IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

[redacted]

14 April 2026 ______________________

DATE **SIGNATURE**

Case number: 049876/2025

In the matter between:

JVA NETWORKS (PTY) LTD APPLICANT

and

PHAKISA HOLDINGS (PTY) LTD 1ST RESPONDENT

ADV PIERRE ROSSOUW N.O. 2ND RESPONDENT

JUDGMENT

VAN ROOYEN, AJ:

Introduction:

[1] Applicant approached this Court in terms of section 33(1) of the Arbitration Act, 42 of 1965 ("the Arbitration Act") for the review and setting aside of an award made by an arbitrator in private arbitration proceedings. The basis for the application was that the Arbitrator committed a gross irregularity in the conduct of the arbitration proceedings or has exceeded his powers as provided for in section 33(1)(b) of the Arbitration Act in that:

1.1. The Arbitrator was required, based on the pleadings between the parties, to determine the Net Revenue generated as a result of the Engagement Agreement between the parties.

1.2. After determination of the Net Revenue, the Arbitrator had to multiply the Net Revenue with a factor of 1.8 (in terms of clause 8.3.2 of the Engagement Agreement) to arrive at the remuneration payable.

1.3. The interpretation and application of the factor 1.8 on the Net Revenue for purposes of determining the remuneration payable to the applicant was admitted in the statement of defence and common cause between the parties.

1.4. The Arbitrator therefore had to apply the factor of 1.8 on the Net Revenue determined and was not entitled to interpret the agreement to decide whether the factor of 1.8 was indeed applicable.

1.5. In interpreting the agreement and finding that the factor of 1.8 was not applicable to the Net Revenue, the Arbitrator committed a gross irregularity.

[2] Apart from applying for the review and setting aside of the award made by the Arbitrator, applicant also seeks condonation for the late institution of the application insofar as it may be necessary.

[3] In this judgment I will refer to the parties as follows:

3.1. The applicant as “JVA”;

3.2. The first respondent as “Phakisa”; and

3.3. The second respondent as “the Arbitrator”.

[4] Phakisa opposed the application on the following grounds:

4.1. JVA failed to comply with the timeframe provided for in section 33(2) of the Arbitration Act;

4.2. the application amounts to an appeal and not a review under section 33 of the Arbitration Act; and

4.3. the arbitrator was entitled to interpret clause 8 of the Engagement Agreement and therefore did not commit a gross irregularity when finding that the factor of 1.8 should not be applied to the Net Revenue.

Background

[5] On 1 September 2019 JVA and Phakisa entered into an agreement termed "Engagement Agreement" (hereinafter referred to as "the Engagement Agreement").

[6] The Engagement Agreement regulated the remuneration that would be payable by Phakisa to JVA for the sale of a business known as the Valorem Group. The remuneration payable to JVA would be calculated after a period of 12 months based on certain performance parameters.

[7] The Engagement Agreement provided for arbitration procedures should any dispute arise between the parties emanating from the agreement.

[8] A dispute subsequently arose between Phakisa and JVA relating to the remuneration that JVA was entitled to in terms of the agreement. The dispute was referred to arbitration and the arbitration that followed forms the subject matter of the present application.

[9] It is mentioned already at this stage that the parties expressly agreed in the pre-arbitration agreement[1] that the disputes between them shall be defined by the pleadings exchanged in the arbitration.

<u>Condonation</u>

[10] The first issue that I have to adjudicate upon is whether this application was instituted within the peremptory six weeks' period allowed under section 33(2) for the review after publication of the award.

[11] The parties agreed that either party shall, after publication of the award, be entitled to request that the costs award be reconsidered by the Arbitrator.

[12] The award by the Arbitrator was published on 1 November 2024.

[13] Phakisa applied for a reconsideration of the costs award on 4 November 2024. The parties exchanged heads of argument during January and February 2025 and the application for the reconsideration of the costs award was heard on 20 February 2025.

[14] The reconsidered costs award was published on 28 February 2025.

[15] The Arbitrator stated the following in paragraph 53[2] of his reconsidered costs award:

> "*53. For the reasons stated above, the Award dated 30 October 2024 is <u>amended</u> as follows …*" (emphasis added)

[16] The present application for the review and setting aside of the award of the Arbitrator was lodged on 9 April 2025. The application was therefore lodged outside the period of 6 weeks prescribed by section 33(2) of the Arbitration Act if the commencement date for the calculation is taken as 1 November 2024, the date of publication of the initial award. On the other hand, the application will be within the prescribed period of six weeks should the commencement date for the

[1] Case Lines 0001-393 par 5 Annexure "FA4"
[2] Case Lines 0001-678

calculation be taken as the publication of the reconsidered costs award that was published on 28 February 2025.

[17] The argument on behalf of JVA was to the effect that the award dated 30 October 2024 and published on 1 November 2024 was only a preliminary award and should not be the determining date for purposes of calculating the six-week period provided for in section 33(2) of the Arbitration Act.[3]

[18] I am not persuaded that the Arbitrator's award dated 30 October 2024 was a preliminary award as contended for.

[19] I am also not convinced that the remission of the costs award necessarily caused the first award to be suspended. The amendment / variation related only to the issue of costs and did not impact on the merits.

[20] For the reasons that follow hereinafter, it is not necessary to further deal with this issue in detail. As is apparent from what is found hereinafter, I am of the view that a proper case has been made out for the condonation of the late filing of the present application insofar as it may be necessary.

[21] I had regard to JVA's prayer for the extension of the time period in terms of section 38 of the Arbitration Act.

[22] Section 38 of the Arbitration Act reads as follows:

> "*38. Extension of periods fixed by or under this Act*
>
> *The court may, on good cause shown, extend any period of time fixed by or under this Act, whether such period has expired or not*."

[23] In exercising my discretion I had regard to all relevant facts, inclusive of the explanation for the delay and the prospects of success.

---

[3] Case Lines 0001-45 par 113

[24] I am of the view that the explanation proffered by JVA for the delay in bringing the application is satisfactory. I am further of the view that JVA established good cause, and its prospects of success are good.

[25] The six-week period allowed for under section 33(2) of the Arbitration Act is herewith extended and condonation is granted for the late filing of the application.

<u>Appeal or Review</u>

[26] JVA approached this Court in terms of section 33(1)(b) of the Arbitration Act for the setting aside of the award alleging that the Arbitrator committed a gross irregularity in that he misconceived the nature of the enquiry or his duties and/or he exceeded his powers.

[27] Section 33(1)(b) of the Arbitration Act provides as follows:

> "*33. (1) Where –*
>
> *(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or. umpire; or …*
>
> *(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 application of any party to the reference after due notice to the other parties, make an order setting the award aside.*
>
> *(2) An application pursuant to this section shall be made within six weeks after the publication of the award to the parties: Provided that when the setting aside of the award is requested on the ground of corruption, such application shall be made within six weeks after the discovery of the corruption and in any case not later than three years after the date on which the award was so published.*
>
> *(3) The court may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.*

(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."

[28] Phakisa contends that the application is not a review but instead an attempt at an appeal[4].

[29] In considering this issue I will first have regard to Clause 8 of the Engagement Agreement that deals with the formula for the calculation of the remuneration payable by Phakisa to JVA. Clause 8 of the Engagement Agreement reads as follows:

"*8. The parties hereby record that remuneration will be calculated in accordance with the following formula:*

8.1 the remuneration payable to the consultant will be based on expected projected parameters of the Business for the Revenue period;

8.2 the expected Gross Revenue is projected at R26 1000.00, less the direct operating costs of R14 166 000.00, resulting in the expected Net Revenue being projected at R11 800 000.00;

8.3 should the Net Revenue as foreseen in clause 8.2 above be less than R11 800 000.00 then:

8.3.1 as a remedy, an amount equal to the reimbursements from the employee tax incentive scheme as generated from the services of the business during the Revenue Period, as well as an amount equal to the provisions made in terms of such services for sick leave and family responsibility leave of seasonal, cyclical or periodic fixed term contract and which have not been incurred in the Revenue Period, will be added to the Net Revenue;

---

[4] Case Lines 0003-7 par 10

8.3.2 after the above remedy has been applied, the consultant will be remunerated, for the calculated Net Revenue, multiplied by a factor of 1.8;

8.3.3 in the event that the calculated Net Revenue exceeds the R11 800 000.00, the excess will be paid to the consultant by the client at a factor of 1 to 1."

[30] It was found by the Arbitrator that the Net Revenue was R 11 623 041.00, therefore less than R 11 800 000.00.[5] This determination of the Net Revenue by the Arbitrator was accepted as correct by all parties to the application.

[31] It is evident from the pleadings that both JVA and Phakisa were of the view that the factor 1.8 (referred to in clause 8.3.2) should be applied in arriving at the amount of remuneration payable. The following is relevant with reference to the pleadings:

31.1. In JVA's amended statement of claim it pleaded that the Net Revenue was less than R 11 800 000.00 and the factor 1.8 was applied.[6]

31.2 In JVA's alternative claim, it also pleaded that the Net Revenue was less than R 11 800 000.00 and the factor of 1.8 was applied.[7]

31.3. In Phakisa's amended statement of defence, Phakisa pleaded that the Net Revenue was less than R 11 800 000.00 and therefore applied the factor of 1.8.[8] The factor of 1.8 was applied by Phakisa, despite the fact that no provision is made for any ETI or Sick and Family Responsibility leave as per clause 8.3.1 of the Engagement Agreement. Put differently, Phakisa applied the factor 1.8 even if no remedy is proved under clause 8.3.1 of the Engagement Agreement.

[5] Case Lines 0001-628 par 114
[6] Case Lines 0001-19 to 0001-20
[7] Case Lines 0001-21
[8] Case Lines 0001-21 to 0001- 22 par 48 to 50; and Annexure "FA5"

31.4 Phakisa regarded the factor 1.8 to be applicable throughout its pleadings. This is illustrated by its preceding remuneration calculations.[9]

[32] It is therefore clear that both parties accepted the factor 1.8 to be applicable if the Net Revenue was less than R 11 800 000.00.

[33] I am therefore satisfied that it was common cause between the parties that the 1.8 factor must apply in determining the remuneration and it would render it unnecessary for any party to adduce evidence to prove it.[10]

[34] When considering the award by the Arbitrator it is evident that the Arbitrator did not apply the 1.8 factor:

"*138. Because of JVA's failure to prove ETI reimbursements and provision for sick leave and family responsibility leave of seasonal, cyclical or periodic fixed-term workers which have not been incurred, the remedy provided for in clause 8.3.1 cannot be applied. Clauses 8.3.2 and 8.3.3 also cannot be applied, because the introductory words of clause 8.3.2, "After the above remedy" has been applied ... " indicate that application of the remedy is a requirement*."[11]

[35] The Arbitrator interpreted the Engagement Agreement and found that the factor of 1.8 did not apply for purposes of determining the remuneration payable to JVA. The Arbitrator disregarded the fact that both parties accepted in the pleadings that the factor of 1.8 will apply in the event that the Net Revenue was found to be less than R11 800 000.00. The Arbitrator further disregarded the concession made by Phakisa during the arbitration proceedings that an amount of R 79 000.00 in respect of ETI ought to be included.

[36] It appears that JVA's complaint relating to the Arbitrator's gross irregularity revolves around his jurisdiction to interpret and apply clauses 8.3.2 and/or 8.3.3 of the Engagement Agreement rather than confining himself to the pleadings[12].

---

[9] Case Lines 0001-22 par 52 and "FA6"0001-402; 0001-404 "FA7"
[10] *Gordon v Tarnow* 1947 (3) SA 525 (A)
[11] Case Lines 0001-635 par 138
[12] Case Lines 0001-14 par 29 and 0001-15 par 32

A further ground for review relates to the Arbitrator's failure to consider the concession made during the arbitration that an amount of R 79 000.00 for ETI had to be included in the calculation.[13]

[37] It is settled law that an arbitrator has no jurisdiction to deviate from the pleadings as it has no inherent jurisdiction to do so.[14] An arbitrator who decides issues which are common cause and which are not canvassed in the pleadings amount to gross irregularity under section 33(1)(b) of the Arbitration Act.

[38] What is also relevant, is the express agreement between the parties in the pre-arbitration agreement that disputes between them shall be defined by the pleadings exchanged in the arbitration.

[39] I am of the view that the Arbitrator went beyond the pleadings and the common cause issues, and he disregarded a concession made. I am therefore of the view that the Arbitrator exceeded his powers and committed a gross irregularity as envisaged in terms of section 33 of the Arbitration Act.

[40] JVA seeks an order that the arbitration award be reviewed and set aside and that the dispute be referred to the Arbitrator for purposes of making a new arbitration award.

[41] Having considered the papers, I make the following order:

41.1. The time period prescribed by section 33(2) of the Arbitration Act, 42 of 1965, for the filing of this application is extended in terms of section 38 of the Arbitration Act, 42 of 1965, and the late filing of this application is condoned;

41.2. The arbitration award made by the Second Respondent dated 30 October 2024, and as amended by the arbitration award dated 26 February 2025, is reviewed and set aside;

[13] Case Lines 0001-32 par 84

[14] Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd & Others 2008 (2) SA 608 (SCA)
Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266

41.3. The arbitration between the Applicant and the First Respondent is referred to the Second Respondent for purposes of making a new arbitration award;

41.4 The First Respondent is ordered to pay the costs of the application on scale B, such costs to include the costs of two counsel.

[redacted]

M VAN ROOYEN

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

This judgment was prepared and authored by the judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 13 April 2026.

APPEARANCES:

For the Applicant	:	R Grundlingh
		TJ Jooste
Instructed by	:	VFV Attorneys
		Ref: T van Wyk / 180904
For the Respondent	:	M v R Potgieter SC
		C Gibson
Instructed by	:	Sekekal Simmons Attorneys
		Ref: JH Senekal / JAS / P508MAT10970
Matter heard on	:	2 February 2026
Judgment date	:	14 April 2026