondent's complaint that the arbitrator resolved a question that was not pleaded.

[83] I thus find that it is incumbent upon me to uphold the counter-application. That has as an inevitable consequence that I must dismiss the application to make the arbitration award an order of court and the relief sought for its enforcement.

Costs

[84] There now remains the issue of costs.

The first respondent has succeeded in resisting enforcement of the award and establishing proper grounds for review in support of its counter-application. Although the costs should ordinarily follow the result, I find that the first respondents conduct in failing to pay the fees of the arbitrator and then relying on this as a basis for avoiding the enforcement of the award was unconscionable. I am thus disinclined to award it costs.

[85] I thus order that each party bear their own costs.

Order

[86] The following order is made:

1. The arbitration award issued by the second respondent on 2 October 2024 is reviewed and set aside in terms of s 33 of the Arbitration Act 42 of 1965.

2. The applicant's application in terms of s 31(1) of the Arbitration Act 42 of 1965 to make the arbitration award an order of court and for enforcement of that award is dismissed.

3. Each party is to pay their own costs

[redacted]

S.WENTZEL-THOMPSON J

Judge of the High Court

Gauteng Local Division, Johannesburg

Appearance for the Applicant:

Adv TJ Machaba SC tmachaba@rsabar.com

Adv K Maponya maponya@rsabar.com

Instructed by: MT Raselo Inc. Attorneys legal1@raseloinc.co.za

Appearance for the Respondent:

Adv K. Tsatsawane SC ken@law.co.za

Instructed by: Shandu Attorneys Inc. Attorneys Siyabonga@Shanduattorneys.co.za