

REPUBLIC OF SOUTH AFRICA



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

Case Number: **2024-118405**

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

In the matter between:

SIGC (PROPRIETARY) LIMITED

Applicant

and

3SIXTY HEALTH (PROPRIETARY) LIMITED

First Respondent

ADVOCATE SCHALK AUCAMP N.O.

Second Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

WENTZEL -THOMPSON J

Introduction

[1] This is an application by SIGC (Pty) Ltd (“the applicant”) for leave to appeal to the Full Court of this Division, alternatively to the Supreme Court of Appeal, against the whole of the judgment and order I delivered on 31 March 2026, in

terms of which I set aside an arbitration award issued in favour of the applicant by the second respondent and dismissed the applicant's application to make that award an order of court in terms of s 31 of the Arbitration Act 42 of 1965 ("the Act").

[2] The application is brought under s 17(1)(a)(i) and, alternatively, s 17(1)(a)(ii) of the Superior Courts Act 10 of 2013 ("the Superior Courts Act"). The applicant advances nine grounds of appeal, but essentially only two grounds were advanced in argument by Mr Mashaba SC, who appeared for the applicant (although he made it plain that the other grounds were not abandoned.)

[3] The grounds relied upon by the applicant were:

- a. First, it was contended that the issue as to whether or not the applicant was entitled to a ten percent revenue consultancy fee - irrespective of whether services were rendered ("the issue"), was sufficiently pleaded in the replication and in the rejoinder. In the circumstances, it was contended that the issue plainly fell within the terms of the second respondent's jurisdiction without the necessity for an amendment to paragraph 16 of the particulars of claim.
- b. The second ground of appeal relied upon was that I ought properly to have adopted a more generous approach to the pleadings and the consequent jurisdiction of the second respondent, particularly where the issue was fully dealt with in the plea, the replication and the rejoinder, was canvassed in cross-examination and fully argued before the second respondent. In addition, it was pointed out that no formal objection was ever brought under Rules 30 or 30A as authorised by AFSA to the evidence led on the issue as one might have expected were it is felt that evidence may be prejudicial to the first respondent; the objection was only raised in the course of the hearing without establishing any prejudice.

[4] Having considered the notice of application for leave to appeal, the updated heads of argument delivered on behalf of the applicant, the heads of argument delivered on behalf of the first respondent, and having heard counsel, I have

come to the conclusion that leave to appeal must be granted, but only on the grounds 3 and 4 in the notice of application for leave to appeal.

The applicable test for leave to appeal

- [5] Section 17(1)(a) of the Superior Courts Act provides that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success, or that there is some other compelling reason why the appeal should be heard.
- [6] The threshold established by s 17 is more onerous than the “reasonable possibility” test which applied under the repealed s 20 of the Supreme Court Act 59 of 1959. In *The Mont Chevaux Trust v Tina Goosen and Others*,¹ Bertelsmann J observed that the use of the word “*would*” in s 17(1)(a)(i) imports a “*measure of certainty*” that another court will differ from the court whose judgment is sought to be appealed against.
- [7] That formulation has been endorsed in a series of decisions of the Supreme Court of Appeal, most notably in *MEC for Health, Eastern Cape v Mkhitha and Another*,² where Plasket AJA emphasised that “*there must be a sound, rational basis for the conclusion that there are prospects of success on appeal*”; a mere possibility of success, an arguable case or one that is not hopeless, is not enough.
- [8] The “*compelling reason*” aspect of s 17(1)(a)(ii) is directed at cases which raise a substantial point of law, a matter of general or public importance, where conflicting judgments exist, or where the interests of justice otherwise demand that a higher court pronounce on the issue.
- [9] It is against these standards that each of the grounds advanced by the applicant must be measured. In doing so, I do not intend to repeat the factual background or the reasoning contained in my principal judgment.

¹ 2014 JDR 2325 (LCC) at para 6

² [2016] ZASCA 176 at paras 16-17. See also *S v Smith* 2012 (1) SACR 567 (SCA) at para 7

Grounds 1, 2, 5, 6, 7, 8 and 9

[10] Grounds 1, 2, 5, 6, 7, 8 and 9 in the notice may be dealt with shortly. In substance, they contend that I impermissibly converted an alleged interpretive error by the second respondent into a gross irregularity on the basis that he had strayed from the pleadings and thus exceeded his powers, that I mischaracterised the pleaded case, that I failed to give effect to the principle of party autonomy and the finality of arbitral awards articulated in *Amalgamated Clothing and Textile Workers Union of SA v Veldspun (Pty) Ltd*,³ *Telcordia Technologies Inc v Telkom SA Ltd*⁴ and *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews*,⁵ and that I improperly relied on the obiter observations at paragraphs [74] to [79] of the judgment concerning public policy.

[11] In relation to these grounds of appeal, no reasonable prospect of success on appeal has been demonstrated for the following reasons:

- a. First, the ratio of the judgment is not that the arbitrator misinterpreted clause 9.1 of the consultancy agreement. The ratio, set out at paragraphs [55] to [73], is the narrower and different proposition that the arbitrator determined the dispute on a basis not covered by the pleadings, namely that the applicant was entitled to the 10% revenue consultancy fee as a retainer irrespective of whether the services referred to in clause 6.2 had been rendered.
- b. That is a well-established and independent ground of review under s 33(1)(b) of the Act, being a matter falling squarely within the passage in *Rabinowitz v Levy and Others*,⁶ where the SCA held that “*an arbitrator might also exceed his or her jurisdiction if a matter is decided on a basis not covered by the pleadings,*” which is “*a question to be decided on the facts of each case.*”

³ 1994 (1) SA 162 (A)

⁴ 2007 (3) SA 266 (SCA)

⁵ 2009 (4) SA 529 (CC)

⁶ [2024] ZASCA 8 at para [20]

- c. Second, the SCA in *Close-Up Mining (Pty) Ltd and Others v The Arbitrator, Judge Phillip Boruchowitz and Another*⁷ has confirmed that under the AFSA Rules an arbitrator does not enjoy a general discretion to entertain a dispute not raised in the pleadings; if the pleadings do not sufficiently reflect a dispute, the remedy is an amendment. No amendment was sought or granted in the arbitration before the second respondent, notwithstanding the objection recorded and the concession by counsel that the point had not been pleaded.⁸
- d. Third, the applicant's own admissions in the answering affidavit filed to the founding affidavit to the counter-application,⁹ to the effect that it "*did not plead that it was entitled to payment without rendering the consultancy services*" and that this "*was not the question before the Second Respondent*" and "*did not arise from the pleadings,*" stand in the record; they were not resiled from in reply and cannot now be re-opened on appeal.
- e. I must mention that Mr Machaba SC suggested that the statements made in the answering affidavit relied upon by Mr. Tsatsawane SC were taken out of context and urged me to read the whole of paragraphs 92-95 where it is made plain that the first respondent contended that it was entitled to revenue consultancy fees after the signing of the RFP agreements. Mr Machaba SC urged me to distinguish between the consultancy fees earned prior to the conclusion of the RFP agreements, and those fees rendered afterwards, where those rendered before the conclusion of the RFP agreements required consultancy services to be rendered, but those rendered afterwards did not. It was argued that paragraph 16 of the particulars of claim plainly referred to the rendering of consultancy services before the RFP agreements were concluded.
- f. Moreover, Mr Machaba SC argued out that the statements made in the answering affidavit to the counter-claim in which the first respondent sought to review and set aside the arbitration award was not before me, as I was

⁷ *Close-Up Mining (Pty) Ltd and Others v The Arbitrator, Judge Phillip Boruchowitz and Another* (286/2022) 2023 ZASCA 43; 2023 (4) SA 38 (SCA) at paras [25]-[27] and [34]

⁸ Referred to at paragraphs [61] and [64] of the principal judgment.

⁹ at paragraphs 92 and 95

not seized with the review proceedings. He thus contended that I should limit myself to the pleadings and not have regard to the alleged concessions made in these affidavits that the issue now before me had not been pleaded.

- g. Mr. Tstsawane SC disagreed; he stressed that the purpose of pleadings in arbitral disputes is to delineate the arbitrator's jurisdiction. He stressed that the purpose of a replication is not to plead a new case and is not required simply to refute the allegations in the plea that are in any event, deemed to be denied. He insisted that while paragraph 16 of the particulars of claim remained in the form that it did, the replication was of no assistance to the applicant.
- h. It is trite that an arbitrator's jurisdiction to determine the matter before him is limited by the pleadings. This distinction was highlighted in the foreign authorities referred to by Mr Tstsawane SC in the course of his argument in the main application that were uploaded onto Caselines by him.
- i. Mr. Machaba SC sought to distinguish *Covexity*¹⁰ on the basis that a formal objection had been raised regarding an amendment sought with regard to the penalty issue on the basis that this raised a new case. Although the objection was upheld, the arbitrator nevertheless sought to re-introduce the penalty issue that was found to be irregular and justified the setting aside of the arbitrator's award. In the present matter, Mr Machaba SC argued that the applicant had elected to file a replication instead of filing a formal objection and thus the matter was not on all fours with that in *Covexity*. I do not see how this distinguishes the present case from that in *Covexity*.
- j. On the basis of *South African Reserve Bank and Another v Khumalo and Another*,¹¹ Mr Tstsawane SC argued that an appeal lies against an order, not against the reasons set out in the judgment. Thus, even if some of the reasoning in the principal judgment was open to legitimate criticism, Mr Tstsawane SC insisted that my order would still stand so long as the ratio

¹⁰ *Phoenixfin Pte Ltd and others v Covexity Ltd* [2022] SGCA 17. See also *Coal & Oil Co LLC v GHCL Ltd* [2015] SGHC 65

¹¹ 2010 (5) SA 449 (SCA) at para [4]

was supportable on the concessions in the record - which, in his view, it was. This was premised on the basis that the concessions made in paragraphs 92 and 95 of the applicant's answering affidavit to the counter-application were fatal to the applicant's case for leave to appeal as they were dispositive; the concessions made were that the applicant's entitlement to post RFP revenue services without the rendering of services had not been pleaded. Thus, on its own version, the fact that this issue was raised in the replication and dealt with by the first respondent in its rejoinder, was not sufficient to confer jurisdiction on the arbitrator to determine the issue objected to.

- k. Fourth, as regards ground 8, I recorded expressly at paragraph [79] of the principal judgment that the observations concerning the possibility that the contract might disguise an "influence peddling" arrangement were obiter and did not form part of the reasoning by which the order was reached. Nothing in the ratio turns on those observations. To the extent that any doubt may exist on the point, I take this opportunity to reiterate that the ratio of the principal judgment is confined to paragraphs [55] to [73], and that paragraphs [74] to [79] are *obiter dicta* that had no bearing on the setting-aside of the award. That formal restatement disposes of ground 8.
- l. Fifth, no compelling reason within the meaning of s 17(1)(a)(ii) has been shown to exist in respect of the aforementioned grounds for leave to appeal. There are no conflicting judgments to be reconciled, the principles are settled and were correctly applied to the facts before me.

[12] For these reasons, grounds 1, 2, 5, 6, 7, 8 and 9 do not meet the *Mkhitha* standard and leave to appeal on those grounds must be refused.

Grounds 3 and 4: the "generous approach" and the absence-of-prejudice

[13] The position is different in respect of grounds 3 and 4: Ground 3 asserts that I failed to adopt the "rather generous approach" to arbitral pleadings endorsed by the SCA in *Rabinowitz* at para [20] and by the older cases there collected. Ground 4 asserts that, in any event, no gross irregularity was established because the first respondent was not, on the facts of this case, denied a fair

hearing on the point that ultimately founded the award; the issue was raised in the replication, engaged with in the rejoinder, put to the applicant's witness in cross-examination, canvassed with the first respondent's witness, and expressly addressed in argument. The applicant's counsel thus argued that the ventilation of the point at the hearing cured any pleading deficiency and, in the absence of prejudice, there could be no gross irregularity as contemplated in s 33(1)(b) of the Act.

- [14] These two grounds are interrelated: If a generous approach to arbitral pleadings is warranted where the true dispute has been fully ventilated without prejudice, then the finding of gross irregularity on the part of the second respondent or that he exceeded his powers may be open to reconsideration on appeal. I propose to address each in turn.

The generous approach to arbitral pleadings

- [15] The starting point is the well-known passage in *Rabinowitz* at para [20], which I cited at paragraph [70] of the principal judgment, namely that “*Courts, however, generally remain reluctant to interfere with an arbitrator's award and are prepared to adopt ‘a rather generous approach’ to the pleadings...*”
- [16] That passage is significant because it makes plain that a “generous approach” to the pleadings is necessary because of the general reluctance of our courts to interfere with arbitral awards. This approach is closely aligned with the principle of party autonomy affirmed in *Lufuno Mphaphuli*,¹² and with the purposes of arbitration recorded by the SCA in *Telcordia*.¹³
- [17] Equally significant is footnote 35 to *Rabinowitz*, which draws a distinction between two very different situations: In the first, the arbitrator's jurisdiction is confined to disputes as formulated in the pleadings. In the second, the arbitrator's referral is of “*disputes arising from an agreement*”, in which case “*the pleadings only serve to identify the contentions of the parties regarding the various issues*

¹² at paras [214]-[219]

¹³ at para [51].

referred to arbitration” and “the ambit of the arbitration is then not restricted to the pleadings.”

[18] Mr Machaba SC contends that the present matter is of the second kind. The arbitration clause in the consultancy agreement was in wide terms, and the dispute referred to the second respondent was a dispute arising out of the agreement between the parties, particularly concerning the applicant’s entitlement to revenue consultancy fees. On that construction, the pleadings did not exhaustively define the arbitrator’s jurisdiction; they served only to identify the parties’ contentions on the various issues arising for determination.

[19] At paragraph [72] of the principal judgment, I acknowledged that, but for the objection recorded during the arbitration and the concession by counsel that the point had not been pleaded, I would have been inclined to accept that the pleadings, read holistically and together with the replication, put the true dispute before the arbitrator. This reflected my acknowledgement that the issue before me was difficult balance and, on reflection, another court could reasonably conclude that a more generous approach ought to have been taken by me to the pleadings on the facts, particularly having regard to the terms of the arbitration agreement and the fact that the referral was of disputes arising from that agreement.

Prejudice and the ventilation of the issue on the merits

[20] An arbitrator’s award is only reviewable under s 33(1)(b) of the Act if he or she has “*committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded [his or her] powers*”. As the Constitutional Court held in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,¹⁴ and as re-emphasised in *Telcordia*¹⁵ and in *Palabora Copper (Pty) Ltd v Motlokoa*,¹⁶ an irregularity is not “*gross*” merely because it exists; the enquiry is whether, as a result of the irregularity, the aggrieved party was denied a fair hearing of the issues that arose for determination.

¹⁴ 2008 (2) SA 24 (CC) at paras [267]-[268]

¹⁵ at paras [50]-[52]

¹⁶ [2018] ZALAC 15

- [21] The extracts from the transcript to which counsel for the applicant drew my attention¹⁷ suggest, at least *prima facie*, that the very issue on the basis of which the arbitrator ultimately decided the matter - namely, whether payment under clause 9.1 was linked to the rendering of specific services under clause 6.2 - was in fact canvassed at the arbitration hearing. The applicant's witness, Mr Sigasa, was cross-examined on the point and repeatedly said that "*our payment is not linked to us rendering specific services.*" The second respondent himself directed questions on the point to Dr Mahanjana, the first respondent's witness. Counsel addressed the arbitrator on the point in argument.
- [22] If, on a proper analysis of the transcript, the point was fully ventilated by both parties and both had the opportunity to lead evidence, to cross-examine, and to address the arbitrator on it, another court might well conclude that no prejudice was suffered and that any pleading deficiency was cured by the manner in which the arbitration was conducted. On that view, the requirements of a "*gross*" irregularity - as opposed to a mere irregularity - would not be established, notwithstanding the objection raised or concession made by counsel that had been relied upon by me in the principal judgment.
- [23] I remain of the view that the objection recorded during the arbitration, together with the concession made by counsel then acting for the applicant that entitlement to payment without the rendering of services had not been pleaded, was material to the finding of gross irregularity. That view finds support in *Close-Up Mining*, where the SCA emphasised that the AFSA Rules do not confer on an arbitrator a general discretion to adjudicate matters outside the pleadings, and that the proper course, if the pleadings do not sufficiently reflect the dispute, is an amendment. No such amendment was ever sought.
- [24] The question, however, is not whether I stand by my own reasoning; it is whether an appellate court would have a reasonable prospect of coming to a different conclusion. I am persuaded that, on grounds 3 and 4, another court could well conclude:

¹⁷ Caselines 015-952, 015-1015 to 015-1029, and 015-1167 to 015-1170

- a. that the arbitration referral, being one of “*disputes arising from the agreement*,” engaged the second category identified in footnote 35 of *Rabinowitz*, with the consequence that the ambit of the arbitration was not restricted to the strict formulation of the pleadings;
- b. that, applying the “*generous approach*” endorsed in *Rabinowitz* at para [20], the pleadings read as a whole (statement of claim, plea, replication and rejoinder) sufficiently identified the true issue for determination; and
- c. that, on a full consideration of the transcript, the first respondent was not denied a fair hearing on the issue and, in the absence of demonstrable prejudice, no gross irregularity within the meaning of s 33(1)(b) of the Act was established.

[25] These are difficult and closely related questions supported by equally compelling lines of authority, namely, the “*generous approach*” doctrine as reaffirmed in *Rabinowitz*, and the “*no discretion outside the pleadings*” doctrine confirmed in *Close-Up Mining*. There is genuine scope for reasonable judicial disagreement about how those doctrines apply where an un-pleaded issue has been objected to, but nonetheless fully ventilated in evidence and argument. It is precisely the kind of question on which an appellate court’s guidance would be of assistance not only to the parties but to the broader legal community which has an interest in the finality and effectiveness of consensual arbitration.

[26] I am accordingly satisfied that grounds 3 and 4 meet the threshold in s 17(1)(a)(i) of the Superior Courts Act. There is a reasonable prospect that another court, weighing the objection and concession relied upon in the principal judgment against the terms of the arbitration agreement, the pleadings read holistically, the transcript, and the absence of demonstrable prejudice, would conclude that no gross irregularity was established. I am also satisfied that, given the developing state of the case law on the interplay between *Rabinowitz* and *Close-Up Mining*, there is a compelling reason under s 17(1)(a)(ii) for the appeal to be heard.

The scope of the leave to appeal

- [27] Leave to appeal should not be granted more broadly than the reasoned prospects justify. The principle of finality of litigation, and the demands on the Full Court and the Supreme Court of Appeal, require that leave be confined to those grounds on which the *Mkhitha* threshold has been met.¹⁸
- [28] Leave is therefore granted only on grounds 3 and 4 as set out in the notice of application for leave to appeal. It is refused on grounds 1, 2, 5, 6, 7, 8 and 9. To avoid any ambiguity, the issue on appeal is confined to the single, discrete question: whether, on the facts of this case, the arbitrator committed a reviewable gross irregularity or exceeded his powers within the meaning of s 33(1)(b) of the Act by determining the matter on a basis said not to have been pleaded, having regard to (i) the terms of the arbitration agreement and the character of the referral; (ii) the pleadings read holistically, including the replication and rejoinder; and (iii) the manner in which the disputed issue was ventilated in evidence, cross-examination and argument at the arbitration hearing.

Forum

- [29] Section 17(6)(a) of the Superior Courts Act provides that if leave is granted, the court concerned “*shall direct that the appeal be heard by a Full Court of that Division, unless it considers that the decision to be appealed against involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion, or the administration of justice, either generally or in the particular case concerned, requires consideration by the Supreme Court of Appeal of the decision.*”
- [30] While the appeal raises a question of some general importance concerning the interaction between the “*generous approach*” doctrine and the confinement of an arbitrator’s jurisdiction to the pleadings under the AFSA Rules, I do not consider

¹⁸ See *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* [2016] ZAGPPHC 489 at para [25]; *Notshokovu v S* [2016] ZASCA 112 at para [2].

that a pronouncement by the SCA on the point is necessary; this is a question of the application of settled principles to a particular set of facts. The Full Court of this Division is well placed to consider it. Should the Full Court itself take a different view, the ordinary avenues of further appeal remain open.

[31] I therefore direct that the appeal be heard by the Full Court of this Division.

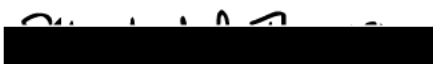
Costs

[32] The costs of the application for leave to appeal ordinarily follow the outcome. The applicant has succeeded in part and failed in part, but the substantive relief for which it applied - namely, leave to appeal - has been granted. In the exercise of my discretion, it is appropriate that the costs of the application be costs in the appeal.

Order

[33] In the result, I make the following order:

1. Leave to appeal is granted to the applicant against the order of this court delivered on 31 March 2026, but is limited to grounds 3 and 4 as set out in the notice of application for leave to appeal dated 21 April 2026.
2. Leave to appeal on grounds 1, 2, 5, 6, 7, 8 and 9 of the notice of application for leave to appeal is refused.
3. The appeal shall be heard by the Full Court of this Division in terms of s 17(6)(a) of the Superior Courts Act 10 of 2013.
4. The costs of the application for leave to appeal shall be costs in the appeal.


WENTZEL-THOMPSON J
JUDGE OF THE HIGH COURT
JOHANNESBURG

Date of hearing: 31 July 2026

Date of judgment: 8 September
2026

Appearances:

For the applicant: Adv. Machaba
SC, instructed by MT Raselo
Incorporated

For the first respondent: Adv.
Tsatsawane SC, instructed by
Shandu Attorneys Inc.