

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAN DIVISION, WINDHOEK  
JUDGMENT

HC-MD-CIV-MOT-REV-2019/00390

In the matter between:

**THE MUNICIPAL COUNCIL FOR THE CITY OF WINDHOEK    APPLICANT**

and

**HENNING SEELNBINDER N.O.**

**1<sup>ST</sup> RESPONDENT**

**TONY KLAZEN T/A MAKETO CONSTRUCTION**

**2<sup>ND</sup> RESPONDENT**

**Neutral Citation:**    **Neutral Citation:**    *The Municipal Council for the City of Windhoek v Seelenbinder N. O.* (HC-MD-CIV-MOT-REV-2019/00390) [2021] NAHCMD 134 (26 March 2021).

**CORAM:**    MASUKU J

**Heard:**    **29 September 2020**

**Delivered:**    **25 March 2021**

**Flynote:**    Administrative Law – review of decisions by arbitrator – whether errors of law qualify for review – concept of gross irregularity explained – need for arbitrators to ensure that parties, even where they may have not complied with one ruling or another, are not readily thrown out and rendered ineligible to participate in proceedings. Other viable methods of punishment should be considered.

**Summary:** The applicant and the 2<sup>nd</sup> respondent are involved in a dispute which was referred to the 1<sup>st</sup> respondent as an arbitrator, The parties, including the 1<sup>st</sup> respondent signed a tripartite arbitration agreement, (TAA), which among other things, set out the procedure that would be followed in progressing the process towards finality. The arbitrator wrote a letter to the parties, proposing that step 2 of the process be skipped and that the parties should move to step 7. The 2<sup>nd</sup> respondent agreed to the proposal but the applicant did not. It filed its letter objecting to the proposal late and it was not considered. Its objection was not sustained. Eventually, the applicant failed to file its statement of defence and counter-claim and its application for condonation was refused. The arbitrator eventually decided that the arbitration will not need the presence of the parties another decision that aggrieved the applicant. It brought the application for the review of the decisions made by the arbitrator, claiming that they constituted a gross irregularity.

*Held:* that not every error of law is capable of resulting in the court exercising its powers of review.

*Held that:* for a gross irregularity to occur, it must be shown that the error prevented a fair trial of the issues. In this regard, if the mistake leads to the court not merely missing or misunderstanding the a point of law but leads to the court misconceiving the whole enquiry, or its duties in connection therewith, then that affects the fair trial and amounts to a gross irregularity.

*Held further that:* the TAA stipulated steps that had to be followed by the parties in the arbitration. The arbitrator had no power in terms thereof, to decide to skip certain steps as he purported to do. In doing so, this led to the applicant being unable to file its statement of defence and its counterclaim, which resulted in affecting the applicant's right to a fair hearing.

*Held:* that arbitrators should be slow in imposing sanctions that throw out the litigants before them out of the proceedings. Where possible, less drastic measures

should be found, that will ensure that due punishment is meted, but the party is able to keep its hands on the plough to the end of the proceedings.

The court questioned the correctness of holding arbitral decisions liable to be set aside only for gross irregularity, but to allow decisions that are wrong to survive. This, the court held, is against constitutional imperatives.

The court held that the skipping of the steps prescribed in the TAA amounted to a gross irregularity and which affected the applicant's right to a fair hearing. All the decisions that flowed from that misstep, were reviewed and set aside, with costs being issued against the 2<sup>nd</sup> respondent, who opposed the application.

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### ORDER

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1. The First Respondent is ordered to properly and fully complete Step 2 recorded in Clause 9.1.2 of Annexure A to the Tripartite Agreement, concluded by the parties on 11 June 2019.
2. Having so completed Step 2 referred to in paragraph 1 above, the First Respondent is ordered to follow the subsequent steps recorded in Annexure A to the Tripartite Arbitration Agreement signed *inter partes*.
3. For the avoidance of doubt, all the steps and decisions taken by the First Respondent subsequent to him not complying with Step 2 are hereby set aside as invalid, unlawful and therefor irregular.
4. The Second Respondent is ordered to pay the costs of the application consequent upon the employment of one instructing counsel and one instructed counsel.
5. The matter is removed from the roll and is regarded as finalised.

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### JUDGMENT

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## MASUKU J:

### Introduction

[1] The law applicable to the review and setting aside of awards and rulings issued by arbitrators has recently come up for determination by the Supreme Court in *Expedite Aviation CC v Tsumeb Municipal Council and Another*.<sup>1</sup> In that case, the Supreme Court reiterated that in terms of s 33 of the Arbitration Act,<sup>2</sup> a court may set aside a ruling or award issued by an arbitrator, if in doing so, the arbitrator committed a gross irregularity.

[2] The applicant, the Municipal Council for the City of Windhoek, has approached this court seeking the setting aside of certain rulings made by the arbitrator, Mr. Henning Seelenbinder in respect of an arbitration in which the latter had been duly appointed.

[3] The question for determination is whether the conduct of the arbitrator complained of, meets the criteria set out in the provisions of s 33 of the Arbitration Act, ('the Act'). The applicant contends that the arbitrator's rulings crossed the line, yet the 2<sup>nd</sup> respondent has submitted otherwise. Which of the two protagonists is on the correct side of the law, is the question confronting the court head-on.

### Factual background

[4] The facts giving rise to the present litigation appear to be pretty straightforward. They are not the subject of much disputation and they acuminate to the following:

- (1) the applicant appointed the 2<sup>nd</sup> respondent, Tony Klazen t/a Maketo Construction, as a contractor for the construction and surfacing of various short streets in Windhoek for an amount of N\$ 15 million;

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<sup>1</sup> Case No. SA 20/2019, delivered on 12 November 2020.

<sup>2</sup> Act No. 45 of 1965.

- (2) a dispute arose between the parties relating to the contract resulting in the project coming to a standstill. The applicant decided to terminate the contract in December 2016;
- (3) the 2<sup>nd</sup> respondent filed a complaint with the Dispute Adjudication Board, (DAB) in terms of the parties' agreement. After a prolonged period, which saw new members of the DAB appointed, the DAB held the applicant liable to the 2<sup>nd</sup> respondent only for a payment of an amount of N\$ 500 000 and not the 2<sup>nd</sup> respondent's claim of N\$ 15 million;
- (4) dissatisfied with the ruling of the DAB, the 2<sup>nd</sup> respondent decided to appeal against the decision of the DAB to the 1<sup>st</sup> respondent;
- (5) on 11 June 2019, the parties signed a Tripartite Arbitration Agreement, (TAA), which among other things, stipulated the timetable for the arbitration before the 1<sup>st</sup> respondent. In this regard, there were various sequential steps that were outlined and to be followed in managing the dispute towards a hearing;
- (6) the 1<sup>st</sup> respondent decided that he wanted to skip step 2 and wrote a letter to the parties requesting their view on his proposed skipping of the step. Their take on the proposed step were required to be filed with 1<sup>st</sup> respondent within a specified period;
- (7) the 2<sup>nd</sup> respondent filed his response within the stipulated time and agreed to the proposed skipping of step 2;
- (8) the applicant did not meet the deadline, in which case the 1<sup>st</sup> respondent presumed an agreement by the applicant. He proceeded to deal with the subsequent steps, including the filing of the statement of claim by the 2<sup>nd</sup> respondent;
- (9) the applicant eventually wrote a letter objecting to the skipping of step 2 and insisting on the terms of the agreement being adhered to;
- (10) the applicant would in due course and in terms of the TAA be required, within a stipulated time frame, to file its answer and counterclaim against the 2<sup>nd</sup> respondent's claim and it was of the view that it was out of time;
- (11) the applicant thus filed an application for condonation for the late filing, which was opposed by the 2<sup>nd</sup> respondent. The 1<sup>st</sup> respondent refused the application for condonation, resulting in the applicant being unable to file its answer to the 2<sup>nd</sup> respondent's statement of claim and its counterclaim;

(12)the applicant claims that the decision by the 1<sup>st</sup> respondent refusing the application for condonation, is irregular and/or unlawful and thus void *ab initio*. The applicant seeks to have this order set aside on review.

[5] It is the applicant's case that the decision to disallow the application for condonation is wrong and contrary to the provisions of the TAA. It is submitted in particular that the *dies* set out in the TAA had not lapsed. It is the applicant's further case that the applicant was not, at the time it filed the application for condonation required to file its statement, as that step had not been reached when the TAA is properly considered.

[6] The applicant further accuses the 1<sup>st</sup> respondent of having circumvented the timelines and procedures set out in the TAA without any lawful basis. In this regard, so submit the applicant, the 1<sup>st</sup> respondent appropriated to himself powers that he did not have in terms of the TAA. His decision was accordingly not based on the correct provision of the TAA, thus rendering the decision '*ultra vires*, unlawful and illegal'<sup>3</sup> and therefore fit to be set aside on review.

[7] The applicant further contended that the applicant's decision also heralded deleterious consequences for its right to a fair trial in terms of Article 12 of the Constitution of Namibia. In this regard, the inability to meet the case launched against it offends against Article 12.

[8] The applicant was not done. It further submitted that the 1<sup>st</sup> respondent's decision sought to be impugned in these proceedings not only trumped its Article 12 rights but it also should fall on grounds that it is unreasonable within the meaning of Article 18, as it is not in keeping with the terms of the TAA. The applicant accordingly argues that it has been treated unfairly and unjustly by the 1<sup>st</sup> respondent's decision and faces the real prospect of having to pay a whopping sum of N\$ 15 million without having had the full benefit of the procedural rights accorded by the TAA in which it would place its version before the 1<sup>st</sup> respondent and also file a counterclaim of N\$ 11 million against the 2<sup>nd</sup> respondent.

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<sup>3</sup> Para 54 of the founding affidavit.

[9] Finally, the applicant contended that the 1<sup>st</sup> respondent, if it was correct that the applicant fell foul of the time periods for filing, he had in his cabinet of retribution, a whip that would have conveyed the seriousness of the neglect or failure to timeously file its papers. This, it was submitted, was an appropriate order for costs. The decision made by the 1<sup>st</sup> respondent has rendered the 2<sup>nd</sup> respondent's matter literally unopposed, but without affording the applicant a proper hearing in that regard.

[10] Finally, the applicant implored the court if it did not find for it in terms of the grounds traversed above, to, in the interests of justice, to exercise its powers in terms of the provisions of s 8 of the Act. This includes the power to extend time lines provided for in any agreement. It is thus the applicant's case that the route followed by the arbitrator is not only prejudicial but condemns it to a judgment without trial, which would be unfair and ought to be corrected by the court.

#### The 2<sup>nd</sup> respondent's case

[11] It is worth mentioning that the 1<sup>st</sup> respondent did not oppose the application. This is indeed a laudable step because it is, except in exceptional circumstances, unseemly that persons who sit in an adjudicative position should embroil themselves in the dust of the conflict that may rightly or wrongly arise from the case they were or are determining. This is a principle that has become settled and entrenched on the judicial soils of this jurisdiction like the majestic Baobab tree.<sup>4</sup>

[12] Predictably, the 2<sup>nd</sup> respondent opposed the application. The nub of his case is that the 1<sup>st</sup> respondent issued a directive and notified the parties that he proposed that Step 2 be skipped. He required the parties to respond to the proposal by 14 June 2019. The 2<sup>nd</sup> respondent replied and agreed to the proposal to skip the said step. The applicant responded 7 days later, indicating that the said step should not be skipped but that was already late and the next step had been engaged. A directive from the 1<sup>st</sup> respondent to resolve the issue amicably between the two protagonists failed to bear fruit as the 2<sup>nd</sup> respondent refused to budge.

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<sup>4</sup>*Tjirare v The Electoral Commission of Namibia* (EC 2- 2020) [2020] NAHCMD 283 (13 July 2020) and *JB Cooling and Refrigeration CC v Willemse t/a Windhoek Armature Winding* (A/76/2015) [2016] NAHCMD 8 (20 January 2016).

[13] The 1<sup>st</sup> respondent then provided a directive to the applicant to file a letter motivating the application for extension of time within 7 days, after which the 1<sup>st</sup> respondent would make his decision on the application. The applicant failed to do so. A meeting was then called by the 1<sup>st</sup> respondent to deal with Step 7. On 20 August 2019, when the meeting was held, the applicant requested for condonation of its failure to timeously file its papers alluded to above. It was agreed that the application for condonation should be filed on or before 28 August 2019.

[14] It was only on 4 September 2019 that the applicant filed an affidavit in respect of the condonation in question. On 17 September 2019, the 1<sup>st</sup> respondent made his ruling refusing the application. The 2<sup>nd</sup> respondent contends that the arbitrator was eminently correct in issuing the ruling that he did and that he should not be faulted therefor. The applicant had been afforded time to file its condonation but it failed to do so timeously.

[15] It is the 2<sup>nd</sup> respondent's case that the 1<sup>st</sup> respondent dealt with the matter in a fair, reasonable manner as well as in accordance with the laws of natural justice. It was the 2<sup>nd</sup> respondent's case that the 1<sup>st</sup> respondent's dealing with the matter was in consonance with the provisions of Article 12 of the Namibian Constitution.

#### Determination

[16] It is now opportune for the court to determine that matter, having briefly encapsulated the parties' disparate positions on the matter. It will be plain that at the heart of the matter will be a consideration of the relevant terms of the TAA and the proper interpretation to be accorded thereto. In particular, the court is called upon to determine whether the applicant is correct in alleging that the 1<sup>st</sup> respondent dealt with the matter in a manner that is subversive of the rules of fairness, justice and thus grossly irregular and contrary to the agreement *inter partes*, such as to justify this court in setting aside the rulings in question.

[17] It is perhaps opportune to, at this juncture, refer to the one of the leading judgments on this aspect. In *Telcordia Technologies Inc v Telekom SA Ltd*<sup>5</sup>, Harms

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<sup>5</sup> *Telcordia Technologies Inc v Telekom SA Ltd* 2007 (3) SA 266 (SCA), p 297, para 69.



JA stated the following regarding the errors of law, which the 1<sup>st</sup> respondent is accused of having committed in the present case:

‘Errors of law, can no doubt, lead to gross irregularities in the conduct of proceedings. Telcordia posed the example where an arbitrator, because of his misunderstanding of the *audi* principle, refuses to hear the one party. Although in such a case the error of law gives rise to the irregularity, the reviewable irregularity would be the refusal to hear that party, and not the error of law. Likewise, an error of law may lead an arbitrator to exceed his powers or to misconceive the nature of the inquiry and his duties in connection therewith.’

[18] In *Ellis v Morgan*<sup>6</sup> Mason J laid down the applicable law as follows regarding reviewable irregularity:

‘But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.’

[19] Harms JA proceeded to refer to the words of Schreiner J where he said the following:

‘The law, as stated in *Ellis v Morgan (supra)* has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and *bona fide*, though mistaken, may come under that description. *The crucial question is whether it prevented a fair trial of the issues.* If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect. And from the magistrate’s reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case, it may be said that he is in a sense failing to afford the parties a fair trial.

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<sup>6</sup> *Ellis v Morgan* 1909 TS 576 at 581.

But that is not necessarily the case. *Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial.* One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the Court's not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the inquiry, or of its duties in connection therewith, then it is in accordance with the ordinary language to say that the losing party has not had a fair trial. *I agree that in the present case the facts fall within this latter class of case, and that the magistrate, owing to the erroneous view which he held as to his functions, really never dealt with the matter before him in the manner which was contemplated by the section.* That being the so, there was a gross irregularity, and the proceedings should be set aside.'

[20] What is clear from the foregoing quotations is that it is not any error of law that would lead to a review of the decision made. For an intervention of a reviewing court to become necessary, the error complained of must result in preventing a fair trial of issues. In that case, it will be regarded as a gross irregularity. As such, a mere wrong decision, owing to the arbiter having committed an error of law does not *per se* amount to a gross irregularity. It is where the mistake committed leads to the court or tribunal misconceiving the nature of the inquiry, or its duties in connection with the trial that it can be said to have committed a gross irregularity, which in turn leads to an unfair trial.

[21] In the instant case, the applicant's gripe is that the arbitrator committed a gross irregularity in that he purported to change the nature of the agreement between the parties. This, it is argued, is so because the TAA stipulated the steps to be sequentially followed and in a progressive manner. For the 1<sup>st</sup> respondent to then skip step 2, contends the applicant, constitutes a gross irregularity, not only in that it was not envisaged by the parties, but primarily because it has detrimentally affected the applicant's full and proper exercise of its procedural rights. This is because the applicant became unable, as a result of the arbitrator's decision, to file its statement of defence and its counterclaim in response to the 2<sup>nd</sup> respondent's claim. Is this argument tenable?

[22] In order to be able to do so, it is proper to have regard to the relevant provisions of the agreement in question. As a general observation, the TAA was an

agreement among three parties, namely the arbitrator and the two litigants before him, namely, the applicant and the 2<sup>nd</sup> respondent.

[23] The TAA made provision for the commencement of the arbitration; warranties by the arbitrator; the procedure to be followed; confidentiality of the proceedings; fees and payments; order of costs and indemnity. Pertinently, the agreement also empowered the arbitrator 'to take decisions regarding procedures for the conduct of the arbitration not covered in this Agreement and its Annexure A.'<sup>7</sup>

[24] It is also important, as seen in the immediately preceding sentence quoted, that the agreement also had an annexure to it, called 'A'. It provided that the arbitration would be conducted in terms of the Arbitration Act, No. 42 of 1965, as amended. It provided for the procedure to be followed, which consisted of nine different steps, that appear to follow sequentially, meaning one after the other.

[25] Step 1, was the signature of the TAA, which it appears common cause, was completed. The next step was Step 2. Because of its centrality to the dispute, it is necessary that it is quoted in full. It provided the following:

'The timetable for the arbitration process shall begin once the Arbitrator has confirmed in writing to the Parties the completion of Step 1 and after holding a PRELIMINARY MEETING on application of either party or the Arbitrator for the purpose of

- 2.1 confirming procedural matters
- 2.2 deciding whether the Arbitrator's Award shall be subject to an appeal
- 2.3 deciding other relevant matters.'

[26] It is now common cause that this is the step that the 1<sup>st</sup> respondent sought to skip. The question is whether it was proper for the 1<sup>st</sup> respondent to have done so. It is common cause that the 1<sup>st</sup> respondent issued a directive via email dated 11 June 2019 to the parties before him to advise within three (3) days of the directive whether they preferred the skipping of Step 2 and proceeding to Step 3. No reasons or justifications were advanced in that email by the 1<sup>st</sup> respondent as to why he proposed to skip the prescribed Step 2.

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<sup>7</sup> Clause 9.1.2 of the TAA.

[27] The 2<sup>nd</sup> respondent agreed to the proposal and the applicant did not. The applicant, however, filed its response beyond the period prescribed by the 1<sup>st</sup> respondent and only did so by letter dated 21 June 2019. The propriety of this very directive is questioned by the applicant and is sought to be regarded as unlawful. Is that proposition correct?

[28] It is worth noting that later, the 1<sup>st</sup> respondent, by communication dated 21 June 2019, informed the applicant that its request for Step 2 not to be skipped was refused. He proffered his reason for that conclusion on the fact that the choice whether to skip the step in question, could only be exercised by 14 June 2019. He added that the applicant's letter of 21 June 2019, did not provide reasons in support of the application for condonation for failure to reply by 14 June 2019.

[29] I am of the considered view that the parties, including the arbitrator had signed a valid agreement, to which there was attached an annexure, dealing with the additional matters, including the steps to be followed by the parties in dealing with the dispute. It appears to me that the 1<sup>st</sup> respondent impermissibly sought to skip the prescribed step 2 and thereby effectively amended the TAA on a unilateral basis, but certainly excluding the applicant. In my view, the 1<sup>st</sup> respondent had no power, right or authority to do so. The consent of one of the parties, in my view did not serve to grant him authority to unilaterally change the terms of the agreement, particularly in the absence of an enabling clause in the agreement.

[30] It appears to me that the directive by the 1<sup>st</sup> respondent constituted an unauthorised and unexplained leap, from Step 2 to 3, without the agreement of the applicant. In my considered opinion, Step 2 had a legitimate purpose as it served as a preliminary meeting, where the timetable, for the arbitration process, was to be agreed upon. It was designed to confirm procedural matters and rule on the decision of the appealability or otherwise of the award and deciding other relevant matters. The parties were thus deprived of this important preliminary step.

[31] By email dated 26 June 2019, the applicant refused to accede to the consideration of the applicant's objection towards the skipping of Step 3. He gave the applicant a choice to resolve that issue amicably with the applicant, which appears from all indications to have been a request to climb Mount Everest, without

any gear to protect one from the elements. In the alternative, he suggested that the applicant should wait until the parties reached Step 7.

[32] I find this to have been unreasonable as the train of arbitration was in motion, passing important landmarks as the applicant had to wait for Step 7. In this regard, the matter was not resolved between the applicant and the 2<sup>nd</sup> respondent. It appears that the applicant was, as it were, a sheep led to the shearers, without even a bleat. Importantly, it must be pointed out, the arbitrator's approach is clearly *dehors* the agreement signed by the parties and the arbitrator.

[33] It does not appear that the parties did attempt to settle the matter between themselves, and one can understand the tactical advantage that the 2<sup>nd</sup> respondent had gained with the late indication by the applicant of its choice on the question of skipping Step 2. To have kept the applicant at the mercy of the elements, so to speak, in the absence of an agreement, until Step 7 was reached, as an alternative, was to throw the applicant to the ravenous dogs as it were as a plump and sumptuous meal. The writing was on the wall against the applicant, leading to its failure in part, in meeting the deadlines for filing the necessary papers in relation to the steps subsequent to Step 2, which was in any event irregularly skipped as I found.

[34] It is accordingly clear that the 1<sup>st</sup> respondent had no power to side-step Step 2 and move to Step 3 as he purported to do. These steps were different and were designed to be executed at different times in the natural progression of the arbitration. To seek to entirely do away with Step 2 did not fall within the remit of the 1<sup>st</sup> respondent and is thus unlawful and liable to be set aside. In doing so, it would seem to that the 1<sup>st</sup> respondent sought to effectively rewrite the agreement of the parties.

[35] The trap that the 1<sup>st</sup> respondent fell into was cautioned against by Wallis JA, in the following lapidary remarks found in his oft-quoted judgment of *Natal Joint Municipal Pension Fund v Endumeni Municipality*<sup>8</sup>:

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<sup>8</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), para 18.

'Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business like for the words actually used. To do so in regard to a statute or statutory instrument, is to cross the divide between interpretation and legislation, in a contractual context it is to make a contract for the parties other than the one they in fact made. (Emphasis added).

[36] I say so considering the fact that in terms of the TAA, particularly the annexure thereto, clause 9.1.2 provides that the 1<sup>st</sup> respondent may take decisions regarding matters not provided for in the TAA. This power is very limited in my view and confined to a specific class of matters. Where a matter is provided for in the TAA and the annexure, then the 1<sup>st</sup> respondent would not be entitled to take decisions in that regard.

[37] The issue of the various steps was set out in the annexure and it was therefor improper for the 1<sup>st</sup> respondent to seek to skip a step that the parties had agreed upon, especially one that was the first official meeting designed to map out a clear process that the parties would follow. In doing so, he, in my view, sought to rewrite the agreement for the parties, which he was not entitled to do.

[38] I recognise that the 1<sup>st</sup> respondent, in skipping Step 2, attempted to get the concurrence of the parties within a specified time. Evidently, the applicant failed to meet that deadline of 3 days, whereas the 2<sup>nd</sup> respondent met it. The applicant recorded its opposition to the skipping of step 2 and recorded its disagreement in writing, albeit late. I am of the view that this was an important matter that the 1<sup>st</sup> respondent was not entitled to proceed with without the views, particularly the concurrence, of both parties. I say so because his proposal was tantamount to rewriting the agreement *inter partes*.

[39] The 1<sup>st</sup> respondent fell into a further error in that he sought to apply the doctrine of waiver, which operated against the applicant and rendered it unable to file its papers ultimately. I am of the considered view, and the authorities state that for the doctrine of waiver to apply, the person waiving his or her rights, he or she should know his or her rights and with full information of the deleterious effect of the waiver on his or her rights, and the consequences thereof, agree. This has not been

shown to be the case by the 1<sup>st</sup> respondent. The failure by the applicant to respond on time did not, in view of the clear language of the agreement, amount to it having agreed to the skipping of the steps.

[40] I take judicial notice of the notorious fact that the applicant, unlike the 2<sup>nd</sup> respondent, is a large institution, with multiple layers of decision-making, for accountability purposes and good governance. In this connection, where time limits for the making of certain decisions are made, the nature and size of the applicant should, in my considered view, have been taken into account. This the 1<sup>st</sup> respondent did not do and this served to imperil the applicant in its ability to properly and fully ventilate its case before the 1<sup>st</sup> respondent.

[41] In view of the conclusion that I have reached above, it is my considered opinion that the 1<sup>st</sup> respondent committed a gross irregularity in seeking, as he did, to skip the a step that was agreed to by the parties, including himself. As stated above, he in so doing, overstepped his powers and effectively rewrote the agreement of the parties, without the concurrence of the applicant, who was, in the premises, committed to unreasonable time frames within which to signify its occurrence or otherwise to the skipping of the relevant step.

[42] Tebbutt JA writing for the majority of the court in *Takhona Dlamini v President of the Industrial Court*,<sup>9</sup> cited with resounding approval the law as collated by Corbett CJ in *Local Road Transportation Board and Another v Durban City Council and Another*<sup>10</sup> stated the following at p 12-13 of the judgment:

‘A mistake of law *per se* is not an irregularity but its consequences amount to a gross irregularity where a judicial officer, although perfectly well-intentioned and *bona fide*, does not direct his mind to the issues before him and so prevents the aggrieved party from having his case fully and fairly determined. In such a case that would be an irregularity justiciable on review.’

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<sup>9</sup> *Takhona Dlamini v President of the Industrial Court* (23/97) [1997] SZSC 1 (01 January 1997).

<sup>10</sup> *Local Road Transportation Board and Another v Durban City Council and Another* 1965 (1) SA 586 (AD)

[43] The learned Judge of Appeal proceeded to cite with approval the sentiments expressed on the concept of gross irregularity in *Paper, Printing, Wood & Allied Workers Union v Pienaar NO and Others*<sup>11</sup>

‘That expression is not confined to defects in procedure as such. It covers the case where the decision-maker through an error of law misconceives the nature of his functions and thus fails to apply his mind to the true issues in the manner required by statute, with the result that the aggrieved party is in that respect denied a fair hearing.’

[44] I am of the considered opinion that the approach adopted by the 1<sup>st</sup> respondent in this matter, falls within the ambit of the law as adumbrated in the cases cited above. More importantly, it becomes clear that as a result of the 1<sup>st</sup> respondent’s decision in part, the applicant ended being unable to ultimately file its statement of defence and his counterclaim as initially intended, hence the dismissed application for condonation.

[45] It is apparent, when one has regard to the entire process, that if Step 2 had been followed strictly in terms of the TAA, it is at that stage that the parties would have been guided and possibly agreed as to what documents they were expected to file in the progression of the matter, i.e. their respective statements of claim, defence and counterclaim, if any. The 1<sup>st</sup> applicant wrongly skipped that step and proceeded to Step 3, which as I have found was wrong, illegal as it is only not covered by the agreement *inter partes*, but it is inconsistent therewith.

[46] In this regard, the parties side stepped Step 2 and moved to Step 3, without any clarity as to what was expected of them in advance in the next step. Step 2 was designed to afford them clarity of the next steps and procedures, without necessarily putting them to terms to file or identifying when filing would be required. As a result of that wrong step, the applicant fell into problems and ultimately failed to file its statement of defence and its counterclaim.

[47] It is now a historical fact that the applicant’s application for condonation for the late filing of its statement of defence and counterclaim failed. This, in turn

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<sup>11</sup> *Paper, Printing, Wood & Allied Workers Union v Pienaar NO and Others* 1993 (4) SA 621 (AD), at 638H-I) per Botha JA.



resulted in the applicant's procedural rights not being properly exercised, if at all. All this stems from and is a direct consequence of the illegal fast-forwarding of the steps by the 1<sup>st</sup> respondent and for reasons that up to now remain very obscure to the court. The applicant has, as a result, been dealt a heavy blow, namely, being denied a fair hearing in the instant case.

[48] I am of the considered opinion that once the court finds that the 1<sup>st</sup> respondent acted irregularly and in a gross manner in respect of Step 2, which I have found is the case, there is no need to consider the balance of the contentions by the applicant relating to the condonation application and its refusal. The improper directive issued by the 1<sup>st</sup> respondent in respect of Step 2 is the author of all the problems that eventuated in this matter, including the failure in part, to file the statement of defence and counterclaim. In any event, if the applicant succeeds on this point as it has done, the proper decision would be to refer the parties back to Step 2, rendering the balance of what the 1<sup>st</sup> respondent ordered subsequently, to be water under the bridge.

[49] I would, without closely examining the merits of the second decision sought to be impugned, wish to state that arbitrators should be very slow to issue punitive orders whose effect is to effectively bar a party from further participating in the proceedings. In this regard, I would call in aid the judgment of the Supreme Court in *Minister of Health and Social Services v Amakali*.<sup>12</sup>

[50] In that case, the Supreme Court upheld the reasoning of this court in *Hilifilwa v Mweshixwa*<sup>13</sup> and *Donatus v Ministry of Health and Social Welfare*<sup>14</sup> where this court warned about the dangers of imposing sanctions that literally take away the right of a party to place its case before court without being placed on sufficient notice of that glaring prospect.

[51] At para 52, Damaseb DCJ reasoned as follows:

'As is apparent from the terms of rule 53, in the exercise of the discretion to impose sanctions, a managing judge has a panoply of alternatives for punishing a party that is in

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<sup>12</sup> *Minister of Health and Social Services v Amakali* 2019 (1) NR 262 (SC).

<sup>13</sup> *Hilifilwa v Mweshixwa* (I 3418/2013) NAHCMD 166, (10 June 2016).

<sup>14</sup> *Donatus v Ministry of Health and Social Welfare* 2016 (2) NR 532 (HC).

default of a court order or through which the court may show its disapproval of the party's conduct. More often than not, a punitive costs order would suffice. That discretion can only be exercised after the court has afforded the parties, especially the one in default, the opportunity to make representations.'

[52] It is accordingly appropriate to mention that arbiters in the 1<sup>st</sup> respondent's position, faced with a default in complying with one or other directive, should be very slow in imposing punishment on an errant party that would result in that party being unable to prosecute its case any longer or meaningfully because of the punishment imposed. Other less drastic whips can be unleashed on the errant party, without the deleterious consequences of having its case literally thrown out because of non-compliance with one order or another. Each case ultimately turns on its own facts and there may be cases where the throwing out of a defence or a claim is the only option open, with all else having failed.

#### Observation

[53] It will be clear from the conclusion above that the 1<sup>st</sup> respondent committed what has been referred to as a gross irregularity, hence the setting aside of the decision that follows. What I proceed to address below is merely mentioned *obiter*.

[54] It is apparent from *Telcordia* and the other cases referred to above that it is not every mistake of law that results in the award of the arbitrator being set aside. That becomes the case if the award amounts to a gross irregularity. The question that tortures my mind is this – what happens in those cases where the irregularity or mistake of law is not considered to be grossly irregular? Should it be allowed to stand, with the court having acknowledged its wrongfulness or erroneous nature? Is it consistent with the rule of law and the principle of legality to allow a decision or order that has been found to be wrong to stand and in the face of a complaint before court about that very decision?

[55] It would appear to me, with respect that what the court does in that scenario, is to say the following to the party on the receiving end of the wrong decision, 'We acknowledge there was an error, the decision is wrong in law. However, it is not so

wrong that we should set it aside because it is the result of a contract that you signed with the other protagonist. As a court, we will only interfere and set aside the decision or award if we are persuaded that it amounts to a gross irregularity and leads to an unfair hearing. Yours does not meet that standard. Take some pain killer tablets and water, to deal with the pain. Sleep for tonight and try and reconcile yourself with this wrong decision. Try with all the powers at your command to lick your wounds, pick up your life and get ready to accept and live with the wrong decision. It is, of course, wrong but we cannot put it aright.'

[56] It must be considered that the Arbitration Act predates the Constitution by some 25 years. At the time that law was promulgated, it would appear that the state of law was such that Parliamentary supremacy reigned supreme. This has since been supplanted by constitutional supremacy. In this regard, all decisions by functionaries and tribunals should fall in line with the prescripts of the Constitution. In this regard, there is no red, yellow or green standard for setting the decision aside for violating the Constitution, red being the egregious one liable to be set aside. Once the decision is wrong, it should be set aside and not survive constitutional scrutiny.

[57] The present state of the law in this area is such that the arena of private arbitration seems to constitute an island where the full reach of the Constitution is not allowed. This is so because wrong decisions are allowed to survive for the reason that they do not meet the threshold of gross irregularity. This is not consistent with the Constitution in my considered view. The majority of the Constitutional Court of South Africa commented in *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*<sup>15</sup> that all areas of the law, including private law, of which the law of contract forms part, should be infused with constitutional values without exception.

[58] I am of the opinion that this is view may be apposite when it comes to the scrutiny of decisions made by arbitrators. It cannot be, in my respectfully considered view, that a decision adjudged to be wrong, and thus failing to survive the court's scrutiny exercising its constitutional mandate, may still be upheld because it is not

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<sup>15</sup> CCT 109/19 [2020] ZACC 13 (17 June 2020).

one that is considered a gross irregularity, born, as it is, from a private contract of arbitration.

[59] The realm of private arbitration should not be allowed to develop into an island in Namibia that survives constitutional scrutiny. I am of the considered that the provisions of section 33 of the Arbitration Act, permit wrong decisions to stand if they fall below the threshold of gross irregularity. I am of the view that in a constitutional State as Namibia, it would be against the ethos of the Constitution to allow such decisions, wrong as they are, to stand. Time to deal with the constitutionality and lustre of the said provisions will hopefully come in the near future.

### Conclusion

[60] In view of the discussion above, I have arrived at the conclusion that this is a matter in which the arbitrator committed a gross irregularity by arrogating upon himself powers that he did not, in terms of the agreement, possess. The decision to fast-forward the proceedings and in the process skip an important and prescribed process that was agreed to in a formal agreement, eventually to the applicant's detriment, resulted in him re-writing the agreement on behalf of the parties. This, in my view, constitutes a gross irregularity. Not only did this decision upset the applectart, but it effectively resulted in the applicant eventually being denied its procedural rights to defend the claim against it and to file its counterclaim, if so advised.

[61] As indicated above, the conclusion reached in respect the skipping of Step 2, as discussed in paragraphs 45 to 48 above, positively impacts on the first and second decisions made by the 1<sup>st</sup> respondent. This renders it unnecessary, in the circumstances, to consider the impact of the second decision, save the limited remarks made immediately above, and only for future guidance.

### Costs

[62] The approach that can be regarded as not immutable, depending on the peculiarity of the attendant facts of the matter at hand, is that costs follow the event. The 1<sup>st</sup> respondent, as stated earlier, and correctly so, did not oppose these proceedings. It would, in any event cause a chilling effect on arbitrators, if they would be personally held liable for errors they commit in the *bona fide* exercise of their powers, even in cases where they can be accused of having committed a gross irregularity.

[63] In the instant case, the 2<sup>nd</sup> respondent, on advice, did oppose the current proceedings. As the axe of failure in the matter has fallen on his lap, as far as costs are concerned, he is to bear the costs of the application. No extenuating or mitigating factors have been put forth that might suggest that this is not a proper or fitting case for the 2<sup>nd</sup> respondent to be ordered to bear the costs.

#### Order

[64] In the premises, I am of the considered opinion that the order that is condign for issuance in this matter is the following:

1. The First Respondent is ordered to properly and fully complete Step 2 recorded in Clause 9.1.2 of Annexure A to the Tripartite Agreement, concluded by the parties on 11 June 2019.
2. Having so completed Step 2, referred to in paragraph 1 above, the First Respondent is ordered to follow the subsequent steps recorded in Annexure A to the Tripartite Arbitration Agreement signed *inter partes*.
3. For the avoidance of doubt, all the steps and decisions taken by the First Respondent subsequent to him not complying with Step 2 are hereby set aside as invalid, unlawful and therefor irregular.
4. The Second Respondent is ordered to pay the costs of the application consequent upon the employment of one instructing counsel and one instructed counsel.
5. The matter is removed from the roll and is regarded as finalised.

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T. S. Masuku

Judge

APPEARANCES:

APPLICANT:

T. Phatela

Instructed by Kangweehi & Kavendjee Inc.

2<sup>ND</sup> RESPONDENT:

K. Haraseb

Of LorentzAngula Inc.