

SUMMARY – HUMAN V BERGER

1. Arbitration – tenant raised disputes with landlord - applicant (“the tenant”) seeks to review and set aside an order made by the arbitrator that *“in the interim, pending the final outcome of the present arbitrationthe parties ought to bear their own legal costs of the present arbitration and ought to share equally the costs in connection with the reference and the award”* - he complains of a number of irregularities on the part of the arbitrator and says the result is that “I will be required to share the costs of the arbitration proceedings and bear my own costs”.
2. At issue was determination of clause 20.5 of the lease agreement which provides that *“Unless otherwise determined by the arbitrator, the Party who demanded the arbitration shall be liable for the costs of the arbitration including the other Party’s legal costs on an attorney and own client scale”*.
3. Arbitrator cannot be criticized for declining to make an order in terms of clause 20.5 of the lease agreement dealing with the costs which may or may not be incurred in the future in the course of the arbitration hearing. The arbitrator has made it clear that he will make a final determination at the end of the arbitration, once he has taken into account all relevant facts, circumstances and arguments on costs. That will be a retrospective not a future award.
4. Where the arbitrator made reference to another clause in the lease agreement this was reference to part of the very agreement within which clause 20.5 is embedded. It is not improper to interpret the meaning and import of clause 20.5 with regard to the rest of the agreement. This is not comparable to the facts in Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others 2008(2) SA 608 SCA.
5. The consideration given by the arbitrator to section 35(6) of the Arbitration Act is entirely relevant when one has regard to Kathrada v Arbitration Tribunal and Another 1975(2) SA 673 A. The issue of costs certainly involves questions of fairness. This arbitrator may not necessarily be correct that clause 20.5 refers only to costs at the end of the arbitration process once he has had regard to all evidence and argument and the final award itself. It is entirely conceivable that clause 20.5 permits the arbitrator to make an interim award, in advance of the actual arbitration hearings, based upon the very considerations of fairness he had in mind when commenting on section 35 of the Act. Just as the tenant complains that he is, in terms of the interim award, obliged to pay his own legal costs and half of the arbitration costs pending the outcome of the entire arbitration process, so too, can the landlord complain that she too is so obligated. This arbitration process is not voluntary and fairness might require an interim award, in terms of clause 20.5, that both parties shall pay their own costs and half the arbitration costs until such time as the merits of the dispute have been determined and then a final award is made which includes a decision as to final liability for costs.

6. I am not persuaded that there has been any 'gross irregularity' as discussed and exemplified in Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA). I cannot find that the arbitrator misconceived the nature of the enquiry or his duties. The reasoning by which he arrived at his decision may be open to question but he has 'the right to be wrong' on the merits. The arbitrator was required to interpret the costs provisions of the lease agreement. He did so interpret. That the outcome is not the one desired by the tenant does not afford ground for review.