In the High Court of South Africa
(Western Cape Division, Cape Town)

Case No: A05/2023

In the matter between:

KEKKEL EN KRAAI SUID AFRIKA (PTY) LTD **Appellant**

and

BES-BUHR TRADING CC **First Respondent**
ADV R S VAN RIET N.O. **Second Respondent**
ADV P COETSEE N.O. **Third Respondent**

Matter Heard: 17 July 2023
Judgment Delivered: 01 September 2023

JUDGMENT

MANTAME J

Introduction

[1] The appeal is against the whole of the judgment and order of Wathen-Falken AJ dated 7 June 2022 in which the appellant's application for review of the Appeal Tribunal ("*the Tribunal*") award granted on 18 December 2020 was dismissed.

[2] The first respondent opposed the appeal. The second and third respondents whose award is the subject of the appeal elected to abide by the decision of the Court.

Background History

[3] The matter has extensive history. On or about April 2013, the appellant herein referred to as '*franchisor*', and the first respondent herein referred to as '*franchisee'*, conducted a written franchise agreement in terms of which the first respondent was granted the exclusive right and licence to establish a Kekkel en Kraai outlet at 30 Bokomo Road, Malmesbury ("*the premises*") and to exclusively trade within a five hundred meters (500 m) radius from the premises ("*the exclusive area")* by selling fresh and frozen chicken and poultry products ("*the product*").

[4] During 2019, the first respondent approached the appellant for permission to deliver the product to areas outside the exclusive area which was granted on a temporary basis and subject to the appellant's exclusive right to withdraw such consent. The appellant stated that the first respondent breached the agreement by delivering and selling the product outside the designated area without the appellant's consent. The temporal consent was withdrawn by the appellant due to complaints from, amongst others, its franchisee in Langebaan and the first respondent was duly informed of the withdrawal.

[5] According to the appellant, despite the withdrawal of consent, the first respondent persisted with its delivery of product outside its exclusive area. It was therefore agreed between the parties that the appellant would seek Counsel's opinion on this dispute. On 26 August 2019, the opinion held that this dispute was to be determined in favour of the appellant.

[6] During December 2019, it came to the attention of the appellant that the product forming part of the franchise agreement was being distributed by a third party, Olhys (Pty) Ltd *("Olhys")* under the packaging style of Swartland Poultry which closely resembled the packaging style of Swartland Fresh Products, a brand licensed to the appellant and designed for sales to non-Kekkel en Kraai outlets. Olhys was formed on 1 November 2019. Its only director was Olinka van Wyk *("Olinka")* who is the daughter-in-law of van Wyk Senior *("van Wyk Sr")* the majority holder of a ninety-five percent (95%) membership interest in the first respondent, and his wife Marina van Wyk *("Marina"),* the manageress of the first respondent. Matthys van Wyk *("Thys")* the husband of Olinka and the son of van Wyk Sr and Marina was said to be involved in the running of Olhys. Olinka was a swimming instructor employed by the Swartland Swimming Club, and the appellant suggested that she had very little, if any experience in the chicken industry.

[7] During October 2019, Thys sold his 50% shares at SVW Kekkels to D van Wyk. On 1 November 2019, Thys resigned as a director of SVW Kekkels. The appellant was aware of his resignation. The appellant alleged that Thys was the one responsible for the day-to-day running of Olhys and utilised the employees and

vehicles of the first respondent. The first respondent disputed the allegation and claimed that Olhys was run by Olinka who was assisted by Thys, her husband. The appellant claimed that Olhys delivered the product outside the exclusive area of the first respondent.

[8] The involvement of this family in this new business, Olhys, culminated in the appellant employing the services of a private investigator, Mr Willem van Romburgh *("Mr van Romburgh")* to investigate the relationship between the first respondent and Olhys. Mr van Romburgh compiled an investigative report and findings in respect of certain alleged breaches of the franchise agreement. His conclusions were that:

8.1 Olhys was a related party to the first respondent as defined in section 2 of the Companies Act 71 of 2008;

8.2 Olhys did not operate as an independent party from the first respondent; and / or;

8.3 Olhys did not act on its own behalf *alternatively* not only on its own behalf but for and on behalf of the first respondent and / or van Wyk Sr its 95% member;

8.4 Olhys was and has been an instrument and / or conduit of the first respondent *alternatively* for its business;

8.5 Olhys had been used as a front or façade for the first respondent's interests, behind which first respondent was committing the breaches.

[9] He concluded that the conduct of the first respondent and / or van Wyk Sr as set out above was furthermore dishonest and / or improper. The first respondent in the formation of Olhys and / or its business operations as set out above was in

breach of clauses 6.6, 8.2.1, 8.2.2, 8.2.3, 8.13.2, and 9.1.5 and / or 21.1 of the franchise agreement.

[10] During December 2019, a dispute arose between the parties. Clause 22 of the franchise agreement required that in the event of any dispute between the parties arising out of or relating to any aspect of the franchise agreement, such dispute would be referred to arbitration in Cape Town on the written request of any party, in accordance with the rules of the Arbitration Foundation of South Africa *("AFSA").*

[11] On 9 March 2020, the appellant through its attorney addressed a demand to the first respondent to remedy its breaches of the franchise agreement within 48 hours. On 13 March 2020 the first respondent denied any breaches and indicated that it could not and would not close the business of Olhys as it was not in a position to do so. The appellant then declared a dispute. The dispute was referred by the appellant to arbitration.

The Arbitration

[12] The parties agreed to the terms of reference that were reduced to an arbitration agreement. In those proceedings, the appellant was the Claimant, and the first respondent was the Defendant. Advocate Louis Olivier SC was appointed as an Arbitrator in terms of the AFSA Commercial Rules. The issues which were referred to arbitration for determination arose from the alleged breaches of the franchise agreement.

[13] From the onset, the arbitration agreement regulated the conduct of the arbitration. The arbitration proceeded on 23 and 24 June 2020. On 24 June 2020, the parties entered into an addendum to the franchise agreement which stated *inter alia,* that *"there shall be a right of appeal in the arbitration to two senior advocates, each one to be nominated by one of the parties respectively, to be appointed by the Chairman of the Cape Bar Council, from amongst the ranks of the senior counsel with more than 20 years' experience as such".*

[14] At the commencement of the arbitration proceedings the first respondent made an application for separation of issues on whether the business conducted under the name Swartland Poultry constituted a breach of any of the provisions of the franchise agreement and that further issues be determined later. The application was opposed by the appellant and the Arbitrator reserved his ruling in this regard.

[15] In its statement of claim, the appellant asked for a declarator that:

15.1 the first respondent and Olhys were related or interrelated parties as defined in section 2 of the Companies Act, 71 of 2008;

15.2 Olhys did not operate as an independent company from the first respondent;

15.3 the first respondent was involved in the formulation of Olhys *alternatively* had knowledge thereof;

15.4 the first respondent had assisted Olhys in its business;

15.5 the first respondent's knowledge of and involvement in the business of Olhys and its operations was in breach of clauses 6.6, 8.2.1, 8.2.2, 8.2.3, 8.13.2, 9.1.5, and / or 21.1 of the franchise agreement;

[16] Further, that the first respondent be ordered to comply with the franchise agreement and in particular with clauses 6.6, 8.2.1, 8.2.2, 8.2.3, 8.13.2, 9.1.5, and / or 21.1 thereof by *inter alia*;

16.1 Not permitting or assisting Olhys – including its employees, directors, members, related parties or any party with any interest therein – in its business operations and in particular not permitting or assisting Olhys to make use of the first respondent's property, facilities, staff or equipment in its operations;

16.2 Not supplying any product to Olhys; and/or

16.3 Not selling or distributing or delivering product outside of the exclusive area whether directly or indirectly through Olhys;

16.4 …;

16.5 The first respondent be ordered to pay the costs of the arbitration, including the costs of the arbitrator and two Counsel.

[17] In its defence, the first respondent denied any breach of the franchise agreement. However, it admitted that it had approached the appellant for permission

to deliver products outside of the exclusive area as defined in the franchise agreement. The appellant confirmed its consent to the permission on the basis that the appellant reserved the right to terminate such consent. Since the franchise agreement did not allow for deliveries, the appellant would not rely on the deliveries as a breach of the franchise agreement. After the consent was terminated in respect of the deliveries in specific areas due to complaints by or on behalf of certain Kekkel en Kraai franchisees, the first respondent thereupon terminated the amendment of the franchise agreement in respect of deliveries in those specific areas. According to the first respondent, the consent by the appellant was unenforceable. The appellant was therefore estopped from relying on such a contention.

[18] The first respondent admitted that Olhys conducted a poultry processing and packaging or / distribution business for its own benefit, however it bore no knowledge of the nature and extent of advertising that was utilized by Olhys. It was admitted that Olhys used the first respondent's vehicles at its cost for purposes of its own business. Further, it was admitted that Olhys used the Swartland Poultry branding to sell poultry products, amongst others, purchased from the first respondent and delivered in the areas mentioned by the appellant. Notwithstanding, the rest of the allegations relating to the breaches of the franchise agreement were denied by the first respondent.

[19] On 11 August 2020, the Arbitrator issued an award in the following terms:

19.1 there was no order granted in respect of the first respondent's application for separation of issues;

19.2 the relief sought as stated in paragraph [15] *supra* was dismissed;

19.3 **the first respondent was ordered to comply with the provisions of clause 8.2.3 of the franchise agreement by not selling or supplying or delivering products outside the Exclusive Area (as defined)**;

19.4 save as aforesaid all appellant's claims were dismissed;

19.5 **the first respondent was to pay the costs of arbitration as well as 75% of the appellant's costs including the costs of two Counsel where so employed, as taxed on a party and party scale or agreed, excluding the costs in regard to the preparation and copying of the bundle of documents that were intended to serve as a trial bundle and the costs of Van Romburgh and Associates (Pty) Ltd and Mr Van Romburgh.** [Emphasis supplied]

The Appeal Tribunal

[20] As the addendum to the franchise agreement made provision for the appeal procedure and was agreed to between the parties in accordance with the AFSA Rules, the Appeal Tribunal was constituted.

[21] On 17 August 2020, the first respondent proceeded to launch its notice of appeal to the Appeal Tribunal against the finding of the Arbitrator **that the first respondent complies with the provisions of clause 8.2.3 of the franchise agreement - by not selling or supplying or delivering products outside the Exclusive Area (as defined) and the order that the first respondent pay the costs of arbitration as well as 75% of the appellant's costs including the costs of two Counsel where so employed, as taxed on a party and party scale or agreed, excluding the costs in regard to the preparation and copying of the bundle of documents that were intended to serve as a trial bundle and the costs of Van Romburgh and Associates (Pty) Ltd and Mr Van Romburgh.** This notice complied with the time periods as specified in Article 22.2 of the AFSA Rules. [Emphasis supplied].

[22] The Appeal Tribunal was called upon to determine an appeal against the arbitration award in terms of Section 33(1)(b) of the Arbitration Act 42 of 1965 ("*the Act*").

[23] Pursuant thereto, on 27 August 2020, the appellant filed a notice of cross-appeal against the dismissal of its claims. The cross-appeal was a few days late. The AFSA Commercial Arbitration Rules under which the Arbitration and the

Arbitration Appeal Tribunal were conducted - Article 22.2 provided that: *"…if there is a notice of cross-appeal, a notice of cross-appeal shall be delivered within seven (7) calendar days of delivery of the notice of appeal, failing which a cross-appeal shall be precluded"*. On 31 August 2020, the appellant filed a notice that an application for condonation for the late filing of the cross-appeal would be made at the commencement of the hearing before the Appeal Tribunal. The application for condonation was opposed by the first respondent.

[24] In the Appeal Tribunal, the appellant sought to have its cross-appeal heard and decided by the tribunal on the following basis:

24.1 Rule 11.2.7 of the AFSA Commercial Rules provides that an arbitrator may extend before or after their expiry, or abbreviate, any time limits provided for in the Rules or by his rulings or directions;

24.2 Rule 22.8 of the AFSA Commercial Rules provides that "the nature of the appeal and cross-appeal, and the powers of the appeal arbitrator or arbitrators shall, save to the extent that the written agreement between the parties or Article 22 provides otherwise, be the same as if it were a civil appeal and cross-appeal to the Appellate Division of the Supreme Court of South Africa"; and

24.3 Rule 12 of the Supreme Court of Appeal Rules provides for an application for condonation.

[25] In its opposition to the application, the first respondent submitted that Article 22.2 precluded a cross-appeal which was filed out of time and Article 11.2.7 of the AFSA Rules pertained only to the powers of an arbitrator during the arbitration hearing and not in a subsequent appeal. Furthermore, the franchise agreement or the amendment thereof conferred no power to grant condonation on the arbitrator or the arbitral Appeal Tribunal. The first respondent further denied that Article 22.8 of the AFSA Rules made provision for condonation for a failure to comply with the time period. To the contrary, it was stressed that Article 22.2 of the AFSA rules specifically precluded a cross-appeal that was filed out of time.

[26] The Appeal Tribunal in its finding refused to entertain the cross-appeal, and issued an award as follows:

26.1 the appellant's application for condonation for the filing of its cross-appeal outside the prescribed time-period is dismissed with costs;

26.2 the first respondent's appeal against the arbitrator's award succeeds;

26.3 the arbitrator's award is set aside and replaced with an order that the appellant's claims are dismissed;

26.4 the appellant is ordered to pay the first respondent's costs of the arbitration and the costs of the arbitrator;

26.5 the appellant is ordered to pay the first respondent's costs of the appeal and the costs of the appeal tribunal;

26.6 all costs are to include the costs consequent upon the employment of two counsel where so employed.

[27] The Appeal Tribunal having issued its award against the appellant, the appellant proceeded with its review application against it before the Court a *quo*.

The Court a quo

[28] The appellants' grounds for review were as follows:

28.1 That the Appeal Tribunal incorrectly found that it lacked the jurisdiction to condone the appellant's late filing of its cross-appeal;

28.2 That the Appeal Tribunal irregularly determined the first respondent's appeal by upholding the challenge against the arbitration award.

[29] In essence, the appellant invoked the provisions of Section 33 (1)(b) of the Act and contended that the Appeal Tribunal committed a gross irregularity in the proceedings or *alternatively* that it had exceeded its powers or otherwise stated, failed to exercise its powers. The Appeal Tribunal's decision to refuse to entertain the condonation application that was placed before it, constituted a gross irregularity as it deprived the appellant of a fair hearing. In addition, the Appeal Tribunal exceeded or proscribed its powers and in so doing committed an irregularity.

[30] In the Court a *quo*, the appellant submitted that in the event the relief sought by it in paragraph 1 (the review and setting aside of the whole award of the Appeal Tribunal dated 18 December 2020) of its notice of motion was granted, it sought an order that:

30.1 the first respondent's appeal and the appellant's cross-appeal against the Arbitrator's award be remitted for determination by a newly constituted Appeal Tribunal in terms of section 33(4) of the Act; and

30.2 that the late filing of the Appellant's cross-appeal either be condoned by this Court, *alternatively,* that the condonation application be remitted for determination by a newly constituted Appeal Tribunal together with the remaining issues.

[31] The first respondent opposed the appellant's application for review on the basis that the Appeal Tribunal lacked jurisdiction to entertain a condonation application for the late filing of the cross-appeal. The Appeal Tribunal exercised its powers according to the arbitration agreement and AFSA Rules. It was therefore wrong to suggest that the Appeal Tribunal had discretionary powers identical to that of a Supreme Court of Appeal judge.

[32] The Court a *quo* dismissed the application for review against the Appeal Tribunal on 7 June 2022. The appellant filed an application for leave to appeal against the whole of the judgment and order of the court a *quo* on 22 June 2022. This application was dismissed on 28 July 2022. Following this failed attempt for an

application for leave to appeal, the appellant successfully petitioned the Supreme Court of Appeal for leave to appeal. On 6 October 2022, the Supreme Court of Appeal granted leave to appeal to this Court, hence the appeal before us.

Discussion

[33] The appellant submitted that both grounds of review against the appeal award relied upon by the appellant were jurisdictional in nature. The question before the Court a *quo* and this Court is *first*, whether the Appeal Tribunal was correct in deciding that it did not have the power to condone the late bringing of the cross-appeal, and on that basis alone, whether it was unable to hear, let alone decide the cross-appeal.

[34] The *second* jurisdictional issue in this appeal is whether the Appeal Tribunal was correct in deciding that the pleadings did not cover the complaint that the first respondent had breached the franchise agreement by itself delivering product to Spar outlets other than through Olhys, and that it was only the alleged breaches in the form of the delivery of product to or through Olhys that was impugned and which served before the Arbitrator. The appellant asserted that these jurisdictional grounds were reviewable.

[35] In the Court a *quo*, the appellant contended that the Appeal Tribunal committed a reviewable irregularity by finding that it lacked the power to grant

condonation and that it was unable to consider the application on its merits. By refusing to hear the cross-appeal, the Appeal Tribunal closed its mind to an issue which the appellant had placed before it, i.e., the merits of the cross-appeal.

[36] Similarly, the Appeal Tribunal closed its mind to the issue which had been before the Arbitrator and which the Arbitrator had decided in favour of the appellant, *albeit*, only in part, on the basis that the issue was not covered by the pleadings.

[37] The first respondent disputed that the Appeal Tribunal and the Court a *quo* committed any gross irregularity by failing to consider the appellant's jurisdictional points. The first respondent submitted that those complaints were without merit and had caused a further delay in the finalisation of the matter. The lengthy litigation by the appellant had caused the parties to accumulate unnecessary legal costs.

[38] The first respondent contended that the letter of demand that was sent by the appellant to the first respondent which sought to establish a dispute between the parties, did not in any way, shape or form encompass a demand being made upon the first respondent directly to discontinue delivery of the products to the exclusive areas. The issue or dispute on behalf of the appellant was not in relation to the first respondent's alleged actions, but rather pertained to Olhys's alleged distribution of product in order to facilitate the first respondent's breach of the franchise agreement.

[39] Equally, the appellant's statement of claim in the arbitration was founded on the allegation that the first respondent used a third party, Olhys, to distribute product to areas outside of the exclusive area assigned to the first respondent in terms of the franchise agreement. According to the first respondent, this was the case that was pleaded in its statement of claim for purposes of arbitration. The first respondent's alleged involvement was not directed at direct breaches of the franchise agreement on the part of the first respondent, in the sense that it had allegedly delivered or had previously delivered product itself. The declaratory relief that was sought in the arbitration focused on Olhys and the remaining relief was consequential and related thereto.

[40] Essentially, the first respondent asserted that Clause 19.2 read with 19.2.1 of the franchise agreement envisaged that in the event of a breach of contract by a party, it is required that a written demand be delivered calling upon the party in breach to rectify it within fifteen (15) business days from the date of receipt of written demand, failing which the other party will have the right to claim specific performance. In its letter of demand, the appellant did not require the first respondent to remedy its alleged breach of the franchise agreement, i.e., to stop with direct deliveries outside of the exclusive area, but Olhys. By virtue of the said clauses, it was precluded from claiming specific performance against the first respondent.

[41] The Appeal Tribunal duly considered the pleadings and thoroughly applied its mind to the matter, so said the first respondent. It identified the alleged breaches that were relied upon by the appellant in the arbitration as the following:

41.1 the supply of product as defined in the franchise agreement to Olhys in order for Olhys to sell and / or distribute and / or deliver the product to areas outside the defined exclusive area; and

41.2 the use of Olhys (an alleged related company who does not operate as an independent company from the first respondent) as a front or façade for the first respondent's interests to sell and / or distribute and / or deliver the product to areas outside the defined exclusive area referred to in the franchise agreement.

[42] According to the first respondent, the Appeal Tribunal found that the appellant alleged in its statement of claim that the first respondent's involvement in the formation of Olhys and / or its business operations constituted a breach of the mentioned provisions of the franchise agreement. Further, the issues on appeal properly identified that the pleadings do not permit any cause of action (or award) in regard to the initial dispute and that the Arbitrator therefore did not have the power to make the order he issued against the first respondent. Furthermore, it correctly found that the award of the Arbitrator related only to the initial dispute and proceeded to formulate the essential question as being "whether the relief granted in paragraph 3 *(19.3 supra)* of the award, was claimed."

[43] It was said, the Appeal Tribunal correctly found that the appellant "*ex facie the SOC premised the relief claimed on the allegations that the defendant (the first respondent) breached the franchise agreement through its involvement in the establishment and operations of Olhys and by supplying product as defined in the franchise agreement to Olhys … for purposes of its business, i.e. to supply 'that which is the terms of the franchise agreement to Olhys to sell and / or distribute and / or deliver the product outside the restricted area.*"

[44] The first respondent stated that the Appeal Tribunal correctly found that the appellant "*did not rely in its SOC on deliveries made by the defendant itself outside the restricted area in constituting a breach of the franchise agreement relied upon for the relief claimed.: On a proper interpretation of the appellant's statement of claim the only breaches relied upon by the claimant (the appellant) relates to the alleged conduct of the defendant (the first respondent) by involving it in the establishment and operations of Olhys and by supplying, delivering and / or distributing product directly through Olhys or indirectly through Olhys as a related party, to circumvent the restrictions of the franchise agreement …*" The first respondent stated that the Court a *quo* having regard to the Appeal Tribunal's findings was justified in dismissing the application for review.

[45] This contention was disputed by the appellant and it stated that having agreed to the arbitration process, the first respondent must now suffer the consequences of that finding, even if it was wrong. It claimed that the judgment of the Court a *quo* makes the same error of reasoning. The golden thread of the appellant has always

been that the rulings were jurisdictional and can be challenged on review on the grounds that they were incorrect. The appellant's complaint is that the Appeal Tribunal did not decide the issues it was required to decide, and in that process deprived the appellant of a fair hearing in the arbitration appeal of the issue which the appellant had sought to place before it.

Analysis

The First Ground

[46] The first question before the review Court and in this Court is whether the Appeal Tribunal was correct in deciding that it did not have the power to condone the late bringing of the cross-appeal. In substantiating this point, the appellant argued that jurisdiction is determined on the basis of the pleadings, and not the substantive merits of the case – See *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae).*[1]

[47] The appellant pointed out that in *Gcaba v Minister of Safety and Security and Others,*[2] the Constitutional Court stated that in the event of the court's jurisdiction being challenged at the outset (in *limine*), the applicants' pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to involve the court's competence. The same applied to the scope of issues which are placed before an Arbitrator by the parties in terms of their

[1] 2007 (3) SA 484 (CC); 2007 (3) BCLR 219; [2006] ZACC 24 at para 40
[2] 2010 (1) SA 238 (CC); 2010 (1) BCLR 35; [2009] 12 BLLR 1145; [2009] ZACC 26 at para 75

pleadings, where it has been agreed between the parties that the pleadings will determine the scope of the arbitration. The appellant stated that a ruling as to jurisdiction is reviewable on the grounds of correctness. In *Hira and Another v Booysen and Another,*[3] Corbett CJ pointed out that our courts drew a distinction between an error of law on the merits and a mistake which causes the decision-maker to fail to appreciate the nature of the discretion or power conferred upon him, and as a result the power is not exercised. The latter error is a ground of review that justifies interference. A court does not interfere merely because the decision was wrong in a review application, but if the error of law is material, if it affects the outcome of the decision, if the result is that one of the parties was deprived of a hearing, the review court will correct the ruling of the arbitrator / tribunal. In the context of arbitrations, this Court was referred to *Gutsche Family Investments (Pty) Ltd v Mettle Equity Group (Pty) Ltd.*[4]

[48] Further, it was the appellant's contention that the Appeal Tribunal committed a reviewable irregularity by finding that it lacked the power to grant condonation. As a result thereof, it was unable to consider the application on its merits. The appellant contended that by not deciding the matter and refusing to hear the cross-appeal on that basis, the Appeal Tribunal clearly closed its mind on the issue which the appellant had placed before it, the merits of its cross-appeal.

[3] 1992 (4) SA 69 (A); [1992] ZASCA 112 at 90
[4] 2007 (5) SA 491 (SCA) para 15

[49] The first respondent disputed the appellant's assertions on the basis that a private arbitration is a process that is built on consent. In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another,*[5] the Constitutional Court quoted with approval from the decision of the SCA in the matter of *Total Support* as follows:

> "*The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement."*
>
> It was said further that in the recent judgment of *Close-Up Mining (Pty) Ltd and Another v The Arbitrator, Judge Phillip Boruchowitz and Another,*[6] the effect of an arbitration agreement was described thus:
>
> > "*What competence the arbitrator enjoys depends upon what is contained in the arbitration agreement. This holding is an application of the principle of party autonomy.*"

[50] In substantiating its argument, the appellant went further to state that the Appeal Tribunal misconstrued the arbitration agreement which incorporated the AFSA Rules, and their powers to condone the late filing of a cross-appeal. Essentially, it claimed that the Appeal Tribunal committed gross irregularities and exceeded its powers in the proceedings by failing to find that it did have the power to condone the appellant's late filing of its cross-appeal.

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[5] CCT 97/07; [2009] ZACC 6; 2009 (4) SA 529 (CC) at paras 195 & 198 – with reference to *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* (457/2000) [2002] ZASCA 14 (25 March 2002)

[6] (286/2022) [2023] ZASCA 43 (31 March 2023) at para 12

[51] The appellant pointed out that the arbitration award was delivered on 11 August 2020 and the first respondent noted its appeal against paragraphs 3 and 5 of the award on 17 August 2020. The Appellant thereafter filed a cross-appeal on 27 August 2020, some three (3) days after the expiry of the period provided for in terms of the AFSA Rules. The appellant simultaneously applied for condonation for the late filing of its cross-appeal.

[52] In its application for condonation the appellant placed reliance on the fact that AFSA Article 22.8 expressly gave the Appeal Tribunal the same powers as if the cross-appeal was a civil cross-appeal to the Supreme Court of Appeal. Article 22.8 reads as follows:

> "*The nature of the appeal and cross-appeal, and the powers of the appeal arbitrator or arbitrators shall, save to the extent that the written agreement between the parties or this article 22 provides otherwise, be the same as if it were a civil appeal and cross-appeal to the Appellate Division of the Supreme Court of South Africa.*"

Article 22.2 provides that:

> "*A notice of appeal shall be delivered by the appellant, within 7 calendar days of publication of the award, failing which the interim award or final award shall not be appealable. If there is a cross-appeal, a notice of cross appeal shall be delivered within 7 calendar days of delivery of the notice of appeal, failing which a cross-appeal shall be precluded.*"

The appellant suggested that the last sentence with the words "*shall be precluded*,"- needs to be read with the rule dealing with powers, i.e Article 22.8. The appellant submitted that the fact that Article 22 does not contain any provision for condonation does not mean that it is excluded. In addition, it was submitted that Section 38 of the Act deals with the extension of periods fixed by or under the Act, and provides that the court may, on good cause shown, extend any period of time fixed by or under the Act, whether such period has expired or not.

[53] The first respondent in its response stated that the appellant's submission was misplaced. It asserted that the arbitration between the parties was instituted by the appellant in terms of Clause 22 of the franchise agreement. When the arbitration commenced, the arbitration agreement did not provide for a right of appeal. On the final day of the arbitration proceedings, the parties concluded a written Addendum to the franchise agreement. The amendment of the franchise agreement provided *inter alia* that the appellant and the first respondent agreed that there would be a right of appeal in the arbitration to two senior advocates, each one to be nominated by one of the parties respectively, *alternatively,* to be appointed by the Chairman of the Cape Bar, from amongst the ranks of senior counsel with more than twenty (20) years' experience as such. This means that Article 22 of the AFSA rules was adopted by the parties as the basis of their agreement in relation to the right of appeal afforded to them.

[54] The first respondent noted an appeal against the award or order of the Arbitrator, i.e., paragraph 3 and 5 thereof. After it had done so, that prompted the appellant to deliver a Notice of cross-appeal (*albeit* out of time).

[55] The first respondent stressed that the attempt at delivery of the cross-appeal not only fell outside of the time frame that had been agreed upon, but was also struck by the consequences of failure to adhere to the time frame in the rules as expressly agreed upon – in the sense that the parties agreed that a cross-appeal delivered outside of the agreed time period, "*shall be precluded*."

[56] The first respondent was adamant that the Appeal Tribunal did not have the power / jurisdiction to grant condonation and was correct in its finding to this effect in its award. It submitted that Article 22.8 does not find application in this regard by reason of the fact that no agreement in relation to the condonation of the late filing of the cross-appeal had been concluded, and there simply is no agreement that provides "otherwise" and only the rule contained in Article 22 applies to appeals and cross-appeals. The first respondent submitted that on a proper reading of the AFSA Rules, the agreement embodied therein does not provide for the condonation of a failure to comply with Article 22.2. The Appeal Tribunal, which derives its powers from the agreement between the parties, in the premises, was not vested with the power to grant condonation. It is trite that jurisdiction describes the power to consider and either uphold or dismiss a claim. In this sense, jurisdiction is fixed by the terms of reference (the agreement between the parties). It was submitted that the appellant's argument that the Appeal Tribunal deprived it of a right to a fair trial

was imprudent. The first respondent denied the allegations that the Appeal Tribunal exceeded its powers by determining its own jurisdiction and mistakenly denying itself a power which it had i.e., to condone the late filing of the notice of cross-appeal.

[57] In the Court's analysis, in circumstances where the appellant failed to file its cross-appeal in compliance with its arbitration agreement and Article 22.2, it defies reason why the appellant should be allowed to resile from or back out of, its own agreement and thereby opt for an alternative, convenient solution to its inaction by way of an alternative interpretation of Article 22.2 read with Article 22.8 and / or Section 38 of the Act. On a proper interpretation of the two AFSA Rules and employing the often quoted principles in the *Endumeni* judgment, they do not suggest that the Appeal Tribunal did have jurisdictional power to condone the late filing of its cross-appeal. In fact, Articles 22.2 and 22.8 and/or Section 38 of the Act do not deal with the non-compliance with time frames, or extension of time or at best condonation for the late filing of the pleadings or documents at the arbitration (appeal) tribunal. The appellant only suggests that this Court should infer that the Appeal Tribunal has unlimited powers in terms of Article 22.8 equal to that of the Supreme Court of Appeal. In this regard, those powers would include the power to condone the late filing of the cross-appeal. In our view, such contention is incompetent as the Appeal Tribunal cannot arrogate to itself assumed and /or unspecified powers it does not have.

[58] The AFSA Rules are clear in so far as the regulation of commercial arbitrations is concerned. They encompass time frames in which the parties have to

comply with the arbitration process in terms of filing pleadings and documents. Surely, it did not escape the drafter of the rules that at times it might be impossible to comply with the rules. On considering the rules, they appear to be strict and require compliance with specific time frames, as a long, drawn-out dispute will inadvertently affect the operation of businesses. Having not complied with the time frames, the appellant contends that the Appeal Tribunal and the Court a *quo* committed a gross irregularity and exceeded its powers by failing to condone its late filing of the cross-appeal. In essence, it avers that it was denied a fair trial.

[59] Commercial arbitrations, unlike Courts, were designed to have a speedy resolution of disputes on appeal, hence no room was made in the AFSA Rules for condonation powers in respect of appeals. The parties to these arbitrations are required to be proactive and swift in the prosecution of their disputes. If the parties in a dispute would be allowed to drag their feet in filing their appeal process, the arbitration proceedings would delay indefinitely. In our considered opinion, AFSA did not make an error by not providing for condonation in their rules in respect of appeals. The last part of Article 22.2 is instructive that *"…a notice of cross-appeal shall be delivered within 7 calendar days of delivery of the notice of appeal,* ***failing which a cross-appeal shall be precluded****"* [Emphasis supplied].

[60] As referred to above, the latter part of Article 22.2 suggests that the time frame for filing of the cross-appeal is not flexible, it is robust in its approach in the sense that it does not give a party an opportunity to remedy its inaction. The fact that parties had a leverage to enter into an arbitration agreement that regulated the

conduct of their proceedings meant that they have no-one but themselves to blame in circumstances of non-compliance with the agreement. In addition, as the parties nominated their own members of the Appeal Tribunal in confidence, and by agreement granted them powers in the arbitration appeal process, a fair trial /hearing is not an issue of concern at all, as the tone of the arbitration process that was determined by the parties was transparent. The appellant's contention in this regard is unfortunate with respect.

[61] The SCA recently visited this issue in *OCA Testing and Certification South Africa (Pty) Ltd v KCEC Engineering Construction (Pty) Ltd and Another*[7] and held as follows:

> "*[21] I consider it convenient at this juncture to deal first with the current state of the law relating to the considerations that bear on the circumstances in which a court will come to the aid of a party relying on s33(1) of the Act. Section 33(1) has been considered albeit briefly, in many judgments of this Court and others. Some of the cases were analysed by Harms JA in Telcordia Technologies Inc v Telkom SA Ltd (Telcordia). In para 72, Harms JA cited a passage from the judgment of Mason J in Ellis v Morgan; Ellis v Desai (Ellis) in which the position was succinctly stated 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*

[7] (1226/2021) [2023] ZASCA 13 (17 February 2023) para 21

prevented the aggrieved party from having his case fully and fairly determined.' [Footnote omitted]

…

"*[23] In Parabora Copper (Pty) Ltd v Motlokwa Transport and Construction (Pty) Ltd (Palabora Copper), this Court reiterated that 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. This is in keeping with the abiding principle that whenever parties elect to resolve their disputes through arbitration, courts must defer to the parties' choice and not lightly intervene.*" [Footnotes omitted]

[62] The appellant suggested that the Appeal Tribunal committed a gross irregularity in the conduct of the arbitration appeal proceedings and exceeded its bounds. In a situation where the Appeal Tribunal is not empowered to grant condonation, it could not confer on itself powers it does not have. Reference to the fact that AFSA Article 22.2 should be read with AFSA Article 22(8) which gave the Appeal Tribunal the same powers as if the cross-appeal was a civil-appeal to the Supreme Court of Appeal is inapt. As pointed out by the first respondent, an Arbitrator does not ordinarily enjoy the inherent discretionary powers such as that of the Court. If that were to be so, there would not be a need for the parties to agree on the terms regulating the conduct of the arbitration (arbitration agreement). The role of an arbitrator is simply to perform a *quasi*-judicial function. To elevate a status and powers of the Arbitrator to those of the Supreme Court of Appeal, with respect, is misguided. If that were to be so, there would not be a need for any party in the

arbitration proceedings to make an application to Court for an award to be made an order of Court. Simply put, the ultimate decision that an Arbitrator arrives at is called an award. This means that it does not have force and effect equal to that of a Court order.

[63] In our view, there is no merit to this ground, and it has to fail.

The Second Ground

[64] The first respondent pointed out that in *Close-Up (supra)* the issue was whether a party to arbitration proceedings that has failed to plead an issue may nevertheless seek to have the Arbitrator decide such issue. With reference to *Shill v Milner,*[8] the Court pointed out that a court enjoys a discretion to give some latitude to a litigant to raise at the trial issues that were not explicitly pleaded, where (a) to do so does not give rise to prejudice, and (b) where all the facts have been placed before the trial court. With regard to arbitration, the position is different in that an agreement between the parties, taken together with acceptance by the parties of the conditions on which the Arbitrator accepts appointment, determines the jurisdiction of the Arbitrator as to the matters referred to arbitration. The source of an Arbitrator's competence in arbitration proceedings, as opposed to Courts, is not derived from an inherent power to protect and regulate their own process, but from the arbitration

[8] 1937 AD 101 at 105

agreement - *See Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing and Consulting (Pty) Ltd and Others.*[9]

[65] In this matter, no agreement between the parties allowed for the Arbitrator to go beyond the pleadings of the parties. The Arbitrator in this instance was not clothed with a discretion such as the one in *Shill v Milner (supra)* and was therefore precluded from adjudicating issues that were not explicitly pleaded. When due consideration is had to the AFSA Rules which regulated the arbitration proceedings, a pleading is defined as including documents comprising a Request for Arbitration, a statement of defence, a counter-claim, and a statement of defence to a counterclaim.

[66] In relation to the ambit and effect of AFSA Rules (being the rules that the parties in these proceedings incorporated in their arbitration agreement), the first respondent observed that the SCA in *Close-Up Mining (supra)* held as follows:

> "*[32] … But a reading of the AFSA rules, taken as a whole, reflects that the exchange of pleadings is the procedure that is to be followed by the parties to define their primary substantive disputes.*
>
> *[33] … The AFSA rules therefore do not contemplate that a party to the arbitration may raise a substantive dispute outside of the pleadings, and that such dispute may be adjudicated by the Arbitrator if he decides, on a discretionary basis, to do so. That would subvert a central feature of the AFSA rules.*

[9] [2007] ZASCA 163; [2008] 2 All SA 132 (SCA) at paras 30-32

[34] The AFSA rules require the parties to raise their substantive disputes in the pleadings. If the pleadings fail to reflect the dispute adequately, then an amendment of the pleadings must be sought, and it is for the Arbitrator to decide whether to permit the amendment. These rules are antithetical to the discretionary Shill v Milner power … and

[35] … Courts enjoy inherent power because they have a constitutional duty to secure justice. That extends beyond the interests of litigants. Arbitrators have no such power. It is the parties' agreement that determines what dispute must be decided and the powers conferred upon an arbitrator to do so … The AFSA rules do no such thing. Their cumulative provisions point to the opposite conclusion – that no such discretionary power was conferred upon the Arbitrator." (Emphasis supplied)

[67] It was the first respondent's assertion that the issue of pleadings was canvased at the arbitration and Counsel for the appellant stated that the issue is limited to the defendant's involvement in Olhys. The statement of claim was limited to the first respondent's alleged involvement with Olhys, and whether the first respondent breached the franchise agreement directly or indirectly through Olhys.

[68] As required by AFSA Rules, it was contended by the first respondent that without making any concessions in this respect, even if it was found that the pleadings in the arbitration were unclear, it was incumbent upon the appellant to

amend its statement of claim at the time, and it elected not to do so. The Appeal Tribunal did not err in their findings.

[69] The first respondent submitted, that it is trite that section 33(1)(b) of the Arbitration Act provides narrow grounds for interference. The Appeal Tribunal did not commit any gross irregularity in the conduct of arbitration and it has not exceeded its powers as the appellant wants this Court to believe.

[70] Reference was made to *Gutsche Family Investment (supra)*, where Brand JA stated, when dealing with an appeal concerning the dismissal of a review application involving section 33(1)(b) of the Arbitration Act, the following applies:

> "*[18] What therefore remained was the appellant's challenge on the basis of s33(1)(b), that the majority of the tribunal not only exceeded its powers, but also committed a gross irregularity in the conduct of the proceedings. Both these concepts recently enjoyed full consideration and discussion by this court (see e.g., Telcordia Technologies Inc v Telkom SA Ltd) … As I see it, further elaboration can therefore serve no useful purpose. Suffice it therefore to distil the following three principles from these decisions that are relevant for present purposes.*
>
> *(a) <u>Errors of law or fact committed by an arbitrator do not in themselves constitute grounds for review by a court under s33(1)(b).</u> Whether or not we agree with the conclusions arrived at by the majority of the tribunal on the various disputes between the parties, is therefore of no consequence.*

(b) *In order to justify a review on the basis of 'gross irregularity' the irregularity contended for must have been of such a serious nature that it resulted in the aggrieved party not having his or her case fully and fairly determined.*

(c) *Arbitrators, including arbitral appeal tribunals, are bound by the pleadings. The only difference between the two in this regard, as I see it, is that on appeal the pleadings also include the notices of appeal and cross-appeal. Unlike a court, arbitrators therefore have no inherent power to determine issues or to grant relief outside the pleadings. Arbitrators who stray beyond the pleadings therefore exceed their powers as contemplated by s33(1)(b).*" [Emphasis supplied]

[71] Based on the aforesaid, it was submitted that the Arbitrator erred in making an award ordering the first respondent to comply with the provisions of Clause 8.2.3 of the franchise agreement.

[72] The first respondent pointed out that the Appeal Tribunal in considering its grounds of appeal on this issue, was correct in framing the 'essential question' as being whether or not in granting paragraph 3 of the award, the relief was actually claimed in the statement of claim.

[73] The Appeal Tribunal, it was stated, correctly found that it is not competent for the appellant to rely upon concessions made by the first respondent in the further

particulars for trial in order to extend the scope of the cause of action pleaded in the statement of claim, without amending the pleading accordingly. In *Ruslyn Mining & Plant Hire (Pty) Ltd v Alexkor Limited,*[10] the SCA held that "*there is clear law that pleadings exclude further particulars.*"

[74] The appellant submitted that it had pleaded to this dispute and pointed out its prayers in the statement of claim at clause (b) (iii) which read as follows:

> "*Not selling or distributing or delivering product outside of the exclusive area whether directly or indirectly through Olhys"*

[75] The appellant, it was said, did not rely in its statement of claim on deliveries made by the first respondent itself (other than through Olhys) outside the restricted area as constituting a breach of the franchise agreement, nor had it sought relief in the form of an award prohibiting the first respondent from doing so in future. There was no cause of action that was pleaded directly against the first respondent in this dispute.

[76] The Appeal Tribunal upheld the first respondent's appeal on the basis that the arbitrator erred in granting the appellant an award in its favour in circumstances where the dispute was not pleaded in its statement of claim. It upheld further the cost order that was granted by the arbitrator.

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[10] (917/10) [2011] ZASCA 218; [2012] 1 All 317 (SCA) (29 November 2011) at para 18

[77] In circumstances where no cause of action was pleaded in the statement of claim against the first respondent, no adverse award was competent against the first respondent. The first respondent correctly submitted that the appellant has not alleged that it had made deliveries of the product for its own benefit outside of the exclusive area, other than and / or through Olhys. Even if the subsequent prayer was directed at the first respondent, it was inappropriate for the appellant to rely on prayers for relief sought which was not pleaded in the statement of claim. In any event, the prayer relied on by the appellant, properly interpreted related to Olhys' actions.

[78] It is well- established principle that the case which the other party has to meet must be properly and clearly pleaded. In *Knox D' Arcy AG v Land and Agricultural Development Bank of South Africa*[11], the SCA held as follows:

> *"It is trite that litigants must plead material facts relied upon as a basis for the relief sought and define the issues in their pleadings to enable the parties to the action to know what case they have to meet. And a party may not plead one issue and then at the trial, and in this case on appeal, attempt to canvass another which was not put in issue and fully investigated. The Land Bank (and the trial court for that matter) was never put on notice that it would answer a case that it had frustrated, deliberately or otherwise, the performance of the obligation imposed by clause 2.1 of the settlement agreement. Clearly, we cannot now, on appeal, decide issues that have neither been raised nor fully ventilated previously."*

[11] [2013] 3 All SA 404 (SCA) at para 35

[79] Similarly, this principle applies in arbitration proceedings. In the same way, in *National Director of Public Prosecutions v Zuma,*[12] the SCA held that it is not proper for a Court in motion proceedings to base its judgment on passages in documents which have been annexed to the papers where the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. A party cannot be expected to trawl through annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. This principle applies in both application and action proceedings.

[80] It would appear that the arbitrator in granting this relief, relied on concessions that were made by the first respondent's Counsel that an award in respect of such breach could be made. The Appeal Tribunal found that the award made was incompetent as it was not supported or borne out by the transcript of the arguments that was placed before it. This Court agrees with the first respondent's assertion that the appellant in its statement of claim did not rely on the deliveries made by the first respondent itself. The arbitrator therefore erred in interdicting the first respondent from delivering its product outside the restricted areas (to the effect that first respondent must comply with the provisions of Clause 8.2.3). Clearly, the appellant's pleaded case was limited to the first respondent's alleged involvement with Olhys, and whether the first respondent breached the franchise agreement directly or indirectly through Olhys. Those allegations were fully qualified and could not be interpreted to have been directed at the first respondent.

[12] [2009] ZASCA 1; 2009 (2) SA 277 (SCA) at para 47

[81] In expanding further on this principle, in *Ruslyn*[13] *(supra),* the SCA observed that:

> "*[18] To deal first with the principle, further particulars for trial are not pleadings. The opportunity to request them arises after the close of pleadings: uniform rule 21(2). They are limited to obtaining information that is strictly necessary to prepare for trial. They do not set up a cause of action or defence by which a party is, in the absence of amendment or tacit concurrence, bound and by which the limits of his evidence are circumscribed. Nor can they change an existing cause of action [or defence] or create a new one (as the trial judge appears to have believed) … Because they are not pleadings, they do not limit the scope of the case being made by the party that supplies them. A party has a right to rely on all and any evidence that is admissible and relevant to his pleaded cause or defence and …*
>
> *[19] Applications to amend particulars for trial seem to me to be largely inappropriate and unnecessary, particularly once the trial has got underway. It should be sufficient for counsel to notify his opponent at an early stage.*"

[82] This Court is satisfied that the Court a *quo* did not err by dismissing this ground of review. In conclusion, the Court a *quo* was correct in finding that there was no basis to interfere with the appeal tribunal's refusal to grant condonation for the late filing of the cross-appeal and it was correct in not setting aside the appeal tribunal's award. For these reasons, the appeal fails.

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[13] Ibid Ruslyn (supra) para 18-19

Order

[83] In the result, I propose the following order:

83.1 The appeal is dismissed with costs, including the costs of two counsel where so employed.

MANTAME J

I agree

SHER J

I agree, and it is so ordered.

FORTUIN J