IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

High Court Case No.: 2025-042293
Reportable

In the matter between:

RYAN DELPORT	**First Applicant**
UDICKA DELPORT	**Second Applicant**
And	
JONATHAN W MITCHELL N. O	**First Respondent**
LEVEL CONTRACTORS (PTY) LTD	**Second Respondent**

Coram: Kusevitsky J
Heard: 06 May 2026
Delivered: 21 May 2026 (delivered electronically)

Flynote: **Arbitration** – Award – Review under S 33 of the Arbitration Act – Setting aside of interim award due to procedural irregularity – gross irregularity in proceedings –

Arbitration - *audi alteram partem* rule - Procedural Fairness – Fair Hearing - Parties agreement to adjudicate point *in limine* without the need to call witnesses does not mean procedural fairness in hearing to be disregarded – Failure amounts to gross irregularity.

Contract – Cancellation – Repudiation – Alternative claim for breach of contract on the grounds of repudiation requires evidence based enquiry.

Summary: Arbitrator upheld the Second Respondent's point *in limine* and made an interim award on the merits of the matter without the parties presenting evidence on the merits. Effect of the dismissal of the point *in limine* final in effect for the applicants. Granting an interim award and upholding a counter-claim in the absence of evidence led in the main hearing constitutes a gross irregularity which vitiates the proceedings. Remittal back to a new constituted tribunal in terms of section 33 (4) of the Arbitration Act, 42 of 1965.

ORDER

1. The first respondent's interim arbitration award dated 10 February 2025 (handed down on 17 February 2025) ("the interim award") is reviewed and set aside pursuant to the provisions of subsections 33(1)(a) and 33 (1)(b) of the Arbitration Act 42 of 1965.

2. The dispute between the applicants and the second respondent is submitted for adjudication before a new arbitration tribunal constituted in accordance with clause 13.2 of the Master Builders South Africa House and Small Contract Agreement between the parties pursuant to the provisions of section 33(4) of the Arbitration Act.

3. The second respondent is ordered to pay the costs of the application which costs are to include the cost of counsel where so employed on Scale B.

JUDGMENT

KUSEVITSKY J

[1] The applicants (and/or "Claimants") seek an order reviewing and setting aside an interim arbitration award handed down by the first respondent, ("the arbitrator") on 14th February 2025, made pursuant to the provisions of sections 33,1(a) and (b) of the Arbitration Act 42 of 1965, ("the Act"), and for the remittal of the dispute for adjudication before a new arbitration tribunal pursuant to the provisions of Section 33(4) of the Act.

Background

[2] It is common cause that during July 2021, the applicants and second respondent ("Level Contractors") concluded a Master Builders South Africa agreement ("MBSA") in terms whereof second respondent undertook to perform construction work at the applicants' residence. In terms

of the agreement, second respondent took occupation of the construction site on 7 July 2021 and commenced with construction work. The date upon which they undertook to finalize the work was around 19 November 2021. By 3 February 2022, applicants averred that the work was still not complete.

[3] In order to mitigate their loss, they decided to retake occupation of the property. They aver that subsequent to moving back into the home, they noticed work had suffered from various serious patent and latent defects, which resulted in *inter alia* multiple water leaks and sagging of the roof. The applicants complain that various correspondence between them and the second respondent ensued, wherein second respondent was alerted to the purported serious defects in the work. They aver that second respondent failed to either complete the work or to arrange a final inspection of the property as contemplated by the provisions of Clause 9.1 of the MBSA.

<u>The referral of arbitration</u>

[4] Having received no cooperation from second respondent, a complaint to the Master Builders Association Western Cape ("MBAWC") was made by the applicants, whereafter on 3rd July 2023, the latter advised the applicants to refer the matter to arbitration.

[5] During the initial stages, neither of the parties were legally represented. MBAWC nominated the first respondent to arbitrate the dispute. On 28 August 2023, a preliminary arbitration meeting was held between the parties at the arbitrator's offices.[1] It was agreed that the arbitrator would arbitrate the dispute between the parties, and the dispute was summarized in clause 2 of a minute as follows:

> "In brief, [the applicants allege] that the work is incomplete and/or defective, whilst Level avers that it is still owed payment from the applicants."

[6] At the time neither of the parties were represented and it was accordingly decided at the meeting that the arbitration would be conducted under the 2021 Edition for the Rules for the conduct of Arbitrators as published by the Association of Arbitrators of South Africa. If the parties were not legally represented, the arbitration would be conducted under the Restricted Representation Arbitration rules. It was further agreed that an inspection *in loco* would be held on 4 September 2023 at the site.

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[1] The minutes of the preliminary meeting reflect a date of 22 August 2022

[7] In their statement of claim, the applicants claimed that they were entitled to cancel the MBSA agreement because of second respondent's breach by not completing the work. Alternatively, that second respondent had repudiated the MBSA agreement, that the applicants accepted the repudiation, elected to cancel the agreement and were thus entitled to claim damages from Level Contractors.

[8] After the exchange of pleadings, the parties agreed during pre-arbitration proceedings that a point *in limine*, which was raised by second respondent, would be determined prior to the hearing of any evidence or determination of the balance of the issues which stood for adjudication.

[9] The point *in limine* related to the manner in which the applicants purported to cancel the MBSA agreement. The second respondent averred that, in essence, the aforementioned contract contained a *lex commissoria* in terms whereof the applicants were obligated to afford Level Contractors an opportunity to remedy defects in the construction works within a specified period before their entitlement to cancel the MBSA agreement accrued.

[10] Clause 12 of the Master Builders Agreement contains the default clause, stipulated as follows:

> "12.1.4.
> "12.1: Should the contractor make default in any of the following respects –
> …
> 12.1.4, refuses after notice in writing from the employer to remove defective work or improper materials within a reasonable time, then such default shall continue for seven calendar days after a written notice has been given to the contractor from the employer specifying the same."
> The employer may, without prejudice to any other rights he may have in terms of this agreement or in law, cancel the agreement.
> In such event, the contractor shall be liable for damages incurred by the employer by reason of such default."

<u>The inspection in *loco.*</u>

[11] On 4 September 2023, the parties attended an inspection *in loco* at the site. Pursuant thereto, the arbitrator compiled a report of observations comprising 40 pages of photographs and descriptions of defects in the works pointed out to him by the applicants.

[12] At the second preliminary arbitration meeting, neither party intended to be legally represented, and the arbitration hearing was scheduled for 14 March 2024. On 5 March 2024,

the arbitrator gave written notice to the parties that he intended to deal specifically and exclusively with the points *in limine* raised by second respondent at the hearing on 14 March 2024. On 14 March 2024, the parties attended the first arbitration hearing.

The first arbitration hearing dated 14 March 2024

[13] The applicants represented themselves and Mr. Welby Solomon represented the second respondent. According to the founding affidavit, at the commencement of the proceedings, the arbitrator remarked that it appeared from the form of the pleadings delivered by second respondent, specifically with reference to the points *in limine* raised therein, that Level Contractors had obtained some form of legal advice. The arbitrator, following discussions, adjourned the hearing in order for the applicants to consider obtaining legal advice for the purpose of properly addressing the legal issues raised in second respondent's pleadings.

[14] Subsequently, and after obtaining legal advice on 16 April 2024, the applicants delivered their notice of intention to amend their statement of claim. After having objected to the notice to amend, the arbitrator having ruled that leave to amend was granted and the objection dismissed – the applicants filed their amended statement of claim. The relevant portion reads as follows:

> "21. By reason of the Respondent's unabated breach of contract, the claimants are entitled to cancel the MBSA agreement and claim damages from the Respondent.
> 22: Alternatively, and by reason of the respondent's repudiation of the MBSA agreement, the Claimants have elected to,
>
> 22.1, accept the respondent's repudiation of the MBSA agreement.
> 22.2, cancel the MBSA agreement, alternatively, hereby cancels the Agreement; and
> 22.3, claim damages from the Respondent."

[15] Thus, in the alternative to their grounds of cancellation based on second respondent's breach of the MBSA agreement, the applicants included at paragraph 22 of the amended statement of claim, a claim for cancellation based on second respondent's repudiation and applicants' acceptance thereof.

[16] On 31 May 2024, second respondent addressed correspondence to the applicants, wherein it took issue with the purported cancellation of the MBSA agreement. As an aside, this was highly irregular – not that anything turns on this - given that the arbitration proceedings had already commenced, albeit postponed and the arbitrator had ruled that the applicants were entitled to amend their statement of claim. In any event, referring to the applicants claim in paragraph 20 of their amended claim which states the following - "*The Respondent's default has continued for more than 7 days after the various written notices from the Claimants, as envisaged by Clause*

12.1.4 of the MBSA Agreement" , the second respondent advised that it had not received any notices from the applicants in terms of clause 12.1 4 of the MBSA agreement; that they did not have a default notice in their possession; have not been provided with the requisite time to remedy their alleged breach and accordingly, were unsure of which notices were being referred to in the applicants amended statement of claim.

[17] The second respondent also referred to paragraphs 21 and 22 of the amended statement of claim and commented as follows in paragraph 6 of that letter:

> "As per the respondent's statement of defense and counterclaim, it is clear that an amount of R144,300.96 became due and payable on 3 February 2023. The claimants have neglected and/or refused to pay this amount to us and are therefore in breach of Clause 11.7 of the MBSA Agreement.

[18] The second respondent further contended in the letter that a party could not terminate an agreement if that party was in breach of the same agreement; that it was clear that the claimants had exhibited a deliberate and unequivocal intention to no longer be bound by the provisions of the MBSA Agreement and that the claimants have expressly repudiated the MBSA Agreement. They therefore advised that '*in the circumstances this repudiation of the MBSA agreement by the claimants is accepted and the MBSA Agreement is hereby canceled'*. They furthermore iterated that they first came to know of the applicants/claimant's purported cancellation of the MBSA Agreement upon reading their submissions on the points *in limine* and their amended statement of claim.[2]

[19] On 17 November 2023, the second respondent submitted its statement of defense and counterclaim and on 19 June 2024 it filed its amended statement of defense and counterclaim. In it, it raised two points *in limine*. The first point *in limine* pertained to applicants' failure to follow correct contractual procedure for their alleged cancellation of the agreement. The second respondent also averred that the agreement made no provision which entitled the applicants to appoint third-party contractors to complete the works and/or rectify any alleged defects.

[20] Various points were raised and I deal with some to the extent necessary. In paragraph 14 of the point *in limine*, the second respondent avers that the applicants have not cancelled the MBSA Agreement and in the circumstances have no right to claim for damages; the claimant's remedy in the event that it is entitled to any relief, lies within the MBSA Agreement; If the claimants are of the view that the second respondent refuses or fails to perform, it is incumbent

[2] Clauses 9 and 10 of the letter dated 31 May 2024

on the claimants to cancel the MBSA Agreement and claim damages in the correct manner[3]; that the claimants have not cancelled the MBSA Agreement and in the circumstances have no right to claim for damages[4]; The claimants have thus failed to prove their contractual entitlement to claim monetary relief and damages and in the result, the claimant's claim for monetary relief to complete the works and/or to rectify any alleged defects and the claim for consequential damages should be dismissed with costs on the basis that it has failed to prove a contractual entitlement for its claims.[5]

[21] On 4 February 2025, the arbitrator sent the parties a further letter, which related to, *inter alia*, the relying of expert witnesses, and also indicating the date and time upon which the hearing of the matter was to resume. At paragraph 4 of the letter, the arbitrator confirmed that the matter would commence with the point *in limine* raised by the second respondent. It states as follows:

> "4. At the commencement of the arbitration hearing, we will need to commence with the point in limine raised by respondent in this matter. Evidence may be led, and argument may be heard, and I may be required to publish an interim award after the point in limine has been determined.
> 5. Without prejudging the merits of either party's case in any way whatsoever, and in order to remain completely impartial, which I shall do throughout these arbitral proceedings, the outcome of the point in limine may have a significant effect on the further issues to be determined by arbitration. However, it is my practice to take one step at a time, and I reiterate that the arbitral proceedings will commence with determining the respondent's point in limine, being, 'Claimant's failure to follow the correct contractual procedure for the claimant's alleged cancellation of the contract.'"

Applicants' contentions

[22] The parties filed heads of argument. In paragraph 2 of the second respondent's heads of argument, they characterized the issues for determination *inter alia* as follows:

> *"Did the applicants correctly cancel the MBSA agreement in paragraph 21 of the applicants' amended statement of claim?*
> *Did the applicants correctly cancel the MBSA agreement in paragraph 22 of their amended statement of claim?*
> *Were the applicants in material breach when they attempted to cancel the agreement?"*
> *Did second respondent correctly cancel the MBSA agreement in its letter dated 31 May 2024?*

[3] para 15 of the Second Respondent's Statement of Defence and Points in *Limine*
[4] para 18 supra
[5] paras 19 and 20

[23] The applicants contend that the arbitrator agreed with this characterization of the issues to be determined at paragraph 47 of his interim award and determined all the issues as if he had heard the evidence. The applicants contend that all of the issues outlined by the second respondent's heads of argument, except for the first item, fell beyond the scope of the point *in limine*.

[24] They say, firstly, in accordance with the arbitrator's directive of 4 February 2025, that the point *in limine* was confined to a determination of whether the applicants failed to follow the correct contractual procedure for them to have cancelled the contract. In other words, they say, was it legally competent for the applicants to cancel the MBSA agreement based on Level Construction's repudiation, or did the *lex commissoria* preclude the applicants, as a matter of law, from cancelling the MBSA agreement based on repudiation.

[25] Secondly, they aver that the arbitrator was not in a position to determine the balance of the issues so outlined by second respondent without hearing evidence, at least of second respondent's alleged repudiation, because the applicants could only be found to be in material breach by purporting to cancel the MBSA agreement by means of the amended statement of claim if such purported cancellation was not justified by virtue of second respondent's repudiation; and furthermore, second respondent could only have properly cancelled the MBSA agreement by means of the letter of 31 May 2024, if the right to cancel had accrued to it.

[26] On 14 Feb 2025, the arbitrator handed down his interim award. The applicants averred that the effect thereof was final in nature and dispositive of all the issues between the applicants and second respondent. The parties are *ad idem* on this score.

<u>Grounds for reviewability</u>

[27] The applicants aver that the following renders the award reviewable. In the founding affidavit, the applicants, referring to paragraph 41 of the interim award, argue that the arbitrator reiterated that the point *in limine* was limited to and defined as, "*The applicant's failure to follow the correct contractual procedure for the applicant's alleged cancellation of the contract*." In paragraph 53 thereof, the arbitrator stated, "*The point raised in limine deals solely with whether or not the applicants followed the correct contractual procedure to allow the applicants to validly cancel the MBSA agreement."*

[28] They agree that this was indeed what the parties had agreed to be determined *in limine* and without leading evidence. They say the arbitrator confirmed the position regarding evidence in paragraph 54, where he stated, "*No evidence has yet been led in these arbitral proceedings, and I am to rely solely upon the pleadings in this arbitral process and the argument presented by each party's legal representatives in order to determine the point raised by the respondent in limine.*"

[29] The applicants state that in fact, the arbitrator went well beyond the scope and made a determination on the issues and factual findings as though they were common cause and as if evidence had been adduced.

The arbitrator's findings-

[30] I do not intend to deal exhaustively with all of the grounds raised by the appellants. In paragraph 57 of the award, the arbitrator held that, "*Nowhere in the pleadings does Level irrevocably state that Level refuses to correct notified defects*." The applicants argue that the absence of an irrevocable refusal by second Respondent in its own pleadings does not amount to evidence of the absence of Level Constructions' repudiation. In this regard, they refer to paragraph 18.9 of the amended statement of claim, where the applicants plead as follows. "*Level has repudiated the MBSA agreement in that it has failed and/or refused to accept responsibility for the issues with the roof and/or denied its obligation to repair and/or rebuild the defectively constructed roof and abandoned the project from 3 February 2022 and made no meaningful attempt to remedy the patent defects and/or complete the work since then."*

[31] The applicants argue that the pleaded facts are consistent with the position that second respondent adopted in its correspondence with MBAWC on 27 January 2023, wherein it stated *inter alia* that they believed that the issue with the roof was because of a design fault and not because of poor workmanship. At paragraph 71, the arbitrator correctly held that repudiation would entitle a party to cancel an agreement, provided that a repudiation of the agreement exists.

[32] The applicants state that that inquiry should have ended there. If the applicants were able to prove in due course the pleaded repudiation by second respondent, then they would be entitled to cancel the MBSA agreement and claim damages. I agree with this contention. On concluding, however, that second respondent had not, in fact, repudiated the agreement, the arbitrator made the following findings.

[33] At paragraph 74, he said that, "*I find that the applicants have failed to allege which specific action or conduct of Level, and on which specific date would constitute repudiation of the contract on the part of Level, which would entitle the applicants to cancel the MBSA agreement."* At paragraph 75, the arbitrator held that, "*I find that the applicants have failed to prove on a balance of probabilities that Level did in fact repudiate the MBSA agreement, and therefore, the applicants were not entitled to accept any such alleged repudiation on the part of Level and to attempt to cancel the MBSA agreement."*

[34] The applicants aver that based upon the incorrect finding that the applicants failed to discharge the burden of proof on a balance of probabilities before affording them an opportunity to do so, the arbitrator found at paragraph 76 of the interim award that their purported cancellation of the MBSA agreement under paragraph 22.2 of the amended statement of claim is, "invalid and of no force and effect."

[35] At paragraph 85 thereof, the arbitrator reiterated his finding that no evidence of repudiation was adduced by the applicants. He found that, "*If the applicants attempted to cancel the MBSA agreement, not in terms of the terms and provisions of the MBSA agreement, but in the alternative, under a repudiation on the part of second respondent, then that would have been a different issue, however, the applicants have failed to prove on a balance of probability that Level did repudiate the agreement by its words or conduct."* In paragraph 91, the arbitrator again repeated his findings regarding the absence of evidence and said that, "*I've also found that the applicants failed to prove on a balance of probability that Level repudiated the agreement by its words or conduct.*" The applicants aver that the arbitrator, after recording these findings, proceeded to examine, based entirely on his own observations of Welby-Solomon's presence during the preliminary arbitration meetings, whether Level's conduct, constituted repudiation, before concluding that it did not.

[36] He said the following at paragraph 93 and the subparagraphs thereunder.

> "*93, When I examine the conduct of Level after practical completion to verify whether or not Level, by its words or conduct, may have repudiated the agreement, I find as follows:*
> *93.1, Level's representative attended the first preliminary arbitration meeting on 22 August 2023.*
> *93.2, Level's representative attended the inspection in loco on 4 September 2023.*
> *93.3, Level filed its initial statement of defense on 20 November 2023*."

[37] The applicants argue that it is apparent that the arbitrator had sought to infer second Respondent's commitment to the project was common cause or proven. The arbitrator then

concluded at paragraph 105 that, "*Based upon preceding, Level by its words and conduct, confirms that it is fully committed to this project and its completion, and I find no evidence whatsoever to support the applicant's allegation that Level repudiated the agreement.*" The applicants contend that it is clear from these findings that the arbitrator reached its conclusions that second respondent remained in attendance of the site based solely on Level Construction's participation in the arbitration proceedings and its attendance of the inspection *in loco* and its alleged, but disputed commitment to the project.

[38] The applicants argue that they were never alerted that the arbitrator would place reliance on irrelevant observations of second respondent's conduct at the proceedings which occurred nearly two years after the applicants alleged that it abandoned the works.

[39] Applicants argue that if they knew that the arbitrator would substitute his own observations for evidence, and that he would, despite the agreement to determine a legal point, determine factual issues without affording the applicants an opportunity to present evidence in substantiation of the repudiation issue, they would never have agreed to proceedings only on the point *in limine* and without leading evidence.

[40] In the evaluation of this contention, it is alarming to say the least, that an arbitrator could import the committing attendance of a quasi-litigating party as an indication of a lack of blameworthiness. It is akin to saying, if one accepts this principle, that an accused can surely not be guilty of an offence because of his committed attendance at court after the fact. Worse still, to import such conduct as an indication that no repudiation occurred as a matter of fact and secondly in the absence of evidence presented by the applicants, is such a gross irregularity in the proceedings which offends a party's right to a fair hearing, and which vitiates it *in toto*. Even if I am wrong on this score, there are other complaints about the arbitrator's conduct raised by the applicants which I do not intend to deal with exhaustively given the above finding, but for the sake of completion, will be evaluated.

<u>The second respondent's contentions</u>

[41] The second respondent denied that the arbitrator misconducted himself and that he committed a gross irregularity in the conduct of the arbitration proceedings. They argue that the applicants' disgruntlement is not aimed at any procedural irregularities. Instead, they argue that the applicants are not satisfied with the reasons and outcome of the interim award. And there is therefore no basis for setting aside a valid award.

[42] The second respondent states that as part of his defense, he raised a legal point *in limine,* contending that the applicants unlawfully cancelled the agreement, and consequently, they had no claim for post-cancellation damages, relying on the judgment of De Waal AJ in *Hodgkinson v K 2011/04122/Pty Limited*, 2019 (2) All SA 754 (WCC), where the court held that one could not claim post-cancellation damages pursuant to an unlawful cancellation.

[43] The second respondent is *at idem* that the correct legal point raised by the second respondent was adjudicated as follows, "*In other words, was it legally competent for the applicants to cancel the MBSA agreement based on Level's repudiation, or did the lex commissoria preclude the applicants as a matter of law from canceling the MBSA agreement based on repudiation*." They argue that the arbitrator upheld the second respondent's legal point and made the following interim award.

> "129. In determining the point raised *in limine* by the respondent, I find that claimants failed to follow the correct contractual procedure for the claimant's alleged cancellation of the MBSA agreement."

[44] They argue the interim award therefore brought an end to the applicants' claim for post-cancellation damages because they unlawfully cancelled the agreement. They say that the award is styled interim as it only disposed of the legal point and that the second respondent's counterclaim is still alive and pending. Accordingly, the arbitration must continue in respect of the second respondent's counterclaim. They furthermore agree in their answering affidavit with the applicants' contention that the effect of the interim award was final in nature and dispositive of all the issues between the applicants and Level Contractors in that it brought an end to the applicants claim for post cancellation damages.

[45] They argue that the applicants want to create the impression that the arbitrator somehow misconstrued the nature of the inquiry when he brought an end to their claim, but that is exactly what the second respondent asked for it in its point *in limine*.

[46] The second respondent further argues that the applicants have misconstrued the point *in limine* when they stated that, "*The arbitrator should have dealt with the point in limine on the same basis as an exception.*" They say the applicants wish to advance to the court that the legal point raised was akin to an exception, because then they would have been afforded an opportunity to amend their statement of claim.

[47] Premised upon this misconception, the applicants contend that the arbitrator was bound to only look at the statement of claim and no other pleadings, as a court would do when determining an exception. Consequently, the applicants aver that the arbitrator completely misconstrued the nature of the inquiry when he made legal and factual findings. These were denied by the applicants. They say the applicants' attorneys wrote to both the arbitrator and the second respondent on 4 February 2025, that an agreement was reached that the point *in limine* needed to be argued and disposed of first, and secondly that, "*We request that the respondent confirms whether it intends to call witnesses to give evidence on the point in limine, or whether it intends to argue the point based on the factual allegations contained in the parties' pleadings. It is our view that evidence need not be led on the point in limine and that it can be argued with reference to the pleaded facts. We await the respondent's confirmation in this regard….In view, thereof, that the continuation of the arbitration will depend on the outcome of the point in limine, we propose that the arbitration in respect of remaining issues be held over until the point in limine has been decided*." ("my emphasis").

[48] The second respondent's representative replied on 5 February 2025 as follows: "*We hereby confirm that we agree that the point in limine can be argued with reference to the pleaded facts. Thus, the respondent will not call witnesses to give evidence on the point in limine*." They argue it was agreed that the point *in limine* would be dealt with as a stated case and that no evidence would be led. They say the applicants can therefore not fault the arbitrator for having accepted the pleaded facts when he came to the conclusion that the applicants unlawfully cancelled the agreement.

[49] The second respondent argues that the applicants are attacking the reasons in the interim award, including the outcome thereof, and that the applicants are cherry-picking from the body of the award. The outcome was clear, they argue, the applicants do not have a claim for post-cancellation damages on account of their unlawful termination of the agreement. The arbitrator simply made a finding on a legal point when he found that the applicants unlawfully cancelled the agreement. They question how it is that if he was called by both parties to the arbitration proceedings to make a finding on the legal point based on the pleadings and arguments, could it be that the arbitrator misconstrued himself and that he committed a gross irregularity in the conduct of the arbitration proceedings? The second respondent states that the arbitrator is neither a judge, advocate or attorney. In fact, he is not legally qualified, and thus to criticize his interim award and looking upon it as a legally trained person would do is unrealistic and unfair.

[50] They argue that it can hardly be contended that there were any procedural irregularities or misconduct. The applicants do not point to an obvious procedural irregularity. Instead, on closer scrutiny, it appears their complaint is aimed at the outcome of the legal point raised *in limine* and not at any irregularity relating to the conduct of the proceedings.

Evaluation

[51] The Applicants argued that in terms of the arbitrators' directive of 4 February 2025, that the point *in limine* was confined to a determination of whether the applicants failed to follow the correct contractual procedure for them to have cancelled the contract. In other words, whether it was legally competent for the applicants to cancel the MBSA agreement based on second respondent's repudiation - or did the *lex commissoria* preclude the applicants (as a matter of law) from cancelling the MBSA agreement based on repudiation.

[52] Second respondent on the other hand argue that the applicants are cherry-picking findings based on the outcome and that their complaints actually amount to a challenge on the merits which is not permitted. They maintain that the applicants failed to point a clear procedural irregularity that rendered the process unfair. I disagree given the earlier finding that I made.

[53] The second respondent concedes in its heads of argument that, as a general observation, it would be unlikely that a Court would interfere with an award in which the arbitrator upheld a point *in limine*, rightly or wrongly, unless obviously he committed a procedural irregularity. In *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd and Anothe*r[6], the Court held that proof that a respondent had been guilty of misconduct or had committed a gross irregularity in the conduct of the arbitration was a prerequisite for the setting aside of the award and that the onus in this regard was on the appellants. It was clear from the authorities that the basis on which an award could be set aside due to misconduct was very narrow and that a gross or manifest mistake was not sufficient, but at best provided evidence of misconduct which, taken alone or in conjunction with other considerations, would ultimately have to be sufficiently compelling to justify an interference.[7]

[54] They argue that the arbitrator correctly upheld the point *in limine*. The termination of a contract has important consequences upon the reciprocal right and duties of the parties. Thus in order to be effective, a notice of intention to cancel must be clear and unequivocal. So too, must

[6] 2002 JDR 0241 (SCA)
[7] *Total Support* at 663

the notice of termination itself.[8] This argument would have sufficed if the claim only related to cancellation based on a *lex commissoria*, however the statement of claim was amended to include a claim based on breach as a result of an accepted repudiation. Furthermore, even if one were to accept that the parties agreed to adjudicate the *in limine* point without calling witnesses as alluded to above, and that the arbitrator erred in relying on irrelevant information to come to the conclusion that the second respondent had not repudiated the agreement; and accepting for the moment that parties must stand or fall by their election, the question then arises whether that misdirection or error is so egregious so as to vitiate the proceedings?

[55] In my view, if the applicants can prove that the arbitrator made one gross irregularity in the proceedings that would result in an unfair hearing, that error would vitiate the proceedings and it would be the end of the enquiry. It matters not that the other alleged mistakes can be explained away due to his non-legal expertise or election by the parties.

[56] Counsel for Second Respondent referred me to further authorities which dealt the *lex commissoria* and a party's failure to comply with its contractual obligations.[9] But this is precisely what the applicants complained of and what the arbitrator misconstrued. *In South African Forestry*, Brand JA stated the following:

> "[37] York's further contention was that even if it is found to have failed to comply with its contractual obligations, Safcol was not entitled to resort to cancellation on the basis of breach, because Safcol failed to comply with the procedural requirements for cancellation. These procedural requirements are stipulated in clause 28.1 of the contract. It required of Safcol, before it was entitled to terminate the contract on the grounds of breach by York, to give written notice to York to remedy such breach as well as a reasonable opportunity to do so. It is common cause that no such notice was given to York prior to Safcol's letter of cancellation. The answer to York's argument is in my view to be found in those cases where it was held that the requirement of notice prior to cancellation contemplated in clause 28.1 of the contracts does not apply where the breach of contract complained of was in the form of anticipatory breach or repudiation.
>
> [38] Repudiation occurs where one party, <u>without lawful grounds, indicates to the other party, by word or conduct, a deliberate and unequivocal intention that all or some of the obligations arising from the contract will not be performed in accordance with its true tenor</u>. It is clear, I think, that in particular circumstances conduct of a contracting party can constitute both a breach of contract in the form of malperformance and a repudiation. A fair example of this is to be found in the present case. York's conduct amounted to breach in the form of failure to comply with his obligations in terms of clause 3.2 and 4.4. However, at the same time it also amounted to a repudiation in that York conveyed the clear indication to Safcol of its intention not to comply with those obligations in the future either. In these circumstances, the contracts were in my view duly terminated when Safcol accepted York's repudiation in its letter of 10 November 1998." (Footnotes omitted")

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[8] *Kragga Kamma Estates and Another v Flanagan* 1995 (2) SA 367 (A) at 376

[9] See *GPC Developments CC v Uys* 2017 JDR 1356 (WCC) at para 27; South African Forestry Co Ltd v York Timbers Ltd 2005 (3) SA 323 (SCA) at paras 37-38

[57] There was clear correspondence by the second respondent to the applicants that stated that he could not remedy the defects as it was a design failure which they would not be able to rectify. This would have been *prima facie* evidence of a potential repudiation which should then have proceeded to the merits of the matter with the calling of witnesses. And so, even if one were to accept that this was a misdirection which in an appeal would have had prospects of success, these are arbitration proceedings where the arbitrator's findings are final, unless set aside on the basis of fraud and bias etc.

[58] The Court in *Absa Bank Limited v Cloete and Another*[10] had this to say - and I quote the paragraphs in full for I can say it no better:

> "[19] Concerning the question of whether the arbitrator had committed a gross irregularity in the proceedings, section 33(1)(b) of the Arbitration Act empowers a court to set aside an arbitration award where an arbitrator has committed any gross irregularity in the conduct of the arbitration proceedings. A gross irregularity is a "methodological error which prevents a fair hearing." A decision will be grossly irregular if there is a mistaken action which prevents the aggrieved party from having its case fully and fairly determined. It is only where the mistake is of such a serious nature that it results in the aggrieved party not having its case fully and fairly determined, that a review will be justified on the basis of a gross irregularity.
>
> [20] What is the gross irregularity in the April 2019 award? As alluded to, Absa contends that the arbitrator made a finding about MyRoof's in *duplum* prejudice in the absence of evidence to support that finding. MyRoof argues, to the contrary, that the statement in the award that "the claimants have informed me that the in duplum limit has already been reached in many if not most cases, and that will prejudice [MyRoof]", is not a finding, in the legal sense of the word, but is merely an observation.
>
> [21] It is immaterial, in my view, whether this statement is understood to be a finding of fact or an observation because what matters, is that it is a factor which the arbitrator took into account in dismissing Absa's extension application. In other words, the arbitrator relied on statements made from the Bar by my MyRoof's counsel that "the *in duplum* limit has already been reached in many if not most cases and that will prejudice [MyRoof]" in the absence of any supporting affidavit evidence from MyRoof. This mistaken action prevented Absa from having its extension application fully and fairly determined. <u>Simply put, the arbitrator made a methodological or procedural error that prevented a fair hearing of the application</u>, by denying Absa (and MyRoof included) the opportunity to present evidence on affidavit on the question of whether MyRoof would suffer *in duplum* prejudice. This is a grave methodological or procedural mistake (and not a mere technicality) as it imperiled the arbitrator's duty to act fairly in the arbitration proceedings before him.
>
> [24] An arbitrator has a margin of appreciation and "the right to be wrong" on the admissibility and weighing up of evidence and these decisions are not reviewable under section 33 of the Arbitration Act. <u>It is quite another matter, however, where an arbitrator makes a decision without any evidence to support the decision</u>. <u>This is a reviewable irregularity as it fatally undermines the fairness of the proceedings by denying the other side the opportunity to interrogate and challenge the facts concerned.</u> <u>Giving judgment against a litigant without any evidence against him or her ignores the very object of the rules of evidence".</u>

[10] [2021] ZAGPJHC 733 (9 March 2021)

> [41] A further argument advanced by MyRoof is that the arbitrator, in dismissing the extension application, considered other factors in addition to the in duplum prejudice such as the delays since 2016 and Absa's egregious shortcomings in the manner in which it conducted itself, hence the purported denial of a fair hearing made no difference to the outcome of the application.
> This submission lacks substance for the simple reason that the no difference principle is not part of our law. This means that when considering whether to set aside any decision, a court does not ask whether the denial of a fair hearing made any difference to the outcome. A right to a fair hearing does not simply dissipate when it is not likely to affect the outcome of a dispute. <u>Even in open and shut cases, an affected party must be provided with the opportunity to meet the case advanced by an adversary. An unfair process can never be countenanced even if a decision- maker might appear to have arrived at the right result."</u> ("My emphasis") (Footnotes omitted)

[59] The arbitrator adjudicated the matter as agreed on the point *in limine* and upheld the objection. That should have been the end of that argument and then he should have proceeded to adjudicate the alternative claim for breach of contract based on repudiation. This he did not. Instead, he proceeded to adjudicate an award that was not argued which had the effect of dismissing the applicants' claim. That amounted to a procedural error that prevented a fair hearing of the application. I am also of the view, as per my finding above, that the consideration of the second respondent's presence during the arbitration proceeds which rendered it proof to an absence of conduct amounting to repudiation amounted to a gross irregularity denying the applicants an opportunity to interrogate and challenge these findings. Thus, even if one were to argue that these were simply an opinion or an observation, the *audi alteram partem* rule demanded that the other party be presented an opportunity to refute this. This was denied and which so rendered the proceedings fatal, despite whatever agreements may have been in place in respect of the calling of witnesses. The right to a fair hearing and the right to be heard is sacrosanct and trumps agreements to the contrary. Unfortunately, the lack of legal expertise by the arbitrator whilst not a requirement, certainly exacerbated the prejudice.

[60] The second death knell in the arbitration proceedings relates to the counterclaim. It is common cause that the arbitrator granted an interim reward. In other words, he prejudged issues pertaining to second respondent's counterclaim, which were not properly before him for determination at the time when the point *in limine* was argued.

[61] At paragraph 82, the arbitrator found that the applicants were in material breach of the MBSA agreement because at the time of practical completion, he said, the applicants had not made payment to second respondent of the balance of the contract price. Again, this finding, it was argued, did not lie within the ambit of the point *in limine* that the arbitrator was tasked to adjudicate. Applicants argue that he lost sight of the fact that legally, the applicants were entitled to withhold a reciprocal obligation in the absence of performance by second respondent and in

circumstances where second respondent had repudiated as averred in their pleadings, and then proceeded to adjudicate the second respondent's counterclaim, again in the absence of the matter being ventilated by the parties. This is another gross irregularity which, for the reasons advanced, would amount to a gross irregularity which would have the effect of vitiating the proceedings.

[62] For all of these reasons, the interim award fall to be set aside in terms of section 33(1) of the Arbitration Act.

<u>Order</u>

In the result, I make the following order:

1. The first respondent's interim arbitration award dated 10 February 2025 (handed down on 17 February 2025) ("the interim award") is reviewed and set aside pursuant to the provisions of subsections 33(1)(a) and 33 (1)(b) of the Arbitration Act 42 of 1965.

2. The dispute between the applicants and the second respondent is submitted to adjudication before a new arbitration tribunal constituted in accordance with clause 13.2 of the Master Builders South Africa House and Small Contract Agreement between the parties pursuant to the provisions of section 33(4) of the Arbitration Act.

3. The second respondent is ordered to pay the costs of the application which costs are to include the cost of counsel where so employed on Scale B.

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DS KUSEVITSKY

JUDGE OF THE HIGH COURT

<u>APPEARANCES</u>

COUNCIL FOR APPLICANT	**: ADV. A FERREIRA**
INSTRUCTED BY	**: TERBLANCHE INC – MR F TERBLANCHE**
COUNCIL FOR FIRST AND SECOND RESPONDENT	**: MR S VAN DER MEER**
INSTRUCTED BY	**: VAN DER MEER & PARTNERS INC**
	: MR S VAN DER MEER