



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: **047694/2025**

(1) REPORTABLE: no
(2) OF INTEREST TO OTHER JUDGES: no
(3) REVISED:
SIGNATURE 15 MAY 2026 DATE

In the matter between:

PROFOOD AFRICA (PTY) LIMITED

Applicant

And

ADVOCATE DH WIJNBEEK

First Respondent

STEINWEG (PTY) LTD

Second Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such 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 handing down is deemed to be 15th May 2026.

JUDGMENT

RETIEF J

INTRODUCTION

[1] The applicant, Profood Africa (Pty) Limited [Profood], by way of an arbitral review seeks to set aside an interim arbitration award delivered on the 18th of February 2025 [the award] by the first respondent, Advocate DH Wijnbeek [the arbitrator]. The award has final effect [the award]. Profood brings its review relief in terms of section 33 of the Arbitration Act 42 of 65 [the Act] and seeks this Court, to *inter alia*, remit the dispute to a new arbitration tribunal.

[2] For introductory purposes it is meaningful to mention the background of the main claim serving before the arbitrator. In the main claim the second respondent, Steinweg (Pty) Ltd [Steinweg] claimed payment from Profood, an importer, for clearing and forwarding services which it provided to Profood as its clearing agent. Profood in its amended statement of defence and claim in reconvention denied that Steinweg complied with its Standard Clearing and Forwarding Trading Terms and Conditions [the agreement] and, in its claim in reconvention, *inter alia*, sought an order declaring clause 4.2 of the agreement, a disclaimer clause, *pro non scripto* on the basis that Mr Payton, a director of Profood was not aware of clause 4.2 and that if he was, he would not have contracted with Steinweg or, he would have procured the deletion of clause 4.2. Furthermore, Profood sought to assert a tacit or implied term of the agreement that it would not be liable for the payments made by Steinweg on its behalf for storage, demurrage, detention and transport charges if such were incurred as a result of negligent (gross negligent) delays on the part of Steinweg.

[3] Flowing from such claim in reconvention, and by consensual agreement both parties agreed that the applicability of clause 4.2 should be considered as a separate issue from the main application. In so doing, it was agreed that the arbitrator would be seized with determining:

- 3.1. whether clause 4.2 was to be treated as unenforceable and/or *pro non scripto*; and

- 3.2. whether there was a duty on Steinweg to point out the existence of clause 4.2 of the agreement to Michael Payton of Profood.

[4] It is common cause that goods were not cleared within the grace period afforded by the shipping line and/or port authorities, attracting penalties. The arbitrator accepted Steinweg's interpretation of clause 4.2 and Profood now dissatisfied wishes to review the arbitrator's decision.

[5] The thrust of Profood's review relief is that the arbitrator misconceived the whole nature of his inquiry in that he failed do what he was enjoined to do, he failed to direct his mind to the true question with reference to Goldfields Investment matter.¹ To distil the misconception Profood's Counsel in written argument submitted that the arbitrator failed to enquire whether clause 4.2 was at variance with what "*-Steinweg holds out to the public that it will clear their goods asap whilst the clause provides that "time is not of the essence" and that, therefore, all responsibility is disclaimed in respect of all delays no matter how long and irrespective of whether this is due to gross negligence (or even wilfulness) on Steinweg's part.*" In this way Profood argues that the arbitrator failed to apply the test as formulated in the Du Toit v Atkinson matter² [the Du Toit test] to determine when the maxim *caveat subscriptor* principle applied. Furthermore, Profood argues that the arbitrator failed to apply the test as set out in the Constantia Insurance Co Ltd v Compusource (Pty) Ltd³ matter by failing to determine whether Steinweg had a duty to bring clause 4.2 to Mr Payton's attention [Constantia test].

[6] Steinweg conversely contends that the Goldfield's matter finds no application in the matter and, that the application itself is both *male fide* and legally untenable. It suggests that it is *male fide* because Profood is no more than a poor loser seeking to deprive Steinweg of the fruits of its labour and, is legally untenable, as stated in written argument, "*-because the consequence of the award does not amount to an*

¹ **Goldfields Investment Ltd and another v City Council of Johannesburg and Another** 1938 TPD 551 [Goldfields matter].

² 1985 (2) 893 [Du Toit].

³ 2005 (4) SA 345 (SCA). [Constantia matter].

irregularity.” It contends that the process adopted by the arbitrator was sound and the outcome, even if wrong, is not reviewable.⁴

[7] Against this introduction it is convenient now to consider the legal principles regarding a review of an arbitration award.

LEGAL PRINCIPLES REGARDING ARBITRATION REVIEWS

[8] The provisions of section 33 of the Act are exhausted on the grounds for a review of awards in consensual arbitrations.⁵ And aggrieved party wishing to successfully review an arbitration award must bring his or her case squarely within the four corners of the relevant provisions of section 33 of the Act. The primary principle is that material errors in an award, that is, errors which lead to a party being unsuccessful, are not reviewable otherwise the distinction between appeals and reviews would be eroded in section 33 of the Act and permissively becomes a right of appeal of arbitration decisions.⁶

[9] If relying on section 33(1)(b) it is the conduct of the proceedings and not the result or outcome which is to be the nub of the complaint. A *bona fide* mistake in respect of the merits, no matter gross, does not fall within the purview of section 33(1)(b). Therefore, not every irregularity and the conduct of the proceedings will afford grounds of review: the irregularity must be serious resulting in an aggrieved party’s case not being fully and fairly determined.⁷ This is so as it should ordinarily be accepted that when parties submit to arbitration, they submit to a process they intend should be fair.⁸

⁴ **Telcordia Technologies Inc v Telkom SA** [2006] 139 SCA (RSA) [Telcordia matter].

⁵ **Dickson & Brown v Fisher’s Executors** 1915 A.D. 1966 at 174–175; **Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun** [1993] ZASCA158; 1994(1) SA162 (A) at 169.

⁶ Footnote 4, par 59 to 60 and 68.

⁷ **Bester v Easigas (Pty) Limited and Another** 1993 (1) SA 30 at 42J.

⁸ **Lufuno Mphaphuli & Associates v Andrews** 2009 (4) SA 529 (CC) at 560.

[10] In the Goldfields Investment matter,⁹ the Court held, as regards what would constitute a gross irregularity, albeit in the context of a review of magistrate court proceedings, that:

“The crucial question is whether the [irregularity] prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect... If, on the other hand, the [magistrate] merely comes to 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 in matters relating to the merits the magistrate may by taking a wrong one of several possible views, or he may by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. Where the point relates only to the merits on the case it would be straining the language to describe it as a gross irregularity or denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law.”¹⁰ (own emphasis)

Simply put:

“And a regularity in proceedings does not mean an incorrect judgment, it refers not to the results, but to the methods of a trial... Which has prevented the grieved Party from having his case fully and fairly determined.”

[11] A gross irregularity may include a decision-maker misconceiving the mandate. In Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd.¹¹

“It suffices to say that where an arbitrator for some reason misconceives the nature of the inquiry in the arbitration proceedings with the result that a party

⁹ Footnote 1 at 560.

¹⁰ Footnote 1, Telcordia matter, par 73.

¹¹ [2018] ZASCA.23; 2018 (5) SA 462 (SCA) at par 8.

is not a fair hearing or 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 inquiry, but errs either on the facts or the law, that is not an irregularity and is not a basis for setting aside the award (own emphasis). If parties choose arbitration, courts endeavour to uphold their choice and do not lightly disturbed. The attack on their ward must be measured against these standards.”

[12] Against these legal principles it is opportune to deal with the ambit of the applicable terms of the arbitration agreement and the award.

THE ARBITRATION AND THE ARBITRATOR’S AWARD

[13] It is common cause that in terms of clause 33 of the arbitration agreement, the parties agreed that “...all disputes concerning the validity, interpretation (as in this case-own emphasis) enforcement, performance and termination of these STC’s, shall [failing negotiation] be finally settled by arbitration...”.

[14] It is clear therefore that the arbitrator was authorised to decide the issues before him and it therefore flows that he was entrusted to find the relevant facts and to decide the legal issues.¹²

[15] Counsel for Steinweg confirmed further that at the first pre-arbitration conference on the 18th of January 2024, the parties agreed that a valid arbitration agreement existed, that the arbitrator had been properly appointed and that the pre-conditions for arbitration had been met. Steinweg also wished to advance that it proposed that the parties reserve themselves a right of appeal in view of the fact that the arbitration agreement did not provide for it. Profood rejected the proposal.

[16] It is common cause that the consensual mandate of the arbitrator was to interpret clause 4.2 and to determine two primary questions referred to earlier in this judgment.¹³

¹² **Johannesburg City Council v Chesterfield House (Pty) Ltd** 1952 (3) SA 809 at 825 (AD)

¹³ Paragraph [3].

[17] In context, clause 4.2 reads as follows:

"notwithstanding any representations made by Company (Steinweg - own emphasis) regarding any times or delivery dates for performance by the Company (Steinweg - own emphasis), these times and delivery dates are estimates only, and it is agreed that in so far as the Company (Steinweg - own emphasis) is concerned time shall not be of the essence and any delay in the Company (Steinweg - own emphasis) performing any of its obligations will not entitle the Customer (Profood's - own emphasis) to cancel any contract or claim damages."

[18] During the proceedings, the arbitrator heard oral evidence from both parties. Although it is not for this Court to consider the evidence, the Court does observe that the summarised evidence which was captured by the arbitrator sets out the material primary facts from which the Du Toit and the Constantia tests could be applied.

[19] Mr Payton's, the Managing Director of Profood, evidence in short is that he was not influenced by any recordal regarding time on Steinweg's website when he signed the agreement, that time is of essence in imports, that he did not read or appreciate clause 4.2 and that if he had, he would not have signed the agreement. It is common cause that he had the agreement at his disposal for more than three days before he signed it and that he confirmed he was at liberty to take legal advice. He persisted that the clause was exceptional.

[20] Mr Lutchman's, the Key Accounts Manager, evidence in short was that although the import documentation was under Steinweg's control the actual product was not, that Steinweg was not the cause of delays nor was it able to prevent delays, that delays were a normal occurrence in the industry, that every importer knows the risks namely that a clearing agent cannot guarantee the clearing goods on time. He testified to the fact that whilst clearing agents accept that time is of the essence, that every clearing agent will seek to avoid storage costs, different role players, beyond the control of a clearing agent are involved. Email documentation was presented to

illustrate that Mr Luchtman chased Profood for their documentation to avoid demurrage and storage costs.

[21] After summarising all the evidence the arbitrator dealt with, recorded and applied the principles governing the interpretation of documents as set out in the matter of Joint Municipal Pension Fund vs Endumeni Municipality.¹⁴ In so doing, he concluded that clause 4.2 must be interpreted contextually and purposefully. Applying the interpretation principles, he formulated certain views which he set out in paragraph [18] of the award. The formulated views were that he did not regard clause 4.2 unusual,¹⁵ that he did not view that it misled the reasonable person,¹⁶ nor that Steinweg had a duty to point it out to Profood.¹⁷

[22] In paragraph [19], the arbitrator explained why he held the views as expressed in the preceding paragraph [18]. In other words, paragraph [19] mainly set out his reasoning.

[23] In conclusion, the arbitrator accepted Steinweg's interpretation of clause 4.2 and made the following order:

"22. I accordingly formed the view that:

22.1 Clause 4.2. All the agreement (as defined in the claimant statement of claim) cannot be treated as unenforceable or pro non-scripto; and

22.2 There was no duty on the claimant to point out the existence of clause 4.2 of the agreement to Mr Payton of the defendant."

THE REVIEW AND THE GROUNDS

¹⁴ 2012 (4) SA 593 (SCA) at par 18, 603F-604C.

¹⁵ Footnote 3.

¹⁶ Footnote 2.

¹⁷ *Ibid.*

[24] It is trite that the grounds for any review as well as the facts and circumstances upon which an applicant wishes to rely must be set out in the founding affidavit. Furthermore, in review proceedings these grounds of review may be amplified in the supplementary affidavit after the record from the presiding officer, if based on new information having become available as a result of the record, can be filed. Profood did not bring the application in terms of rule 53 and in consequence, no record was sought nor provided. Profood's review is to be adjudicated on its filed founding papers.

[25] At this point it is relevant to point out that Profood made no mention in the founding papers to which sub-section of section 33 of the Act it relied in support of prayer 1. It too, did not deal with whether and/or which of the misdirections it relied on which constituted a "*gross irregularity*" resulting in an unfair hearing.¹⁸ Profood's Counsel in written argument simply stated that "*The Founding Affidavit lists the respects in which the Arbitrator's award constitutes an irregularity within the meaning of section 32 of the act,-*". Profood was simply relying on an irregularity and in consequence, no mention was made of an unfair result to constitute a gross irregularity. Furthermore, no specific mention of section 33(1)(b) was made by Profood in its papers nor in written argument. The Court tried therefore to ascertain whether the incorrect reference to section 32 in Counsel's heads of argument was merely a *bona fide* typing error. This was done by raising the reference to section 32 during argument. Profood's Counsel either chose to disregard any invitation to address whether it was an error or, he simply did not recognise the incorrect reference to section 32 in his heads of argument. None the less, it is therefore left to this Court to deal with. In the absence of Steinweg taking the point, this Court accepts it was merely a typographical error and therefore considers the wording of section 33 as against reference to it application in the Goldfields matter as raised by Profood.

[26] The provisions of section 33(1) of the Act reads:

"Where-

¹⁸ Telcordia at [73].

- (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 the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside."

[27] The grounds of review relied on by Profood in its founding papers were described as misdirections. Mr Payton, the deponent amplified the misdirections, the thrust of which were directed at paragraph [19] of the award as a means to expose the rational expressed by the arbitrator for coming to the views he did. Mr Payton clearly took issue with the arbitrator's interpretation of clause 4.2, its commercial reach and what his own evidence was.

[28] According to Profood's founding papers, the misdirections relied on are that the arbitrator completely misapplied the legal test (Du Toit and Constantia test); the arbitrator misconceived the case before him and lastly, that he failed to interpret the relevant clause (clause 4.2) and/or if he did, he did so incorrectly. As a consequence Profood alleges under oath that: "*17.4 As a consequence, failed to any extent, address the issues so raised, either properly or at all* (own emphasis).

[29] The review grounds, as raised are to be dealt with.

COMPLETELY MISAPPLIED THE LEGAL TEST/S

[30] To commence, in oral argument, Counsel for Profood pegged the irregularity on the arbitrator's failure to apply the Du Toit test and went further by submitting that if the arbitrator did apply the test, he got it terribly wrong. This is probably why this ground is advanced in the founding papers as a misapplication of the legal test and not a failure to apply the legal test at all. Misapplying the test whether completely or

not surely accepts that the test, whether the Du Toit or Constantia test, as advanced by Profood, was indeed applied but, was “*mis*”-applied or applied incorrectly or ill-applied. This means that the arbitrator did engage with and apply his mind to the test or tests but somehow, according to Profood, erred on the facts or law and/or applied it incorrectly.¹⁹ This understanding of the review ground fits snugly into the submission of their Counsel when, he in argument, submitted that if the arbitrator applied the test he got it terribly wrong. This does not amount to a failure to apply the tests but rather amounts to an alleged misdirection/s when applying what he was asked to do in the first place.

[31] To amplify, the award itself demonstrates that the arbitrator indeed applied both the Du Toit and Constantia tests. This is evident from the views formulated by the arbitrator in paragraph [18] of the award. To recap, in paragraph [18] the arbitrator stated that he did not regard clause 4.2 unusual. To come to this conclusion, he would have to have engaged with the evidence to decide whether a contextual interpretation of clause 4.2, within the industry, was unexpected or novel or indeed onerous. By coming to a conclusion, he must have engaged with and applied his mind to the Constantia test. If the outcome is wrong, it does not mean he did not apply nor that he misapplied the test. It is common cause that other agreements used in the industry were tendered into evidence. Steinweg also specifically dealt such clauses in each agreement found in the industry in their answering affidavit. Profood did not engage with any of clauses in reply.

[32] The arbitrator too held the view that clause 4.2 did not mislead the reasonable person nor, that Steinweg had a duty to point it out to Profood. To come to this conclusion, he would have to consider the Du Toit test, namely whether the exception to the general rule of maxim *caveat subscriptor* applied to the facts. According to the recorded evidence, Mr Payton acknowledged that he was not induced by any representation “*promises*” regarding time made by Steinweg on their website when he signed the agreement. His own evidence is contrary to the basis upon which Profood’s Counsel made the submission that “*Steinweg holds out to the public that it will clear their goods asap whilst the clause provides that “time is not of the essence”*” to support the argument that Steinweg should have pointed clause

¹⁹ See footnote 11.

4.2 out to Mr Payton and not remained silent. Absent evidence to support being induced by Steinweg's public representation which representation appeared at variance with clause 4.2, the arbitrator to come to the view that clause 4.2 did not mislead nor that Steinweg had to point it out to Mr Payton, he would have had applied his mind to the Du Toit test. This is so because the principle in the Du Toit matter applies when, on the facts, the conclusion of an agreement is induced by a representation which later, is found to be at odds with a clause in the contract. In such an event, the clause is to be brought to contracting parties attention. Absent an induced representation, it follows that the arbitrator, whether correct or not, was open to take the view that the reasonable man was not misled by clause 4.2 therefore no obligation arose for Steinweg to point it out to Mr Payton and furthermore that whether he read it or not was of no moment. He determined then that the exception to the maxim *caveat subscriptor* rule did not apply. An answer to the Du Toit point. Any argument that the arbitrator did not apply or engage with the Du Toit test at all is a stretch too far. Profood's argument on this basis stands to be rejected.

[33] In consequence, the arbitrator applied the test/s whether the outcome of such application to the material facts was right or wrong. Being wrong, does not constitute an irregularity nor did Profood rely on such misapplication as a gross irregularity constituting an unfair determination of the issues as a consequence, therefore, this ground, as raised, must fail.

MISCONCEIVED THE CASE IN FRONT OF HIM AND FAILED TO INTERPRET THE RELEVANT CLAUSE OR DID INTERPRET IT, BUT INCORRECTLY

[34] To misconceive a case as relied on with reference to the Goldfields matter, is to be reminded that it is a complaint that strikes to the arbitrator mistaking or misunderstanding the point in issue. The consequence of which is that an aggrieved party is thereby not afforded a fair trial. But as explained in the Goldfields matter, this may not always be the case because "[W]here the point relates only to the merits on the case it would be straining the language to describe it as a gross

irregularity or denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law."²⁰

[35] This is exactly the case made out in the founding papers which is considered together with the absence of an allegation of unfairness. To not agree with the interpretation of clause 4.2 by the arbitrator after he considered it does not morph into mistaking or misunderstanding the very point of issue before him.

[36] Furthermore, having already found that the arbitrator did not misapply the test/s, and reconsidering yet again what the SCA in the *Palabora v Cooper* matter²¹ said, when it spoke to this point, this Court is reminded that "*Where an arbitrator engages in the correct inquiry, but errs either on the facts or the law, that is not an irregularity and is not a basis for setting aside the award.*" There is little doubt the arbitrator clearly understood the case before him and what he had to do. The process was clear and he engaged with the task, applied the tests and formulated a view. Whether Profood agrees with his interpretation of clause 4.2 and how he applied the test/s is not the basis for a review.²² He decided the case fairly even if he went wrong on the law.

[37] The probability that the arbitrator did not misconceive the case was anticipated by Profood in that they also raised an alternate ground, namely that the arbitrator did interpret clause 4.2, but did so incorrectly. In the quoted words of Hoexter JA as relied on by Harms AJ in *Telcordia*:

"[85] - It cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the country and interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by a court."

²⁰ Footnote 3, *Telcordia* at [73].

²¹ Footnote 11.

²² *Telcordia* from par [85].

[38] The inevitable conclusion is that Profood must fail on the grounds as raised.

COSTS

[39] As far as costs are concerned there is no reason why costs should not follow the result. Steinweg moves for a punitive cost order on the basis that the application was thinly veiled in an attempt to re-argue the merits of the separated hearing which is not the purpose of review and a section 33 and, secondly, that Profood neglected to disclose many material facts and otherwise attempted to mislead this Court, even if by failing to provide context in connection with many of its allegations. On this basis, Steinweg argues that the application is *male fide* and amounts to an abuse of process. Lastly, it argues that the application is vexatious relying on the cost and time associated with opposing this ill-conceived application.²³

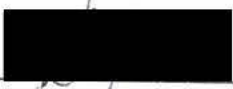
[40] Steinweg's claim for punitive costs was not met by Profood in written nor oral argument. A lack of opposition is not the determining factor but rather a consideration of the basis relied on by Steinweg. This Court agrees that Profood's application was thinly veiled and that includes its reply to Steinweg's opposition but having said that it did not amount to a re-argument of the merits because Profood did not deal with the merits in its application, it centred its attack on points of argument. This Court did not find that Profood attempted to mislead the Court by not disclosing material facts. The material facts were to be found in the award itself which was annexed to its founding papers. Having regard to Steinweg's argument that the application was *male fide*, vexatious and an abuse of process, this is not supported by the procedural facts. The outcome of this matter is important to both parties and it is common cause that no appeal lies against the issues determined on arbitration therefore, the omission by the arbitrator to specifically refer to the Du Toit matter may very well have raised a concern for Profood, even if found otherwise.

[41] Having regard to the argument, this Court is not inclined to award punitive costs.

²³ **Alluvial Creek Ltd** 1929 CPD 532-535.

[42] The following order:

1. The application is dismissed.
2. The Applicant is ordered to pay the Second Respondent's costs, Counsel's fees taxed on scale C.


L.A. RETIEF

Judge of the High Court
Gauteng Division

Appearances:

For the Applicant:	Adv R Van Riet SC Tel: 021 423 1304
Instructed by attorneys:	Pepler O'Kennedy Tel: 021 204 0959 Email: andre@po.legal sherri@po.legal
For the Second Respondent	Adv M De Oliveira Cell: 082 497 5124 Email: macro@maisels3.co.za
Instructed by attorneys:	HBGSchindlers Attorneys Tel: 011 568 8500 Email: binneman@hbgschindlers.co.za powell@hbgschindlers.co.za

Date of hearing: 29 April 2026

Date of judgment: 15 May 2026