REPUBLIC OF SOUTH AFRICA

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

Case No: 20/18332

REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: YES
REVISED.
29/03/2022

In the matter between:

KRUINKLOOF BUSHVELD ESTATE NPC	Applicant
and	
THE CHAIRPERSON OF THE PANEL OF APPEAL ARBITRATORS	First Respondent
THE PANEL OF APPEAL ARBITRATORS	Second Respondent
ALOUISE ADLAM	Third Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 29 March 2022

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] A dispute arose between the applicant ('*Kruinkloof*'), a homeowners association, and the third respondent ('*Ms Adlam*'), a member of Kruinkloof. Kruinkloof claimed R1,4 million from Ms Adlam. This amount comprised of three components: monthly levies, penalty levies and interest. The dispute was referred to arbitration where Kruinkloof secured an award in its favour. Ms Adlam appealed the arbitration award and was successful in her appeal. The Appeal Panel found Ms Adlam to be indebted to Kruinkloof in the sum of R72,000 and not R1.4 million. Such indebtedness is for monthly levies only. In other words, the Appeal Panel rejected the claim for penalties and interest. As will be seen, there were two grounds (relevant to this hearing) upon which the Appeal Panel rejected the claim for penalties. The first ground is set out in paragraphs [72] and [73] of the award, the second in paragraphs [74] and [75] of the award of the Appeal Panel. In this judgment I find that the former ground (that contained in paragraphs [72] and [73] of the Appeal Panel's award) constituted an exceeding of their powers, but that the latter ground (that contained in paragraphs [74] and [75] of the Appeal Panel's award) was within the scope of the issues which the parties had referred to arbitration, was hence *not* an exceeding of their powers and that the one ground was distinct from the other with the effect that the one could survive whilst the other was rejected.

[2] Kruinkloof seeks a review of the award of the Appeal Panel.

Background facts

[3] The matter has its origin in two agreements concluded between Ms Adlam and the developer, Kopane Financial Services (Pty) Ltd ('*Kopane*') of a private residential estate in Boskruin, Randburg. The one agreement was a sale agreement in respect of Erf [....] Boskruin Ext 59 Township ('*Erf [....]*') and the other a building agreement. In terms of the sale agreement, Ms Adlam was contractually obliged to become a member of Kruinkloof upon transfer of Erf [....] into her name. This occurred on 20 November 2014. She remains the registered owner of Erf [....].

[4] Certain disputes arose between Ms Adlam and Kopane. Ms Adlam initiated arbitration proceedings against Kopane wherein she claimed to have cancelled both the sale agreement and the building agreement and claimed repayment of the moneys paid to Kopane, both as seller and as builder. Retired Judge Van der Merwe was appointed as arbitrator and made two awards in an arbitration between Ms Adlam and Kopane. No costs order was made in either award by Retired Judge Van der Merwe. The costs were reserved.

[5] The cancellation of the two agreements was confirmed (by consent of Kopane) and Kopane was directed to pay Ms Adlam R1,648,000 and R1,4 million against transfer of Erf [....] to Kopane.

[6] Kopane and Ms Adlam were unable to come to terms as to the transfer of Erf [....]. Ms Adlam then issued an application which resulted in an order made by Kairinos AJ.

[7] The order made by Kairinos AJ resulted in arbitration proceedings which ultimately ended in the appeal before the Appeal Panel which forms the subject matter of this review. The appointed arbitrator was Adv Gregory Amm ('*Mr Amm*'). The pleadings which served before Mr Amm formed part of the founding affidavit. Mr Amm found for Kruinkloof ('*the Amm award*').[1]

---

[1] The Amm award reads:

"1. The defendant's special defence of prescription is dismissed with costs on the same basis as that listed in paragraph 6 below.

2. The defendant is to make payment to the claimant of the costs pertaining to the defendant's withdrawal and abandoned counterclaim.

3. The defendant is liable to make payment to the claimant in each of the following:

(a) each of the relevant monthly levy payments from the period April 2016 as required in terms of rule 11.1 of annexure SOC3 of the claimant's statement of claim;

(b) each monthly levy penalty (being 3 x the rule 11.1 monthly levy) as provided for and to be calculated in terms of rule 11.5.1 of annexure SOC3 of the claimant's statement of claim; and

(c) the rule 2.4.2 monthly penalty levies from 1 September 2016 (being 8 x the rule 11.1 monthly levy and as provided for in and to be calculated in terms of annexure SOC3 of the claimant's statement of claim).

4. Interest on each of the aforesaid amounts *a tempore morae* to date of payment.

5. To the extent necessary and/or required, in the event of either of the parties failing to reach an agreement and/or consensus on the calculation of any of the amounts due, owing and payable by the defendant to the claimant in respect of paragraphs 3(a) to (c) above, any of the parties may approach the arbitrator, on reasonable and appropriate written notice to the other party, for appropriate direction and/or hearing and subsequent award on the specific issues.

[8] An appeal was lodged against the Amm award.

[9] The Appeal Panel (the first and second respondents) delivered its award [2] and it is against such award by the Appeal Panel that Kruinkloof applies for the relief set out in the notice of motion.

Relief sought in the notice of motion

[10] The relief sought by Kruinkloof in the notice of motion is the reviewing and setting aside of the award of the Appeal Panel dated 9 June 2020 ('*the award'*) in terms of section 33(1)(b) of the Arbitration Act, 42 of 1965 ('*the Arbitration Act*').

The basis for the review

[11] Kruinkloof contends that the Appeal Panel exceeded its powers and handed down an award which falls to be set aside for gross irregularity and/or having exceeded its powers as the Appeal Panel ignored the grounds of appeal and proceeded to determine the appeal on the basis introduced by themselves, which formed no part of the *lis* between the parties and which was disavowed by Ms Adlam during argument before the Appeal Panel. The Appeal Panel found the following: Firstly, they made an award that Kruinkloof must pay the costs of the awards of Retired Judge Van der Merwe (in an arbitration to which Kruinkloof was not a party); ("*the first ground of review"*); and Secondly, they decided the appeal on a novel basis (concerning the effect of the cancellation of the sale and building agreements (not raised as a ground of appeal) (*"the second ground of review"*).

Issues

[12] Ms Adlam concedes that the Appeal Panel exceeded its powers in ordering Kruinkloof to pay the costs of the arbitration proceedings unrelated to the dispute before the Appeal Panel. The sole question which falls for determination in respect of

---

6. The defendant is liable to make payment to the claimant of the claimant's costs of the arbitration to date, the costs of the arbitrator to date, and the transcription services to date."

[2] The award which was made reads as follows:

"1. The appellant is ordered to pay the costs occasioned by the withdrawn counterclaim;

2. The appellant's prescription defence is upheld in respect of the arrear levies due for April 2016 and May 2016;

3. The appellant is ordered to pay the sum of R72 000,00 plus *mora* interest at the rate of 10.5% per annum from date of *mora* to date of payment;

4. The respondent is to pay the costs of this arbitration as well as the costs reserved in Award No. 1 and Award No. 2 by the Honourable retired Judge Van der Merwe, which costs are to include the costs occasioned by the employment of two counsel where applicable;

5. The remaining orders issued by the arbitrator are set aside."

the first ground of review is the effect of the Appeal Panel having exceeded its powers concerning the award of costs on the remainder of their award. Ms Adlam contends that her counterclaim is a sensible manner of correcting the costs of the award. The relief sought in the counter application is that an order be granted in terms of section 31(2) of the Arbitration Act, correcting the alleged patent error in the costs order contained in the award and that paragraph 82.4 of the appeal award dated 9 June 2020 be corrected to read:

> '4. The respondent [Kruinkloof] is ordered to pay the costs of this arbitration, which costs are to include the costs occasioned by the employment of two counsel where applicable.'

[13] Ms Adlam then finally requests that an order be granted in terms of section 31(1) of the Arbitration Act, making the award of the Appeal Panel dated 9 June 2020 as amended an order of court.

[14] The second issue is whether or not the second ground of review should be sustained and the Appeal Panel's award be set aside.

The primary sections in the Arbitration Act relied upon

[15] Kruinkloof relies on Section 33(1)(b) of the Arbitration Act which reads:

> " (1) Where- (b) an arbitration tribunal has committed any **gross irregularity** in the conduct of the arbitration proceedings or has **exceeded its powers** 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**." (emphasis provided)

[16] Ms Adlam in her counterclaim relies on section 31 (2) of the Arbitration Act which reads:

> '31(2) The court to which application is so made, may, before making the award an order of court, correct in the award any clerical mistake or any patent error arising from any **accidental slip** or omission." (emphasis provided)

First Ground of Review

[17] It was common cause between the parties before this court that the Appeal Panel had exceeded its powers in ordering Kruinkloof to pay the costs of the arbitration proceedings before retired Judge Van der Merwe (which had been reserved by him) which proceedings were unrelated to the dispute before the Appeal Panel.

[18] Ms Adlam's case was that this constituted an 'accidental slip' as contemplated in section 31(2) of the Arbitration Act.

[19] In *Food Corporation of India v Marastro CIA Naviera S.A.*[3], in explaining what was meant by 'accidental slip' in relation to the provisions of section 17 of the Arbitration Act (older act in England but similar to our Arbitration Act) it was held that -

> 'In one sense, of course all errors are accidental. You do not make a mistake on purpose. But here the words take their colour from their context. I do not suggest that (the section) is limited to clerical mistakes. But, in general, the error must, in the words of Rawlatt J in *Sutherland and Co v Hannerig Brothers Ltd*, [1921] 1K.B. 336 at 344 be an error affecting the expression of the tribunal's thought, not an error in the thought process itself.... The fact that the error was an elementary error is not sufficient to make it accidental.'

[20] In the case digest for *Bristol- Meyers*[4] the essence of the slip rule was formulated as follows:

> '…..while it was not possible to use the slip rule…..to permit the court to revise a judgment after having second thoughts, it was possible to utilise the rule in order to give effect to the original intention of the court…'

[21] Russell on Arbitration 24th edition explains the use of the slip rule as follows[5]:

---

[3] [1986] 2 Lloyd's Rep. 209 Lloyd L.J. See too the leading case on rule 42(1)(b): *Firestone South Africa (Pty)Ltd v Gentiruco AG*, 1977 (4) SA 298 (A) at 306F- H where the principle was distilled to encompass only the correction of an error in expressing the judgment or order not the substance thereof.

[4] *Bristol-Myers Squibb Co v Baker Norton Pharmaceuticals Inc (Costs) Court of Appeal (Civil Division)* [2001] EWCA Civ 414 28 Mar 2001

[5] Paragraph 6 - 169

'Thus, if the tribunal assesses the evidence wrongly or misconstrues or fails to appreciate the law, it cannot correct the resulting errors in its award under the slip rule. Nor can it use the slip rule to reconsider a decision once made. Where, however, the tribunal has transposed the parties, or has incorrectly calculated the amount payable under the award as a result of accepting the evidence of a particular witness but attributing that witness to the wrong party, it may correct the award under the slip rule. If the correction under the slip rule reveals other errors, for example in relation to costs, they may also be considered as 'arising from' the slip and therefore within the tribunal's power to correct the award.' (footnotes omitted)

[22] By parity of reasoning, Mr Badenhorst SC, representing Kruinkloof, argued that the Appeal Panel had deliberately (although *bona fide*) applied themselves to the question of costs, which had not been placed before them and had decided to make a finding on such issue. This error, so the argument ran, is one, which evidences an error in the thought process of the Appeal Panel itself and although it may be labelled elementary, does not qualify to be corrected under 'the slip rule'.

[23] Mr Van Vuuren SC, representing Ms Adlam, argued that the court should have regard to the Appeal Panel's subsequent pronouncement on the issue ie their communication to the parties that this was a 'slip' and that it could be corrected. Mr Van Vuuren, however, also conceded readily that this labelling by the Appeal Panel has limited value. In the case digest for *Mutual Shipping Corp of New York*[6] the following caution appears:

> 'Although admission by the arbitrator of the error is not a necessary prerequisite, the court should be slow to intervene unless there is such an admission'

[24] In an email from one of the members of the Appeal Panel the following is stated:

> 'Dis met spyt dat ons verneem van die fout met die kostebevel in ons Toekenning. In 'n arbitrasie is dit wel moontlik om 'n klaarblyklike fout reg te

[6] *Mutual Shipping Corp of New York v Bayshore Shipping Co of Monrovia (The Montan)* [1985] 1 W.L.R. 625, [1984] 12 WLUK 262

stel. As al die partye toestem tot die wysiging, kan ons dit informeel wysig op een van die volgende maniere:

1 Ons reik net 'n gewysigde toekenning uit; of

2 Die Respondent gee net kennis van afstanddoening van daardie deel van die toekenning; of

3 As almal toestem is geen verdere stappe nodig nie, tensy iemand dit 'n bevel van die Hof wil maak.

Ons hoor graag van julle.

Groete

……..'

[25] I am not persuaded that it is admissible as a tool of interpretation to have regard to the *ipse dixit* of a member/or the members of the Appeal Panel nor that a court should be slow to intervene unless there is such an admission as was suggested in the *Mutual Shipping* matter[7] but I do not pronounce on the correctness of either of these propositions as I do not consider it necessary by virtue of the route that I have chosen to follow to reach my finding on this issue.

[26] Mr Van Vuuren suggested that I should have regard to the entire award and assess how this obvious, and perhaps even elementary, error came about ie to investigate the reasons and to establish whether the correction would give effect to the original intention of the Appeal Panel or whether it would amount to a revision (a disguised appeal) of the award. In my view, this would be the correct approach. In doing so, I am mindful of the comments in *Bristol-Myers* at paras 24 and 25:

'24. Robert Goff LJ went on: "I do not think it would be right for me to attempt in this judgment to define what is meant by "accidental slip or omission": **the animal is I suspect, usually recognizable when it appears**

[7] Quoted in paragraph [24] hereof.

> **on the scene."** 25."Those cases establish that the slip rule cannot enable a court to have second or additional thoughts. Once the order is drawn up any mistakes must be corrected by an appellate court. However it is possible under the slip rule to amend an order to give effect **to the intention of the Court**. If the last two cases referred to above had been cited in Molnlycke, I believe the obiter statement made by the judge would have been expressed differently."' (emphasis provided)

[27] The costs of the application and the considerations in respect thereof are dealt with in paragraphs [79] to [81] of the award. The Appeal Panel in paragraph [81] concluded:

> 'The respondent must therefore be held liable for the costs incurred **in this appeal**'.

[28] It is clear from this finding that the Appeal Panel intended that Kruinkloof be liable for the costs of the appeal (and thus the hearing under consideration). Mr Badenhorst argued that the slip rule applies where, by way of example, the reasons in the award justifies an award of R 50 000 but the order reads R100 000. In my view this case is no different to his example because the costs order is not supported by the reasoning in respect of the costs in paragraph [81] of the award. The award ought to have reflected costs against Kruinkloof for the appeal only (analogous position is the R50 000) but the award reflected costs against Kruinkloof for both the appeal and the reserved costs of the arbitration before retired Judge Van der Merwe (analogous position is the R100 000). In my view, this was clearly a slip and was not intended. The Appeal Panel intended to limit the costs to those incurred in respect of the appeal only and I find it to be so: the animal [8] appeared on the scene and is clearly recognizable to me.

[29] If I am wrong in my conclusion on this point [9], I would be driven to conclude that that portion of the award should be disregarded as it is a nullity[10].

[30] The Appeal Panel had no jurisdiction to make an order in respect of the costs of an arbitration where they were not presiding and where one of the litigants, Kruinkloof, was not even a party.

---

[8] To borrow from the colourful description in *Bristol-Meyers.*

[9] or more appropriately phrased: If I mistook the animal on this scene.

[10] *Vidavsky v Body Corporate of Sunhill Villas*, 2005 (5) SA 200 (SCA) at para [17]

[31] Relying on the judgment of *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd*[11] Mr Van Vuuren argued that the costs award is completely separate and severable from the Appeal Panel's award on the merits of the dispute, that it does not taint the remainder of the award and that Ms Adlam's counter application would be a sensible manner of correcting the costs award.

[32] Mr Badenhorst argued that Ms Adlam could not succeed in her contention that the award was bad in part and good for the rest because the *Palabora* principles had not been established.

[33] The prerequisites for the Palabora principle are (a) whether the objectionable provisions in the award are separable from the rest, or not so clearly separable that it can be seen that the part of the award attempted to be supported is not at all affected by the faulty portion; and (b) it can be demonstrated that the award is "*good for the rest*".

[34] Mr Badenhorst submitted that the irregular costs order was far more serious and had a far reaching effect. It was so egregious, so the argument ran, that it cast a pall of irregularity and evidenced a failure by the Appeal Panel to apply its mind to the proceeding as a whole. He submitted that this was the kind of mistake that led to the Appeal Panel not merely missing or misunderstanding a point of law on the merits but resulted in its misconceiving the entire nature of the enquiry as was the case in *Goldfields Investment Ltd v City Council of Johannesburg*[12]:

> 'The law, as stated in *Ellis v Morgan* (supra) has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and *bona fide*, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect. And if from the magistrate's reasons it appears that his mind was not in a state to

[11] 2018 (5) SA 462 (SCA) at [48]

[12] 1938 TPD 55 and followed in *Telcordia Technologies Inc v Telkom SA Ltd*, 2007 (3) SA 266 (SCA)

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. 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. 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.'

[35] In *Telcordia*, Harms JA, set the scene for the aforegoing as follows:

'[72] It is useful to begin with the oft quoted statement from *Ellis v Morgan* where Mason J laid down the basic principle in these terms:

> '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.'

> [73] The *Goldfields Investment* qualification to this general principle dealt with two situations. The one is where the decision-making body misconceives its mandate, whether statutory or consensual. By misconceiving the nature of the inquiry a hearing cannot in principle be fair because the body fails to perform its mandate. *Goldfields Investment* provides a good example. According to the applicable Rating Ordinance any aggrieved person was entitled to appeal to the magistrates 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 had asked himself the wrong question, that is, a question other than that which the Act directed him to ask. In this sense the hearing was unfair. ‘

[36] The Appeal Panel made an order on something not argued and not placed before it. It did not prevent Kruinkloof from having its case fully and fairly determined. Nothing during the appeal hearing in regard to this feature infringed on the rights of Kruinkloof. The award was incorrect insofar as it ordered Kruinkloof to pay costs of an arbitration to which it was not a party (the Appeal Panel exceeded its powers) but that does not equate to an irregular proceeding and applying the *Palabora* principle, I conclude that subject to what is said hereinafter about the findings in paragraphs [72] and [73] of the award, that the award is good for the rest which entitles this court to excise the offending portion of paragraph 82.4 and to endorse the balance.

Second Ground of Review

[37] The parties were in agreement that the correct approach to the matter is to be found in the leading case of *Hos+Med Medical Scheme*[13] where Lewis JA summarised the source of an arbitrator's powers as follows:

> 'In my view it is clear that the only source of an arbitrator's power is the arbitration agreement between the parties and an arbitrator cannot stray beyond their submission where the parties have expressly defined and limited the issues, as the parties have done in this case to the matters pleaded. **Thus the arbitrator, and therefore also the appeal tribunal, had no jurisdiction to decide a matter not pleaded.** … It is of course possible for parties in an arbitration to amend the terms of the reference by agreement, even possibly by one concluded tacitly, or by conduct, but no such agreement that the pleadings were not the only basis of the submission can be found in the record in this case, and Thebe strenuously denied any agreement to depart from the pleadings.' (emphasis provided)

[38] *Hos+Med* makes clear the relationship between (a) the arbitration agreement; (b) the issues in the arbitration, and (c) the powers of the arbitrators. *Telcordia* makes clear that the arbitration clause in an arbitration agreement may have independent existence from the 'host' arbitration agreement and that the 'reference' to arbitration is what defines the set of issues that the parties have agreed they want the arbitrator to decide by referring those issues to her for decision. Whether a particular issue falls within the reference to arbitration is often referred to as being a question of jurisdiction of the arbitrator. It can also be understood as a question of whether the parties agreed (often a matter of interpretation) that a particular issue should or should not be decided by the arbitrator. An arbitrator who has decided an issue that was not part of what the parties agreed the arbitrator should decide is said to have exceeded her powers or to have lacked jurisdiction to decide that issue. In *Hos+Med* the parties to that arbitration agreement had agreed that the issues to be decided by the

---

[13] *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others* 2008 (2) SA 608 (SCA) at [30]

arbitrator were the issues defined by the pleadings filed in the arbitration[14]. In *Hos+Med* unlike in *Telcordia*, the arbitrator was confined to the issues on the pleadings. That was what the parties had agreed the arbitrator should decide, the issues on the pleadings. The Appeal Panel in *Hos+Med* decided the appeal on an issue that had not been pleaded and thus they were found by the SCA to have exceeded their powers and the Appeal Panel's award in that matter was set aside. In *Telcordia*[15] the arbitration agreement gave the arbitrator wider powers than did the arbitration agreement in *Hos+Med* to determine what set of issues was to be decided. As the comparison between *Hos+Med* and *Telcordia*[16] demonstrates, the term 'jurisdiction' in relation to arbitrations is in many ways (but not in every way) synonymous with the terms of the arbitration agreement,[17] If the issues decided by the arbitrator fall within the terms of the agreement that the parties agreed the arbitrator should decide then, matters of substantive law aside, the arbitrator is said to have jurisdiction. Decisions made by an arbitrator on issues falling within her jurisdiction are within her powers, decisions made on issues falling outside her jurisdiction are instances of 'an arbitrator exceeding her powers'. Of course there are other ways in which an arbitrator can exceed her powers[18] but those do not arise in this matter.

---

[14] In a typical South African arbitration the pleadings are the statement of claim, the statement of defence, the statement of counterclaim and the statement of defence to the counterclaim. In *Hos+Med* the parties had filed additional pleadings using the titles of pleadings conventionally used in the High Court rules but that is of no moment.

[15] The arbitration clause in *Telcordia* referred to by Harms JA in par [7] of that judgement provided that all disputes between the parties that may arise had to be determined by an arbitrator. This included disputes related to interpretation of the agreement as well as disputes of a legal nature. See par [36], & [52] of *Telcordia* and par [56] where the point is made that 'to exceed one's powers does not go to merit but jurisdiction'.

[16] Which was concerned with the issue of irregularity in the proceedings before the arbitrator and with an exceeding of powers, as appears from par. [52] and [80] – [86] of *Telcordia*, see also par. [95] & [99]

[17] It could also be synonymous with 'the terms of the agreement referring a particular set of issues to an arbitrator (the reference)' or to 'the terms of the arbitration clause' and of course to the substantive law of jurisdiction, but such considerations do not arise for consideration in this case.

[18] An example is given at par. [69] of *Telcordia* that: '[A]n error of law may lead an arbitrator to exceed his powers…' Contra par. [86] '[I]t is a fallacy to label a wrong interpretation of a contract, by the arbitrator as a transgression of the limits of his power….[I]f he errs in his understanding or application of local law the parties have to live with it.'

[39] Mr Badenhorst argued that the issues which the Appeal Panel was empowered to decide were circumscribed by the grounds of appeal of which notice was given in the notice of appeal. The agreement on the appeal procedure, was contained in the following documents: (a) paragraph 5 of the consent order made by Kairinos AJ which read "*Should the parties not agree to the amount owing by the applicant to the second respondent within two weeks from the date upon which the invoices, statements and supporting documentation referred to in paragraph 4 is provide to the applicant, any one of the applicant or the second respondent may refer the dispute to AFSA for determination in terms of the AFSA's expedited rules*". (b) the minutes of the pre-arbitration agreement held on 14 August 2019 ('*the pre-arbitration agreement*') and (c) the AFSA expedited rules. Paragraph 2.4 of the pre-arbitration agreement records agreement on a right to appeal and refers to annexure X which sets out that which is relevant to such an appeal. Mr Badenhorst emphasised paragraph 2 of Annexure X which provides that the notice of appeal shall set out concisely and succinctly the grounds of appeal.

[40] Mr Badenhorst therefore argued that the jurisdiction of the Appeal Panel was circumscribed by the issues defined in the notice of appeal.

[41] Mr Van Vuuren argued that the Appeal Panel had the same Jurisdiction as Mr Amm (the arbitrator) and that annexure X did no more than circumscribe the procedure on appeal.

[42] The Appeal Panel made the following findings:

> In paragraph [72]: -
>
> > 'The moment the owner lawfully cancels the deed of sale the obligation to erect a dwelling falls away. It can never have been the intention of the parties to hold an owner liable for the completion of a building after the agreement to purchase a stand has been cancelled and such cancellation has been accepted. A fortiori must such obligation cease the moment the building contract is validly cancelled as well by the owner because of the builder's inability to finalize the building. The

> respondent's rule aimed at forcing the owner/member to complete a building can only apply to an owner who is still contractually bound to remain in the estate and who is able to compel the builder to complete his task. Any other interpretation is wholly unbusinesslike and could not have been contemplated by the parties."; and

In paragraph [73]: -

> 'The obligation to complete the building fell away once both the deed of sale and the building contract had been cancelled. The appellant was therefore not liable for any penalties sought to be imposed thereafter.'

[43] When the Appeal Panel raised the propositions underpinning the aforegoing, Ms Adlam's counsel explicitly renounced same.

[44] A transcript of the relevant portion of the argument reveals that the Appeal Panel put a question to both counsel for Kruinkloof and Ms Adlam as to the effect of the cancellation of the sale and building agreements as follows: -

> 'Een groot vraag wat julle nie aangespreek het erens nie: Die effek van die kansellasie van die kontrakte op al die goed'
>
> and
>
> 'Toe het albei kontrakte ontbind by ooreenkoms. Daarna wil ek weet wat julle betoog is oor die effek op hierdie kansellasie of ontbinding dan op al die goed, want dit speel 'n rol en al wat ek kon sien in die kontrak - en dis in die koopkontrak - is dat daar solank daar 'n dispuut is oor die kansellasie, sal heffings en sulke goed aanloop maar dis al. Daar is nie 'n ding dat enige ander goed gaan voortloop ten spyte van kansellasie nie, so dit het 'n effek op heffings, dit het 'n effek op n bouery, dit het 'n effek op al die goed wat gedoen is daarna, so ek wil antwoorde daarop he'
>
> and

‘Kan ek hierby aansluit? Dit essensieel 'n uitleg van die kontrakte. Die oomblik toe die boukontrak gekanselleer word, kan daar nog sprake daarna wees daarvan dat die appellant versuim het om die bouwerk te voltooi? Die boukontrak is gekanselleer en tesame met die kansellasie van die boukontrak is die lidmaatskap, of is die koopkontrak van die eiendom gekanselleer. Lidmaatskap van die huiseienaarsvereniging is 'n funksie van die koopkontrak van die eiendom. Die oomblik wat daai kontrak gekanselleer word, kan daar dan nog sprake daarvan wees dat die appellant onderworpe is aan die reels van die huiseienaarsvereniging, laat staan nou die feit dat oordrag nie gegee kan word voordat die heffings nie bepaal is nie. Post die kansellasie van die koopkontrak van die eiendom. (a) kan daar nog sprake daarvan wees dat die huiseienaarskap nog bevoegdheid oor die appellant het om enige heffings of enige boete te verhaal en (b) na die kansellasie van die koopkontrak, kan daar nog sprake daarvan wees dat die appellant enigsins onderhewig gestel kan word aan die boetes dat die boukontrak nie voltooi is nie nadat die boukontrak nie meer bestaan nie en dat eienaarskap van die huiseienaarsvereniging beeindig sou word indien dit nie was vir die feit dat die eiendom nog nie oorgedra is nie. maar dis juis die probleem - as sy ophou om 'n lid te wees van die huiseienaarsvereniging, is sy dan nog onderhewig aan boetes?”

[45] Ms Adlam’s counsel then responded as follows to the Appeal Panel’s questions:

‘Ek het die vraag oorweeg en meen dis tweeledig – daar is niks gepleit van die aard in die arbitrasie nie en ek was onseker hoe ver so ’n punt gevoer kon word op appèl as dit nooit geopper is nie. Die tweede punt is dat die huiseienaarsvereniging nie direk ‘n party tot enige van hierdie kontrakte was nie. Dit het regte gekry ten behoewe van ‘n derde waar die voordele aanvaar is en dit is nie vir my seker dat as daardie koopkontrak gekanselleer is, dat die beding ten behoewe van ‘n derde daarmee saam gekanselleer word nie. Wat vir my die deurslag gegee het, is die feit van registrasie en dit wil vir my voorkom of die feit van registrasi.e in die naam van die appellant beteken dat sy ‘n lid van die huiseienaarsvereniging bly in

> terme van die bepalings van die titelakte. Dit is weereens ‘n geval waar ek graag sou wou saamstem en sê die appellant is nie meer onderhewig nie, maar dit lyk vir my ... nie veel aandag daaraan gegee nie. Dit lyk vir my of daar probleme is met ‘n argument dat die appellant die gevolge van die registrasie kan oorkom op hierdie manier.“

[46] It is clear from the above extract, that the Appeal Panel was expressly advised (by Ms Adlam’s counsel) that it was not open to Ms Adlam to rely on the consequences of a finding that the sale agreement and the building agreement had been lawfully cancelled.

[47] It is common cause that this issue had not been pleaded and was not dealt with in the hearing or in the award of Mr Amm. Thus, assuming without finding that Ms Adlam is correct on this issue ie that the Appeal Panel’s jurisdiction is that of Mr Amm’s, it follows that Mr Amm had no jurisdiction to decide the issue canvassed in paragraphs [72] and [73] and accordingly also not the Appeal Panel.

[48] There is no real dispute that the Appeal Panel had the jurisdiction to decide the penalty levies issue. They found in paragraphs [74] and [75] of the award that Kruinkloof’s rule 13.2, provided for the exercise of a discretion when deciding to impose penalties or not. The Appeal Panel found that the wording of the rule is incompatible with an automatic imposition of any penalties and the absence of any demand prior to the litigation almost three years later lead to the ineluctable conclusion that penalties would not be imposed. Mr Badenhorst contended that this might have been a good argument and might have passed the *Palabora* test had the last sentence of paragraph [75] not linked the reasoning of that which was not within the Appeal Panel’s jurisdiction, to paragraphs [74] and [75], such sentence being: *‘Given the cancellation of both the deed of sale and the building contract the probabilities are overwhelming that Mr Wasserfall snr did not seek to impose penalties that he must have known or suspected to be unenforceable.*’(‘*the linking sentence’*).

[49] In my view, the linking sentence does not scupper the *Palabora* test. The linking sentence was no more than a ‘belts and braces’ finding. The finding that Mr Wasserfall had exercised a discretion against imposing penalties had already been made in paragraph [74] of the award. The linking sentence was a further string in the bow of the reasoning. The linking sentence was unnecessary in making such finding

and I conclude that the linking sentence is separable from the remainder of the findings in paragraphs [74] and [75] of the award.

[50] Mr Badenhorst argued further, on this point, that the heading in the award which preceded the discussion in paragraphs [71] and further, is a clear indication that this section was one composite thought process and not capable of being severed. Such heading reads: '*The Obligation to Complete the Building Operations'*.

[51] In my view, the introductory portion of paragraph [74] is clearly indicative that what follows, is separable, it reads: *'There is further, and in the alternative, no evidence whatsoever…..*'. What then follows is an evaluation of the evidence. What was considered and discussed in paragraphs [72] and [73], were the legal and factual consequences of the cancellation of both the deed of sale and the building contract thus not an analysis of the evidence *per se*. The linking sentence relates to an evaluation of the evidence and the probabilities in respect thereof. The two sections: paragraphs [72] and [73] on the one hand and paragraphs [74] and [75] on the other, are conceptually distinct and thus separable.

[52] Mr Van Vuuren argued that the facts relied upon in paragraphs [74] and [75] were recorded in paragraph 7.2.10 of the notice of appeal. Mr Badenhorst pointed out that paragraph 7.2.10 was a sub-paragraph of paragraph 7 of the notice of appeal which dealt with the Conventional Penalties Act and that it is impermissible to stretch the application of paragraph 7.2.10 to cover the finding made in paragraphs [74] and [75]. This appears to be correct.

[53] Paragraph 4 of the notice of appeal, however, dealt squarely with this issue being the mechanism to be followed to impose penalties and this was addressed by the Appeal Panel, which they were perfectly entitled to deal with. Moreover, this review focussed exclusively on the findings in paragraphs [72] and [73] and Kruinkloof had no quarrel with the findings in paragraphs [74] and [75] in their founding affidavit or heads of argument.

[54] The crux of Mr Badenhorst's argument was that the position was clearly that none of paragraphs [71] to [74] are covered by the Appeal Panel's powers as defined in terms of the Notice of Appeal and thus that there is no scope for separating good from bad in terms of *Palabora*.

[55] Mr Van Vuuren argued that the source of the Appeal Panel's jurisdiction is not to be found in the grounds of the Notice of Appeal. Their jurisdiction is the same as that of Mr Amm which jurisdiction encompassed the disputes, issues and questions

set out and/or those arising from the pleadings[19]. For this proposition he relied on the decision of *Sentrale Kunsmis Korporasie*[20]

[56] Annexure 'X' does not in its terms provide that the Appeal Panel's jurisdiction is limited to the grounds of appeal. It sets out a procedure. As pointed out by Mr Van Vuuren, what would the position be if at the hearing of the appeal another more valid reason was to arise for finding that the 'award' were sustainable? Relying on *Sentrale Kunsmis* he argued that never can it be that a notice of appeal can circumscribe jurisdiction. In my view, it would indeed lead to an absurdity if that were the general rule although, the parties could conceivably, by agreement, limit the Appeal Panel's jurisdiction in this way but I find that it did not occur here.

[57] In summary on the second ground of review:

57.1. The issue whether penalties were payable served before Mr Amm and the Appeal Panel thus had the jurisdiction to decide the issue[21].

57.2. The Appeal Panel could decide that penalties were not payable for another reason not canvassed in the hearing before Mr Amm nor traversed in his reasons for his award provided the parties were afforded an opportunity to deal with the point before the Appeal Panel and it constituted a purely legal argument.[22]

57.3. If the jurisdiction of the Appeal Panel is determined with reference to the notice of appeal (which I have found not to be the case in this matter), the issue of penalties is dealt with in paragraph 4 thereof.

57.4. If the Appeal Panel had no jurisdiction to decide the penalties issue for the reasons set out in paragraphs [72] and [73], I find that the issue of penalties served before Mr Amm and that the Appeal Panel could determine such issue on the basis reflected in paragraphs [74] and [75] which paragraphs did not form the basis of the review. Kruinkloof only took issue with paragraphs [72] and [73].

Conclusion

---

[19] This case is thus to be distinguished from *Hos-Med* in which case the issues were limited to the pleadings.

[20] *Sentrale Kunsmis Korporasie (Edms) Bpk v NKP Kunsmisverspreiders (Edms) Bpk*, 1970 (3) SA 367 (A) at 395F

[21] Thus, the notice of appeal did not circumscribe jurisdiction.

[22] *Sentrale Kunsmis* (supra) at p395F

[58] The relief sought by Kruinkloof in its notice of motion is that the award of the Panel of Appeal Arbitrators dated 9 June 2020, save for paragraphs [68] to [70] and paragraph [82.2] be set aside[23]. Implicit in this request is an interpretation that the reasons are part of the award.

[59] Much was made of this at the hearing and in the additional heads of argument filed. In my view, this question is to be answered with reference to the four corners of the Arbitration Act and the caution expressed by the Constitutional Court in *Lufuno Mphaphuli*[24] that Section 33(1) of the Arbitration Act should not be interpreted in a manner that will enhance the powers of a court to set aside arbitration awards. If Section 33(1) were to be interpreted as suggested by Mr Badenhorst, it would mean that every time an application to make an award an order of court is placed before a court, such court would be obliged to scrutinise and consider the reasoning process that led to the executory part of the award being granted. Such an approach would fly in the face of what the litigants expressly agreed, being that the legal issues should be left for the decision of the arbitrator (and in this case the Appeal Panel too). The complaints which can be raised before a court are very limited in scope and must be directed at the method utilised to reach the conclusion and not at the result itself. One should not confuse the reasoning with the conduct of the proceedings.[25] The reasons are not considered by a Court when enforcing an award. The reasons are accordingly not sanctioned or endorsed by making the award an order of court. The executory part of the award (the order) is. The purpose of an order is to make the processes of the high court in regard to the execution of judgments available to the successful party in the arbitration.[26]

[60] Section 31 of the Arbitration Act authorises a court to make an award an order of court which should be read in context: Section 28 provides for the parties to comply with the award. This is clearly a reference to the "*order"*, which is the Arbitrator's award. The ordinary meaning of the word "award" is: "*to give or order the giving of (something) as an official payment compensation or prize*"

---

[23] It is not insignificant that Kruinkloof seeks the enforcement of the Appeal Panel's award in respect of the finding of prescription of the levies for April and May 2016. This request evidences the fact that Kruinkloof concedes that the award is good at least insofar as it supports such relief and thus, to that extent, separable from the rest.

[24] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*, 2009 (4) SA 529 (CC) at para [235]. See too *Palabora* (supra) at paragraph [8]

[25] *Telcordia* (supra) paragraphs [75] and [76]

[26] *Palabora* paragraph [51]

(Oxford Dictionary); and *"money or a prize following an official decision"* by example "*the jury awarded liable damages of £100 000.*" (Cambridge Dictionary); and *"To declare to be entitled, as by a decision of court of law or an arbitrator*" (Chambers Dictionary).

[61] In my view, the reasons in an arbitral award can and should be used to assist in the enquiries relating to jurisdiction, whether there were irregularities in the process and the like. Very much as such reasons were used in this matter. However, when it comes to what is to be made an order of court, a court only endorses the executory part of the arbitral award.

[62] There was some mudslinging during the course of the additional heads of argument which were filed. Accusations were made that the court was being mislead and other impropriety was alleged. I have found none. In my view, counsel argued what the papers allowed.

Order

[63] I accordingly make the following order:

63.1. The review application is dismissed with costs including the costs of two counsel one of which is a senior counsel, where so employed.

63.2. The following accidental slip in paragraph 82.4 of the award of the Panel of Appeal Arbitrators dated 9 June 2020 is corrected in terms of Section 31(2) of the Arbitration Act 42 of 1965, as amended so that paragraph 82.4 reads: 'The respondent is to pay the costs of this arbitration which costs are to include the costs occasioned by the employment of two counsel where applicable;'

63.3. Paragraph 82 of the award of the Panel of Appeal Arbitrators dated 9 June 2020 as amended in paragraph 63.2 hereof, is made an order of court.

63.4. The applicant is to pay the costs of the counter-application including the costs of two counsel one of which is a senior counsel, where so employed.

OPPERMAN

Judge of the High Court

Gauteng Local Division, Johannesburg

Counsel for the applicant: Adv CHJ Badenhorst SC and Adv JW Steyn

Instructed by: Rossouws, Lesie Inc

Counsel for the third respondent: Adv PHJ Van Vuuren SC and Adv HM Viljoen

Instructed by: Ramsay Webber Inc

Counsel for the first and second respondents: None

Date of hearing: 18 August 2021

Date of additional heads of argument: 23 August 2021 (3rd respondent), 30 August 2021 (applicant), and 6 September 2021 (3rd respondent)

Date of judgment: 29 March 2022