

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: **2025-238521**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
24/8/2026	
DATE	SIGNATURE

In the matter between:

NEIL HARVEY & ASSOCIATES (PTY) LTD

Applicant

and

MEDSCHEME HOLDINGS (PTY) LTD

First Respondent

ANDRE MEYER

Second Respondent

KEVIN WRIGHT

Third Respondent

JOHAN SWARTS

Fourth Respondent

THE HONOURABLE MR JUSTICE FRITZ BRAND N.O.
(In his capacity as a member of the Appeal Tribunal)

Fifth Respondent

THE HONOURABLE MS JUSTICE CAROLE LEWIS N.O.
(In her capacity as a member of the Appeal Tribunal)

Sixth Respondent

**THE HONOURABLE MR JUSTICE TREVOR
GORVEN N.O.**

Seventh Respondent

REVIEW JUDGMENT

Headnote

Arbitration Review | Section 33(1)(b) of the Arbitration Act 42 of 1965 | Gross irregularity | Failure to determine issue alleged

The applicant sought to review and set aside an appellate arbitration award on the basis that the Appeal Tribunal allegedly failed to determine a ground of appeal concerning the arbitrator's treatment of Annexure C6, a detailed pleading relied upon in support of claims for unlawful competition, misuse of confidential information and trade secrets. The review was brought outside the statutory six-week period and condonation was sought.

Held, condonation should be granted. The delay was adequately explained, arose partly from bona fide settlement negotiations and related proceedings, and the interests of justice favoured determination of the matter on the merits.

Held further, no reviewable irregularity was established under s 33(1)(b). The applicant's complaint amounted to an attempt to recast dissatisfaction with the arbitrator's reasoning and evaluation of evidence as a failure to exercise adjudicative power. Annexure C6 did not constitute a pleading of causes and evidence requiring separate adjudication; the arbitrator considered and determined the unlawful competition claim as a whole, notwithstanding his adoption of a "broad strokes" approach to the evidence contained in the annexure.

The notice of appeal did not raise as a distinct ground that the arbitrator had failed to decide the unfair competition dispute or failed to consider Annexure C6 as a self-contained pleaded case where each part thereof had to be traversed. The Appeal

Tribunal accordingly addressed the grounds that were before it and discharged the mandate conferred upon it.

The application for review was dismissed with costs, including the costs of senior counsel where employed on scale C.

Cases referred to: *Dickenson & Brown v Fisher's Executor* 1915 AD 166; *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA).

Legislation: Arbitration Act 42 of 1965, ss 33(1)(b), 33(2) and 33(4).

FISHER J

Introduction

- [1] This application concerns the review of an appellate arbitration award arising from long-running litigation between the applicant, Neil Harvey & Associates (Pty) Ltd (NHA) and Medscheme Holdings (Pty) Ltd (Medscheme).
- [2] NHA applies under section 33(1)(b) of the Arbitration Act¹ (the Act) to review and set aside an appeal award delivered on 15 August 2025 by an appeal Tribunal comprising the fifth to seventh respondents (the Tribunal) and for the remittal of the arbitral appeal under section 33(4).
- [3] The appeal was in respect of an award handed down by the eighth respondent sitting as a single arbitrator.
- [4] In addition, condonation is sought by the applicant for non-compliance with the six-week period in section 33(2).
- [5] The arbitration submission agreement subjects the appeal to the Arbitration Foundation of South Africa (AFSA) Rules for Commercial Arbitration.

Condonation

¹ Arbitration Act 42 of 1965.

- [6] The Appeal Award was delivered on 15 August 2025; the section 33(2) period expired on 26 September 2025; the application was launched on 5 December 2025. Condonation is thus sought for a delay of ten weeks.
- [7] A court exercises a wide discretion on a conspectus of interrelated factors: lateness, explanation, prospects, importance, prejudice and the interests of justice.
- [8] Mr Johann Gautschi SC leading Mr van Dorsten for the applicant/NHA argued that ten weeks, in a seventeen-year long dispute with a record which runs to thousands of pages, is relatively modest.
- [9] The explanation provided is full, documented and supported by the confirmatory affidavits of Mr Moodley and Mr Boyce. It entails that instruction was given the day after the award; and that authority to proceed followed on 22 August 2025.
- [10] I am persuaded that bona fide settlement engagement was entered into which reasonably took up some of the delay. The deferring of the briefing of new counsel in the circumstances of these settlement attempts was, to my mind, not unreasonable. A resolution was taken to proceed within five days of the breakdown in settlement negotiations whereafter, it seems that preparation ensued in earnest.
- [11] Medscheme's enforcement application which was brought under case 2025-204976 on 30 October 2025 in relation to the costs of the arbitration being paid against three individuals personally including Mr Neil Harvey unavoidably loaded the plate of the new team.
- [12] There was an ambitious attempt to set down that application together with this one but, ultimately, the parties agreed to an order which postponed the merits but allowed for taxation of the fees.
- [13] To my mind, this application is best dealt with on the merits of the review and condonation should be granted.
- [14] I turn to the merits.

The ground/s of review

[15] NHA initially identified five grounds of review as follows:

- a. whether the Appeal Tribunal misconceived the nature of the enquiry by deciding a copyright/source-code question;
- b. whether the findings by the Tribunal that "no concrete examples were given of the specific way in which Medware functionalities operated" and that there was an "absence of concrete evidence of features of Nexus" - are irreconcilable with annexure C6 to the particulars of claim;
- c. whether the interpretation of clause 1.4 of the Confidentiality Agreement excluded the entire pleaded category of unmarked operational know-how from the enquiry and thereby impermissibly redefined its subject-matter;
- d. whether the Tribunal decided a ground of appeal which attacked the arbitrator's alleged express refusal to analyse Annexure C6 and his decision to proceed by "broad strokes";
- e. whether the Tribunal decided the adverse-inference ground of appeal arising from Medscheme's failure to call material witnesses and to produce material documents within its control, including any working version of Pulse/Nexus.

[16] In argument Mr Gautschi helpfully narrowed these grounds to that set out in the fourth ground only, being whether the Tribunal decided a ground of appeal which attacked the arbitrator's express refusal to analyse Annexure C6 and his decision to proceed by "broad strokes".

[17] Essentially the complaint, is the following. The facts and evidence pleaded in annexure C6 to the particulars of claim contained the heart of the pleading of the claim on unfair competition; the arbitrator refused to examine the case a quo against the detail pleaded therein and resorted to analysing it in "broad strokes"; this meant there was a failure to consider the unfair competition case at all; this failure was raised before the Tribunal as a ground of appeal; this ground was not considered by the Tribunal; this failure to consider the ground of appeal

constituted a gross irregularity and is thus reviewable under section 33(1)(b) of the Act.

[18] NHA accepts that an error of law or fact, however gross is unreviewable.² It argues, however, that in endorsing the arbitrator's broad strokes approach the Tribunal failed at a fundamental level in that it, like the arbitrator, did not consider the case.

[19] It argues that a proper engagement with the appeal ground would have led the Tribunal to consider that the arbitrator erred in refusing to deal with the case pleaded being C6 and to itself have dealt with it. It argues, thus, that there should be a referral to a new appeal tribunal so that the case as pleaded (in C6) can be considered on appeal.

[20] It argues further that the Tribunal, in not considering the ground of appeal, failed to decide the case on unfair competition as pleaded or at all. This, it argues, constitutes a failure to comply with its mandate under the arbitration agreement.

[21] The first to fourth respondents (collectively Medscheme) are represented by Mr Rome SC who leads Mr Learmonth. They argue that the case is an attempt at a further appeal purporting to be a review.

[22] They dispute, in any event, that the ground of appeal now relied on was ever before the Tribunal.

[23] These arguments require a determination of the nature and scope of the appeal.

[24] It is useful first to sketch the background.

Background

[25] The background can be stated briefly. Medscheme is a medical aid scheme administrator; NHA is a software developer and developed Medware. Before 2003 Medscheme used its own software, Pulse, later renamed Nexus to administer the schemes. I shall call it Nexus.

² *Dickenson & Brown v Fisher's Executor* 1915 AD 166; *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at para 85.

- [26] During 2003 Medscheme licensed Medware for use in relation to four of the 23 medical schemes it administered. Nexus continued to be used for the remaining schemes.
- [27] After the contractual relationship between the parties collapsed and in 2007 NHA commenced its claims against Medscheme by way of combined summons. Later that year the parties agreed to refer their dispute to arbitration.
- [28] NHA advanced three broad claims in the arbitration. First, it alleged that Medscheme had infringed copyright in a software module called the EMI module; second, it alleged that Medscheme had breached a contractual obligation to use Medware for all the schemes administered by it and third, it alleged that Medscheme had competed unlawfully by misappropriating its trade secrets and confidential information.
- [29] In 2020 a claim based on copyright infringement of a Medware product known as EMI was adjudicated as a separated issue before the fifth respondent sitting as a single arbitrator Brand JA (retired). Medscheme was ordered to pay and has paid R2.7 million in respect of this claim.
- [30] The remaining claims were dismissed by the arbitrator a quo in March 2024 and then by the Tribunal in August 2025.
- [31] NHA accepts that the Tribunal validly dismissed the contractual claim.
- [32] This review is directed at the dismissal of the claims based on trade secrets, confidential information and unlawful competition.
- [33] To answer the question whether the Tribunal failed to consider the ground relied on one must start with the enquiry as to whether the ground ever presented itself for decision at all.

The case as run before the arbitrator

- [34] The applicant's complaint was that Medscheme had used confidential information and trade secrets, acquired through operational access to Medware

obtained via a contractual relationship, to copy desirable functional features in Nexus.

[35] A pivotal part of the case, as in any case of unfair competition, was that the *boni mores* of the community were offended by such a scheme.

[36] A concerted plan to acquire access to confidential information and trade secrets through licence was at the heart of the case.

[37] The contractual claim, which comprised the main the case was underpinned by the assertion that Medscheme acted by false pretences in the conclusion of the licencing agreement in that NHA was induced to believe that the contractual relationship would encompass the use of Medware for all its clients. The assertion of NHA was that, had it known that Medscheme's employment of Medware would be limited to select clients and that Medscheme would continue to use and develop its own system whilst using Medware, it would never have allowed the access which it complained of.

[38] Ultimately, the arbitrator rejected this factual premise. All that, then, remained was an analysis of the relationship between the competing systems such as would show that unlawful copying had occurred.

[39] The review case pivots around the function and import of C6 in the arbitration and its treatment by the arbitrator and later the Tribunal.

The function and import of Annexure C6

[40] C6 seeks to provide a detailed catalogue of features and processes of Medware which it claims have been unlawfully copied; it includes pleading of factual evidence of the exposure to these features and processes had by Medscheme as part of the contractual relationship between Medscheme and NHA.

[41] In short, C6 alleges and seeks to demonstrate that Medscheme identified desirable Medware features; discussed them internally; instructed staff and ITQ,

its specialist developers to incorporate similar functionality into Nexus and that similar features later appeared in Nexus.

[42] Thus, C6 employs and presents an inferential method: Medware had a feature; Nexus later had something similar; Medscheme had access; therefore, Medscheme must have unlawfully copied the manner of producing the same feature albeit in a different language. A direct translation if you like.

[43] This inferential method permeated the case. The arbitrator found that this evidence did not sufficiently address the unlawfulness question. He found that what was required was the direct identification of the confidential operational method by which Medware achieved the relevant functionality that was rendered by Medscheme into a new system in its own language. This would have required a comparative analysis of the two systems which went beyond the identification of replication of features.

[44] It must also be understood that the case forms a coherent whole. Once it was accepted that there was no breach of copyright (save in respect of the EMI product); no nefarious conduct and that Medscheme had written its own code in a different language the case for NHA was significantly weaker. It stands to reasons that it was, thus, required to go deeper than inference and provide system comparisons at a direct technical level.

[45] Furthermore, the rejection of the contractual claim segues into a consideration, at a factual level, of whether Medscheme was lawfully engaged in the development of its own product on the basis of industry standards and regulatory requirements rather than the unlawful copying alleged. In fact, the arbitrator and the Tribunal both accepted that industry standards and regulations relating to the administration of the medical aid schemes dictated functionality and features. Mr Neil Harveys own characterization of medical aid administration as not being “rocket science” was persuasive on this point.

[46] The Tribunal agreed that the inferential approach was insufficient. Hence its comment there was a lack of concrete examples of unlawful copying.

[47] NHA has sought to elevate this comment as being indicative of a failure by the Tribunal to consider the many examples which were pleaded in C6. The argument is untenable.

[48] Proof of the presence of similar features in both systems, begs the question.

[49] The arbitrator's acceptance of the legal position as being that once it is established as a technical fact that the same behaviour of a computer may be achieved by two computer programs expressed completely differently from each other, the direct causative link between the expression of the claimant's computer program and the expression of the defendant's computer via the emulation is broken was held by the Tribunal to be decisive.³

[50] The evidence required was evidence of actual replication underlying development at the level of technicality of operation rather than feature similarity.

[51] The arbitrator's lament that there was no comparative exercise undertaken in relation to the workings and know-how in the two systems and his broad approach to the case in C6 is indicative of the insufficiency of the evidence placed before him not a refusal to examine evidence. Even if all the allegations in C6 were accepted as proved this did not prove the case; direct evidence of copying of information was needed.

[52] Once C6 was evaluated and found to be lacking in relation to the kind of evidence needed, to prove the case the arbitrator was perfectly entitled to deal with it broadly. A case-by-case analysis of the instances of copying contended for would not have yielded the missing evidence.

The appeal

[53] The appeal case must also be looked at through the lens of how the case on appeal was presented.

³ Tribunal award: discussion at paras 49 and 50.

- [54] This inquiry starts with the notice of appeal.
- [55] The notice of appeal criticised the arbitrator's analysis of the facts and law. It alleged errors in evaluation of and failures properly to assess evidence, and challenged the application of copyright principles in circumstances said to involve unlawful competition. These complaints are orthodox appeal grounds.
- [56] Significantly, the notice of appeal did not contend that the arbitrator had entirely failed to determine the unfair competition dispute. Nor did it identify Annexure C6 as a discrete composite whose treatment deprived NHA of a determination of its case.
- [57] Reference to the heads of argument in the appeal shows that the appeal was argued as noted in the notice of appeal. There was no expansion of the appeal to include a ground of the nature now relied upon. Indeed, such a ground would have been and remains unsustainable.
- [58] In short: The Tribunal addressed the grounds placed before it. The C6 point was not before it and, in any event, is without substance.
- [59] The debate before the Tribunal coalesced around whether any information used by Medscheme was confidential.
- [60] In light of the acceptance that copying of function and feature without copying of code is per se unobjectionable, It would have been be in the comparative examination of evidence of method underlying the relevant feature that confidentiality could be located. Such comparative technical examination was found by both the arbitrator and the Tribunal to be missing and the inferences sought to be drawn from the evidence that was there did not to go far enough.

Discussion on approach taken to the review.

- [61] The review is founded on a category error: the applicant impermissibly converts a complaint about the quality and extent of reasoning of the available evidence into a complaint about a failure to exercise adjudicative power.

- [62] The arbitrator examined C6; found that it was insufficient to prove the case and thus dealt with the evidence broadly.
- [63] The arbitrator was required to determine whether unlawful competition had been proved. It is not established by the applicant that this entailed that he was obliged to produce a commentary on every document, communication, comparison and inference contained in Annexure C6 before reaching that conclusion. That case was never run. It would, in any event have been unsustainable from a logical or legal perspective.
- [64] The attempt to characterise the broad approach adopted by the arbitrator to C6 as an express refusal to deal with the whole case is misguided.
- [65] The arbitrator decided the case presented before him. He expressly identified the unfair competition claim, summarised the competing contentions, examined the evidence relied upon, analysed the legal principles governing unlawfulness and confidentiality, and ultimately concluded that the evidence did not establish unlawful competition.
- [66] The Tribunal in turn analysed all the evidence, agreed that it was insufficient for being inferential in the context of a weak case whose underpinning contentions in relation to misrepresentation and unlawful collapsed and upheld the appeal which was run before it – and which was not one of a lack of consideration of available evidence.

The straw-man

- [67] Mr Rome makes the assertion that the review is characterised by what may properly be described as a straw-man argument. There is merit in this submission.
- [68] The actual issue decided by the arbitrator was whether the evidence as a whole established unlawful competition. The applicant seeks to substitute that issue with a different question, namely whether each item contained in C6 was individually examined and articulated in the award.

[69] Having reformulated the issue in that manner, the applicant then argues that because the reformulated question was not addressed, the unfair competition claim itself was not decided. This is then retrofitted in the review as a ground of appeal when it never was such a ground.

[70] The reasoning substitutes a procedural complaint for the substantive issue that was actually before the arbitrator and decided.

[71] The record reveals a careful and extensive consideration of the unfair competition case by the arbitrator and an equally clear understanding by the Tribunal of the issues it was required to decide. The review is therefore founded not upon an omission by either tribunal, but upon an impermissible re-characterisation of what their awards actually say.

[72] Thus, in sum, the arbitrator's adoption of a broad analytical approach to evidence which was found to be insufficient to prove the case because it was inferential rather than direct did not constitute a refusal to determine the dispute.

[73] Equally, the refusal to consider the appeal ground now relied upon was not advanced before the Tribunal in the form asserted during the review.

Conclusion

[74] The review is accordingly founded upon a misconception of both the arbitral award and the appellate process and the law.

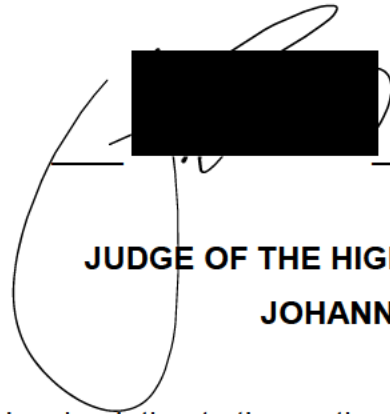
[75] The Tribunal discharged the mandate conferred upon it. No reviewable irregularity has been established.

Order

1.the application for condonation is granted

2. The application for review is dismissed.

3 The applicant shall pay the costs of the review proceedings, including the costs consequent upon the employment of senior counsel where so employed and on scale C.



FISHER J
JUDGE OF THE HIGH COURT
JOHANNESBURG

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Caselines. The date for hand-down is deemed to be 24 August 2026.

Date of Hearing: 03 & 04 August 2026

Date of Judgment: 24 August 2026

Appearances:

Counsel for the Applicants: **Adv J Gautshi SC**

Adv J van Dorsten

Attorneys for the Applicants: **Kumesh Moodley Attorneys**

Counsel for the Respondents: **Adv G Rome SC**

Adv I Learmonth

Attorneys for the First Respondents: **Werksmens Attorneys**

