REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 10548/2010

DATE:17/02/2011

In the matter between:

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	Applicant
and	
INTERNATIONAL PARKING MANAGEMENT (PTY) LTD	First Respondent
J.H. CONRADIE N.O.	Second Respondent
J.W. SMALBERGER N.O.	Third Respondent
J.F. MYBURGH SC N.O.	Fourth Respondent
R.A.K. VAHED SC N.O.	Fifth Respondent

J U D G M E N T

MBHA, J:

INTRODUCTION

[1] This is an application to review and set aside the arbitration award of the second respondent dated 28 August 2009, and the arbitration appeal award of the third, fourth and fifth respondents dated 5 February 2010, upholding the second respondent's award ("*the awards*"). The review is brought under section 33 of the Arbitration Act 42 of 1965 ("*the Arbitration Act*").

[2] The grounds upon which the applicant relies for bringing the application are threefold and can be summarised as follows:

2.1 Legality:

2.1.1 The applicant avers that the legality rule requires that arbitration awards must comply with the law including statutes and regulations, and that arbitration awards that fail to comply with the law and which accordingly violate the legality rule are unlawful, unenforceable and should be set aside on review.

2.1.2 The applicant avers further, that the awards, in particular the finding that employees of the first respondent are competent in law to carry out law enforcement within the City of Johannesburg municipality ("*the municipality*"), violate the legality rule. In further elucidation of this point, the applicant submits that the constitutional and statutory scheme governing law enforcement within the municipality, requires that only duly authorised servants or employees of the applicant may carry out law enforcement within the municipality.

2.2 Public Policy:

2.2.1 The applicant avers that contracts that are similar to the Parking Management Contract ("*the contract*"), which governs the relationship between the applicant and the first respondent, and which is the focal point of this litigation, which seek to incentivise law enforcement by paying 90% of fine revenue to a private company similar to the first respondent, whose employees generate fine revenue by issuing fine tickets for parking and stationary offences, offend public policy.

2.2.2 The applicant contends therefore that as the arbitration awards uphold and enforce the contract, they offend public policy and accordingly fall to be reviewed and set aside.

2.3 Gross Irregularity:

2.3.1 The applicant contends that the arbitrators were wrong in rejecting the expert opinion of Dr Sampson, the witness called by the applicant and who was the only expert who was qualified to give an opinion on the question of fine revenue generated over time by effective law enforcement. On the other hand, the three experts called by the first respondent were not qualified to give an opinion on this question and ignored the crucially relevant assumption that should have been applied to the generation and calculation of fine revenue over the period of the contract.

2.3.2 The applicant therefore submits that in rejecting the opinion of Dr Sampson and accepting that of the first respondent's experts, the arbitrators adopted an approach that is so irrational, illogical and fundamentally flawed that it amounts to a gross irregularity in the proceedings.

[3] The first respondent resists the review application on four grounds which can be summarised as follows:

3.1 Assuming that the applicant is correct on the merits, two of the applicant's grounds of review, namely "*legality*" and "*public policy*", fall to be dismissed at the outset in the light of the arbitrators' findings in the alternative regarding severability of the contract.

3.2 The first respondent contends that the grounds of "*legality*" and "*public policy*" cannot override or somehow augment, as applicant seems to suggest, the exclusive and limited grounds of review of private consensual arbitrations which are set out in section 33 of the Arbitration Act. The first respondent submits that:

3.2.1 the "*legality*" point as founded in jurisprudence which applies exclusively to arbitration decisions in compulsory, statutory arbitrations which constitute administrative action such as CCMA awards, does not apply to private arbitrations; and

3.2.2 the "*public policy*" point does not constitute a ground of review.

3.3 The first respondent avers that none of the applicant's three grounds of review fall within the limited purview of section 33(1) of the Act and accordingly ought to be dismissed as they do no more than raise issues on the merits which have been decided against the applicant in the arbitration proceedings.

3.4 Finally, the first respondent asks that in the event this Court finds that anyone of the applicant's grounds of review is not bad in law, that they are in any event without merit and that the entire application should be dismissed with costs.

BACKGROUND FACTS

[4] Before I proceed to consider the respective parties' submissions, I deem it necessary to set out a summary of the background facts of this matter. It is worth mentioning that other than the extensive and quite detailed pleadings and documentation of the application, I also had at my disposal the entire arbitration record consisting of some 31 volumes, the Supreme Court of Appeal record and a bundle of documents which were referred to in the arbitration. Counsel for the parties also furnished me with extensive and well-prepared heads of argument. I unreservedly commend both counsel for their invaluable assistance in this regard. I need also point out that I found argument and debate, which lasted the entire day professional, lively, quite enlightening and entirely helpful.

[5] On 10 June 1999 the applicant and the first respondent concluded a 10 year parking management contract ("*the contract*") consisting of two parts:

5.1 The first part provides for a parking management system in terms of which the first respondent was required to supply parking meters for 6 500 street parking bays to the applicant, service and maintain them and collect the proceeds from the said parking meters.

5.2 The second part is a law enforcement service in terms of which the first respondent agreed to provide the applicant with a law enforcement service in return for 90% of the fine revenue generated and collected from fines issued by the first respondent's employees. The law enforcement service included the following:

5.2.1 The first respondent's employees who are called traffic wardens enforced parking and stationary offences applicable under the by-laws and the Road Traffic Act No. 29 of 1989 ("*RTA*") in defined areas within the area under the jurisdiction of the applicant by issuing fines to motorists who committed these offences.

5.2.2 The applicant paid the first respondent 90% of the fine revenue generated from fines issued by the first respondent's employees for parking and stationary offences under the by-laws and RTA, collected from motorists who admitted guilt and who were prosecuted by the National Prosecuting Authority ("*NPA*") for these offences.

[6] In terms of clause 11 of the contract the applicant would train and appoint personnel as traffic wardens, but the first respondent would employ them.

[7] It is common cause that this review only concerns the law enforcement part of the contract.

[8] On 23 July 2003 the applicant unilaterally suspended the law enforcement part of the contract alleging that it was contrary to public policy and thus unenforceable. It is common cause that the first respondent did not accept this repudiation.

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[9] It is important to note that after the applicant unilaterally suspended the law enforcement aspect of the contract, the rest of the contract, specifically the part encompassing the parking management service continued to be enforced until 23 June 2008 when the parties mutually agreed to cancel the entire contract.

[10] The suspension of the law enforcement part of the contract resulted in a flurry of litigation instituted by the first respondent. This included a claim for the reinstatement of the law enforcement part of the contract and a claim for fine revenue lost after the suspension of the law enforcement part of the contract.

[11] On 1 September 2005, Makhanya J granted an order *inter alia*, for specific performance of the law enforcement provisions in the contract against the applicant. This order was granted by consent, the applicant having apparently abandoned its public policy argument.

[12] The applicant did not comply with the aforesaid order for specific performance and omitted to appoint newly trained traffic wardens purportedly on the grounds that the appointment of wardens employed by the first respondent was unlawful by virtue of section 334(2) of the Criminal Procedure Act 51 of 1977 ("*the CPA*").

[13] The first respondent then launched a contempt application to this Court for an order *inter alia*, declaring that clause 11 of the contract was enforceable. The applicant resisted the contempt application on the basis that it was precluded from appointing the first respondent's employees as traffic wardens by virtue *inter alia* of section 334(2) of the CPA. The applicant also resisted the contempt application on the basis that law enforcement of parking and other stationary offences by traffic wardens employed by a private

company which earned a share of the fine revenue, was contrary to public policy and thus unenforceable.

[14] The contempt application served before Victor AJ (as she then was) on 14 March 2007 who decided the matter in the first respondent's favour. In deciding the matter, Victor AJ dealt specifically with section 334 of the CPA but not the public policy point since this aspect was apparently never raised by the applicant.

[15] The applicant being unsatisfied with the outcome referred the matter to the Supreme Court of Appeal with Victor AJ's leave.

[16] In the interim, the first respondent had instituted an action for damages and an application for a statement and debatement of account.

[17] At the SCA hearing in April 2008 the court urged the parties to resolve the various disputes between them, to avoid what was considered to be an unfortunate proliferation of litigation between the parties. On the basis of that advice, the parties agreed in principle that all the disputes between them be referred to arbitration.

[18] On 23 May 2008 the parties entered into a written arbitration agreement ("*the arbitration agreement*") in terms of which they agreed that:

18.1 all pending litigation between them would be consolidated and referred to arbitration before retired Supreme Court of Appeal Judge Johan Conradie ("*the arbitrator*");

18.2 the arbitration would be held in terms of the Arbitration Act; and

18.3 a right of appeal to an appeal tribunal consisting of three former or retired Judges or Senior Counsel of not less than 10 years' standing shall lie from any award of the arbitrator.

[19] The arbitration was held from 21 March 2009 to 7 April 2009. On 28 August 2009 the arbitrator published his award the executable part whereof was expressed as follows:

"*1. The memorandum of agreement between the claimant (first respondent) and the defendant (the applicant) dated 10 June 1999 is rectified by –*

1.1 *adding to the definition of 'offences' in clause 1.2.12 the words 'and Road Traffic Act 29 of 1989'.*

1.2 *Inserting in clause 1.2.9 after the word 'bylaws' in the definition of 'law enforcement' the words 'and Road Traffic Act' so that the definition reads '… enforcement of the by-laws and Road Traffic Act relating to the offences to be carried out by IPM law enforcement personnel subject to the provisions of clause 11'.*

2. *The defendant is to pay to the claimant an amount of R216 809 943,00 plus interest thereon at the mora rate of 15,5% per annum from 23 June 2008 to date of payment.*

3. The costs of the High Court and Supreme Court of Appeal litigation between the parties are to be paid by the defendant on the footing that the costs of two counsel were justified.

4. *The costs of the arbitration as well as those of the application to compel further and better discovery are to be paid by the defendant including the costs consequent upon the employment of two counsel, the arbitrator's fees, the costs of the venue and the transcription of the record.*"

[20] After publication of the award, the applicant elected to exercise its right of appeal to an appeal tribunal as provided for in clause 12 of the arbitration agreement. The arbitration appeal was heard on 26 and 27 January 2010 and the appeal tribunal published its award ("*the appeal award*") on 5 February 2010.

[21] In terms of the appeal award, the applicant's entire appeal against the award was dismissed with costs and the appeal tribunal concluded as follows:

"*126. The COJ's appeal is dismissed with costs, such costs to include the costs of two counsel, the fees and costs of the appeal arbitrators and the cost of the appeal venue.*"

[22] There was thereafter an exchange of correspondence between the parties in which first respondent demanded payment as per the arbitration awards. The applicant replied stating that it would resist any attempt to enforce the arbitration awards on the basis that "*the agreement sought to be enforced is illegal, and to enforce it would be contrary to public policy*".

[23] Consequently, the first respondent brought an application to enforce the awards. The applicant successfully obtained a stay of that application on the basis that it intended filing a review application which it ultimately did.

CONSIDERATION OF THE PARTIES' RESPECTIVE SUBMISSIONS

[24] The first three of the defences raised by the first respondent are in effect points *in limine.* In order to be able to effectively consider and deal with these "*points in limine*", it is necessary to have an overview of the applicant's case.

[25] The applicant's first ground of review, namely the "*legality*" point, is that the arbitrators committed an error of law in that they misinterpreted and misapplied several legal provisions, especially the pre-2004 by-laws. More particularly, the applicant contends that:

25.1 the rule of law is a foundational value of our Constitution and incorporates the constitutional principle of legality which in turn requires that arbitration awards must comply with the law, including statutes and regulations;

25.2 arbitrators are accordingly subject to the rule of law and the principle of legality meaning that their awards cannot sanction what the law does not permit; and

25.3 if they do then the awards offend the legality principle and can be set aside.

[26] The applicant's second ground of review is that the arbitrators committed an error of law in finding that the contract between the parties was not contrary to public policy. This is referred to as the "*public policy*" ground of review. More particularly, the applicant contends that:

26.1 The contract between the applicant and the first respondent was contrary to public policy because:

26.1.1 it purported to afford the first respondent's employees powers in contravention of the pre-2004 by-laws read together with several other legal provisions; and

26.1.2 it incentivised law enforcement with a share in fine revenue.

26.2 Our courts do not enforce awards which are derived from contracts that are illegal or against public policy;

26.3 The arbitrators were wrong in finding that the contract between the parties was not contrary to public policy;

26.4 Applicant accordingly contends that because the awards uphold a contract that offends public policy, they should be set aside for this reason.

[27] The applicant's third ground of review, which is referred to as "*gross irregularity*" is that the arbitrators committed an error of law and/or fact because they preferred the evidence of the first respondent's experts over that of the applicant's. The applicant contends that this amounts to a gross irregularity in the conduct of the proceedings.

[28] The first point *in limine* raised by the first respondent is that in the light of the arbitrators' findings regarding severability of the contract, the applicant's "*legality*" and "*public policy*" grounds of review have no impact on the award, even if one were to assume that the arbitrators erred as alleged and that their error renders their awards reviewable, which first respondent submits it does not. Simply stated, the first respondent submits that even if this Court were to strike down the arbitrators' findings on the grounds of "*legality*" and "*public policy*", the awards would still stand on the alternative basis found by the arbitrators.

[29] It is clear that the very issues which the applicant canvasses under the applicant's "*legality*" and "*public policy*" grounds of review were explicitly referred to arbitration for determination. In other words the questions of whether the law enforcement provisions of the contract accorded with the relevant constitutional, statutory and regulatory framework, and whether they were contrary to public policy were matters that were fully argued by both parties and decided by the arbitrator and the appeal tribunal. Clearly, the applicant agreed that these issues be decided by way of arbitration and

subsequently both the arbitrator and the tribunal decided those issues in favour of the first respondent.

[30] However, the first respondent also pleaded, led evidence on, and fully argued an alternative argument before the arbitrator in relation to the "*legality*" and "*public policy*" issues. In so doing, the first respondent's alternative argument assumed that the law enforcement provisions of the contract did not accord with the relevant constitutional, statutory and regulatory framework, or were contrary to public policy.

[31] The first respondent submitted before the arbitrator that the law enforcement provisions of the contract providing for the first respondent to carry out the law enforcement can be severed, and that the remaining provisions of the contract are still valid and enforceable. This submission accords full square with the provisions of clause 17.3 of the contract which provides that:

> "*In the event that any of the provisions of this Agreement are found to be invalid, unlawful or unenforceable, such terms shall be severable from the remaining terms, which shall continue to be valid and enforceable.*"

[32] The arbitrator found that the applicant also accepted that the law enforcement aspect of the contract is severable from the remainder. This is borne out by the fact that the applicant acted accordingly when it suspended only part of the contract on 23 July 2003.

[33] The context in which the severability point arises is as follows:

33.1 In terms of the contract, the applicant was required to train and appoint law enforcement personnel who would be responsible for law enforcement in relation to the parking management system, other parking offences and licensing and registration offences. These law enforcement personnel would however enter into contracts of employment with the first respondent and the first respondent would pay their salaries and benefits.

33.2 The basis upon which the applicant purported to suspend the law enforcement part of the contract was that only it and not the first respondent or any other entity could be responsible for law enforcement through its employees. In the arbitration, the applicant's basis for this contention were the legality and public policy arguments.

[34] Therefore, the first respondent pleaded, in the alternative, that if the law enforcement aspects of the contract proved to be unenforceable, as contended by the applicant, then and in that event the law enforcement personnel had to be employed directly by the applicant and the applicant had an obligation properly to carry out the law enforcement aspects of the contract.

[35] In this context the only issue between the parties before the arbitrator turned on the consequences of severance, because the severability of the contract was and is common cause. The first respondent submitted that the sole consequence of severing the law enforcement provisions of the contract is to place the responsibility of the law enforcement on the applicant, without altering the essence of the agreement between the parties. In short, the fine sharing agreement remains in place subject to the first respondent's share being reduced by the cost of law enforcement carried out by the applicant.

[36] The arbitrator adopted the approach that if first respondent's contention on severance succeeded, it did not matter that the other issues namely, "*legality*" and "*public policy*", were resolved in favour of the applicant. Furthermore, the first respondent's damages claim would still succeed and in the same amount.

[37] The applicant adopted the attitude that the consequences of its taking over law enforcement are that it is not obliged to share fine revenue with the first respondent on the basis provided for in the contract.

[38] The arbitrator found, correctly in my view, in favour of the first respondent and held as follows:

> "*In my opinion a claim for severance along the lines suggested by IPM would have succeeded if IPM's other claims had failed.*"

[39] Clearly, the arbitrator's award regarding severance was made in order to deal with the possibility of an appeal tribunal overturning his award on any of the "*legality*" and "*public policy*" issues which applicant now uses as a basis for seeking a review.

[40] The effect of the arbitrator's award on severance is that it would not matter that the other issues of "*legality*" and "*public policy*" were resolved in favour of the applicant. The first respondent's damages claim would still succeed and in the same amount.

[41] The appeal tribunal also found in favour of the first respondent on the alternative severance argument. The appeal tribunal upheld the arbitrator's findings to the effect that even if they were wrong in deciding the "*legality*" and "*public policy*" issues in favour of the first respondent, the first respondent would still succeed in its damages claim in the same amount based on its alternative severance argument.

[42] Significantly, the applicant has not made any attempt whatsoever to criticise and/or find any fault with the arbitrators' findings on the first respondent's alternative severance argument. It is noteworthy that in its replying affidavit, applicant merely avers that "*it is not necessary for COJ to seek to specifically review the severance findings*".

[43] In the circumstances and in the absence of any challenge by the applicant on the findings of the arbitrators on this aspect, I come to the conclusion that first respondent's contention regarding its alternative severance argument, must be upheld.

[44] Although my finding on this point should dispose of this entire matter, I have nonetheless decided to address the other issues that have been raised in this application.

ARE THE APPLICANT'S GROUNDS OF REVIEW OF "*LEGALITY*" AND "*PUBLIC POLICY*" BAD IN LAW?

[45] The first respondent in its answering affidavit, expressly challenged the applicant's reliance on the "*legality*" and "*public policy*" grounds of review, claiming that these do not fall within section 33 of the Arbitration Act.

[46] Section 33(1) of the Arbitration Act provides as follows:

> "*(1) Where –*
>
> (a) *any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or*
>
> *(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or*
>
> *(c) an award has been improperly obtained,*
>
> *the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.*"

[47] Significantly, in its notice of motion, founding and replying affidavits, and heads of argument the applicant never even attempted to accommodate any of its alleged grounds of review, specifically "*legality*" and "*public policy*" under any of the statutorily defined categories as set out in section 33 of the Act. Instead, the applicant argues that the awards of the arbitrator and the appeal tribunal ought to be set aside on *sui generis* grounds of review of "*legality*" and "*public policy*", which clearly do not fall under any of the provisions of section 33. More particularly, the applicant contends that:

1. "*The principles of legality and justice override the provisions of section 33 of the Arbitration Act*" and

2. "*They are principles which underlie every area of our law, and need not be specifically included in statutes such as the Arbitration Act, to be valid considerations*."

[48] The picture that emerges is that the applicant realises that it has no prospect of review under section 33(1) of the Act and therefore attempts to circumvent section 33 altogether by inventing grounds that are not contained in this section.

[49] In my view the applicant is wrong in contending that there are other grounds of review that can override or even supplement those set out in section 33 of the Arbitration Act.

[50] In *Amalgamated Clothing and Textile Workers Union of SA v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A), at 169B-C, Goldstone JA emphasised that:

> "*…The basis upon which a Court will set aside an arbitrator's award is a very narrow one. … It is only in those cases which fall within the provisions of s 33(1) of the Arbitration Act 42 of 1965 that a Court is empowered to intervene.*"

[51] The SCA re-stated and affirmed this position in *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) where Harms JA said (at paragraph [51]):

> *"[51] Last, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in s 33(1) of the Act. By necessary implication they waive the right to rely on any further ground of review, 'common law' or otherwise.*"

[52] More recently, the Constitutional Court in *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) at paragraphs [224] and [235] made it clear that the extent to which the judiciary may scrutinise private arbitration awards, as in this case, is exclusively regulated by section 33(1) of the Arbitration Act, and that the Constitution requires that these grounds must be "*reasonably strictly*" interpreted thereby limiting judicial interference with arbitration awards.

[53] In the face of the authoritative case law just referred to above, the applicant's contention that "*legality*" and "*public policy*" can be used to override or even supplement section 33 of the Arbitration Act is incorrect. It follows that the applicant's grounds of review of "*legality*" and "*public policy*" fall to be dismissed.

DO THE APPLICANT'S GROUNDS OF REVIEW FALL WITHIN SECTION 33(1) OF THE ARBITRATION ACT?

[54] The applicant contends that the arbitrators erred in the following respects:

54.1 That they erred in law in interpreting and applying the pre-2004 by-laws read together with several other statutory and constitutional provisions and by finding that the traffic wardens implementing the law enforcement provisions of the contract were duly authorised servants of the applicant;

54.2 That they erred in law in interpreting the contract as being in accordance with public policy; and

54.3 That they erred in law and in assessing and evaluating the evidence of the expert witnesses.

[55] In my view, even if all four arbitrators made the errors of law of fact attributed to them, such errors do not found a basis in law to set aside or correct the awards on review.

[56] It is important to keep in mind that the parties agreed to submit their disputes in relation to each of the issues that now constitute the applicant's grounds of review to the arbitrator for determination and to the appeal arbitrators. It is trite that the parties adduced evidence before the arbitrator and addressed the arbitrator on such evidence at length. In the end the arbitrator decided these issues that were submitted to him for determination. He then upheld the first respondent's contentions and dismissed those of the applicant. The applicant exercised its rights to appeal and the appeal tribunal considered the issues raised by applicant afresh. The appeal tribunal evaluated the record of evidence and it is apparent that the parties filed lengthy written argument in advance of the hearing and addressed the appeal tribunal on such evidence over a period of two days. In the end, the appeal tribunal upheld the arbitration award and in so doing, upheld the first respondent's contentions and dismissed those of the applicant.

[57] What the applicant now seeks to do is to have the award and the appeal award overturned on the basis that the arbitrators erred in law and/or fact in that they ought to have upheld the applicant's submissions and not those of the first respondent on the interpretation and application of the law, on the interpretation of the contract, and on the evaluation of the evidence. It

appears to me that what the applicant is attempting to do is to appeal the awards under the guise of a review.

[58] In my view the applicant's approach, specifically in wishing the court to revisit the issues that have been disposed of by the arbitrators is wrong and cannot be sustained. I say so for the following reasons:

58.1 For more than a century our courts have emphasised:

58.1.1 the consensual nature of private arbitration;

58.1.2 its objective of an efficient and speedy final resolution of disputes; and

58.1.3 the consequent need for a great deal of judicial deference when scrutinising arbitration awards.

This is collectively referred to in modern legal parlance as the principle of party autonomy.

58.2 Based on this principle, in 1915 the Appellate Division in *Dickenson and Brown v Fisher's Executors* 1915 AD 166 refused to overturn an arbitration award on the basis that the arbitrator had made a mistake in the interpretation of the party's contract. The Appellate Division held, at page 174, that:

> "*Since the appointment of English and Scottish judges in 1828 the principle of the finality of awards became firmly established in our Courts.*"

58.3 Solomon JA's *dicta* is in this respect apposite and I feel duty-bound to quote him in full. He said the following:

> "*Now it is not, I think, open to question that as a general rule where parties have referred their disputes to an arbitrator, his award is final and conclusive and no appeal lies from his decision. In the case of Caledonian Railway Co. v Turcan (1898, A.C. 256), which is referred to in the judgment of the court below, the English law is thus stated by LORD HALSBURY: 'The parties have selected the arbitrator as judge both of fact and law, and if he be ever so erroneous in the decision at which he has arrived it is conclusive upon the parties …; his award is final, and whether it be right or wrong in point of law, it is a matter with which I am not entitled to deal.' And in the same case LORD HERSCHELL said: 'The arbitrator whether he has decided rightly or wrongly is supreme. There is no power to review his decision, whether he has made a mistake in law or whether he has made a mistake in fact.'*"

[59] The SCA has since then repeatedly affirmed the principle. It did so for instance in *Veldspun* where it said, at page 174, that:

> "*when parties agree to refer a matter to arbitration, unless the submission provides otherwise, they implicitly, if not explicitly (and, subject to the limited power of the Supreme Court under s 3(2) of the Arbitration Act), abandon the right to litigate in courts of law and accept that they will be finally bound by the decision of the arbitrator. … In my opinion the Courts should in no way discourage parties from resorting to arbitration and should deprecate conduct by a party to an arbitration who does not do all in his power to implement the decision of the arbitrator promptly and in good faith.*"

[60] In *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 (4) SA 661 (SCA) at paragraph [20], the SCA confirmed the legal position as laid down in *Dickenson* holding that the principle of finality of awards was "*well-established and firmly entrenched in our law*".

[61] The SCA made it clear in *Veldspun* (*supra*) and again in *Total Support Management* (*supra*) that the *rationale* that underpins the principle of finality of awards, is that consensual arbitration is based on the agreement of the parties to submit to arbitration and to abide by the arbitrator's award. It said, in *Total Support Management* (*supra*), at paragraph [25] that:

> "*[25] The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement.*"

[62] In *Telcordia Technologies Inc* (*supra*) the SCA considered a review brought under section 33(1) of the Arbitration Act. The court referred with approval to, *inter alia*, the Appellate Division decision in *Dickenson* (*supra*) and the academic writings of Professor Christie, in "*South Africa as a Venue for International Commercial Arbitration*" Arbitration International, Vol 9 No. 2153, and affirmed that the principle of party autonomy is a cornerstone of arbitration proceedings in South Africa. The SCA overturned the decision of the lower court which had set aside an arbitration award, and held as follows:

"*[4] The High Court in setting aside the award disregarded the principle of party autonomy in arbitration proceedings and failed to give due deference to an arbitral award, something our courts have consistently done since the early part of the 19th Century. This approach is not peculiar to us; it is indeed part of a worldwide tradition …*"

[63] Most importantly, the SCA in *Telcordia* (*supra*) at paragraphs 50, 51 and 59 laid out the following interpretive markers when considering grounds of review under section 33(1) of the Arbitration Act:

63.1 by agreeing to arbitration, parties waive their rights *pro tanto*, they usually waive the right to a public hearing (as occurred in the present matter);

63.2 they necessarily agree that the fairness of the hearing will be determined by the provisions of the Arbitration Act and nothing else; and

63.3 most importantly, they limit interference by the courts to the grounds of procedural irregularities set out in section 33(1) of the Act, and, by necessary implication, they waive the right to rely on any further grounds of review, "*common law*" or otherwise.

[64] In *Lufuno* (*supra*) the majority of the Constitutional Court, per O'Regan ADCJ, reiterated the same points regarding the paramount nature of the principle of party autonomy and the limited scope for scrutinising and setting aside arbitration awards. The court first considered the essential nature of private arbitration, saying:

> "*[195] … it is important to start with an understanding of the nature of private arbitration. Private arbitration is a process built on consent in that parties agree that their disputes will be settled by an arbitrator. …*
>
> *[196] Private arbitration is widely used both domestically and internationally. Most jurisdictions in the world permit private arbitration of disputes and also provide for the enforcement of arbitration awards by the ordinary courts. With the growth of global commerce, international commercial arbitration has increased significantly in recent decades. …*
>
> *[197] Some of the advantages of arbitration lie in its flexibility (as parties can determine the process to be followed by an arbitrator, including the manner in which evidence will be received, the exchange of pleadings and the like), its cost-effectiveness, its privacy and its speed (particularly as often no appeal lies from an arbitrator's award, or lies only in an accelerated form to an appellate arbitral body). In determining the proper constitutional approach to private arbitration, we need to bear in mind that litigation before ordinary courts can be a rigid, costly and time-consuming process and that it is not inconsistent with our constitutional values to permit parties to seek a quicker and cheaper mechanism for the resolution of disputes.*
>
> *[198] The twin hallmarks of private arbitration are thus that it is based on consent and that it is private, ie a non-State process. It must accordingly be distinguished from arbitration proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the Labour Relations Act 66 of 1995 which are neither consensual, in that respondents do not have a choice as to whether to participate in the proceedings, nor private. Given these differences, the considerations which underlie the analysis of the review of such proceedings are not directly applicable to private arbitrations.*"

[65] After evaluating comparative international law, the court concluded that in light of the principle of party autonomy and the objectives of private arbitration, section 33(1) of the Arbitration Act should be strictly interpreted. The court then reiterated that the extent to which the judiciary may scrutinise arbitration awards is a matter which is regulated by section 33(1) of the Arbitration Act. O'Regan ADCJ then said:

> "*[235] To return then to the question of the proper interpretation of s 33(1) of the Arbitration Act in the light of the Constitution. Given the approach not only in the United Kingdom (an open and democratic society within the contemplation of s 39(2) of our Constitution), but also the international law approach as evinced in the New York Convention (to which South Africa is a party) and the UNCITRAL Model Law, it seems to me that the values of our Constitution will not necessarily best be served by interpreting s 33(1) in a manner that enhances the power of courts to set aside private arbitration awards. Indeed, the contrary seems to be the case. The international and comparative law considered in this judgment suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. Section 33(1) provides three grounds for setting aside an arbitration award: misconduct by an arbitrator; gross irregularity in the conduct of the proceedings; and the fact that an award has been improperly obtained. In my view, and in the light of the reasoning in the previous paragraphs, the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration.*
>
> *[236] … Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If courts are too quick to find fault with the manner in which an arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of s 33(1), the goals of private arbitration may well be defeated.*"

[66] The Constitutional Court in *Lufuno* (*supra*) pointed out that the legal trend towards greater recognition of party autonomy and the finality of private arbitration awards under South African law mirrors the situation under international law and foreign law.

66.1 The House of Lords, for instance, per Lord Steyn, said in *Lesotho Highlands Development Authority v Impregilo SpA* 2005 UKHL 43 (2005 WL 1505127) para [25] that the policy of the new English Arbitration Act of 1996 is one "*in favour of party autonomy*" which is "*intended to promote one-stop adjudication*", and therefore an arbitration award was not reviewable on the basis of an error of law of fact.

66.2 Lord Justice Mance expressed the same sentiment in the Court of Appeal when he said in *Moscow v Bankers Trust Company, International Industrial Bank* 2004 EWCA Civ 314 paragraphs [1] and [30], that:

> "*party autonomy is fundamental in modern arbitration law.*"

[67] As is evident from the above exposition of the principle of party autonomy, it is important to limit the court's power of interference to safeguard the public interest by ensuring fairness in the proceedings, to the minimum necessary. This is because every power vested in the courts to interfere in

the process, also create an opportunity for the loser in the arbitration to avoid or delay its outcome and thereby undermine the principle of party autonomy.

[68] Quite appropriately, clause 11.1 of the arbitration agreement in this case expressed the parties' aspiration "*to conduct and finalise the arbitration proceedings before the end of 2008*". It is my considered view that following the handing down of the awards, this matter should accordingly have been put to rest.

[69] In my view the SCA and the Constitutional Court have addressed all these concerns in *Telcordia* and *Lufuno* by emphasising the paramount nature of an arbitration award and the exceedingly limited scope for a court to interfere in private awards or to set them aside.

[70] As can be seen above, the long-standing principle of party autonomy is well-entrenched in our law. It requires a court to defer to an arbitrator's award. The grounds for setting aside private arbitration awards are exclusively regulated by section 33(1) of the Arbitration Act and these must be interpreted narrowly and in a manner which limits a court's power to set aside private arbitration awards.

[71] I have set out the express provisions of section 33(1) of the Arbitration Act. It is significant that the applicant does not allege any misconduct on the part of the arbitrators in terms of section 33(1)(a), nor does the applicant allege that either of the awards were improperly obtained in terms of section

33(1)(c) of the Arbitration Act, or point to conduct contemplated in these provisions. Similarly, the applicant does not expressly mention or refer to section 33(1)(b) of the Arbitration Act dealing with "*gross irregularity*". As I will show, certain errors of law can result in gross irregularity, but in my view this is not true of the alleged "*errors*" complained of by the applicant in this case.

[72] The meaning of section 33(1)(b) of the Arbitration Act, that an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or exceeded its powers has been the subject of detailed consideration by our courts, most notably the SCA in *Telcordia.* The law under this ground of review is trite.

[73] The SCA in *Telcordia* pronounced on the meaning of the expression "*exceeding its powers*" in section 33(1)(b) of the Arbitration Act. The court referred with approval to the decision of the House of Lords in the *Lesotho Highlands* case and reiterated the clear and long established legal proposition that an arbitration award was not reviewable on the basis of the exercise of the power vested in the arbitrator even though it resulted in an error of law of fact. This approach has in fact been followed in a number of other decisions. For instance in *Abrahams v RK Komputer SDN BHD* 2009 (4) SA 201 (C) at 204E-F Gauntlett AJ said that "*mistakes of law or fact are not per se bases for setting aside an arbitration award*".

[74] The SCA in *Telcordia* also pronounced on the meaning of the term "*gross irregularity*" in section 33(1)(b) of the Arbitration Act. The court held that this ground of review is akin to a ground of review available in relation to proceedings of inferior courts, and stated that:

> "*[53] This term must be understood in context, historical and textual. … The ground is to all intents and purposes identical to a ground of review available in relation to proceedings of inferior courts. Although the textual setting is different, which might affect its meaning, I am content to hold that for present purposes the two provisions are identical and that cases decided in relation to the review of inferior courts are relevant in determining the meaning and scope of para (b)*."

[75] The court then considered how procedural errors of law could give rise to a "*gross irregularity*".

[76]

76.1 The SCA held that although an error of law cannot in and of itself found a ground of review within the meaning of section 33(1) of the Arbitration Act, procedural errors of law can however lead to gross irregularities in the manner in which the proceedings are conducted. The court cited the example of where an arbitrator, because of a misunderstanding of the *audi* principle, refuses to hear one party. Clearly in such a case the error of law gives rise to the irregularity, but the refusal to hear that party, and not the error of law would be the reviewable irregularity.

76.2 The SCA also referred to the case of *Goldfields Investments Ltd v City Council of Johannesburg* 1938 TPD 551, where a magistrate committed an error of law when he misconstrued an appeal before him as an ordinary appeal as opposed to a full re-hearing with evidence. The court in *Goldfields Investments* held that the error of the law resulted in the magistrate misconceiving the nature of the enquiry before him and therefore he could not have granted the litigant a fair hearing because he failed to perform his mandate.

76.3 The SCA in *Telcordia* at para [73], emphasised the words of Schreiner J in *Goldfields Investments* to the effect that the "*crucial question is whether it prevented a fair trial of the issues*" and that "*where the point related 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*".

[77] The SCA in *Telcordia* examined the nature of the enquiry, the duties of the arbitrator and the scope of his powers on the particular facts before it and concluded that the arbitrator had to:

> "*[83] (i) interpret the agreement; (ii) by applying South African law; (iii) in the light of its terms; and (iv) all the admissible evidence.*
>
> *[84] In addition, the arbitrator had, according to the terms of reference, the power (i) not to decide an issue which he deemed unnecessary or inappropriate; (ii) to decide any further issues of fact or law, which he deemed necessary or appropriate; (iii) to decide the issues in any manner or order he deemed appropriate; and (iv) to*

decide any issue by way of a partial, interim or final award, as he deemed appropriate."

[78] The SCA then concluded that in the light of the scope of the arbitrator's powers – which in my view are no different to the arbitrators' powers in this matter – the fact that the arbitrator may have misinterpreted the contract or wrongly perceived and applied South African law or incorrectly relied on inadmissible evidence did not mean that he had exceeded the limits of his power or that he had committed a gross irregularity, and therefore his decision could not be reviewed. The court stated, at paragraph 85 that:

"*… the fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the enquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry – they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the enquiry. To adopt the quoted words of Hoexter JA (in Administrator, South West Africa v Jooste Lithium Bpk 1955 (1) SA 557 (A)): it cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground of review by a court.*"

Most importantly at paragraph [86], the SCA held that:

"*… Errors of the kind mentioned have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate*

… If he errs in his understanding or application of local law the parties have to live with it …"

[79] In my view the reasoning in *Telcordia* has a direct bearing on the facts of the present matter. The arbitrator in the present matter was vested with the power to interpret the contract by applying South African law in the light of his terms and all the admissible evidence. In addition, the arbitrator had to decide any further issues of fact or law, including those relating to expert evidence which he deemed necessary and in a manner which he deemed appropriate.

[80] In my view the decision in *Telcordia* falls squarely with the facts of this case. In the circumstances I find that all the applicant's grounds of review namely:

80.1 that the arbitrators committed an error of law by incorrectly interpreting and applying the pre-2004 by-laws, read together with other legal provisions;

80.2 that the arbitrators committed an error of law by incorrectly interpreting the party's contract as being consonant with public policy; and

80.3 that the arbitrators committed a gross irregularity in the conduct of the arbitration proceedings by incorrectly weighing up the expert evidence,

are all patently without merit and do not fall within the terms or purview of section 33(1) of the Arbitration Act.

[81] The errors alleged to have been committed by the arbitrators in relation to the applicant's "*legality*" and "*public policy*" grounds of review, would clearly have been committed within the scope of their mandate. Consequently, the arbitrators cannot be said to have exceeded their mandate.

[82] In relation to the applicant's "*gross irregularity*" ground of review, the applicant's case is that the arbitrators used an incorrect assumption for purposes of quantifying damages, based on the evidence of the first respondent's witnesses. The applicant contends that the arbitrators committed a "*gross irregularity*" in accepting this assumption and rejecting a competing assumption based on the evidence of the applicant's witnesses. However this complaint does not even remotely impugn the fairness of the manner in which the arbitrators arrived at their decisions. Therefore the arbitrators could not possibly have committed any gross irregularity. The applicant's complaint is instead aimed at the weighing up and consideration of competing evidence on a point in dispute which is quintessentially a matter exclusively within the province of the arbitrators. However, the power given to the arbitrators was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible and to weigh it, rightly or wrongly. Clearly, errors of the kind complained of by the applicant have nothing to do with the arbitrator exceeding his powers. They

are errors committed within the scope of his mandate and are therefore not reviewable.

[83] The applicant argues that "*our courts, and the English courts, do not enforce awards, which are derived from contracts which are illegal or against public policy*". However, the applicant's contention conflicts with the SCA's decision in *Telcordia* to which I have referred extensively. The essence of the applicant's argument is that:

83.1 if the arbitrator makes an error of law his award must be set aside on "*the legality rule*" i.e. because it is contrary to a relevant law or laws; and

83.2 if the arbitrator makes an error or law in interpreting an underlying contract that is the subject-matter of a dispute between the parties as being in consonance with public policy when it is contrary to public policy, his award must similarly be set aside.

[84] But as I have illustrated above, the SCA in *Telcordia* clearly held that private arbitrations are not reviewable for such errors of law.

[85] The applicant cites various English cases as authority for the proposition that an arbitration award may be set aside if it is "*derived from contracts that are illegal or against public policy*". However, the applicant's

reliance on the decision in *Soleimany v Soleimany* 1998 (3) WLR 811 (1999) QB 785 and *Westacre Investments Inc v Jugoimport SDRP and Others* 1999 WL 477322 is misplaced.

85.1 The court in *Soleimany* emphasised that its *ratio* was confined to the situation where the arbitrator made a finding that the contract between the parties was as a matter of law in fact illegal, but nevertheless enforced the contract. The court in *Soleimany* held that "*different considerations may apply where there is a finding by the foreign court to the contrary or simply no such finding*". The court was, importantly, at pains to point out that its decision was limited to the factual scenario where the arbitrator found a contract illegal but nevertheless enforced it; its decision did not extend to the situation where the arbitrator found the contract legal.

85.2 The court in *Westacre* was even more emphatic in rejecting any attempt to re-open the merits of the case argued before the arbitrator. The majority, per Lord Justice Mantell, held in a very short decision that an arbitration award could not be reviewed for illegality of the underlying contract because "*the arbitrators specifically found that the underlying contract was not illegal … there was nothing to suggest incompetence on the part of the arbitrators*, [and] *… there is nothing to suggest collusion or bad faith in the obtaining of the award*".

[86] Significantly, the House of Lords in the *Lesotho Highlands* case (*supra*) at para [31], while interpreting the recent English Statute governing arbitrations, namely the Arbitration Act 1996, held that in terms of the 1996 Act arbitration awards are not reviewable for errors of law of fact. Significantly, the SCA in *Telcordia* referred to this very proposition with approval.

[87] The applicant's reliance on the South African case law cited is also in my view, misplaced. In *Veldspun* the then Appellate Division held that:

> "*The basis upon which a court will set aside an arbitrator's award is a very narrow one. … It is only in those cases which fall within the provisions of section 33(1) of the arbitration award that a court is empowered to intervene.*"

The court then went on to state that even a gross mistake, unless it establishes *mala fides*, or partiality would be insufficient to warrant any interference by a court. Clearly the then Appellate Division's decision in *Veldspun* puts an end to the applicant's argument regarding "*illegality*" as a ground of review.

[88] The applicant's reliance on the Constitutional Court decision in *CUSA v Tao Ling Metal Industries* 2009 (2) SA 204 (CC) (*supra*) is similarly misplaced. In that case, the court was dealing with a review of a statutorily compulsory arbitration held before a public official exercising public power in terms of the Labour Relations Act 66 of 1995 ("*the LRA*"). It is trite law that the exercise of all public power must comply with the Constitution, which is the supreme law,

and the doctrine of legality which is part of the rule of law. This means that the narrow grounds of review found in section 33(1) of the Arbitration Act are not exclusively applicable to such reviews. Instead, reviews of the exercise of public power such as compulsory arbitration proceedings under the LRA apply, in addition, the constitutional standard applicable to all administrative action of "*reasonableness*". This is so because such arbitration awards amount to administrative decisions which involve the exercise of public power.

[89] By contrast however, private arbitrations as in this case, are consensual by nature and do not involve the exercise of public power. This is a vital distinction which seems to have escaped the applicant and which allows the applicant to draw inapposite analogies between consensual private arbitrations and compulsory statutory arbitrations involving the exercise of public powers, contrary to clear *dicta* from our highest courts. It was therefore in the context of administrative law reviews that the court in *CUSA* held that where a point of law is apparent on the review papers, but the common approach of the parties proceeds on a wrong perception of what the law is (insofar as it has a bearing on the review and not on the merits of the original dispute before the arbitrator) a court reviewing a compulsory arbitration held in terms of the LRA is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law arising in the review, and require the parties to deal with it. Otherwise, the result would be an administrative decision which was in fact reviewable and thus contrary to law, would be allowed to stand as a result of the failure of the parties correctly to identify the ground of the review. Since the administrative decision amounts to the exercise of public power which is

governed by the principle of legality, the administrative decision cannot be allowed to stand.

[90] The South African case law the applicant relies upon is also, in my view, ill-conceived and misplaced.

90.1 Firstly, the two cases quoted of *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) and *Botha, Now Griessel v Finanscredit (Pty) Ltd* 1989 (3) SA (A), deal solely with trite principles regarding the enforcement of contracts that are contrary to public policy. Significantly, they do not deal with arbitration awards, or the principles governing a review and setting aside of arbitration awards, or public policy and arbitration awards.

90.2 *Sasfin* concerned a deed of cession between a doctor and a finance company which had the effect that the finance company had, at all times, effective control over all the earnings of the respondent. Although the contract was set aside, the court nonetheless referred to the often difficult problem which must always be kept in mind namely that public policy, generally, favours the utmost freedom of contract and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom. Furthermore, the court reiterated that "*public policy*" should properly take into account the doing of simple justice between man and man.

90.3 In *Botha* the then Appellate Division emphasised that the court's power to declare contracts contrary to public policy should be exercised sparingly and only in cases in which the impropriety of the transaction and the elements of public harm are manifest.

[91] In the light of my findings as aforesaid, the points *in limine* raised by the first respondent must all succeed. However, in case I am wrong in my finding as aforesaid, I have decided to proceed and deal with the merits.

THE MERITS: PUBLIC POLICY

[92] The applicant raises the public policy argument as one of the bases for contending that the law enforcement provisions of the contract are unenforceable. The applicant contends that:

92.1 In terms of the common law public policy cannot countenance private law enforcement because a private entity like the first respondent is motivated by profit. The applicant contends that it had no control over the first respondent's law enforcement personnel and therefore it would be unjust for the first respondent to share in fine revenue. The applicant then avers that it re-negotiated similar contracts with other third parties and that this was after the Director of Public Prosecutions ("*the DPP*") had objected to private companies sharing in fine

revenue generated by them in the course of law enforcement and that as a result it did not enter into such contracts.

92.2 Secondly, the applicant contends that the law enforcement provisions of the contract are contrary to the Constitution, section 334 of the CPA, and the pre-2004 by-laws.

92.3 Thirdly, the applicant claims that the law enforcement provisions offend a guideline issued by the DPP.

[93] Mr Bruinders, appearing for the applicant, submits that:

93.1 Private institutions are profit-driven.

93.2 The task of law enforcement should be in the hands of local authority, which is not profit-driven and which will enforce the law without fear, favour or prejudice.

93.3 There was a likelihood that the first respondent's profit motive could incentivise the first respondent to carry out the contract dishonestly.

93.4 Even if the first respondent carried out the contract honestly, the mere fact that the first respondent enforces the law with a profit motive instead of enforcing the law purely for the sake of

deterring and reducing violations renders the contract against public policy.

93.5 The fact that the first respondent has a profit motive may lead to the perception that in carrying out the law enforcement functions, the first respondent's employees are not acting honestly. Furthermore, this perception could impact on an accused's constitutionally guaranteed right to a fair trial.

[94] In my view these considerations are without merit. I say so because:

94.1 The applicant's argument is based on a questionable premise that local authorities, which are funded both through rates and taxes and profit-generating activities such as the sale of water, electricity and gas and the provision of bus services, have no interest in maximising fine revenue. The record of the arbitration proceedings shows that even the applicant's own witnesses gave unequivocal evidence at the arbitration, that local authorities do maximise fine revenue in a bid to maximise their income and swell their coffers.

94.2 Nowhere does applicant suggest that a perception exists that the first respondent's employees were carrying out law enforcement under the contract dishonestly.

94.3 The further suggestion that any such perception in relation to a private institution would impact on an accused's constitutionally guaranteed fair trial is illogical as there is no reason why the trial of any person who is prosecuted for a traffic offence and who chose to contest his or her parking ticket, would be compromised by a perception that the first respondent has a motive to maximise fine revenue. Obviously, the trial of such a person would only turn on whether the parking ticket has been properly issued for a contravention actually committed.

94.4 It is not disputed that the applicant retained sufficient control over the first respondent and its law enforcement personnel and ensured that it carried out their duties in precisely the same manner as they would have if they were directly employed by the applicant. In addition, the DPP retained indirect control by its power not to prosecute.

94.5 It is also not in dispute that the first respondent's employees did in fact carry out the law enforcement diligently, effectively, efficiently and honestly.

[95] It always has to be borne in mind that "*public policy*" is in itself not an easy concept to define. In *Sasfin (supra)* Smalberger JA (at p 9B-G) highlighted that "*public policy*" was a difficult concept to grapple with and that, most importantly, one must be careful not to conclude that a contract is

contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness.

[96] It follows that "*public policy*" of necessity involves a balancing act. In this case the benefits of law enforcement of having a properly managed, efficient parking management system must be weighed against any theoretical perception that the first respondent may be overzealous in carrying out its task by reason of its profit motive.

[97] In *Juglal v Shoprite Checkers t/a OK Franchise Division* 2004 (5) SA 248 (SCA) the Supreme Court of Appeal was called upon to deal with the enforceability of a notarial general bond over movables held by a landlord in respect of its tenant, in which the validity of certain clauses was questioned on the basis that they had a tendency "*to expose the debtor to exploitation by the creditor to an extent that was unconscionable and incompatible with the public interest*". The court held (at para [12]) as follows:

> "*[12] Because the courts will conclude that contractual provisions are contrary to public policy only when that is their clear effect … it follows that the tendency of a proposed transaction towards such a conflict … can only be found to exist if there is a probability that unconscionable, immoral or illegal conduct will result from the implementation of the provisions according to their tenor. (It may be that the cumulative effect of implementation of provisions not individually objectionable may disclose such a tendency.) If, however, a contractual provision is capable of implementation in a manner that is against public policy but the tenor of the provision is neutral then the offending tendency is absent. In such event the creditor who implements the contract in a manner which is unconscionable, illegal or immoral will find that a court refuses to give effect to his conduct but the contract itself will stand. Much of the appellant's reliance before us on considerations of public policy suffered from a failure to make the distinction between the contract and its implementation and the unjustified assumption that,*

because its terms were open to oppressive abuse by the creditor, they must, as a necessary consequence, be against public policy."

[98] Heher JA's *dictum* must be read together with the legal presumption that parties intent to perform agreements in a lawful manner. Thus in *Claasen v African Batignolles (Pty) Ltd* 1954 (1) SA 552 (O) at 556H-557A, Brink J stated that:

"… *But a contract perfectly valid on the face of it may stipulate for the performance of an act which is illegal at the time the contract is entered into and then it is void ab initio. A contract, however, is not necessarily illegal merely because it may be performed in a manner contrary to law. There is a presumption that the parties intend to act lawfully, and a contract which may be performed in two ways, one lawful, the other unlawful, will not be void except on proof that it was intended to perform it in the illegal way.*"

[99] In my view clause 11 of the contract is not *per se* contrary to public policy, nor was the manner in which it was implemented. I say so for the simple reason that the involvement of the first respondent in an activity of law enforcement, which was once the preserve of local government, does not lead to the interference that it is contrary to public policy. It is also important to bear in mind that the policing of stationery offences is at the lowest possible level of law enforcement. It is so that transgressors typically pay admission of guilt fines and they do not acquire any criminal records. They are not regarded as criminals and penalties are generally modest in the extreme. Whilst in many other countries the enforcement of parking and licensing laws is on the whole a civil matter, in this country it is at best

criminal. It is so that the main purpose of parking regulations is to ensure the provision and equitable utilisation of available space on street parking.

[100] It is also important to note that the privatisation of government functions to advance service delivery is currently more prevalent than before. There are enumerable other examples of private agencies being contracted to exercise public functions (including the collecting of revenue) on behalf of organs of state without any objection or legal challenge. For example, section 103 of the Correctional Services Act 111 of 1997 provides that the Minister may enter into a contract with a private party for the design, construction, financing and operation of a prison or part of a prison.

[101] It cannot be denied that such privatisation of government functions has had a bearing on the formulation of "*public policy*". Thus the legislature has widely endorsed public/private partnerships in order to meet service delivery needs of the population.

[102] The applicant's main problem with the contract would be that because the employment and supervision of the law enforcement personnel is entrusted to the first respondent which, according to the applicant, has a profit motive, clause 11 of the agreement is "*capable of implementation in a manner that is against public policy*", namely the over-zealous pursuit of fine revenue.

[103] However, a reading of the contract shows that it does not require the first respondent to implement it in that manner. I cite a few examples:

103.1 Clause 11.1 refers to the first respondent's obligation to employ sufficient personnel "*to carry out the law enforcement efficiently and effectively throughout the duration of this agreement*".

103.2 Clause 11.3 requires that the law enforcement personnel "*shall throughout the course of the employment by the first respondent comply with the applicant's Standards of Discipline and Code of Conduct*".

103.3 The first respondent's personnel undergo training at the Johannesburg Traffic Academy. As such, it may reasonably be assumed that such training involves imposing upon such personnel how they should properly carry out their duties.

103.4 Although the applicant was required to appoint the law enforcement personnel, there is nothing in the contract to prevent the applicant from withdrawing the appointment of first respondent's personnel if they in any way acted improperly.

103.5 Clause 12.1 of the agreement provides that the first respondent indemnifies the applicant from any loss, the payment of any damages and against all liability in respect of all actions, suits, proceedings, claims and so forth, which may be taken or made arising out of any activities of first respondent's employees.

103.6 Clause 15.3 of the contract provides a powerful incentive to the first respondent not to abuse its position. It reads as follows:

> "*15.3 It shall be regarded as a material breach of this agreement by IPM if action is taken against the GJMC more than twice in any 180 (one hundred and eighty) day period as a result of a failure by the Law Enforcement personnel to carry out any duty properly in terms of this agreement.*"

[104] In the light of what is stated above, it is obvious that the agreement cannot even be described as neutral on the question whether it is theoretically open to abuse as applicant contends it is possible to happen. Even if theoretically it is at the very worst for the first respondent neutral, it has not been claimed that there is presence of any offending tendency by first respondent's employees in the execution of their duties in terms of the agreement.

[105] In the unlikely event of abuse and breach of the abovementioned terms of the agreement, it is so that the accused persons who are prosecuted as a result of traffic violations and ticketing affected by first respondent's employees, enjoy the full protection of the courts. Furthermore, in the event of any tendency amongst the first respondent's law enforcement personnel to abuse their powers, the applicant has contractual remedies to sanction the first respondent and the National Director of Public Prosecutions ("*the NDPP*"), has the power to refuse to prosecute.

[106] In my view, the implementation of the contract was not against public policy. The broader picture in fact shows that its implementation was entirely consonant with public policy. The following undisputed factors support this view:

106.1 The first respondent's law enforcement personnel had no discretion in relation to the amount of the fine payable on admission of guilt in respect of any specific offence. Each traffic warden was provided with an electric handheld ticket machine used to issue tickets and which automatically records the date and time of issue of the ticket and the amount of the admission of guilt fine is determined by the offence code issued by the applicant.

106.2 The amount of the admission of guilt fine per offence was determined by the local Chief Magistrate in terms of section 341(5) of the CPA.

106.3 The first respondent's law enforcement personnel were not simply private citizens masquerading as law enforcement officers but were properly trained and duly appointed by the applicant. The sole impact of their employment by the first respondent was merely that the first respondent bore the cost of their employment and supervised them to ensure that they properly carried out their duties.

106.4 No motorist was obliged to pay any admission of guilt fine. Accordingly, they are entitled to have their day in court before an impartial forum which will assess the evidence for and against them and apply the criminal *onus* of proof "*beyond a reasonable doubt*". Furthermore, any motorist who chose not to pay an admission of guilt fine was dealt with by the prosecuting authorities in the Magistrate's Court, neither of which fell under the jurisdiction or control of the first respondent.

106.5 The law enforcement personnel employed by the first respondent were never given powers of arrest; they never issued nor served summonses and were not involved in the adjudication process which may have resulted in the imposition of a fine or alternative form of criminal sanction. They could conceivably be involved in such adjudication process only as witnesses.

106.6 The first respondent's law enforcement personnel were subjected to a series of checks to ensure that they remain honest and that the entire parking management and law enforcement system functioned efficiently and effectively, which ultimately inured to the benefit of the public. In that regard the following need particular mention:

106.6.1 Once a ticket has been issued, it cannot be deleted from the system. Clearly this was intended to prevent any attempt at bribing and/or corrupting the traffic wardens.

106.6.2 The first respondent did monitor the number of fines issued per warden and per location, but this was a measure to determine whether a particular traffic warden was walking his or her "*beat*" and diligently going about his or her duties. Law enforcement personnel were not disciplined if they did not make any target, nor were they incentivised to achieve any target in terms of tickets issued or fine revenue generated for the first respondent. In my view there is nothing untoward or sinister in establishing such a measure as applicant would like the court to believe. On the contrary, it accords with sound practice and common sense in enabling the first respondent to monitor the traffic wardens.

106.6.3 The first respondent's close monitoring of law enforcement personnel resulted in a number of them being dismissed when it was discovered that they were not walking their "*beat*" but were instead

issuing fictitious tickets to non-existing motor vehicles in order to create the impression that they were doing their work. This to me, is sufficient proof that the first respondent went out of its way to ensure that the public interest, if any, was protected. Furthermore, there is nothing that shows such scams as mentioned above resulted in any prejudice to any particular member of the monitoring public.

106.6.4 The first respondent duly employed supervisors who would randomly check on the law enforcement personnel and ensure that they were moving through their immediate areas and doing their work properly and effectively. Furthermore, the continuous presence of law enforcement personnel and supervisors resulted in the regular and timeous reporting of faulty parking meters with the result that the first respondent's maintenance crews could be summoned by radio and the faulty parking meters would be fixed promptly thus ensuring the efficiency of the parking management system as a whole.

106.6.5 Most importantly, up to the time applicant suspended the law enforcement part of the agreement on 23 July 2003, there had been no material complaints by the applicant or by any member of the motoring public for that matter, against the first respondent in respect of the manner in which the first respondent and its law enforcement personnel had conducted the law enforcement aspect of the agreement. Neither was there ever any complaint that the first respondent's law enforcement personnel were abusing their positions to the detriment of the motoring public.

[107] On a conspectus of the above facts, I am satisfied that the implementation of the contract was not in contravention of public policy. On the contrary, it was overwhelmingly in the public interest.

THE MERITS: LEGALITY

[108] The applicant's second contention is that the law enforcement provisions of the contract are contrary to the Constitution, section 334 of the CPA and the pre-2004 by-laws. The relevant legislative provisions in issue will now be considered in turn.

THE CONSTITUTION

[109] The applicant contends that the law enforcement provisions of the contract offend the Constitution which provides for a single police force to uphold and enforce the law. In this regard reliance is placed on section 199(1) providing for a single police force, and section 205(3) which provides that the police service uphold and enforces the law.

[110] In my view the applicant's argument cannot be sustained and reliance on the specified sections of the Constitution are misconceived in that:

110.1 The contract does not envisage the applicant contracting out core policing functions of protecting society from the ravages of what one could call serious crime. Instead, the contract contemplates the applicant contracting out the administration and supervision of public parking. In my view, this is not "*a policing function*" in the narrow sense of the word. If this is to be construed as a policing function at all, it is in my view merely penumbral.

110.2 The first respondent's law enforcement personnel were employed to carry out their law enforcement functions on behalf of the applicant. Thus, the interposition of the first respondent is immaterial to the point raised.

110.3 In any event, the police would not be precluded from exercising this same function as they would simply have concurrent jurisdiction with the first respondent's law enforcement personnel strictly in respect of stationary vehicular and parking offences.

110.4 Most importantly, there is no provision in the Constitution or in any other law for that matter, that precludes the establishment of municipal police services, or that precludes the outsourcing of minor non-discretionary functions subject to appropriate checks and controls as those contained in the contract and circumstances *in casu*.

[111] In my view the arbitrators' decision, in dismissing this part of the applicant's argument is well-founded and cannot in any way be faulted.

SECTION 334 OF THE CPA

[112] The central contention of the applicant is that section 334 of the CPA does not permit the enforcement of parking and stationary offences by persons who are not employees of the applicant. The applicant contends that it was unlawful to confer a traffic warden's powers to issue traffic tickets, on first respondent's employees. Essentially, the applicant's argument is as follows:

112.1 The applicant cannot issue first respondent's law enforcement personnel with certificates of appointment in terms of section 334(2)(a) of the CPA because it is not their employer; and

112.2 In terms of section 334(2)(b), they cannot lawfully exercise the powers of a traffic warden without certificates of appointment.

[113] The first respondent contends that:

113.1 As the applicant appointed and "*employed*" the law enforcement personnel via the contract with the first respondent to carry out law enforcement, the applicant is accordingly, for purposes of section 334, the party that "*employed*" them;

113.2 The applicant was in that limited sense their "*employer*"; and

113.3 That the proper interpretation of "*employee*" must include an employee of a sub-contractor of the applicant.

[114] The arbitrator accepted the interpretation contended for by the first respondent and found that similar to the independent contractor's relationship, the applicant was the employer of the first respondent's traffic wardens whom it trained and entrusted with public duties. He accordingly found that the first respondent's interpretation of section 334 of the CPA was the correct one and that this provision was no impediment to the first respondent's employees

carrying out the law enforcement of stationary offences. This finding was upheld by the appeal arbitrators.

[115] In determining which of the parties' interpretation of the relevant statutory provision is correct, it is necessary firstly, first, to consider the relevant contractual and statutory framework and second, consider the effect of and proper meaning to be attributed to section 334(2) of the CPA.

[116] In terms of clauses 2.1 of the contract, read together with clauses 1.2.14, 1.2.15.2, 1.2.9, 1.2.12 and 11, the first respondent was obliged to render the law enforcement services comprising the enforcement of offences relating to the by-laws and the RTA.

[117] The first respondent undertook in terms of clause 11.1 read with clause 1.2.10 to employ the necessary law enforcement personnel. Clause 11.5 of the contract expressly provides that such personnel will have "*the same powers as a traffic warden insofar as traffic wardens' powers extend to law enforcement*".

[118] The first respondent's law enforcement personnel were appointed in that capacity by the applicant in terms of section 3(1) of the RTA, which provides that:

"*(1) For the purposes of this Act –*

(a) *An Administrator may, subject to the laws governing the Public Service and upon such conditions as he may determine, appoint for the province as many persons as*

(i) inspectors of licences ;

(ii) examiners of vehicles;

(iii) *examiners for drivers' licences;*

(iv) traffic officers; and

(v) traffic wardens

as he may deem expedient.

(b) *A local authority which is a registering authority may, upon such conditions as the Administrator may prescribe by notice the Official Gazette, appoint for its area so many persons as:*

(i) inspectors of licences;

(ii) examiners of vehicles; and

(iii) *examiners for drivers' licences as he may deem expedient.*

(c) Any local authority or two or more local authorities may jointly, upon such conditions as the administrator may prescribe by notice in the official gazette, appoint for its area or for their areas jointly, as the case may be, so many persons as traffic officers or reserve traffic officers as such authority or authorities may deem expedient, and such officer shall function –

(i) within such area or areas;

(ii) *with the prior approval of the Administrator and subject to the conditions of such approval, outside such area or areas:*

…

(d) Any local authority may appoint persons as traffic wardens or as a reserve traffic warden to exercise or perform within its area such powers and duties of a traffic

officer as the Administrator may determine: … Provided that the Administrator may:

(i) make different determinations in respect of different categories of traffic wardens;

(ii) either generally or specifically, impose conditions with regard to the exercise or performance of such powers and duties;

(e) …"

[119] Section 1 of the CPA defines a "*peace officer*" and provides that:

> "'*Peace officer' includes any magistrate, justice, police official, correctional official as defined in section 1 of the Correctional Services Act, 1959 (Act 8 of 1959) and, in relation to any area, offence, class of offence or power referred to in a notice issued under section 334(1), any person who is a peace officer under that section.*"

[120] The definition of "*peace officer*" makes it clear that certain defined persons namely magistrates, justices, police officials, and correctional officials all of whom are defined by statute – as well as a group of persons determined from time to time by Ministerial notice in terms of section 334(1) of the CPA, shall have the powers of peace officers as circumscribed in respect of their particular class. In my view, the law enforcement personnel employed by the first respondent do fall within the latter group, determined by Ministerial notice.

[121] Section 334(1) and (2) of the CPA provide as follows:

"*A Minister may declare certain persons peace officers for specific purposes.–*

(1)(a) A minister may by notice in the Gazette declare that any person who, by virtue of his office, falls within any category defined in the notice, shall, within an area specified in the notice, be a peace officer for the purpose of exercising, with reference to any provision of this Act or any offence or any class of offences likewise specified, the powers defined in the notice.

(b) The powers referred to in paragraph (a) may include any power which is not conferred upon a peace officer by this Act.

(2)(a) No person who is a peace officer by virtue of a notice issued under subsection (1) shall exercise any power conferred upon him under that subsection unless he is at the time of exercising such power in possession of a certificate of appointment issued by his employer, which certificate shall be produced on demand.

(b) A power exercised contrary to the provision of paragraph (a) shall have no legal force or effect."

[122] Government Notice R209 (Part 5(c)) of 19 February 2002, in terms of which the Minister declared certain categories of persons to be peace officers in terms of section 334(1) of the CPA, provides that:

"*Traffic wardens appointed under section 3(1) of the Road Traffic Act, 1989 (Act 29 of 1989) shall be peace officers for the purpose of exercising, with reference to the offences specified in Column 3 of the Schedule, the offences defined in Column 4.*"

[123] The applicant's contention that the provisions of the contract offend provisions of the CPA which contemplates that law enforcement is carried out only by peace officers who are employed by the State or who are specially designated as such by the Minister cannot stand. From what I have just stated above, it is clear that traffic wardens appointed in terms of section 3(1)

(b) of the RTA, are peace officers in terms of section 334(1) of the CPA read together with Part 5(c) of the Ministerial notice. It follows that they are *inter alia*, entitled to issue written notices in terms of sections 56 and 241 of the CPA. This is the power to issue traffic tickets which was afforded to first respondent's law enforcement personnel in terms of the contract.

[124] The applicant contends that the law enforcement provisions of the contract are unlawful and unenforceable in the light of section 334(2) of the CPA in that:

124.1 In terms of section 334(2)(b) of the CPA, first respondent's law enforcement personnel cannot lawfully exercise the powers of a law enforcement officer/traffic warden/peace officer without certificates of appointment.

124.2 Section 334(2)(a) contemplates that these certificates will be issued by the peace officer's "*employer*"; and

124.3 The applicant cannot issue first respondent's law enforcement personnel with certificates of appointment in terms of section 334(2)(a) of the CPA because it is not their employer.

[125] On the other hand, the first respondent contends that:

125.1 The statutory power to appoint traffic wardens or law enforcement officers does not arise from section 334(2) of the CPA.

125.2 Section 334(2)(a) does not purport to place a limitation on the category of persons who may be appointed, in terms of the applicable legislation.

125.3 In any event, the applicant places a narrow interpretation on the word "*employer*".

125.4 The applicable legislation is section 3(1)(d) of the RTA, which places no such limitation on the local authority.

125.5 The first respondent contends, accordingly, that first respondent's employees can lawfully be appointed by the applicant as peace officers.

[126] In my view, the first respondent's contentions accord foursquare with the applicable legislation. I say so for the following reasons:

126.1 In terms of section 334(1) of the CPA, the Minister of Justice may by notice in the Gazette declare that any person who "*by virtue of his office*" falls within any category defined in the notice, shall be a peace officer. As such, a peace officer is therefore

someone who qualifies as one "*by virtue of his office*" and not by virtue of his employment.

126.2 In terms of Part 5(c) of the Ministerial notice, traffic wardens appointed under 3(1) of the RTA qualify as peace officers. There is no reason whatsoever to interpret the word "*appointed*" in the schedule to the Ministerial notice to mean "*appointed as an employee*". All that is required is an appointment as a "*traffic warden*".

126.3 Section 3(1)(d) of the RTA provides that a local authority "*may appoint persons as traffic wardens or as reserve traffic wardens*". Significantly, the section provides that the local authority may "*appoint*" people as traffic wardens and not that it may "*employ*" them in the capacity.

[127] Section 334(2) does not in any manner purport to deal with the question of who is eligible to be appointed as a peace officer. It merely provides that duly appointed peace officers may not exercise their powers without being in possession of their certificates of appointment and that members of the public may demand production of such certificate.

[128] The word "*employer*" as appears in section 334(2) must be read in context. Clearly the word is incidental to the matter sought to be regulated in the section.

[129] The applicant's interpretation of the word seeks to elevate it to a substantive requirement of the appointment of a peace officer. The applicant's interpretation also decontextualises the use of the word "*employer*" and places the narrowest possible meaning on the word. The applicant thus seeks the meaning of the word in texts dealing with the distinction between employees and independent contractors, and their "*employers*".

[130] In my view, in the context of section 334 of the CPA a more sensible construction of "*employer*" is to include persons who are employed, directly or indirectly, to carry out the duties of a peace officer.

[131] For the applicant to succeed, the word "*employer*" must be interpreted to mean employer in the narrowest possible sense of the common law "*master and servant*" employer, rather than in the context, the more sensible meaning of the party on behalf of whom the peace officer's duties are ultimately carried out. This, in my view, is the only and correct manner in which the word must be interpreted.

[132] Whilst the term "*employer*" is not defined in the CPA, the dictionary definition evinces a spectrum of possible meanings ranging from a broad meaning to a narrower one. Thus the New Shorter Oxford Dictionary Vol 1, Oxford University Press 1993 edition, broadly defines the word as follows: "*employer: a person who employs or makes use of*". Its more specialised and narrower dictionary meaning is "*especially a person or organisation that pays someone to do work on a regular or contractual basis*".

[133] The word "*employ*" is defined in the Concise Oxford Dictionary 10th edition, Revised 2001 as: "*(1) give work to (someone) and pay them for it. Keep occupied. (2) Make use of*".

[134] Our then Appellate Division held in *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA 1 (A), at page 8A-H, that the meaning of "*employer*" goes as far as including an even broader meaning for example, the "*employer*" in a contractual relationship between an employer and an independent contractor.

[135] While the current Labour Relations Act, 66 of 1995 does not contain a statutory definition of employer, it does define "*employee*" in section 213(d) as including "*any other person who in any manner assists in carrying on or conducting the business of the employer*".

[136] As can be seen, the definition of employee in the LRA is not limited to the narrow meaning of "*servant*" in the old common law contractual relationship of "*master and servant*", also known as *locatio conductio operarum*.

[137] In *Board of Executives Ltd v McCafferty* 2000 (1) SA 848 (SCA) 856 at paragraphs [12] to [13], 857 at paragraph [15] and 858 at paragraph [18], the SCA held that when a person is paid by one company, supervised by another and has had his "*employment*" terminated by a third, in a group company context, all three were his employer for purposes of the LRA. In this case the

party which terminated the contract of service was not even a party to it, yet the termination was held to be effective.

[138] The legislature has also recognised that there can be no universally applicable notion of an employment relationship and has introduced a rebuttable statutory "*presumption of employment*". Thus in terms of section 200A of the LRA and section 83A of the Basic Conditions of Employment Act 75 of 1997 ("*the BCEA*"), a person who renders services to another is presumed, regardless of the form of the contract, to be an employee if one or more of *inter alia*, the following factors are present:

138.1 The manner in which the person works is subject to the control or direction of another person.

138.2 The person's hours of work are subject to the direction or control of another person.

138.3 In the case of a person who works for an organisation, the person forms part of the organisation.

138.4 The person is economically dependent on the other person for whom he or she works or renders services.

[139] Applying this criteria, it follows that for the purposes of the LRA and the BCEA, a rebuttable presumption of employment would arise between the applicant and first respondent's law enforcement personnel in this case. The reasons for this are as follows:

139.1 Clause 11 of the contract closely stipulates the training which traffic wardens must undergo at the hands of the applicant; they are subject to the applicant's "*Standards of Discipline and Code of Conduct*"; and the applicant circumscribed the powers to be accorded to first respondent's law enforcement personnel. Clearly, the first respondent's law enforcement personnel could only act with the blessing of and through their appointment by the applicant in accordance with, *inter alia*, the by-laws and rules and regulations passed by the applicant.

139.2 Secondly, whilst the applicant would not have the power itself to dismiss law enforcement personnel from the service of first respondent, it would certainly have the power to withdraw their appointment as traffic wardens, as law enforcement officers and as peace officers and thereby prevent them from continuing in those roles. It is clear that the applicant had a material degree of control which it exercised over the first respondent's law enforcement personnel.

[140] As shown above both common and statutory law recognise that the concept of "*employer*" is potentially broad. The concept of the word "*employer*" must of necessity be interpreted in light of the context in which the word is used and the purpose of the statutory provision in which it is used. A reading of the wording of section 334(2) shows that its purpose is not to determine who may be peace officers but to ensure that peace officers will be issued with and be required to carry proper identification certificates when carrying out their duties as peace officers. Of necessity the section had to determine who would issue the certificate and the legislature settled on the term "*employer*" who would perform that function.

[141] The term employer is conveniently broad and in the context denotes the person or body responsible for appointing the person to the post or position which results in that person being deemed to be a peace officer. Typically, that person or body would be one in some form of authority over the peace officer, or one whose function or obligations were being carried out by the peace officer, hence "*the employer*".

[142] It is common cause that the applicant has the statutory mandate to provide the City of Johannesburg with a traffic management system. It accordingly must employ traffic wardens and/or law enforcement officers in order to do so. Whether it employs them directly or through the intervention of first respondent is incidental and in no way proscribed or regulated by section 334(2)(b) of the CPA.

[143] In the light of what I have stated above, the first respondent's law enforcement personnel properly became peace officers by virtue of the Minister's notice and the accompanying schedule without having to be in the service of the applicant, in the sense of being employees thereof.

[144] The simple point is that the applicant appointed and "*employed*" the traffic wardens or law enforcement personnel via the contract with the first respondent to carry out law enforcement. Therefore, the applicant is for purposes of section 334, the party that "*employed*" them to perform certain duties. The applicant was thus in that limited sense their "*employer*" which, as the arbitrators correctly found, is sufficient for purposes of section 334.

REGULATION 1 OF THE PRE-2004 BY-LAWS

[145] The applicant contends that in terms of the above by-law, law enforcement, such as the issue of fines for traffic offences as contemplated by the contract, can only be carried out by police officers or peace officers who are employed by the State and that the applicant was precluded by this regulation from appointing any person not directly in its employ to regulate traffic.

[146] Regulation 1 of the pre-2004 by-laws provides as follows:

> "*The regulation of traffic in the streets and all other public places within the municipal area shall be in the hands of the police and/or duly authorised servants of the council, who are empowered to enforce these bylaws …*"

[147] It is common cause that the law enforcement part of the contract related to parking and parking meters. In my view whether this by-law is applicable in this case is not clear cut as it clearly concerns "*the regulation of traffic in the streets*". It is therefore questionable whether the enforcement of by-laws relating to parking and parking meters amounts to "*the regulation of traffic*".

[148] In dealing with this aspect of the applicant's argument, both the arbitrator and the appeal tribunal found that it was not valid and said that the regulation was merely "*… a broad statement of principle on a division of functions within the council's governing mandate …*".

[149] Most importantly, the arbitrator held, correctly in my view, that the regulation does not in any way suggest that no one other than a servant of the applicant might be duly authorised to deal with the "*regulation of traffic*", whatever that expression encompasses.

[150] In any event and as I have already shown, the first respondent's law enforcement personnel were in fact servants of the applicant.

[151] In the light of the above, the applicant's argument that it was impossible to designate first respondent's law enforcement personnel as "*law enforcement officers*" because of the applicant's clearly incorrect interpretation of this regulation must fail.

THE PLAINTIFF'S RELIANCE ON THE DPP'S OBJECTION AND GUIDELINE

[152] The applicant contends that it is unable to comply with the law enforcement provisions of the contract because during 2002, the DPP informed the applicant that he considered the law enforcement part of the contract to be objectionable and against public policy.

[153] The applicant claims that it was then obliged to suspend the law enforcement provisions of the contract pursuant to a "*directive*" issued by the DPP, in which the DPP stated:

153.1 he objected to contracts between traffic departments and private companies in terms of which the latter received a percentage of fine revenue;

153.2 his objection was based on the fact that private companies have a vested interest in the outcome of the prosecution of tickets that they issue; and

153.3 private companies are motivated by profit, rather than traffic law enforcement and as such, this financial motivation interferes with the discretion which they exercise in issuing tickets to motorists.

[154] I have already dealt with the aspect of profit motivation and shown that municipalities do in fact have primarily, a profit motive in the conduct of their affairs and that the applicant's premise that the first respondent is actuated by a profit motive is wrong.

[155] The directive which the applicant relies upon is in fact a letter by the DPP to the applicant dated 9 January 2003. A reading of this letter reveals that:

155.1 The DPP expressed a broad general sentiment and specific concerns in relation to other contracts.

155.2 The DPP had nothing to say in relation to the substance of the applicant's contract with the first respondent and in fact, made no mention at all about the contract; and

155.3 There is nothing in the letter which indicated a refusal on the part of the DPP to prosecute fines which were generated by the traffic wardens in accordance with the terms of the contract.

[156] It is clear that the DPP was in fact concerned about a specific contract called the "*Road Ranger Contract*" in respect of which the DPP took clear and decisive action by, *inter alia*, refusing to prosecute offences. However, in relation to the contract between the applicant and the first respondent, the

DPP has never voiced any concerns nor refused to prosecute offences emanating from implementation of the contract.

[157] In 2004 the first respondent brought an application against the applicant *inter alia* for specific performance and declaratory relief. It is trite that the first respondent joined the NDPP and the DPP to that application after the applicant had raised a plea of non-joinder, specifically based on the applicant's reliance on the DPP's "*directive*" and the latter's alleged public policy concerns.

[158] Significantly, the NDPP and DPP did not oppose the relief sought by the first respondent but instead indicated they would abide by the decision of the court.

[159] Most importantly, the DPP has expressly stated:

159.1 that his letter dated 9 January 2003 which he addressed to the applicant "*is not and was never intended to constitute a directive (instruction) as alleged*" by the applicant;

159.2 the facts and circumstances relating to the Road Ranger contract are distinguishable and different from the contract; and

159.3 the DPP "*never expressed any intention not to prosecute the traffic fines nor can it reasonably be inferred from anything else … that it would not do so*".

[160] It is common cause that on 28 October 2005, the applicant met with first respondent's representatives to discuss the re-implementation protocol of the contract which the applicant had unilaterally suspended. During this meeting the applicant's officials provided the first respondent's representatives with a document which purported to be a "*guideline*" issued by the NDPP and addressed to all the DPP's and which could at some stage in the future result in a refusal by the NDPP to pursue prosecutions based on tickets issued by privately employed law enforcement officers.

[161] It is common cause that the NPA, representing both the NDPP and DPP has responded through the office of the State Attorney, stating that:

161.1 They "*never interfered with the contractual relationship*" between the first respondent and the applicant, "*nor did the NPA ever refuse to prosecute offences flowing from their contractual relationship*"; and

161.2 The guideline was not applied inflexibly but it was simply a guideline that permitted a wide discretion and exceptions.

[162] Clearly the NPA, NDPP and DPP have not indicated any view which is in any way adverse to the contract.

[163] In the circumstances I come to the conclusion that the arbitrators were correct in finding the applicant's contention that it could not comply with the law enforcement provisions because the DPP's view was that the contract was objectionable and against public policy, was clearly untenable.

GROSS IRREGULARITY

[164] It is trite that first respondent's claim for damages was lost profit in the form of lost fine revenue which it would have made from the contract from 23 July 2003, when the contract was partially suspended and the date on which the contract would have expired in June 2009.

[165] It is common cause that the crux of the claim for lost profit in the form of lost revenue is based on certain "*assumptions*" which had to be determined by the arbitrator. One such assumption was the fine revenue which would have been recovered by the first respondent, but for the breach.

[166] The correct assumption to apply to fine revenue was a hotly contested and much debated issue before the arbitrator. It appears that this aspect was thoroughly re-argued before the appeal tribunal. Based on a conspectus of all the evidence, all the arbitrators found in favour of the first respondent's

assumption and rejected the applicant's assumption as unsupported by the evidence and improbable.

[167] During argument the applicant revisited this point contending that the arbitrators adopted an approach "*that is so irrational, illogical and fundamentally mistaken that it amounts to a gross irregularity in the proceedings*". The complaint is that the arbitrators erred in accepting an assumption relating to the increase in fine revenue and rejecting the applicant's assumption that there would have been a decrease in fine revenue over the period of the contract, despite an increase in both metered bays and fine tariff.

[168] The applicant's assumption was essentially based on the evidence of the applicant's witness Dr Sampson who, the applicant claims, was the only expert who was qualified to give an opinion on the question before the arbitrator namely, the fine revenue generated over time by law enforcement. On the other hand, the three experts called by the first respondent were not, so the applicant asserts, qualified to give an opinion on the question before the arbitrator in that their assumption is not the crucially relevant assumption that should have been applied to the generation and calculation of fine revenue over the period of the contract.

[169] As I have already pointed out, this complaint really goes to the merits of the arbitrators' findings and not the manner in which the arbitration was conducted, or the manner in which the arbitrators conducted themselves. It

does not, accordingly found a basis for review. Simply put, whether right or wrong, the arbitrators' decisions on the point do not establish that they have committed any gross irregularity. Clearly, the applicant's complaint is aimed at the weighing up and consideration of evidence adduced by the parties on a point in dispute which is quintessentially a factual matter exclusively within the province of the arbitrators.

[170] The applicant's complaint, essentially, is that:

170.1 The arbitrator and the panel rejected the expert opinion of the applicant's expert Dr Sampson and relied on the fundamentally flawed opinion of the first respondent's experts.

170.2 The three experts called by the first respondent were not qualified to give an opinion on the question before the arbitrator and their opinion is not the crucially relevant assumption that should have been applied to the generation and calculation of fine revenue over the period of the contract.

[171] In my view, this reasoning is flawed at least in two respects, namely:

171.1 The determination of fine revenue was a factual question and the evidence relevant to its determination was a broad combination of clearly factual evidence and some expert

evidence. It was by no means a question quintessentially for a single expert witness.

171.2 The principle is well-established that courts – and arbitrators – are not bound by the opinions of experts. The court remains the sole arbiter of fact and expert evidence has to be weighed up, accepted or rejected by the court the same as any other evidence. In this respect, Satchwell J's *dicta* in *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 773 finds application. She said the following:

> "*Finally, opinion evidence must not usurp the function of the court. The witness is not permitted to give opinion on the legal or the general merits of the case. The evidence of the opinion of the expert should not be proffered on the ultimate issue. The expert must not be asked or answer questions which the court has to decide.*"

[172] As the arbitrator is the sole arbiter of fact and law, the applicant's proposition that an arbitrator is bound by the views of an expert is legally incorrect and must fail.

[173] In any event, on the merits, the criticism of the arbitrator's findings is both unjustified and incorrect.

[174] The assumptions used by the respective parties relate to the fine revenue which the first respondent claims it is entitled. This relates to the projected figures for the number of tickets that would have been issued from July 2003 to June 2010.

[175] The first respondent assumed a growth in a number of fines issued between 2003 and 2010, albeit at a diminishing rate of increase. The basis for the first respondent's assumption is that the applicant had a nascent and developing parking management system where the number of fines issued was steadily increasing (albeit at a declining rate of increase) to a level where it would have ultimately levelled off.

[176] On the other hand, the applicant contends that its parking management system had, in a sense, peaked by about April 2002 and thereafter effective law enforcement would have caused the number of transgressions to decrease, resulting in a decrease in the number of tickets issued. The assumption was that in the area of parking, licensing and motor vehicle offences, the good citizens of Johannesburg would have become amongst the most law abiding in the world.

[177] In my view, the arbitrators were correct in accepting the first respondent's assumption because, *inter alia*:

177.1 The first respondent's forecast takes into account the historic figures of the numbers of fines issued, and the clear trend of growth in the historic number of fines issued year on year, such growth diminishing over the years as the parking management system matured;

177.2 The first respondent's forecast took into account the impact of other relevant variables such as the increase in the number of parking meters, the large increase in the number of vehicles on the road, the increase in the number of wardens and the greater densification of the various areas where parking is located and so forth. Taken together, all these variables lead to a reasonable inference that the number of fines issued would increase between 2004 and 2010;

177.3 The first respondent's forecast was in fact supported by the applicant's own figures for fine revenue collected from 2001 until 2008 which showed that there has been a substantial increase in fine revenue collected over the period. These figures were submitted at the arbitration hearing;

177.4 The first respondent's forecast is conservative in relation to the number of fines issued, is reasonable and realistic when one has regards to human nature and behaviour;

177.5 Most significantly, the arbitrator found that the first respondent's forecast was verified by an independent and an alternative statistical valuation model which was presented by the first respondent's witness, Prof. Fatti.

[178] All the arbitrators rejected the applicant's assumption *inter alia* because they found:

178.1 The applicant's forecast as to the projected number of fines issued from 2004 until 2010 ignored the actual historical growth in the number of fines and because it was not put to the first respondent's witnesses;

178.2 The applicant's forecast flies in the face of its own documents and data;

178.3 The applicant's assumption and underlying thesis fails to take into account other relevant variables such as *inter alia* the projected increase in the number of parking meters, the large projected increase in the number of vehicles on the road, the projected increase in the number of wardens and the greater densification of the various areas where parking is located. The arbitrators also took into consideration that Dr Sampson, the applicant's witness, conceded that if he were to have taken an incrementally increasing number of meter bays into account,

then the number of violations, and therefore the fines issued, would have increased.

[179] There is simply no basis upon which to criticize the arbitrators' acceptance of the first respondent's assumption and the rejection of that of the applicant. The arbitrators correctly adopted the approach presented by the first respondent in calculating the first respondent's damages.

COSTS

[180] Counsel for first respondent has urged the court to consider imposing a punitive costs order on the basis *inter alia*, that this application is frivolous, vexatious and contrary to the public interest and that this review application was brought in order to enable the applicant to avoid complying with the arbitration awards.

[181] I have given due consideration to this request but I am of the view that a punitive costs order is not justified as the applicant was within its right to have brought this review application. Furthermore, as applicant is using the taxpayers' money to fund this case, I am of the view that imposing a punitive costs order will only serve to unduly punish the general public. However, the applicant must be made aware that it voluntarily elected to pursue the arbitration route and that this was in the hope that this entire dispute would be brought to finality timeously.

[182] Considering the nature and complexity of this matter, I am of the view that the employment of two counsel was justified. In the circumstances the following order is made:

The application is dismissed with costs, such costs to include the costs of two counsel.

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B H MBHA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

MATTER ARGUED ON	:	25 OCTOBER 2010
JUDGMENT DELIVERED ON	:	17 FEBRUARY 2011
FOR THE APPLICANT	:	ADV T BRUINDERS SC ASSISTED BY ADV T TOLMAY
INSTRUCTED BY	:	MOODIE AND ROBERTSON
FOR THE FIRST RESPONDENT	:	ADV C WATT-PRINGLE SC ASSISTED BY ADV F ISMAIL
INSTRUCTED BY	:	RAMSAY WEBBER