REPUBLIC OF SOUTH AFRICA

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

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.

..... 09.11.2018
SIGNATURE DATE

CASE NO: 15478/2018

In the matter between:

ROAD ACCIDENT FUND **APPLICANT**

And

MOHLALA ATTORNEYS **FIRST RESPONDENT**

ADVOCATE PHILLIP MOKOENA SC N.O. **SECOND RESPONDENT**

JUDGMENT

WINDELL J:

INTRODUCTION

[1] The applicant, the Road Accident Fund ("the Fund"), is a statutory body established to compensate persons who suffer loss from injuries to themselves, or from the death of a breadwinner, arising from the negligent or other unlawful driving of a motor vehicle. To defend itself against the claims instituted against it, the Fund established a panel of attorneys. The first respondent, ("Mohlala"), was one of the attorneys on the Fund's panel.

[2] The relationship between the parties was governed by a Service Level Agreement ("the SLA") concluded on 25 November 2014. In terms of the SLA Mohlala was appointed for a period of 5 (five) years to provide legal services to the Fund. On 25 September 2015 the Fund served Mohlala with a *"Breach Notice"* wherein it recorded numerous alleged breaches committed by Mohlala. On 23 November 2015 the Fund addressed a further letter to Mohlala, a *"Suspension Notice"*, notifying it of the Fund's decision to suspend Mohlala from receiving new instructions from the Fund. Mohlala did not respond to the notices. It is alleged that it did not come to their attention. On 7 December 2015 the Fund terminated the SLA by sending a letter ("the termination letter") to Mohlala in which it indicated that *"it had resolved to and in fact terminated the SLA with immediate"* and that Mohlala had to hand over all the files in their possession. A dispute arose between the parties regarding the termination letter. Mohlala also refused to hand over the files to the Fund. A court order was subsequently granted on 29 January 2018 against Mohlala for the return of the files.

[3] The SLA contained an arbitration clause. With the consent of both parties the dispute between them was referred for arbitration before the second respondent ("the arbitrator"). In its amended statement of case Mohlala, *inter alia,* alleged that the letter amounted to a repudiation of the SLA which it elected to accept, and that it suffered damages as a result of the repudiation ("the claim"). The Fund denied that it repudiated the SLA, averred that it was entitled to cancel the SLA, and in addition alleged that the Fund, in fact, suffered damages as a result of certain breaches (referred to in the proceedings as the "Big Five") committed by Mohlala ("the counterclaims").

[4] In a pre-arbitration conference held between the parties it was agreed that the arbitration would be conducted in accordance with the Uniform Rules of Court and that the parties would exchange pleadings. It was agreed that the arbitrator's terms of reference would be defined by the pleadings.

[5] On 25 April 2017, pursuant to an application by Mohlala pertaining to the separation of issues, the arbitrator ordered that the following questions will be determined separately from any other question and that all further proceedings are stayed until the separated issues have been disposed of:

1. whether the Fund's purported termination of the Service Level Agreement [concluded on 25 November 2014 ("the SLA") on 7 December 2015 was unlawful and constituted a repudiation, alternatively breach by the Fund of the SLA];
2. whether the SLA was lawfully cancelled by Mohlala;

3. whether the Fund should be ordered to pay the costs of the arbitration (in relation to the proceedings to the date of the award on the separated questions) on the attorney client scale , including the costs of two counsel, the costs of the arbitrator, the venue and recording/transcript services;

4. all defences raised by the Fund in its Statement of defence in response to the aforesaid issues;

5. all allegations raised and as currently pleaded by the Fund in support of its counterclaims in as far as they relate to the merits, excluding the quantification of damages suffered, if any.

6. all defences raised by Mohlala in its Plea to the counterclaims.

The parties expressly agreed that the questions pertaining to causation and the quantification of damages should not be determined at this stage.

[6] On 9 March 2018, the arbitrator issued the first award ("the main award"). He found in favour of Mohlala and held that the termination of the SLA by the Fund in terms of the termination letter cannot be justified in light of clause 11 of the SLA; that it constituted a repudiation of the SLA; and, that it was therefore cancelled and/or terminated unlawfully.

[7] On 12 March 2018 the arbitrator received correspondence from Mohlala wherein he was requested to make a further award in terms of section 32(1) of the Arbitration Act.[1] Section 32 (1) provides for a procedure where *"the parties to a reference may within six weeks after the publication of the award to them, by any writing signed by them remit any matter which was referred to arbitration, to the arbitration tribunal for*

[1] Act 42 of 1965

reconsideration and for the making of a further award or a fresh award or for such other purpose as the parties may specify in the said writing." The arbitrator was requested to consider two questions, which formed part of the separated questions which was referred to arbitration, but which the arbitrator omitted to address in the award namely: (a) whether the SLA was lawfully cancelled by Mohlala; and (b) whether Mohlala is entitled to the costs of two counsel, where applicable the costs of senior counsel. It is common cause that the Fund did not consent to the remittal of these two questions to the arbitrator.

[8] On 19 March 2018 the arbitrator made a further award wherein he addressed the two outstanding questions. He found in favour of Mohlala and held that Mohlala lawfully cancelled the SLA and its annexures. As far as the costs issue is concerned the arbitrator introduced a further paragraph to the main award. The effect of this paragraph was that the costs order in paragraph 231.5 of the main award was to include the costs of two counsel where applicable, including the costs of senior counsel. The arbitrator, however, declined to deal with the issue in respect of reserved costs without the benefit of argument from both parties.

[9] The Fund, aggrieved by the awards, launched a review application to set aside both awards in terms of section 33 (1)(b) of the Arbitration Act. The Fund averred that the arbitrator committed gross irregularities in the conduct of the proceedings and that he exceeded his powers. In its amended notice of motion the Fund seeks the following Order:

"1. Reviewing and setting aside the arbitration award dated 9 March 2018.

2. Declaring the arbitration award dated 19 March 2018 purporting to have been delivered by the second respondent pursuant to section 32(1) of the Arbitration Act, was not delivered in accordance with the provisions of section 32 (1) and is accordingly null and void, and of no force and effect.

3. Alternatively to prayers 1 and 2 above, reviewing and setting aside the arbitration award dated 19 March 2018."

[10] Mohlala opposed the application and asked that the application be dismissed with costs on an attorney client scale. Mohlala seeks, in the alternative and in the event of the court reviewing and setting aside the further award that the court refers the subject matter of the further award back to the arbitrator in terms of section 32(2) of the Arbitration Act ("the conditional counterclaim").

THE SLA

[11] Clause 11 of the SLA and Clauses 18 and 19 of "Annexure A", annexed to the SLA, were relevant in the dispute between the parties. As these contractual provisions have been set out in great detail by the arbitrator, it is not necessary, for purposes of the question whether the arbitrator committed reviewable irregularities, to discuss the clauses in much detail.

[12] Clause 11, the so-called "no fault" clause, provides for termination of the SLA by the Fund by giving 30 (thirty) days written notice. It also provides for an elaborate process of termination provided for in clause 11.3 and 11.4 of the SLA, which, *inter*

alia, affords Mohlala the right to make representations to the Fund after receiving the termination letter.

[13] Clause 18 ("the breach clause") provides for the cancellation of the SLA in the event of the defaulting party committing a breach of any provision of the SLA and failing to remedy such breach within a period of 14 (fourteen) days after receipt of a written notice to remedy such breach.

[14] Clause 19.1 states that the Fund may terminate the SLA, or suspend its operation, in whole or in part, at any time and at the Fund's sole discretion, by giving no less than 1 (one) month's written notice to Mohlala.

THE DISPUTES

[15] The first main issue, which lay at the heart of the dispute before the arbitrator, was the termination letter. It reads as follows:

> *"2. The Road Accident Fund ("the Fund") noted several breaches of the Service Level Agreement ("the SLA") details of which were communicated to your offices in our aforementioned letter of 23rd November, to which you have failed to respond or provide any explanations thereto. In light of the seriousness of the breaches and your failure to respond or provide reasonable explanations, the Fund has resolved to and in fact hereby terminate the SLA with immediate.*

3. In addition, and as contemplated in clause 13 of the SLA, you are obliged to hand over all files to the Fund and the Fund requires your compliance with the following logistical plan for such had over process:"

[16] The arbitrator had to determine the meaning to be given to the letter and whether it amounted to repudiation. Mohlala called one witness to testify, its director, Ms Mohlala-Mulaudzi. The Fund called no witnesses.

[17] Mohlala alleged that the termination letter amounted to a repudiation or breach of the SLA as it purported to terminate the SLA with "immediate **effect**" (my emphasis), when the Fund was only entitled to terminate the SLA upon giving 30 days written notice and after compliance with the procedure in clause 11.4. The Fund confined its case for termination of the SLA to the "no fault" provisions in clause 11 and abandoned any reliance on the "breach" provisions in clause 18 as the basis for its termination of the SLA. The Fund's argument during the arbitration proceedings and the hearing of the review application is the following: The termination letter, properly construed, indicates that the SLA was to terminate after 30 days. Even if the letter purported to terminate the SLA with immediate effect that is of no moment, because as matter of law, the letter would simply take effect after 30 days. The parties understood that the Fund intended to terminate the SLA after 30 days and conducted themselves in accordance with this understanding. If the SLA was indeed terminated with immediate effect Mohlala would have been obliged to hand over copies of all files in its possession immediately, yet the letter did not demand their immediate delivery, instead it required that they be delivered within 30 days.

[18] The evidence eventually turned on and was decided with reference to only two key issues: (a) the "notice of termination issue", namely whether the phrase in the termination letter "with immediate", must be objectively be understood to have been intended to read "with immediate **effect**" and (b) the "second bite issue", a phrase that was used during the proceedings to describe the process of termination provided for in clause 11.3 and 11.4 of the SLA, which affords Mohlala the right to make representations to the Fund after receiving the termination letter.

[19] The second main dispute between the parties was the Fund's counterclaims. In its statement of defence the Fund made the following averments:

19.1 The Fund sought damages for breach of contract arising out of Mohlala's handling of five matters ("the Big Five") in which it represented the Fund in proceedings instituted by third parties. The Fund's counterclaims are quoted verbatim in paragraph 37 of the award.

"51. As a result of the aforesaid breaches and the conduct of the claimant as aforesaid, the respondent has suffered damages made up as follows:

51.1 In the Beytell claim, the costs of defending the action in circumstances where the matter ought to have been settled;

51.2 In the Herbst claim, the costs of the postponement;

51.3 In the Mathebula claim, the costs of defending the action in circumstances where the matter ought to have been settled;

51.4 In the Oosthuizen claim, the amount paid out to the plaintiff as damages which would not have been paid out if the claim was properly investigated

51.5 The additional costs incurred by the respondent due to the failure of the claimant to hand over the files timeously."

[21] The Fund as stated earlier called no witnesses. It contends, with reference to Ms Mohlala-Mulaudzi evidence, that the "Big Five" breaches were established and that there was therefore no need for the Fund to call any witnesses.

THE ARBITRATOR'S FINDING

[22] The arbitrator found that the termination letter, properly construed, conveyed the intention to terminate the SLA with immediate effect and that the termination and/or cancellation of the SLA cannot be justified in light of clauses 11 or 19 of "Annexure A" of the SLA. In addition he found that the Fund was in any event precluded from relying upon clause 11 and 19 because its earlier correspondence and conduct was based on the existence of breaches and that it was the breaches, consistently referred to throughout the correspondence, that motivated the termination of the SLA and not the "no-fault" clauses as contemplated in clause 11 and 19. In other words, the Fund's reliance upon those clauses was therefore at odds with the letters of the Fund.

[23] Although the arbitrator understood that the Fund had narrowed its case to a "no fault' termination, he nevertheless proceeded to deal with the breach clause (clause 18 of "Annexure A" of the SLA) and found that there was no basis, in law, for the Fund to have terminated and/or cancelled the SLA premised on the alleged breaches. At paragraph 207 of the main award he explained his reasons for dealing with the breach clause as follows:

> *"217. For completeness, I deemed it necessary and prudent to entertain a question whether or not premised on the evidence adduced in these proceedings, the claimant had breached the agreement between the parties."*

[24] It was, in fact, necessary for the arbitrator to deal with the alleged breach of the SLA, not only "for completeness" but in order to make a determination on the Fund's counterclaims. The arbitrator found that no breaches had been committed and that the Fund was not entitled to terminate and/or cancel the SLA premised on the alleged breaches. He also found that as the Fund has failed to prove any breach that the counterclaims should also fail. The main reasons for this finding can be found in paragraph 207.1 to 217 of the main award. I highlight but a few:

> *"209. From the documents relied upon by the parties in these arbitration proceedings, it becomes apparent that various allegations of breaches are made by the Respondent in relation to the Claimant.*
>
> *210. At some stage reference was made to C1 to C9 as containing the relevant breach notices or conduct of the Respondent justifying the ultimate cancellation of the SLA. In some instances reference was made to 67*

breaches. During the oral testimony, more effort was placed on the five main matters where it was alleged that the Claimant breached the SLA. Fundamentally, no witnesses was called on behalf of the Respondent to testify on any of the alleged breaches.

211. The Claimant's main witness was subjected to cross-examination on these breaches and a version being put to her. However, no oral testimony was adduced on behalf of the Respondent to demonstrate the alleged breaches and/or rebut and/or contradict the testimony of the Claimant.

212 The Claimant's main witness testified at length pertaining to the matters of Beytell, Herbst, Mathebula, Ntshakala and Oosthuizen. She was also cross-examined at length on these matters as evident from the transcript of the proceedings and the summation of the evidence document presented on behalf of the Respondent, during these arbitration proceedings.

213. It was the evidence of the Claimant's witness that despite the allegations contained in various correspondence that the Claimant has failed to respond to breach notices and/or alleged breaches, the Claimant has in fact on a number of occasions proffered a detailed explanation with annexures, in the past, pertaining to the alleged breaches.

214. Fundamentally, during these proceedings, the Claimant's main witness took time to deal with each and every allegation contained in the correspondence allegedly dispatched by the Respondent to the Claimant and

which ultimately found its way into the board meeting which ultimately resolved to terminate the SLA.

215. In addition, the Claimant's main witness testified at length pertaining to the Beytell matter, the Herbst matter, the Mathebula matter, the Ntshakala matter and the Oosthuizen matter and furnished comprehensive and detailed answers pertaining to the alleged breaches. There was no single witness called on behalf of the Respondent to refute, contradict, rebut or challenge the evidence adduced by the Claimant in these proceedings.

218. On the basis of my findings above, it therefore follows that the Respondent's counterclaim must also fail as the respondent failed to call any witnesses to corroborate and/or substantiate and/or demonstrate the basis upon which its counterclaim is premised".

THE FUND'S COMPLAINTS

The termination letter

[25] The arbitrator made the following findings in respect of the termination letter:

"(1) The author of the letter was not called to testify as to what she meant by paragraph 2 of the letter;

(2) Ms Mohlala-Mulaudzi testified about her telephonic discussions with the chairperson of the board about *"the manner in which she was treated and on*

her understanding of the events leading to the termination of the SLA but the chairperson was not called";

(3) Despite the fact that correspondence was exchanged after the termination letter, no attempt was made on the part of the Fund to clarify what it intended in paragraph 2 of the letter;

(4) Legal argument based on the letter was no substitute for the testimony of witnesses and the arbitrator *"was left guessing as to what is the version of the respondent in relation to the meaning and import of the letter of 7 December 2015".*

[26] Counsel for the Fund contends that it is clear from the abovementioned findings that, although the arbitrator considered the arguments and the authorities cited by the Fund on the meaning to be given to a term or a phrase in a document (dealing with the principle that the process of interpretation was purely objective and not subjective and that the testimony of the Fund's witnesses on what was intended was thus irrelevant and inadmissible), that *"he did not apply them correctly"* and/or that he misunderstood the law. But, so it is argued, it is not the fact that the arbitrator has committed an error of law, it is that he did not consider the remainder of the letter at all and that he was "so beguiled" by the failure of the Fund to call witnesses to testify on the meaning of the letter, that he refused to consider whether the balance of the letter shed meaning on the phrase in paragraph 2 thereof. The Fund contends that the arbitrator ignored the Fund's defences and failed to consider the balance of the letter and the fact that it pointed strongly to a different meaning namely that the SLA was to terminate after 30 days.

[27] The arbitrator also found that here was no doubt that Mohlala reasonably concluded that proper performance would not be forthcoming when the Fund approached the High Court for the return of the files. The Fund contends that this finding is in direct conflict with both the common cause facts and the evidence of Ms Mohlala Mulaudzi herself. It is submitted that the approach adopted by the arbitrator demonstrates that he was not even prepared to accept the testimony of Ms Mohlala Mulaudzi where such testimony favoured the Fund. It is submitted that it is therefore "*difficult to understand how the arbitrator came to these conclusions except on the assumption that he simply failed to apply his mind properly to the issues before him*".

[28] The Fund contends that as far as the interpretation of the termination letter is concerned that the arbitrator ignored the case pleaded by the Fund, merely paid lip service to it, and because he did not grapple with the argument advanced by the Fund regarding the remainder of the letter, he failed to apply his mind and committed a gross irregularity. It is submitted that he made findings that were inconsistent with the common cause facts, both on the pleadings and in evidence and disregarded the documentary evidence that had been accepted. He also accepted evidence based on hearsay. The Fund submits that Ms Mohlala–Mulaudzi's evidence was adequately challenged in cross examination and that there was no need to produce contradictory evidence as she made concessions that nullified and in some instances counterbalanced her testimony in chief. He was, therefore, wrong in finding that Mohlala provided a detailed explanation. The Fund also contends that the arbitrator failed to consider the Fund's additional defences, namely, that even if the termination letter amounted to a repudiation it would simply take effect after 30 days and that the letter was not understood by Mohlala to be terminable immediately

and, in fact, both parties conducted themselves as if the termination would take effect after 30 days. The Fund contends that it is therefore apparent that the Fund had not been given a fair hearing of the case and that the arbitrator committed a gross irregularity.

The counterclaims

[29] As far as the counterclaims are concerned the arbitrator found that the Fund failed to prove any breaches. He held that Ms Mohlala Mulaudzi's evidence regarding the alleged breaches of the SLA was unchallenged and should be accepted because *"cross-examination cannot replace the evidence to demonstrate that the breaches were indeed committed"*. The Fund submits that the arbitrator's interpretation of the testimony and evidence was entirely wrong and that Mohlala had, on its own version committed innumerable breaches of the SLA. The evidence relating to the Big Five demonstrated this and the documentation that was discovered by Mohlala was crucial in demonstrating the breaches. To the extent that the arbitrator found otherwise he did not properly apply his mind to the pleadings or to the applicable South African law.

THE MAIN AWARD

[30] By agreeing to arbitration, the parties had limited the grounds of interference in their contract by the courts to the procedural irregularities set out in section 33 (1) of the Arbitration Act. The Fund relies on section 33 (1)(b) which reads as follows:

> *"[33] Setting aside of an award: (1) Where-*

(a).....

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(c) .....

The court may, on the application of any party or parties, make an order setting the award aside".

[32] The grounds for the review as well as the facts and circumstances upon which the Fund wishes to rely have been set out in a 199 page founding affidavit. The nub of the Fund's complaint is that the arbitrator applied the wrong legal principles in interpreting the termination letter and the counterclaims; ignored certain undisputed facts; placed too much emphasis on the failure by the Fund to call any witnesses; and therefore "closed his mind" to the Fund's defences and arguments. This, it argues, is a latent gross irregularity, resulting in an unfair trial, entitling the court to review and set aside the awards. As far as the further award is concerned, the Fund contends that the arbitrator ignored the requirements set out in section 32(1) of the Arbitration Act and that he was not entitled to issue a further award. The Fund's complaint is summarized as follows;

"The essential complaint of the Fund is that the Arbitrator failed to perform the very task he was called upon to, viz. arbitrate the dispute. The Fund contends that it has not had a full and fair hearing of the dispute. In fact, the approach adopted by the Arbitrator denied the Fund of a hearing of its case"

[33] Mohlala avers that the review application is an attempted appeal "dressed up as a review" and that the principal relief claimed by the Fund ultimately turns on the proper application of the "Telcordia test" as laid down in *Telcordia Technologies Inc v Telkom SA Ltd*[2]. In *Telcordia,* the Supreme Court of Appeal ("SCA") set aside a decision by the High Court to review and set aside an arbitrator's award. One of the principal complaints in that matter was that the arbitrator did not understand and did not apply our law dealing with variations of written contracts.

[34] Mohlala contends that the Fund ignored the key findings and principles stated in *Telcordia* and elected to emphasize a few peripheral findings which do not represent the substance of the judgment. It is contended that the Fund specifically ignored paragraph 85 and 86 of the judgment that stated as follows:

> "[85] 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 inquiry 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 nature of the inquiry. To adapt the quoted words of Hoexter JA: 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

[2] 2007 (3) SA 266 (A)

interpretation of the Integrated Agreement could not afford any ground for review by a court.

[86] Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly. Errors of the kind mentioned have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate. To illustrate, an arbitrator in a 'normal' local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd."

Evaluation

[35] In *Luvuno Phaphuli & Associates (Pty) Ltd v Andrews and Another*[3], O'Regan ADCJ said the following in relation to the review of an arbitrator's award in terms of section 33 (1) of the Arbitration Act:

"[235].....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] The final question that arises is what the approach of a court should be to the question of fairness. First, we must recognise that fairness in arbitration proceedings

[3] 2009 (4) SA 529 (CC)

> should not be equated with the process established in the Uniform Rules of Court for the conduct of proceedings before our courts. Secondly, there is no reason why an investigative procedure should not be pursued as long as it is pursued fairly. The international conventions make clear that the manner of proceeding in arbitration is to be determined by agreement between the parties and, in default of that, by the arbitrator. Thirdly, the process to be followed should be discerned in the first place from the terms of the arbitration agreement itself. 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."

[36] It is important to be reminded of the fact that this is not an appeal. This court is therefore not entitled to interpret the termination letter and the evidence afresh. Its only function is to analyse the conduct of the proceedings and to determine whether the gross irregularities alleged had been committed. In *Ellis v Morgan*[4], quoted with approval by the SCA in *Telcordia*, Mason J held as follows:

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

[4] 1909 TS at 581

[37] It will also be wrong of this court, in establishing whether a gross irregularity had been committed, to confuse the reasoning of the arbitrator with the conduct of the proceedings. Where the legal issue is left for the decision of the functionary, any complaint about how he reached his decision must be directed at the method and not the result. This is known as the "*Doyle v Shenker*" principle. In *Doyle v Shenker*[5], a case that dealt with a review on the ground of a gross irregularity in the proceedings, Innes CJ summarized it as follows:

> 'Now a mere mistake of law in adjudicating upon a suit which the magistrate has jurisdiction to try cannot be called an irregularity in the proceedings. Otherwise a review would lie in every case in which the decision depends upon a legal issue, and the distinction between procedure by appeal and procedure by review, so carefully drawn by statute and observed in practice, would largely disappear. Yet in this case it is a mistake of law alone which is relied upon as constituting gross irregularity. There is neither allegation nor suggestion that the magistrate, his attention having been drawn to sec. 37, deliberately refused to apply his mind to it, or to consider it. The position, if the section means what the applicant contends, is that the magistrate either honestly misinterpreted or completely overlooked it. In either event it would not, I am afraid, be the first occasion on which a court of law has misread a statutory provision or overlooked one not brought to its notice at the trial. Whichever supposition were the correct one, the result would be (still assuming the correctness of the applicant's interpretation) an unfortunate error of law which, but for the special prohibition of the statute would afford good ground for an appeal. But there would be no gross irregularity in the proceedings, and therefore no justification for a review.'
>
> 'It was suggested that, in the present instance, the fact that the magistrate did not deal with the merits, would constitute a gross irregularity. But if he considered the

[5] *Doyle v Shenker & Co Ltd* 1915 AD 233

document to be conclusive, there was no need to discuss the merits. He may have been wrong in that view, but that would be an error of law only, and not an irregularity. The admission of illegal evidence is in itself an independent ground of review. But the document in question was not improperly received in evidence; indeed, it could not properly have been excluded. If the magistrate's reading of it, and of the bearing of the statute upon it, was wrong, that could again be a mistake of law, which, as already pointed out, could afford no basis for review proceedings.'

[38] I, however, acknowledge that an error of law may lead an arbitrator to exceed his powers or to misconceive the nature of the inquiry and his duties in connection therewith.[6] The procedure followed by the magistrate in the matter of *Goldfields Investments Ltd v City Council of Johannesburg*[7], is a perfect example. According to the applicable Rating Ordinance any aggrieved person was entitled to appeal to the Magistrate's Court against the value put on property for rating purposes by the local authority. The appeal was not an ordinary appeal but involved, in terms of the Ordinance, a rehearing with evidence. The magistrate refused to conduct a rehearing and limited the inquiry to a determination of the question whether the valuation had been 'manifestly untenable'. This meant that the appellant did not have an appeal hearing (to which it was entitled) at all because the magistrate had failed to consider the issue prescribed by statute. The magistrate misconceived the nature of the enquiry and *"had asked himself the wrong question, that is, a question other than that which the Act directed him to ask"* and in that sense the hearing was unfair. Schreiner J referred to *Ellis v Morgan* and reiterated that it was not merely high-handed or arbitrary conduct which is described as a gross irregularity but behaviour

[6] Telcordia par 69.
[7] 1938 TPD 551

which is perfectly well-intentioned and *bona fide*, though mistaken, may come under that description. At 560-561 the learned Judge held as follows:

> "The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect. And if from the magistrate's reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law. <u>But if the mistake leads to the Court's not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the inquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial.</u> I agree that in the present case the facts fall within this latter class of case, and that the magistrate, owing to the erroneous view which he held as to his functions, really never dealt with the matter before him in the manner which was contemplated by the section. That being so, there was a gross irregularity, and the proceedings should be set aside.' (Underling added)

[39] The setting aside of an arbitrator's award based on gross irregularities was the subject of the recent decision of *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd*[8], Wallis JA remarked at paragraph [8]:

> "[8] This provision was the subject of detailed consideration by this court in *Telcordia*. It suffices to say that where an arbitrator for some reason misconceives the nature of the enquiry in the arbitration proceedings with the result that a party is denied a fair hearing or a fair trial of the issues, that constitutes a gross irregularity. The party alleging the gross irregularity must establish it. Where an arbitrator engages in the correct enquiry, but errs either on the facts or the law, that is not an irregularity and is not a basis for setting aside an award. If parties choose arbitration, courts endeavour to uphold their choice and do not lightly disturb it. The attack on the award must be measured against these standards."

[40] The hearing took place over the course of 27 days spread over more than 18 months. Ms Mohlala-Mulaudzi testified for 17 days, during which she was cross-examined for 10 days. In the course of the proceedings the arbitrator handed down several rulings and awards. A spreadsheet detailing the proceedings before the arbitrator had been furnished to this court. There is nothing to suggest that the arbitrator misunderstood the nature of the inquiry. The Fund has selectively referenced the arbitrator's findings in its founding affidavit, which distorted the thrust and the meaning of the main award. Whether the arbitrator's conclusion on the facts and/or on the law was correct is beside the point. Even if the arbitrator had been wrong it does not mean that he misconceived the nature of the inquiry or his duties, or that he acted irrationally.

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[8] 2018 (5) SA 462 (SCA).

[41] Counsel for the Fund contends, with reference to *Telcordia*[9], that the arbitrator's alleged wrong interpretation of the termination letter "*prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision".* It is contended that the arbitrator was so fixated on the failure of the Fund to call witnesses to testify on the meaning of the letter and the alleged breaches, that he only considered Ms Mohlala-Mulaudzi testimony and was therefore "prevented" by his own understanding of the law to consider her answers in cross-examination. It is submitted that although the arbitrator's attention was drawn to the concessions made by Ms Mohlala-Muladzi during cross-examination he refused to consider it and therefore "closed his mind" to the admitted facts.

[39] There are no merits in this complaint. The arbitrator specifically took into account the Fund's "*summation of the evidence document*" (This is the document which, according to the Fund, identifies chapter and verse of Ms Mohlala's evidence relied on by the Fund in support of its counterclaims). It is clear from the record of the proceedings and the detailed and reasoned award that the arbitrator evaluated the evidence, both oral and documentary, considered the applicable law and arguments of senior counsel, and only then came to a conclusion in favour of Mohlala, rightly or wrongly. At best for the Fund it could be argued that he erred on the facts or the law. This is an argument for appeal, not review. As aptly remarked by the SCA in *Telcordia,* this is a case where the Fund's complaints are merely *"a factual issue once again dressed up as a question of law and cross-dressed as a procedural irregularity."*

THE FURTHER AWARD

[9] At [85]

[40] The further award was purportedly issued in terms of section 32(1) of the Arbitration Act which provides for a procedure where the **parties** consent to the remittal of any matter to the arbitrator for the making of a fresh or further award (my emphasis). The Fund did not consent to the remittal of the matter back to the arbitrator and Mohalala conceded during argument that the arbitrator was not entitled to make a further award without the consent of the Fund. The further award is therefore reviewable under section 33 (1)(b) of the Arbitration Act.

[41] Mohlala, however, contends that the two omissions dealt with in the further award were omitted *per incuriam* in the main award and that such omissions are the result of a slip of the arbitrator's pen which he had power to correct in terms of Rule 42 of the Uniform Rules of the High Court. I disagree. Rule 42 provides for an application on notice and is not applicable in the circumstances. The arbitrator clearly exceeded his powers in making a further award. The further award is reviewed and set aside.

THE CONDITIONAL COUNTER-APPLICATION

[42] Once the further award is set aside, Mohlala's conditional counter-application is triggered and falls to be considered.

[44] In the counter-application, Mohlala seeks an order in terms of section 32(2) of the Arbitration Act for the following questions to be remitted to the arbitrator for reconsideration and for making of a further award or a fresh award:

1. whether Mohlala lawfully terminated the SLA

2. to deal with Mohlala's request in the arbitration proceedings for the costs of two counsel, where applicable.

[45] In terms of section 32 (2) of the Arbitration Act:

> *"The court may, on the application of any party to the reference after due notice to the other party or parties made within 6 weeks after the application of the award to the parties, on good cause shown, remit any matter which was referred to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as it may direct".*

[46] It is common cause that Mohlala did not bring an application for remittal within 6 weeks. Mohlala relies on the provision of section 38 of the Arbitration At for an extension of the 6 week period. The section allows the court "on good cause shown" to extend "any period of time fixed by or under this Act, whether such period has expired or not".

[47] In considering the application, I took note of the following facts, which in my view are relevant to the question whether good cause have been shown to condone the failure to remit within 6 weeks as well as good cause for remitting the two questions back to the arbitrator. Mohlala was not supine. Once the omissions were discovered the attorney immediately raised the alarm within 3 days of receiving the main award. Although Mohlala relied upon the incorrect sub-section, the original request to the arbitrator nevertheless resulted in all the defects being cured by the further award. The further award is set aside as a result of a technicality. The effect of setting aside the further award will be that the two questions will be left unanswered.

[48] The Fund does not contend that the arbitrator was correct in failing to allow the costs of two counsel (where applicable) or that the arbitrator was correct in failing to answer the question whether Mohlala lawfully terminated the SLA. The Fund however contends that because Mohlala failed to deal sufficiently with the requirement of good cause, the court should refuse to extend the period within which it was required to bring the application in terms of section 32(2).

[49] This, in my view, is an overly technical approach. I agree with counsel for Mohlala that the better approach under the specific circumstances of this case is for the court to place substance over form and extend the 6 week period prescribed under Section 32 (2) as requested in prayer 2 of the conditional counter-application That would allow an orderly reconsideration and repair of the relatively minor but manifest blemishes in the main award.

[50] In terms of section 28 of the Arbitration Act an award remains binding until it is set aside by a court. Under the peculiar circumstances of the present matter it was impossible for Mohlala to apply under Section 32 (2) for the remittal of the matter before the further award was set aside. This fact, in itself, is "good cause" for relief to be granted in terms of Section 38 for the extension of the 6 weeks prescribed in terms of Section 32 (2).

[51] I am satisfied that good cause exists for this court to remit the two outstanding issues to the arbitrator for the making of a further award.

COSTS

[52] Mohlala was successful in its opposition of the review of the main award and the further award has been set aside on a technicality. Mohlala is, in my view, entitled to the costs of the application. Mohlala seeks an attorney client scale costs order against the Fund. After careful consideration, exercising my discretion, I decline to make a punitive costs order.

[53] In the result the following order is made:

1. The application for the review of the main award (dated 9 March 2018) is dismissed.
2. The arbitrator's further award (dated 19 March 2018) is reviewed and set aside.
3. The counter-application is granted. The main award is remitted back to the arbitrator in terms of section 32(2) of the Arbitration Act for reconsideration and for the making of a further award in respect of the following two questions:

    3.1 Whether the Service Level Agreement was lawfully cancelled by Mohlala Attorneys;

    3.2 Whether Mohlala Attorneys is entitled to the costs of two counsel, where applicable, including costs of senior counsel.

4. Costs to be paid by the applicant including the costs of senior counsel.

L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the applicant:	Advocate G.I. Hulley SC
	Advocate L.C. Segeels
Instructed by:	Borman Dumazitha Attorneys
Counsel for the first respondent:	Advocate C.H.J. Badenhorst SC
Instructed by:	Werksmans Attorneys
Date of hearing:	5 August 2019
Date of judgment:	29 November 2019