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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A516/25

In the matter between

TRANSPENINSULA INVESTMENTS (PTY) LTD APPELLANT

AND

THE CITY OF CAPE TOWN FIRST RESPONDENT

JAN CHRISTIAAN HEUNIS SC SECOND RESPONDENT

CORAM: CLOETE, J *et* THULARE, J *et* O'BRIEN, AJ

Heard: 20 FEBRUARY 2026

Delivered electronically: 25 MAY 2026

ORDER

1. The appeal is dismissed with costs on scale C, including the costs of two counsel.

2. The order of the court a quo is confirmed, save that para 2 thereof is amended to read as follows:

   'The determination of claim D (which for sake of clarity includes the respondent's counterclaim) is referred to a new arbitrator. The new arbitrator shall be appointed by agreement between the parties within 20 calendar days from date of this order, and failing agreement, within a further 20 calendar days by the Chairperson of the Legal Practice Council from the ranks of an advocate or attorney with at least 15 years experience including arbitration experience.'

JUDGMENT

THULARE, J (CLOETE, J *et* O'BRIEN, AJ concurring separately):

[1] This is an opposed appeal against the decision of the court of first instance wherein it reviewed and aside the award of the 2nd respondent in a dispute between the appellant (TPI) and the first respondent (the City) (the parties). The court of first instance refused an application for leave to appeal, which application was granted by the Supreme Court of Appeal. The second

respondent did not participate in any of the proceedings in respect of the review of his award.

[2] TPIs case is that the application to review the arbitration award was fatally flawed as it alleged only errors of law and fact, not procedural irregularities or actual excesses of powers, and sought to re-argue the merits; that the arbitrators interpretation of the parties agreement and his assessment of the evidence, even if mistaken, were merits issues, unrelated to the conduct of the arbitration; that the court of first instance ignored the binding authority, overstepped its limited review powers, conflated review and appeal, and set aside awards untouched by procedural defects and that the court referred the matter to a new arbitrator despite the parties preference for remittal to the same arbitrator.

[3] The position of the City is that the appeal had to be dismissed primarily on two grounds, which were the grounds of review:

3.1 The arbitrator did not determine all the pleaded issues in dispute between the parties. Regrettably, the arbitrator's failure was premised in part, on a misunderstanding of the parties' joint agreement on the quantum of claim D, (Noticeably in the court of first instance the appellant did not dispute the terms of this agreement). This constituted a gross irregularity in the conduct of the arbitration proceedings; and

3.2 The arbitrator (a) went beyond that which was at issue between the parties in relation to claim D and (b) granted relief that was never sought by the appellant or ventilated at the arbitration. Consequently, the arbitrator

overstepped his mandate to adjudicate the claim D dispute, and in doing so exceeded his powers in a manner severely prejudicial to the City, resulting in millions of rands of public fund having to be paid out twice.

[4] The parties had two competing interpretations of Table 4 of annexure A within the broader context of their agreement. The City pleaded that it compensated TPI for the provision of the tyres category of the kilometre-related costs for 9m buses provided for in Table 4 of Annexure A of the agreement, and that it compensated TPI for brake pads and brake discs in terms of the other category of the kilometre-related costs for the 9m buses as set out in the same Table and Annexure. The City denied TPIs alleged terms alternatively that TPIs construal of the agreement was at all viable. The City accepted that there was no similar express provision for the payment of the costs of brake discs and pads, however its version was that 23% of the 14.33% allocated to other in Table 4 was in fact allocated to brake pads and discs. TPI received for year 1 to 5 R2 612 601 under the tyre portion and R2 870 291-00 under other, a total consideration of R5 482 892-00. The pleadings and the parties agreed minute regarding the quantum of claim D did not delineate between ordinary wear and tear and a risk portion for the tyres.

[5] The agreement between the parties, on the initial maintenance period, provided for the City to negotiate the benefit of various vehicle maintenance agreements from relevant City vehicle suppliers and which agreements covered each City vehicle in the initial fleet for the initial maintenance period. All maintenance repairs which did not fall within the parameters of the vehicle maintenance agreements was to be promptly carried out by the operator at its own costs in terms of a preventative maintenance programme. During the initial

maintenance period, the specific maintenance provisions set out in annexure L of the agreement applied. In terms of annexure L, there was a Busmark Fleet management Agreement between the City and Busmark (2000) (Pty) Ltd in terms of which the maintenance and servicing of all vehicles (chassis and body) must be carried out by Busmark and/or its subcontractors over the initial period of 3 years or 240 000km whichever occurred first and the Busmark agreement was provided to TPI. The Busmark agreement excluded maintenance or repairs required due to abuse, incidents and accidents and these were for the operator's account. Where Busmark responsibility was excluded, the operator would be liable for the relevant risk, maintenance or work. In terms of Annexure L, the operator would receive free of charge from Busmark the following tyres and spare parts for each vehicle after which the operator would be liable for the cost of subsequent replacements: 6 new tyres, 4 brake pads and 4 brake discs and Busmark would return used tyre casings to the operator. The brake testing fell outside the scope of the Busmark agreement and was to be carried out by the operator every 5000km at its own cost. The Maintenance Plan was for 3 years or 240 000km service and maintenance parts on chassis and body work components. The City was to extend to 5 years from the date of commencement of operators agreement with an option to extend to 6 years should the City elect to tender the work.

[6] TPI, as operator, was liable for further maintenance obligations which included regular servicing, maintenance and repair of all vehicles for the remaining period of the agreement. The maintenance and repair obligations included the repair and replacement of tyres and/or wheels subject to accident damage, excessive wear and tear and uneven wear, and the operator always had to adhere to the tyre specifications determined by the City from time to time. The parties agreed to review the 9m vehicle maintenance.

[7] Busmark was contracted for 3 years to amongst others main the chassis and bodies of the 9km vehicles, the initial maintenance period. The operator was obliged to commence the maintenance of the 9km vehicles immediately upon expiry of the maintenance contract with Busmark or its relevant subcontractor. Due to inadequate reliable information on the cost and life expectancy of major parts under the South African Bus Rapid transport conditions, the operator was unable to predict the future maintenance costs for the 9m vehicles without being exposed to unacceptable risk. It was acknowledged that the initial maintenance period did not allow for sufficient time to collate reliable data pertaining to maintenance costs excluding tyres, as failure rates of components were typically lower for new vehicles than for vehicles which had operated a higher number of kilometres. This informed the decision to extend the initial maintenance period to 5 years with either Busmark or another maintenance service provider, to allow for the establishment of a reliable history regarding maintenance costs and contributing component life cycles subject to further provisions, which included maintenance monitoring and enhanced information gathering through scout vehicles.

[8] Scout vehicles were designated vehicles constituting 10% of all 9m vehicles, rounded downwards to disregard fractions, required to run at the maximum number of scheduled kilometres possible in preference to other 9m vehicles with the aim of establishing the likely maintenance costs of the 9m vehicles. The comprehensive exercise of monitoring the scout vehicles included identification of imported components that could be substituted by local products including but not limited to window glass, body parts, brake friction material, seats, filters, radiators and electrical component substitutes. The maintenance service provider and operator were still obliged to utilize genuine

original equipment components exclusively in respect of all safety critical component replacements such as suspension, steering and brake callper components unless the City agreed otherwise thereto in writing beforehand. The City was to conduct a review of the actual life of the major parts, which were set out as the drive-train components which were the engine, gearbox and differential.

[9] The costing model agreed to was the one referred to in the Operational Specifications Schedule as a guide for the basis upon which they were to seek to reach agreement with regard to the kilometre-related rate to be paid to the operator in respect of the maintenance of the 9m vehicles for the remaining 7 year period of the agreement and having regard to the weighting allocated to maintenance costs within the 9m vehicle kilometre rate as set out in Table 4 of the Operator Specific Addendum. The parties were to commence their negotiations to reach an agreement at the start of the 54th month to finalise by no later than the 56th month following the commencement date. The revised kilometre-related rate agreed was to be implemented with effect from the 61st month following the commencement date. Should the parties fail to reach agreement, the maintenance contract with the relevant maintenance service provider would be extended for a period of 1 year subject to the City's supply chain management policy to afford the City an opportunity to advertise the maintenance of the 9m vehicles for the remainder of the period of the agreement by way of a tender process in which the operators fee per kilometre was to be adjusted accordingly.

[10] The kilometre-related rates agreed to in Table 1: Table of Rates for the 9m vehicles was R5.95 for year 1 to 5 and R10.54 for year 6 to 12 as provided

in Annexure A, the Operator Specific Addendum. Table 4 of Annexure A provides for the proportional weights for costs adjustment reflecting average weight of the different cost components across the vehicle operators as referred to in the Cost Adjustment Schedule and as required in the agreement. For the 9m vehicle, for tyres the proportion was 3.00% for year 1 to 5 and 2.66% for year 6 to 12. For other the proportion was 14.33% for year 1 to 5 and 49.96% for year 6 to 12. The remaining percentage for each periods was for fuel to add to a total of 100%. The proportion for kilometre-related rate for the vehicle maintenance for the 9m vehicle for years 6 to 12 was 46.91%.

[11] The principal issue on appeal is whether grounds existed in terms of section 3(1)(b) of the Arbitration Act, 1965 (Act No. 42 of 1965) (the Act) for setting aside the three awards in respect of claim D, or any of them. Section 33(1)(b) of the Act provides that:

33 Setting aside of award

(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.

Paragraphs 211 to 213 of the Arbitration award reads as follows:

211. I am therefore of the view that there is a *lacuna* in the agreement i.e. that the parties must have intended provision of compensation for tyres and brakes after the first 3 years in respect of years 4 and 5 or that they were, mistakenly, under the impression that such provision had in fact been made.

212. This follows from the fact that such provision as had been made in the agreement in respect of the 9m initial maintenance period i.e. the free tyres, brake pads and brake discs, was intended to be compensation in respect of years 1 to 3 only and not beyond that even

though it had been foreseen that TPI would not become responsible for maintenance during years 4 and 5 of the 5 year initial maintenance period.

213. I am therefore able to find that there is a *lacuna* inasmuch as there is, in effect, no provision for what the parties, given various provisions of the Agreement, must have intended, i.e. compensation in respect of tyres, brake discs and brake pads during the years 4 and 5 of the Agreement.

[12] The dispute in relation to claim D arose in relation to the payment of replacement tyres, brake pads and brake discs on the 9m buses operated by TPI. TPI contended that the agreement required the City to be liable for those costs, whilst the City contended that the agreement required TPI to pay. The arbitrator was called upon, by interpreting the agreement, to determine which of the parties was required to pay for the replacement of the tyres and brakes. It was common cause between the parties that the liability was either that of the City or TPI. None of the parties pleaded a *lacuna* in the agreement. But most importantly, The City's case was that it already compensated TPI for the provision or the obligation to maintain tyres in terms of the tyre category of the kilometre-related cost for 9m buses as provided for in Table 4 Annexure A of the agreement as well as for brake pads and discs in terms of the other category of the kilometre-reated costs. The arbitrator did not evaluate or consider this aspect of the pleaded defence and the evidence in relation thereto. This was a material issue in dispute between the parties and evidence was led in relation thereto. Furthermore, the City argued that if needed, calculation of TPIs contractual damages should consider the consideration that TPI was already paid for tyres and brakes and was to be deducted from any monetary award determined. These were pleaded and argued, but not dealt with in the award. The quantification of the damages was an issue in dispute, and was not adjudicated. TPI, in opposition, simply sought to advance its own analysis and findings on the pleaded case.

[13] The parties did not negotiate a revised kilometre-related rate from year 6 onwards. It was not a pleaded issue in dispute. The arbitrator has no power to make an agreement for the parties. TPI itself did not seek an order wherein until the kilometre-related rate was increased, it assumed the responsibility to maintain the 9m vehicles and that the City remained responsible for the cost of provision for tyres, brake pads and brake discs. There was no such cause of action before the arbitrator. TPI understood that it was not yet responsible for the major vehicle service, which is the most comprehensive type of vehicle service, with a full inspection of the vehicle. It includes the outside of the vehicle, hinges and latches, and the timing belt. This is where every defect will be checked and replaced if necessary. In a major vehicle service the technician works through a comprehensive checklist that insures the vehicle is inspected from head to tail. If the technician detects any problems during the service, TPI would receive a quote for any additional work that might be required [*The difference between a major service and a minor service,* M[...], 30 January 2023].

[14] The complaint by the City that the arbitrator's failures were in part premised on the misunderstanding of the parties' agreements cannot be faulted. The brake friction material includes brake lining, brake pads, discs and drums (*Comprehensive Review on Brake Friction Materials,* DN Kumar, Vijayakumar and G Murali, Journal of Polymer and Composites, Engineering Journals, Researchgate.net publications, 31 January 2024). These components, together with the tyres condition, tread depth and pressure forms what is commonly referred to as minor services of vehicles [*The difference between a major service and a minor service,* M[...], 30 January 2023], which the parties agreed would take place every 5000km.

[15] Whilst the brake friction material was included in the scout vehicles, against the background of the intended purpose of identification of imported components that could be substituted by local products, except for filters the other components which formed the subject matter of the study were what the parties agreed their cost and life expectancy was unpredictable before some exposure to actual use. The research to which the scout vehicles were subject, were to deal with that challenge, to wit, the cost and life expectance of major parts under the South African Rapid Transport conditions, to enable the operator to predict the future maintenance costs for the 9m vehicles without being exposed to avoidable risk which would be unacceptable. The parties clearly identified the drive-train, that is the engine, gearbox and differential as major parts with high value. These are not parts that require attention every 5000km, just like products like window glasses, body parts, seats, radiators and electrical components which were also added in the study but may require attention after 5 years of actual use on the road. The products implicated in minor services did not require years to have an idea of the risk to which one would be exposed. It is the products implicated in the minor service which were the subject matter of the dispute between the parties. It was tyres, which were excluded from the study, and brake discs and brake pads, which did not require years to study as envisaged in the scout agreements. The parts in dispute were in use, frequently under assessment and attention, to determine their life cycle and costs in the project and did not require beyond 3 years or 240 000km to determine their cost and life cycle.

[16] *Palabora Copper (Pty) Ltd v Motlokwa Transport and Construction (Pty) Ltd* (298/2017) [2018] ZASCA 23; [2018] 2 All SA 660 (SCA); 2018 (5) SA

462 (SCA) (22 March 2018) at para 8, with reference to section 33(1)(b) of the Act, it was said that:

[8] This provision was the subject of detailed consideration by this Court in *Telcordia*. It suffices to say that where an arbitrator for some reason misconceives the nature of the enquiry in the arbitration proceedings with the result that a party is denied a fair hearing or a fair trial of the issues that constitutes a gross irregularity. The party alleging the gross irregularity must establish it. Where an arbitrator engages in the correct enquiry, but errs either on the facts or the law, that is not an irregularity and is not a basis for setting aside an award. If parties choose arbitration, courts endeavour to uphold their choice and do not lightly disturb it. The attack on the award must be measured against these standards.

The parties were agreed that one of them was liable for the tyre, brake pads and brake discs costs in terms of their written agreement. The issue was which one of them. The arbitrator did not decide on this issue but made a different determination which was not pleaded, with no opportunity granted to the parties for argument being advanced to the arbitrator as to why this was or was not appropriate. The arbitrator did not direct his mind to the central issue in the dispute. Furthermore, the City's case was also for a determination to be made in relation to what it already paid for the tyres and the brake pads and brake discs, and the City was entitled to a decision on the issue. It was for TPI to allege as it did, and prove, the fact of loss and the amount thereof [*Aucamp v Morton* 1949 (3) SA 611 (A); *Palabora* para 31]. Breach of contract is not in itself a wrong carrying an award of damages unless the aggrieved party has suffered patrimonial loss [*LAWSA* Vol 7 (2 ed, 2005), sv 'Damages' para 47 and the cases cited in fn 2; *Palabora* para 31]. The arbitrator did not find that TPI had established its tacit term or that it had in fact suffered a loss because of the alleged breach. The arbitrator made a prospective order on his award in circumstances where the relief was not sought.

[17] In *OCA Testing and Certification South Africa (Pty) Ltd v KCEC Engineering Construction (Pty) Ltd and Another* (1226/2021) [2023] ZASCA 13 (17 February 2023) at para 31 and 32 it was said that:

[31] However, what then followed was that the arbitrator inexplicably dismissed the claim in its entirety without, for once, engaging in any analysis in regard to the legitimacy or otherwise of the amounts claimed pursuant to the second and third agreements. That OCA Testing had elected to claim a composite amount combining three separate agreements was beyond question and the arbitrator, too, was cognisant of this fact. Thus, in failing to address the residue of the claim, just as he had done with the component of the claim flowing from the first agreement, the arbitrator effectively closed off his mind to the fundamental question that he was called upon to answer, namely whether OCA Testing's claim for the residual amount – that had its genesis in the second and third agreements – was sustainable. In my view, this omission prevented a fair trial of the totality of the issues and therefore amounts to a gross irregularity.

[32] In summary therefore, I am satisfied that OCA Testing has established that there is good cause to remit the dispute to a new arbitrator. As I have already found, this must be so because the arbitrator in this matter failed to deal with all the issues that were before him. As already indicated, we are here not dealing with a situation where the arbitrator got it horribly wrong without more, in which event there would have been no basis to disturb the award. Rather, he simply overlooked some of the crucial issues that he was required to determine. Section 28 of the Act explicitly provides that absent an agreement between the parties to the contrary, an award shall, subject to the provisions of the Act, 'be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms.' And as Harms JA forcefully put it: '[A]n arbitrator "has the right to be wrong."' Consequently, where an arbitrator errs in his or her interpretation of the law or analysis of the evidence that would not constitute gross irregularity or misconduct or exceeding powers as contemplated in s 33(1) of the Act.

[18] All these gross irregularities were done in good faith, but the cumulative effect was to deprive the City of a fair trial of these issues. It follows that the

decision in claim D of the award could not stand. In its notice of motion the City had prayed for remittal to the arbitrator alternatively to a new arbitration tribunal constituted in the manner directed by the court. Section 33(4) of the Act provides that if the award is set aside the dispute shall at the request of either party be submitted to a new arbitration tribunal constituted in a manner directed by the court. The City expressed as a preference submission to a new arbitration tribunal. Save for the amendment to the order proposed by Cloete J, I am unable to find anything wrong with the order of court. For these reasons I would make the order.

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DM THULARE

JUDGE OF THE HIGH COURT

CLOETE, J (O'BRIEN, AJ concurring):

[19] I have had the benefit of reading the judgment of my colleague, Thulare J. Although I agree with the outcome proposed, save for an amendment to the court a quo's order, I arrive at the outcome by a somewhat different route.

[20] In order to provide context, I will briefly sketch the background although it overlaps to a degree with Thulare J's summary thereof. For convenience, I refer to the appellant as 'TPI'; the first respondent as 'the City', and TPI and the City collectively as 'the parties'.

[21] The arbitrator's award (the award) covered four claims brought by TPI against the City, which were referred to in the arbitration as claims A, B, C and D. The City's review application which served before the court a quo was directed only at the award in respect of claim D, which read as follows:

"235.1 the Respondent *(the City)* is ordered to pay the Claimant *(TPI)* the amount of R2 721 670-19, being the fair and reasonable cost incurred by it between 1 February 2017 and 31 October 2018 in respect of new and recapped tyres, brake pads and brake discs as well as interest on the aforesaid amount at the legal rate *a tempore morae;*

235.2 it is declared that until the kilometre-related rate is increased as provided for in the Table of Rates and the Claimant assumes responsibility for the maintenance of the 9m vehicles, the Respondent remains responsible for the cost of the provision of tyres, brake pads and brake discs for those vehicles as may be reasonably required with the exclusion of maintenance or repairs required due to abuse, incidents or accidents which will be for the Claimant's account.

236. The Respondent's counterclaim is dismissed."

[22] The City's counterclaim pertained to repayment of R7 001 244 'and all further sums incurred subsequent to November 2021 to date and yet to be incurred by the respondent *(the City)* for the replacement of tyres, brake pads and brake discs' together with interest thereon.

[23] Claim D and the City's counterclaim were both the subject of the proper interpretation of certain portions of a written agreement concluded between the parties during August 2013. This was a vehicle operator agreement for the provision of a bus-based public transport service in respect of Phases 1A and 1B of an Integrated Rapid Transit System within the City's metropolitan area (the

IRT system). In terms thereof, TPI was to provide a public transport service on certain designated routes utilizing 9m, 12m and 18m buses for a period of 12 years from 1 November 2013 until 31 October 2025.

[24] On 17 May 2018, TPI declared a dispute in relation to claim D. TPI took issue with the City's interpretation of the agreement in relation to the provision of tyres, brake pads and brake discs (other than those pertaining to abuse, incidents and accidents, in respect of which there was no dispute that TPI would be liable therefor). According to the City, there would only be one free issue by it of these items during the lifespan of the agreement. According to TPI, it was entitled to one free issue during the first three years, and another free issue thereafter once a new maintenance contract was awarded.

[25] Prior to commencement of the arbitration, the parties agreed to a joint minute regarding the quantum of TPI's claim in respect of claim D (joint minute). The joint minute made it clear that the agreed quantum was dependent upon a finding of liability on the part of the City in respect of the unit price for the items fitted to the 9m busses. The joint minute also expressly recorded (in para 5) that 'although the parties have agreed the quantum as stated in paragraph 3, the reason for the replacement has not been agreed'. In other words, even if the City was found to be liable – depending upon which of the competing versions the arbitrator accepted as being the proper interpretation of the relevant portions of the agreement – what would still need to be determined by the arbitrator was which items had been damaged due to ordinary wear and tear, and which had been damaged due to so-called risk or abuse. TPI bore the onus in this regard.

[26] The written arbitration agreement made no provision for an appeal. The arbitrator interpreted the relevant portions of the vehicle operator agreement and found against the City in respect of claim D. He thus also dismissed its counterclaim.

[27] Given that the arbitration agreement precluded any appeal from the arbitrator's award, the City was limited to pursuing a review in terms of s 33 of the Arbitration Act.[1] As stated by Thulare J, the City relied on s 33(1)(b), namely that where 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…make an order setting the award aside."

[28] The City relied on both elements in s 33(1)(b). The first ground of review was that the arbitrator did not determine all the pleaded issues in respect of claim D because his findings were premised, in part, on a misunderstanding of the joint minute (the 'gross irregularity' element). The second ground of review was that the arbitrator: (a) went beyond that which was at issue between the parties in relation to claim D; and (b) granted TPI relief that was never sought by it, or even ventilated in the arbitration (the 'exceeding of powers' element.)

[29] Before the court a quo the City also sought an order remitting the matter to the arbitrator, alternatively submitting the matter to a new arbitration tribunal. At the hearing before the court a quo the City indicated its preference for the alternative relief in this regard.

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1 Arbitration Act 42 of 1965.

[30] The court a quo set aside the impugned award and referred claim D to a new arbitrator to be agreed between the parties, and failing agreement, an arbitrator appointed by the Legal Practice Council. Each party was directed to pay its own costs. TPI's application for leave to appeal failed before the court a quo. The Supreme Court of Appeal subsequently granted leave to a Full Court of this Division. TPI thus seeks to set aside the order of the court a quo and replace it with one that the arbitrator's award is made an order of court in terms of s 31 of the Arbitration Act.

[31] As previously indicated, the issues in dispute before the arbitrator in respect of claim D were not only the resolution of two competing interpretations of the vehicle operator agreement, but also, if he found against the City, the extent of the City's liability on quantum as formulated in the joint minute. The City contends that the arbitrator failed to determine the second leg.

[32] It was also common cause that the parties had not negotiated a revised rate for the maintenance of tyres and brake pads and discs from year 6 onwards (the second period). The arbitrator found that upon a proper interpretation of the relevant portions of the vehicle operator agreement, TPI would only be liable for these costs if a rate could be agreed upon between the parties for TPI to take over the maintenance of the 9m busses. Despite this finding, the arbitrator then made an award that *until* the rate had been agreed, the City would have to pay TPI for all its maintenance costs.

[33] The City argues that the arbitrator, in so doing, made an agreement for the parties which he was not permitted to do, and thus exceeded his powers. This, says the City, is exacerbated by the fact that clause 45.4.10 of the vehicle

operator agreement expressly precludes from arbitration a failure to reach agreement in respect of a revised rate for the second period.

[34] Regrettably, in its judgment the court a quo conflated the two distinct grounds of review. It also impermissibly entered into the merits of the dispute, and did not deal at all with the City's counterclaim. To this extent, it is perhaps understandable that TPI pursued an appeal, although an appeal lies against the order of a court, and not its reasoning or findings.[2]

[35] I now deal with TPI's opposition to the City's review grounds. First, TPI submits that the 'gross irregularities' identified by the City relate to the arbitrator's reasoning; and the City does not complain that it did not receive a fair hearing in the 'method' or 'conduct' of the arbitration, which is the true test.

[36] This submission fails to withstand scrutiny. The arbitrator was bound to determine all the issues before him. It is not contended by TPI – at least with any vigour – that he did so. The failure to determine an agreed issue in dispute goes directly to the conduct of the arbitration proceedings, and constitutes a gross irregularity. In addition to the authorities referred to by Thulare J, it was stated in *Goldfields* [3] that:

"It seems to me that gross irregularities fall broadly into two classes, those that take place openly, as part of the conduct of the trial- they might be called patent irregularities- and those that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given by him and which might be called latent…the law, as stated in *Ellis v Morgan*

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2 *Absa Bank v Mkhize and two similar cases* 2014 (5) SA 16 (SCA) para 64. See also *Neotel (Pty) Ltd v Telkom Soc Ltd and Others* (605/16) [2017] ZASCA 47 (31 March 2017) paras 22-24.

3 *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another* 1938 TPD 551 at 560.

(supra) has been accepted in subsequent cases , and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and bona fide, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to gross irregularity…if, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity." (my emphasis)

[37] As to the second ground (the exceeding of powers complaint) TPI's argument proceeds as follows. It was common cause that the parties had not negotiated a revised rate applicable from year 6. The City had even pleaded this in its statement of defence in the arbitration. The arbitrator therefore did not need to decide the issue, nor did he attempt to – it was a given. Accordingly, for the City to contend that it was not an issue in dispute is meaningless. Moreover, on a proper construction of the pleadings and vehicle operator agreement, it fell within the arbitrator's powers to make the award that he did.

[38] TPI relies on an alleged finding by the arbitrator of the existence of a tacit term in its favour. Nowhere in the award did the arbitrator specifically find that such a term was proven. Further, TPI itself conceded in heads of argument filed on its behalf that 'the arbitrator did not make a separate award in which he specifically declared his interpretation of the agreement, but it is clear what his interpretation was'. [4]

[39] No relief was sought before the court a quo for a declarator, and understandably so, given that this is not a review power. However, as pointed

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[4] Appellant's heads of argument para 68.

out by the City, the arbitrator did not uphold either party's contentions in respect of liability for tyres, brake pads and brake discs from year 6. In other words, he did not accept either party's interpretation of the disputed clauses in the vehicle operator agreement.

[40] Instead the arbitrator made an order akin to interim, but open ended, relief, namely that until such time as agreement on the revised rate was reached, the City was liable to pay all TPI's maintenance costs. He clearly exceeded his powers in doing so, since no general discretion had been conferred upon him under the terms of the arbitration agreement.

[41] In any event, as was reiterated by the Constitutional Court in *Mphaphuli*[5] quoting *Interbulk*[6]:

"The essential function of an arbitrator, indeed a judge, is to resolve the issues raised by the parties…if an arbitrator believes that the parties or their experts have missed the real point …then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of material justice to put the point to them so that they have an opportunity of dealing with it ."

[42] The effect of the arbitrator exceeding his powers was highly prejudicial to the City. It is unclear how, if at all, the City could have compelled TPI to negotiate with it for purposes of reaching agreement on a revised rate, and there was no incentive for TPI to have done so either, given that the City was to pay for all of TPI's maintenance costs until such an agreement was reached.

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5 *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) para 168.
6 *Interbulk Ltd v Aidan Shipping Co Ltd, The 'Vimiera'* [1984] 2 Lloyd's Rep 66.

[44] There is one final aspect. Para 2 of the court a quo's order reads as follows:

"2. The matter is referred to a new arbitrator to determine claim D within 20 days from the date of this order and failing such agreement an arbitrator shall be appointed by the Legal Practice Council of South Africa from amongst the senior advocates, and or senior attorneys with the requisite experience in arbitration proceedings of not less than 15 years."

[45] What the court a quo must have meant was that the referral, not the determination, of claim D was to occur within 20 days. This is an error which we can correct. It is also prudent to make it clear that the determination of claim D includes the City's counterclaim.

[46] The following order is made :

1. The appeal is dismissed with costs on scale C, including the costs of two counsel.

2. The order of the court a quo is confirmed, save that para 2 thereof is amended to read as follows:

   'The determination of claim D (which for sake of clarity includes the respondent's counterclaim) is referred to a new arbitrator. The new arbitrator shall be appointed by agreement between the parties within 20 calendar days from date of this order, and failing agreement, within a further 20 calendar days by the Chairperson of the Legal Practice Council from the ranks of an advocate or attorney with at least 15 years experience including arbitration experience.'

_____

JI CLOETE

JUDGE OF THE HIGH COURT

I agree,

_____

S O' BRIEN

ACTING JUDGE OF THE HIGH COURT

Appearances

For appellant:	Advocate D Melunsky
Instructed by:	Ward Brink Attorneys
For first respondent:	Adv N Bawa SC
	Adv G Solik
Instructed by:	Mulangaphuma Incorporated t/a DM5 Incorporated
For second respondent:	Abides (no appearance)