

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 137492/25

1. REPORTABLE: NO	
2. OF INTEREST TO OTHER JUDGES: NO	
3. REVISED: NO	
07 September 2026	
DATE	SIGNATURE

In the matter between:

FETAKGOMO TUBATSE LOCAL MUNICIPALITY Applicant/Respondent for Leave

And

KIPP CONSULTING ENGINEERS (PTY) LTD Applicant for Leave/First Respondent

ARBITRATOR CP WESLEY SC NO Second Respondent

ARBITRATION FOUNDATION OF SOUTHERN AFRICA Third Respondent

LEAVE TO APPEAL JUDGMENT

MOGALE, AJ

Introduction

1. This is an application for leave to appeal brought by the First Respondent, Kipp Consulting Engineers (Pty) Ltd ("Kipp"), against the whole judgment and order I handed down on 2 June 2026. In that judgment, I reviewed and set aside the arbitrator's rulings of 8 May 2025 and 27 May 2025, set aside the final award of 4 July 2025, remitted the matter to AFSA for determination by a different arbitrator, dismissed Kipp's application to have the award certified as an order of court, dismissed Kipp's counter-application, and ordered Kipp to pay the costs of the application and counter-application on enhanced scales.
2. The Municipality opposes the application for leave to appeal.
3. I have considered the notice of application for leave to appeal, the grounds for the appeal, the heads of argument filed on behalf of Kipp, and those filed on behalf of the Municipality. I have also considered the record of proceedings and the judgment sought to be appealed.

LEGAL FRAMEWORK

4. Section 17(1)(a) of the Superior Courts Act 10 of 2013 provides that leave to appeal may only be granted where the judge is of the opinion that:
 - (i) the appeal would have a reasonable prospect of success; or
 - (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.
5. The test is well-established. In *Mount Chevaux Trust v Tina Goosen and 18 Others* 2014 JDR 2325 (LCC) para 6, Bertelsmann J held that the threshold has been raised by the new Act:

"The use of the word 'would' in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against." This requires a realistic prospect of success, not merely a possibility.
6. The Court in *S v Smith* (475/10) [2011] ZASCA 15 (15 March 2011) held that leave should not be granted merely because a party wishes to appeal; there must be a sound, rational basis for concluding that there are prospects of success on appeal.
7. I must also consider whether there is some other compelling reason for the appeal to be heard, even if prospects are not strong. Such reasons include conflicting judgments on the issue, or matters of great public importance that require appellate guidance.

EVALUATION OF THE GROUNDS OF APPEAL

8. Kipp has advanced numerous grounds of appeal. I have carefully considered each of them and, for the reasons set out below, I am not persuaded that any of them meet the threshold for the granting of leave to appeal.

Ground 1: The Court decided an unpleaded Constitutional issue

9. Kipp contends that I erred by finding *mero motu* that Article 9.1 of the AFSA Rules for Expedited Arbitration is inconsistent with constitutional public policy, when no such case was pleaded, argued, or relief sought by the Municipality.
10. This ground is without merit. The Municipality's case was squarely founded on the right to a fair hearing under section 34 of the Constitution. The founding affidavit specifically pleaded that the arbitrator's exclusion order deprived the Municipality of its right to a fair hearing and constituted a gross irregularity. See caselines 001-13 para 22.
11. In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC), the Constitutional Court held that arbitration agreements and rules must be interpreted and applied consistently with the Constitution. The Court stated that "should the arbitration agreement contain a provision that is contrary to public policy in light of the values of the Constitution, the arbitration agreement will be null and void to that extent."
12. I did not declare Article 9.1 constitutionally invalid in the abstract; rather, I held that its interpretation and application in this case, as an automatic, total, and permanent exclusion without any proportionality enquiry, violated the Municipality's right to a fair hearing. That was a necessary application of constitutional principles to the pleaded and argued facts. No separate declaration of invalidity was sought or granted. The Municipality was entitled to rely on section 34, and the Court was duty-bound to give effect to it.
13. The cases cited by Kipp, such as *Fischer v Ramahlele* and *Phillips v NDPP*, are distinguishable. In those cases, the constitutional complaint was entirely new and not pleaded. Here, the constitutional right to a fair hearing was the very foundation of the review application. The challenge to the rule's application was directly raised in the papers and also in oral argument. This court did not formulate a new issue; it applied settled constitutional principles to the facts.

Ground 2: The arbitrator had procedural authority, and no gross irregularity was established

14. Kipp contends that the arbitrator acted within his powers under the AFSA Rules and section 14(1)(a)(ii) of the Arbitration Act, and that his enforcement of agreed procedural consequences did not constitute a gross irregularity.

15. I disagree. The test under section 33(1)(b) is whether the arbitrator committed a gross irregularity in the conduct of the proceedings. As stated in *Ellis v Dessai* 1909 TS 576 at 581, 'an irregularity in proceedings does not mean an incorrect judgment, it refers not to the result, but to the method of a trial, such as, for example, some high-handed or mistake action which has prevented the aggrieved party from having his case fully and fairly determined'. In *Palabora Copper (Pty) Ltd v Motlokwa Transport Construction (Pty) Ltd* (298/207)[2018] ZASCA, the court held that "where an arbitrator for some reason misconceives the nature of the enquiry in the arbitration proceedings with the result that a party is denied a fair hearing or a fair trial of the issues, that it constitutes a gross irregularity under section 33(1)(b)."
16. The arbitrator here misconceived the nature of the enquiry. He treated the Municipality's failure to deliver an amended statement of defence, a procedural default in response to a claim amendment, as a justification for excluding the Municipality entirely from the arbitration, including from its own counterclaim and all remaining issues. He did not consider whether the default was wilful, whether prejudice could be cured by costs, or whether a less drastic sanction would suffice. He applied Article 9.1 automatically and mechanically, without any proportionality assessment.
17. The parties' agreement to the AFSA Rules does not render the arbitrator's use of those rules immune to constitutional review. Party autonomy is limited and must align with public policy and constitutional principles. I concluded that the complete exclusion in this case violated those boundaries.
18. The arbitrator also misunderstood his role when he stated that he could not permit the Municipality to participate unless a court order required it. He believed he lacked the authority to revisit his own ruling, when in fact Rule 6.5 granted him the widest discretion to ensure a just and final determination. This misconception of his powers is a gross irregularity.

Ground 3: The Court's proportionality test was not a legally grounded review standard

19. contends that I devised a proportionality enquiry that is not found in the Arbitration Act, the AFSA Rules, or binding authority, and that I thereby substituted my own conception of fairness for the procedural regime chosen by the parties.
20. This criticism is unfounded. The review of proportionality is not new; it is inherent in the constitutional right to a fair hearing under section 34. Any procedural penalty, especially one as harsh as complete exclusion from proceedings, must be proportionate to the breach. Courts have consistently required courts and tribunals to weigh the parties' interests and explore less severe alternatives that can achieve the intended goal.
21. In *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA), the court emphasised that the Constitution requires courts to strike a balance that

curtails the unacceptable excesses of freedom of contract. I merely gave effect to that balance by identifying factors that should have guided the arbitrator's exercise of discretion.

22. The factors I listed are not jurisdictional prerequisites; they are rational considerations that any fair decision-maker ought to consider before imposing a permanent and comprehensive exclusion. The arbitrator considered none of them.

Ground 4: The separation of issues did not remove the arbitrator's procedural authority

23. Kipp contends that I erred in finding that the separation of issues created a procedural barrier to applying Article 9.1 to the remaining issues.
24. This ground mischaracterises my reasoning. I did not hold that the separation of issues removed the arbitrator's procedural authority altogether. I held that the separation agreement meant that the Municipality's default in responding to an amendment on one aspect of Kipp's claim could not justify excluding the Municipality from entirely separate issues, particularly its own counterclaim. The arbitrator's exclusion order was overbroad and disproportionate because it swept up issues unrelated to the default.
25. The separation agreement set out how the arbitration should be conducted and was binding on the arbitrator. It could not be ignored unilaterally or used to treat the whole process as a single, inseparable proceeding for the purpose of imposing penalties. The default concerned only Kipp's amended claim and did not prevent the Municipality from pursuing its own separate counterclaim, which was postponed.

Ground 5: The remedy was overbroad and failed to consider severability

26. Kipp contends that even if any irregularity was established, it did not justify setting aside the entire final award, and that I should have considered severability.
27. This ground also lacks merit. The arbitrator's exclusion of the Municipality from all further participation meant that the entire subsequent proceedings, including the hearing on the remaining issues, the counterclaim, and the final award, were conducted without the Municipality's participation. The irregularity was not confined to a discrete aspect of the award; it infected the entire proceedings after the exclusion ruling. The final award was a product of that unfair process.
28. In *Palabora Copper*, the court did set aside only the affected part of the award because the irregularity was confined to the counterclaim while the claim was properly heard. Here, the exclusion order prevented the Municipality from participating in any aspect of the remaining issues, including Kipp's own

amended claim. The entire remainder of the arbitration was tainted by the same irregularity. Severance was neither appropriate nor feasible.

COMPELLING REASONS

29. I have considered whether, even if prospects are not strong, there are compelling reasons for the appeal to be heard. Kipp argues that the matter raises questions of general importance about the limits of judicial intervention in private arbitration, the relationship between party autonomy and constitutional public policy, and the proper application of section 33(1)(b) of the Arbitration Act.
30. While these issues are undoubtedly important, established jurisprudence has already addressed them. The principles are clear: private arbitration is subject to constitutional norms; courts will intervene only where a gross irregularity has occurred; and the right to a fair hearing is non-waivable. Applying these principles to the facts of this case does not raise novel or unresolved legal questions that require appellate guidance.
31. Moreover, this matter is essentially a dispute about the correctness of a procedural ruling in a single arbitration. It does not involve conflicting judgments on the same point, nor does it affect a class of cases beyond the parties. The interests of justice do not require that leave be granted.

CONCLUSION

32. Having considered all the grounds of appeal advanced by Kipp, I am not persuaded that there is a reasonable prospect that another court would come to a different conclusion on the merits of the review application.
33. The application for leave to appeal is therefore dismissed.

ORDER

34. The following order is made:

1. The application for leave to appeal is dismissed.
2. The First Respondent (Kipp Consulting Engineers (Pty) Ltd) is ordered to pay the costs of this application, including the costs consequent upon the employment of senior counsel on Scale C and junior counsel on Scale B.



K MOGALE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of Appeal hearing:
Date of judgment:

26 August 2026
07 September 2026

Appearances

Applicants' counsel:
Junior Counsel:
Instructed by:

Advocate Rip SC
Advocate W Maodi
Mmakola Matsimela Attorneys

Respondents' counsel:
Instructed by:

Advocate Solomon SC
Michael Ramphela's Attorneys