REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2024-104308

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

[redacted]

27 March 2026 ____________________

DATE SIGNATURE

In the matter between:

ENGEN PETROLEUM (PTY) LTD Applicant

And

ANCHOR BUSINESS ENTERPRISES CC
t/a ENGEN WESTERN SERVICE STATION First Respondent

ADV J GAUTSCHI SC N.O. Second Respondent

This judgment was handed down electronically by circulation to the parties' representatives by email and by uploading the judgment onto CourtOnline/CaseLines. The date of delivery of the judgment is deemed to be 27 March 2026.

JUDGMENT

SOUTHWOOD, AJ

Introduction

[1] This is an application brought by Engen Petroleum (Pty) Ltd ("Engen") in terms of section 33 of the Arbitration Act, 42 of 1965 ("the Arbitration Act") to review and set aside an arbitration award made by the second respondent ("the Arbitrator") on 11 July 2024 and published on 1 August 2024. The second respondent did not oppose the application.

[2] The arbitration was conducted in terms of section 12B of the Petroleum Products Act, 120 of 1977 ("the PPA") following a referral by the Controller of Petroleum Products. The first respondent, Anchor Business Enterprises CC t/a Engen Western Service Station ("Anchor"), alleged that Engen had engaged in unfair and unreasonable contractual practices by (a) terminating the operating lease agreement between the parties on 17 October 2022, and (b) refusing to afford Anchor an opportunity to sell its business.

[3] The Arbitrator found in favour of Anchor, set aside the termination notice, and directed Engen to afford Anchor an opportunity to sell its business in terms of the operating lease. Engen now seeks to have that award reviewed and set aside; and further seeks to have this court substitute the award with an order dismissing Anchor's claims; to award the costs of the arbitration and the costs of this application to Engen on an attorney and client scale; and to refer the issue of frivolous and capricious damages to arbitration.

[4] Anchor seeks condonation for the late filing of its answering affidavit. Engen does not oppose the application. There being no prejudice to Engen, I am inclined to grant condonation.

Background facts

[5] The relationship between the parties commenced in 2006 when Anchor purchased the goodwill of an Engen filling station for R1.6 million and began operating as an Engen retailer. The parties concluded various operating leases over the years, the most recent being an agreement of lease and operation of

service station concluded on 11 January 2022 ("the Operating Lease"), which was to endure until 31 August 2024.

[6] The founding affidavit avers that Clause 4.1 of Schedule 2 obliged Engen to assist Anchor to establish, administer and grow the business including that Engen had to deliver all of Anchor's fuel requirements within 48 hours of Anchor placing an order with Engen, provided that Anchor obtains an official Engen order number in respect of such order.

[7] The Operating Lease contained other terms setting the context for the dispute, *inter alia*:

a. clause 5.3 of Schedule 2 permitted Anchor to purchase from other sources only if Engen was unable to deliver for a period longer than 48 consecutive hours, and only with Engen's prior written consent;

b. clause 41.1(b) of Schedule 2 entitled Engen to cancel the Operating Lease forthwith if Anchor breached its exclusivity obligations;

c. Schedule 3 regulated the disposal of the business, recognising that Anchor had an "entrenched value" in the business and was entitled to realise such value, subject to Engen's approval of any proposed purchaser.

[8] Between August 2021 and March 2022, Anchor sourced fuel from third-party suppliers on eleven occasions. The quantities purchased were relatively small (ranging from approximately 1900 to 6002 litres per transaction).

[9] On 25 August 2022, a meeting was held between the parties where Anchor was confronted with its third-party purchases. On 17 October 2022, Engen formally cancelled the Operating Lease by written notice, citing Anchor's breach of clause 41.1(b) of Schedule 2. The notice stated that Anchor could remain in occupation until such time as Engen required it to vacate.

[10] On 28 February 2023, Anchor approached the Controller of Petroleum Products in terms of section 12B of the PPA, alleging that Engen had engaged in unfair and unreasonable contractual practices, namely the cancellation of the lease,

and Engen’s threat not to allow Anchor to sell its business. The Controller referred the matter to arbitration on 21 April 2023.

[11] In its Statement of Claim, Anchor identified two unfair contractual practices: (a) the termination of the Operating Lease on 17 October 2022, and (b) Engen's refusal to afford Anchor an opportunity to sell its business. Paragraphs 6.3 and 6.4 of the Statement of Claim expressly stated that these were the only practices forming the subject matter of the arbitration and that this determined the scope of the enquiry.

[12] However, in her witness statement and oral evidence, Ms Sikwane (Anchor's sole member) testified extensively about various other issues, including electricity challenges, a damaged pipe, contaminated tanks, late billing, zoning certificate difficulties, and issues relating to another Engen site (Sedibelo) that Anchor had operated. These issues were not pleaded as unfair contractual practices.

[13] The arbitration hearing took place from 11 to 15 March 2024. On 13 May 2024, oral argument was heard. The Arbitrator published his award on 1 August 2024.

The arbitration award

[14] In his award, the Arbitrator:

a. acknowledged that the only two unfair contractual practices pleaded and relied upon by Anchor were the termination of the lease and the refusal to consent to an opportunity to sell the business;

b. nevertheless, considered evidence relating to late deliveries, full or half load requirements, COVID-19 related evidence, and settlement discussions, which he regarded as "directly relevant" to the pleaded practices;

c. found that Anchor had established late deliveries, relying on Ms Sikwane's explanations of the eleven instances of third-party purchases, WhatsApp messages, probabilities (that small quantities followed by Engen deliveries suggested stop-gap measures rather than cheaper fuel), and the evidence of Mr Kuna (Anchor's former area manager);

d. held that the principle of *pacta sunt servanda* was not a bar to relief, holding that section 12B imposes an equitable standard that overrides contractual terms;

e. held that the PPA is premised on an unequal bargaining position;

f. concluded that Engen's termination of the Operating Lease on 17 October 2022 constituted an unfair and unreasonable contractual practice;

g. found that Engen's refusal to grant Anchor an opportunity to sell the business was unfair and unreasonable.

[15] The arbitrator made the following award:

a. The termination notice of 17 October 2022 is set aside.

b. Engen is directed to afford Anchor an opportunity to sell its business as provided for in terms of the 2022 Operating Lease agreement.

c. Engen is ordered to pay the costs of the arbitration.

The review

[16] Engen seeks to review and set aside the award on the following grounds:

a. Terms of reference: The Arbitrator exceeded his powers by considering and being influenced by "peripheral issues" (late deliveries, load requirements, COVID-19 relief) that were not pleaded as unfair contractual practices and fell outside the scope of the reference; the Arbitrator accepted Ms Sikwane's explanation relating to the eleven instances of third-party product acquisitions; the Arbitrator's refusal to Engen's application to introduce late additional discovery.

b. *Pacta sunt servanda*: The Arbitrator erred in law by finding that this principle did not apply, when it should have informed the determination of whether the practices were unfair.

c. Unequal bargaining power: The Arbitrator erred in finding this relevant without proper basis, and in any event, this was not a pleaded issue.

d. Setting aside the termination notice: This decision resulted from errors of law and the Arbitrator exceeding his powers; further, the Arbitrator failed to correct the practices that actually imperilled the relationship (late deliveries and load restrictions), leaving them uncorrected.

e. Opportunity to sell the business: The Arbitrator exceeded his powers by correcting a consequence rather than a practice; the award is incapable of implementation as the site has ceased trading and Anchor lacks financial resources; the Arbitrator failed to consider that the sale provisions in Schedule 3 contemplate a functional, "wet" site.

Anchor's opposition

[17] Anchor opposes the application and contends that:

a. The relief sought in paragraphs 2, 3 and 4 of the Notice of Motion is incompetent. Section 33 of the Arbitration Act does not provide for an order which substitutes the award with an order by the Court; if an award is set aside, the dispute must be submitted to a new arbitration tribunal.

b. Engen misconstrues the restricted grounds for review in section 33(1)(b), which only renders an award reviewable where the arbitrator has committed a gross irregularity in the conduct of the proceedings or has exceeded his powers.

c. The Arbitrator made no determination on any peripheral issue; he merely considered evidence relevant to the pleaded practices. He restricted his award to the pleaded case and the relief sought.

d. Errors of law or fact do not constitute grounds for review under section 33(1)(b).

e. The Arbitrator did not exceed his powers. Section 12B(4)(a) empowers an arbitrator to determine whether contractual practices are unfair or unreasonable and to make such award as he deems necessary to correct such practice. The Arbitrator confined his award to correcting the pleaded practices.

f. The application is ill-conceived and should be dismissed with a punitive costs order.

The Legal framework

<u>*Section 33 of the Arbitration Act*</u>

[18] Section 33 of the Arbitration Act provides *inter alia*:

> "(1) Where— …
>
> (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; …
>
> 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.
>
> (4) If the award is set aside the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court."

[19] Section 33(4) makes plain that if an award is set aside, the dispute must be submitted to a new arbitration tribunal. There is no provision for a court to substitute its own decision for that of the arbitrator.

<u>*The meaning of "gross irregularity" and "exceeding powers"*</u>

[20] The leading authority on section 33(1)(b) is *Telcordia Technologies Inc v Telkom SA Ltd*[1]. The Supreme Court of Appeal held that by agreeing to arbitration, parties limit court interference to the grounds set out in section 33(1). The parties waive the right to have the merits of their dispute re-litigated or reconsidered. [2] Furthermore, the Act did not permit a review based on a material error of law. [3]

[21] The Court in *Telcordia* explained that "exceeding its powers" means the tribunal purported to exercise a power it did not have, as distinct from erroneously

1 2007 (3) SA 266 (SCA)
2 *Telcordia* footnote 1 at para 51
3 *Telcordia* footnote 1 at para 67

exercising a power that it did have. A mere erroneous exercise of a power vested in the tribunal does not amount to exceeding powers. [4]

[22] As for "gross irregularity", the Supreme Court of Appeal endorsed the statement in *Ellis v Morgan; Ellis v Dessai* [5] that:

> “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." The irregularity must be of such a serious nature that it resulted in the aggrieved party not having its case fully and fairly determined.”

[23] The Supreme Court of Appeal held that “gross irregularity” also encompasses where a decision-maker misconceives the whole nature of the enquiry or his duties in connection therewith[6] and any behaviour, though well-intentioned and *bona fide* which prevented a fair trial on the issues. [7]

[24] In *Gutsche Family Investments v Morgan (Pty) Ltd v Mettle Equity Group (Pty) Ltd*[8], the Supreme Court of Appeal distilled three principles from three recent judgments in that court:

a. Errors of law or fact committed by an arbitrator do not in themselves constitute grounds for review by a court under s33(1)(b). Whether or not we agree with the conclusions arrived at by the majority of the tribunal on the various disputes between the parties, is therefore of no consequence.

b. In order to justify a review on the basis of gross irregularity, the irregularity contended for must have been of such a serious nature that it resulted in the aggrieved party not having his or her case fully and fairly determined.

c. Arbitrators ... are bound by the pleadings. ... Arbitrators who stray beyond the pleadings therefore exceed their powers as contemplated by s33(1)(b).

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4 *Telcordia* footnote 1 at para 52
5 1909 TS 576 at 581
6 *Telcordia* footnote 1 at para 71
7 *Telcordia* footnote 1 at para 73
8 2012 JDR 0358 (SCA) at para 18

[25] In *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd*[9], the Supreme Court of Appeal reiterated that where an arbitrator engages in the correct enquiry but errs on the facts or the law, that is not an irregularity and is not a basis for setting aside an award.

[26] In *Rabinowitz v Levy*[10] confirmed that "gross irregularity" required by section 33(1)(b) must relate to the conduct of the proceedings, and not the result or outcome. If an arbitrator is guilty of conducting an arbitration in some form of high-handed or arbitrary manner, or dishonestly, that would constitute a gross irregularity. But a *bona fide* mistake in respect of the merits, no matter how gross, will not suffice.

[27] In respect of "exceeding powers", the Court found that:

> "A review in terms of s33(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 the 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 interpretation or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator, as a transgression of the limits of the arbitrator's power." [11]

Section 12B of the PPA

[28] Section 12B(1) provides:

> "The Controller of Petroleum Products may on request by a licensed retailer alleging an unfair or unreasonable contractual practice by a licensed wholesaler, or *vice versa*, require, by notice in writing to the parties concerned, that the parties submit the matter to arbitration."

[29] Section 12B(4) of the PPA provides that an arbitrator:

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9 2018 (5) SA 462 (SCA) at para 8
10 2024 JDR 0220 (SCA) at para 15
11 *Rabinowitz* footnote 10 at para 19

a. shall determine whether the alleged contractual practices concerned are unfair or unreasonable and, if so, shall make such award as he or she deems necessary to correct such practice; and

b. shall determine whether the allegations giving rise to the arbitration were frivolous or capricious and, if so, shall make such award as he or she deems necessary to compensate any party affected by such allegations.

[30] I was referred to the following authorities.

[31] The Constitutional Court in *Business Zone 1010 CC v Engen Petroleum Ltd*[12] dealt with an administrative review of the decisions of the Controller of Petroleum Products and the Minister of Minerals and Energy in relation to decisions about whether to refer complaints to arbitration in terms of section 12B of the PPA. The Court held that section 12B imposes an equitable standard that overrides the terms of the contract to ensure that fairness and reasonableness prevail. [13]

[32] The Court stated, further, that section 12B(4)(a) of the PPA mandates the arbitrator to enter into and interrogate the merits of the alleged contractual practice in order to decide the unfairness or unreasonableness thereof. [14]

[33] Furthermore, held the Court, even a single act of cancellation can amount to a contractual practice, and the arbitrator's powers can extend to setting aside the termination and reinstating the contract. [15]

[34] In *Mfoza Service Station (Pty) Ltd v Engen Petroleum Ltd*[16], which dealt with whether an arbitrator could award damages in terms of section 12B(4)(a) of the PPA, the Constitutional Court held that section 12B is a limited arbitral mechanism dealing with allegedly unfair or unreasonable contractual practices and their 'correction'. The award must correct the practice not the consequences of the practice. To correct a practice is about restoring the relationship by identifying the contractual practice that imperilled the relationship and then

12 2017 JDR 2059 (CC)
13 *Business Zone* footnote 12 at para 48
14 *Business Zone* footnote 12 at para 63
15 *Business Zone* footnote 12 at para 76
16 2022 (1) SA 317 (CC) at paras 37, 40 to 46, 50 and 78

making an award that would end the practice in question. It is an intervention that is forward-looking. Correcting a practice does not extend to the historical effect of the consequences of that practice as that is not what was required to correct the practice. An award of compensation that deals with the consequences of unfair or unreasonable practice will leave the practice uncorrected. This is not what section 12B had in mind

[35] *Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels*[17] dealt with whether a High Court was entitled to refuse a request to stay legal proceedings in respect of a matter already referred to arbitration under section 12B of the PPA. The Court confirmed that the arbitral mechanism introduced by section 12B addressed the unequal bargaining power between wholesalers and retailers prevalent in the petroleum industry; and, further, that the equitable standard of fairness and reasonableness prevailed in petroleum contracts. [18]

[36] *Engen Petroleum Limited v Rissik Street One Stop CC*[19] dealt with an application to stay eviction proceedings in the context of a referral to arbitration in terms of section 12B. The judgment was overturned by the Constitutional Court in *Rissik Street One Stop t/a Rissik Street Engen and Another v Engen Petroleum Ltd*[20].

[37] *Marndre Beleggings CC v The Minister of Energy and two others*[21] concerned an administrative review of the Minister's decision overturning the Controller's decision to refer a practice to arbitration in terms of section 12B of the PPA. The applicant relied, in particular, on paragraph 23 of the judgment which provided that:

> "no arbitrator can force Engen to conclude an operating lease agreement with the purchaser of the business",

as providing a practical challenge to the implementation of the award.

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17 [2023] ZACC 3
18 *Crompton Street Motors* footnote 17 at paras 42, 60 and 62
19 2021 JDR 1065 (SCA)
20 2024 (4) SA 447 (CC)
21 Unreported judgment by Potterill J dated 22 March 2018 under case number 51067/15

[38] It is pertinent that none of the authorities referred to by the parties deal with a review of an arbitrator's award given in terms of section 12B(4) of the PPA.

Evaluation

<u>*The relief sought*</u>

[39] Before addressing the merits of the review, it is necessary to deal with the relief sought in paragraphs 2, 3 and 4 of the Notice of Motion.

[40] Prayer 2 seeks an order "[r]eplacing and substituting the award with an award that the first respondent's claims are dismissed."

[41] Prayer 3 seeks the costs of arbitration as well as the costs of this application on an attorney and client scale.

[42] Prayer 4 seeks a referral to arbitration relating to the issue of frivolous and capricious damages.

[43] Section 33 of the Arbitration Act makes no provision for an order as contemplated by prayer 2. Section 33(4) expressly provides that if an award is set aside, the dispute shall be submitted to a new arbitration tribunal. This court has no power to substitute its own decision for that of the arbitrator. Mr *Aucamp*, Engen's counsel, correctly conceded same in argument, indicating further that if the award was set aside and the dispute heard before a new arbitration tribunal, then, per prayer 4, the issue of damages for a frivolous complaint would be considered by a new arbitrator. As I understood the submission, prayer 4 has no independent existence apart from prayer 1.

[44] In relation to prayer 3, Mr *Aucamp* referred to the Lease Agreement as the basis for the attorney and client costs sought. Mr *Aucamp* did not refer me to any authority which permitted this court to make a costs award in relation to the arbitration. Mr *Venter*, for Anchor, submitted that Engen was not entitled to the costs of the arbitration. Given that the Arbitration Act does not make provision for this court to substitute its own order for what is contained in the award, in my view, this court cannot make a costs order in relation to the arbitration.

The grounds for review

[45] I turn now to consider whether Engen has made out a case for the review and setting aside of the award under section 33(1)(b).

i. The terms of reference ground

[46] Engen's primary complaint is that the Arbitrator exceeded his powers by considering and being influenced by "peripheral issues" that were not pleaded as unfair contractual practices and fell outside the scope of the reference. These include evidence relating to late deliveries, full or half load requirements, COVID-19 relief, and settlement discussions.

[47] The Arbitrator addressed this complaint directly in his award. In paragraphs 18-21, he recorded that Engen's counsel had objected to the admissibility of such evidence, contending that only two unfair contractual practices had been pleaded. He recorded, further, that Engen’s counsel did not seek a directive but wanted its objection recorded and that, consequently, it would not be leading evidence on or cross-examining in relation to those incidents. The Arbitrator recorded that Anchor's counsel acknowledged this but submitted that the various incidents (termed "side issues") were relevant when considering whether the pleaded contractual practices were unreasonable or unfair.

[48] The Arbitrator then stated:

> "21. Having heard the evidence and having considered the submissions of the parties in their heads of argument and in oral argument, I am of the view that the so-called 'peripheral issues' which I have regard to are those which are directly relevant to weighing up whether the 17 October 2022 cancellation notice was unfair or unreasonable and whether the refusal of an opportunity to sell the business was unfair or unreasonable. More particularly, I shall consider and have regard to the evidence relating to late delivery and related issues as to full or half loads, Covid-19 related evidence (including evidence relating to the Covid-19 relief package) and the evidence on the various settlement discussions, as in my view evidence on those issues have a direct bearing on the two pleaded contractual practices relied upon and are relevant in considering whether those two pleaded contractual practices are unfair or unreasonable. The evidence which I regard as

relevant and which I have taken into account for this purpose [i]s that referred to in paragraphs 4.2.2, 4.2.6 and 4.2.7 of the claimant's heads of argument quoted above and the evidence presented at the hearing relating thereto which includes the evidence relating to late deliveries and purchasing fuel from third-party suppliers to avoid 'standing dry'."

[49] The Arbitrator made no award on any peripheral issue. He expressly confined his award to the two pleaded practices: setting aside the termination notice and directing that Anchor be afforded an opportunity to sell its business.

[50] The question is whether an arbitrator exceeds his powers by considering evidence that is not identified as the unreasonable or unfair practice but is relevant to the determination as to whether these practices are unreasonable or unfair.

[51] In my view, he does not. An arbitrator is entitled to consider evidence that sheds light on the fairness and reasonableness of the pleaded practices. The context in which a termination occurs, including the parties' history and the surrounding circumstances, is relevant to assessing whether that termination was unfair or unreasonable.

[52] This is particularly so in a section 12B arbitration, where the enquiry is into fairness and reasonableness. As indicated above, the arbitrator is mandated to "enter into and interrogate the merits of the alleged contractual practice in order to make a determination into the unfairness or unreasonableness thereof." [22] That interrogation necessarily involves consideration of the context and background.

[53] The Arbitrator was careful to identify the evidence he regarded as relevant. He did not stray beyond the pleaded practices in making his award. He did not determine any peripheral issue or grant any relief beyond that sought in Anchor's Statement of Claim.

[54] As part of this ground, Engen contends that the Arbitrator should have approached the determination of the issues by identifying the contractual practices that imperilled the relationship between the parties, in this case the

22 *Business Zone* footnote 12 at para 63

practices that according to Anchor imperilled the relationship, namely the late deliveries and/or Engen's refusal to allow Anchor to acquire lesser loads. Engen contends that the Arbitrator failed to correct these practices.

[55] If Engen's ground is to be upheld, then this would mean that an arbitrator decides what contractual practices are the subject matter of the arbitration instead of the claimant. This would be inconsistent with section 12B(4)(a) which provides that an arbitrator "shall determine whether the <u>alleged contractual practices</u> concerned are unfair or unreasonable". (my emphasis). This provisions requires the complainant to determine the subject matter of the arbitration.

[56] As indicated above, Anchor identified the cancellation of the lease and Engen's refusal to allow it to sell its business as the unfair or unreasonable contractual practices which it wished the arbitrator to determine as unfair or unreasonable, both in its request for referral and in its Statement of Claim. These are the two practices which the Arbitrator found to be unfair and unreasonable.

[57] Had the Arbitrator found that other practices, not defined in the referral or the Statement of Claim as the alleged unfair or unreasonable practices, were unfair or unreasonable and made an award to address these practices, no doubt Engen would have reviewed the award on the basis that the Arbitrator had exceeded his mandate.

[58] In the arbitration, Anchor requested the arbitrator to set aside the termination notice of 17 October 2022 and to direct Engen to afford Anchor with an opportunity to sell its business as is provided for in terms of the 2022 lease agreement. That is the award that the Arbitrator gave.

[59] By setting aside the cancellation and directing Engen to afford Anchor an opportunity to sell its business as provided for in the lease, the Arbitrator directly addressed the practices which the claimant had identified. This is not a backward-looking award but deals with the narrow relationship which existed between the parties.

[60] In these circumstances, I am unable to find that the Arbitrator exceeded his powers. He engaged in the correct enquiry, considered evidence he believed to

be relevant to that enquiry, and confined his award to the pleaded practices. Even if he erred in his assessment of relevance, that would be an error of fact or law on the merits, not a reviewable irregularity. As the authorities make plain, an arbitrator has the right to be wrong on the facts and the law.

[61] Accordingly, this ground of review must fail.

ii. The *pacta sunt servanda* ground

[62] Engen contends that the Arbitrator erred in law by finding that the principle of *pacta sunt servanda* did not apply. A reading of the award, however, does not support this contention.

[63] In paragraphs 28 and 29 of the award, the Arbitrator stated:

> "I am in agreement with the submissions made by claimant's counsel in oral argument in reply that, the statutory position is, as stated in paragraph 48 of the Business Zone judgment of the Constitutional Court: 'the real significance of section 12B ... in the equitable standard it imposes. A standard that overrides the terms of their contract to ensure that fairness and reasonableness prevail.
>
> It also follows that what is relevant is to determine the equitable standard of fairness and reasonableness, not whether a provision is 'invalid on account of the fact that it offends public policy'."

[64] The Arbitrator did not find that *pacta sunt servanda* has no application. He correctly recognised that section 12B imposes an equitable standard that operates alongside the contractual terms. This is exactly what the Constitutional Court held in *Business Zone*.[23] The Arbitrator's approach was consistent with the law.

[65] Engen contends that the Arbitrator erred in not applying *pacta sunt servanda* and finding that Engen was justified in its actions.

[66] Such an alleged error is an error on the merits not a procedural irregularity. Such an error is not reviewable under section 33(1)(b).

23 footnote 13

[67] In the premises, this ground of review must fail.

iii. The unequal bargaining power ground

[68] Engen contends that the Arbitrator erred in finding unequal bargaining power relevant and that no case was made out for such finding.

[69] As indicated above, the Constitutional Court has consistently recognised that one of the purposes of section 12B is to address unequal relations of power between licensed wholesalers and retailers.

[70] The Arbitrator's reference to unequal bargaining power was not a finding that such inequality existed in this specific case; rather, it was a recognition of the context in which section 12B operates. He stated:

> "However, that ignores the fact that the standard Operating Lease as negotiated with the National Advisory Council is not site-specific and, in any event as submitted in oral argument by claimant's counsel, the Petroleum Products Act is premised on an unequal bargaining position."

[71] This was not a finding that determined the outcome. It was an observation about the legislative context. Even if it were a finding, it would be a finding on the merits, not a reviewable irregularity.

[72] Accordingly, this ground of review has no merit.

iv. The setting aside of the termination notice

[73] Engen contends that the decision to set aside the termination notice is based on errors of law alternatively was reached by considering facts that were irrelevant and/or by disregarding relevant considerations. The decision is also a direct result of the Arbitrator having exceeded his powers and failing to correct the practices that imperilled the relationship (late deliveries and load restrictions).

[74] Errors of law, taking irrelevant facts into consideration and disregarding relevant facts are not grounds of review in terms of section 33 of the Arbitration Act.

[75] Insofar as Engen contends that the arbitrator exceeded his mandate, this has been dealt with above.

[76] As indicated above, an arbitrator's power to set aside a termination notice was confirmed by the Constitutional Court in *Business Zone*.[24] The Court held that even a single act of cancellation could amount to a contractual practice under section 12B(4)(a) and that the arbitrator's powers could extend to correcting the practice by setting aside the termination and reinstating the contract, but only where there is a relationship that remains in existence either in law or in fact.

[77] The Arbitrator expressly considered this requirement. In paragraph 34 of the award, he noted that in the present case it was common cause that, but for the termination, the Operating Lease would only expire in August 2024. He concluded that it was therefore competent to set aside the termination, which would have the effect of reinstating the contract until it expired by effluxion of time.

[78] The Arbitrator's conclusion that the termination was unfair and unreasonable was based on his assessment of the evidence. He accepted Anchor's version regarding the circumstances surrounding the third-party purchases and found that Engen's termination in those circumstances was unfair and unreasonable. This was a finding on the merits. Whether one agrees with it or not is irrelevant for purposes of this review.

[79] As for the complaint that the Arbitrator failed to correct the practices that imperilled the relationship (late deliveries and load restrictions), this misunderstands the nature of the enquiry. The practice complained of was the termination itself. That is what Anchor sought to have corrected. The underlying reasons for the breach of the Operating Lease (late deliveries, financial difficulties) were relevant to assessing whether the termination was unfair or unreasonable, but they were not themselves the practices sought to be corrected. The Arbitrator did exactly what he was required to do: he determined whether the pleaded practice (the termination) was unreasonable or unfair and, finding that it was, made an award to correct it (by setting it aside).

[80] Accordingly, this ground of review must fail.

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24 *Business Zone* footnote 12 at para 76

v. The opportunity to sell the business

[81] Engen contends that the Arbitrator exceeded his powers by correcting a consequence rather than a practice; that the award is incapable of implementation as the site has ceased trading and Anchor lacks financial resources; and that the Arbitrator failed to consider that the sale provisions in Schedule 3 contemplate a functional, "wet" site.

[82] The practice complained of was Engen's refusal to afford Anchor an opportunity to sell its business. This was pleaded as a separate unreasonable and unfair contractual practice. The Arbitrator found that this refusal was unfair and unreasonable, evidenced *inter alia* by the contents of settlement negotiations and Engen's notification that Anchor should remain in operation on the site.

[83] The remedy granted (directing Engen to afford Anchor an opportunity to sell its business in terms of the Operating Lease) is precisely what Anchor sought. It is a correction of the practice complained of.

[84] Engen's argument that the sale provisions contemplate a functional, "wet" site is an argument about the interpretation and application of the Operating Lease. That is a matter for the Arbitrator, not for this court on review. Even if the Arbitrator erred in his understanding of how the sale provisions would operate, that would be an error of law or fact on the merits, not a reviewable irregularity.

[85] Insofar as it is contended that the award is unworkable, I was not referred to any authority which justifies setting aside an award on this basis.

[86] The power to set aside an award is confined to the statutory grounds in section 33 of the Arbitration Act: misconduct by the arbitrator, gross irregularity in the proceedings, exceeding the arbitrator's powers or improper procurement of the award. That carrying out the award may be difficult, impractical or incapable of performance does not fall within the grounds of review contemplated by section 33 of the Arbitration Act. [25]

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25 *Amalgamated Clothing and Textile Workers Union of SA v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A) at 169B-C; *Telcordia* footnote 12 at para 51; *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) at paras 224 and 235

[87] In the premises, this ground of review must fail.

vi. Error of law so egregious that it amounts to a denial of a fair trial

[88] This point falls within the ground Terms of Reference in the founding affidavit but emerged with greater clarity in argument.

[89] Engen's counsel contended that the Arbitrator failed to apply the trite principles in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*[26] in relation to his factual findings dealing with Engen's alleged late deliveries and the requirement to order a full or half load. Such failure, it is contended, constitutes an error of law that is so egregious that it amounts to a deprivation of a fair hearing.

[90] The parties were *ad idem* that generally errors of law or fact do not constitute a basis for review in terms of section 33 of the Arbitration Act.

[91] Neither the papers nor the argument explains why or how the alleged misapplication of the principles for resolving factual disputes results in a gross irregularity. Such misapplication would result in an error of fact.

[92] In my view, even if there was such a misapplication, it did not prevent Engen from receiving a fair hearing.

[93] This, too, is not a ground which falls within the provisions of section 33 of the Arbitration Act.

vii. Refusal of Engen's application to admit further late discovery

[94] This point arises in the founding affidavit in the Terms of Reference Ground.

[95] The complaint is that the reasons for the ruling have no merit.

[96] This complaint goes to the merit of this ruling.

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26 2003 (1) SA 11 (SCA) at para 5

[97] Accordingly, it does not fall within the review grounds contemplated by section 33 of the Arbitration Act and, so, this ground, too, must fail.

Conclusion

[98] Having considered all the grounds of review advanced by Engen, I am satisfied that none of them establish a basis for review under section 33(1)(b) of the Arbitration Act.

[99] The Arbitrator conducted the proceedings fairly. Both parties were given a full opportunity to present their cases. The Arbitrator considered the evidence, made findings of fact and law, and confined his award to the pleaded practices. He did not exceed his powers. He did not commit any gross irregularity in the conduct of the proceedings.

[100] Engen's real complaint is that it disagrees with the outcome. It seeks to re-argue its case and have this court substitute its view for that of the Arbitrator. This it cannot do. The limited grounds of review contemplated by section 33 of the Arbitration Act have not been established.

[101] In the premises, the application must be dismissed.

Costs

[102] Anchor seeks a special costs order on the scale as between attorney and client, contending that Engen's conduct in launching this application is vexatious and frivolous, and that Engen simply wants to delay and frustrate the execution of the arbitral award.

[103] In *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd*[27], the Supreme Court of Appeal applied the *dictum* from *In re*: *Alluvial Creek Limited*[28], which states that a punitive costs order may be granted where proceedings are vexatious, meaning they have the effect of being vexatious even if the intent was

27 2015 (5) SA 38 (SCA)
28 1929 CPD 535

not that they should be vexatious, where they put the other side to unnecessary trouble and expense which the other side ought not to bear.

[104] While I have found that Engen's application lacks merit, I am not persuaded that it was vexatious or frivolous to the extent warranting a punitive costs order.

[105] In the exercise of my discretion, I consider that the appropriate order is that Engen pay Anchor's costs on the ordinary party and party scale.

Order

[106] In the result, I make the following order:

1. The respondent's application for condonation for the late filing of its answering affidavit is granted.
2. The review is dismissed.
3. The applicant is ordered to pay the first respondent's costs of this application, such costs to include the costs consequent upon the employment of counsel at scale C.

[redacted]

F SOUTHWOOD
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of hearing:	4 February 2026
Date of judgment:	27 March 2026
For the Applicant:	S Aucamp
instructed by:	Mathopo Moshimane Mulangaphuma Inc t/a DM5 Inc

For the First Respondent:	JA Venter
instructed by:	Des Naidoo & Associates