CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 97/07
[2009] ZACC 6

LUFUNO MPHAPHULI & ASSOCIATES (PTY) LTD Applicant

versus

NIGEL ATHOL ANDREWS First Respondent

BOPANANG CONSTRUCTION CC Second Respondent

Heard on : 13 May 2008

Decided on : 20 March 2009

JUDGMENT

KROON AJ:

Introduction

[1] This is an application for leave to appeal to this Court against a decision of the Supreme Court of Appeal[1] upholding a judgment of the High Court in Pretoria.[2] In terms of the latter judgment an application by the second respondent to have an

[1] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2007] ZASCA 143; 2008 (2) SA 448 (SCA); 2008 (7) BCLR 725 (SCA).

[2] *Bopanang Construction CC v Lufuno Mphaphuli & Associates (Pty) Ltd; Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*, Case Nos 27225/04 and 33188/2004, North Gauteng High Court, Pretoria, 22 February 2006, unreported.

arbitrator's award made an order of court was granted, and an application by the applicant for the review and setting aside of the award was dismissed.

Factual Background

[2] The applicant, Lufuno Mphaphuli & Associates (Pty) Ltd (Mphaphuli), conducts business at Polokwane, Limpopo as an electrical infrastructure contractor. The first respondent, Mr Andrews (the arbitrator), is a quantity surveyor and project manager in Johannesburg. The second respondent, Bopanang Construction CC (Bopanang), carries on business at Witbank, Mpumulanga.

[3] Mphaphuli was the main contractor on a project of Eskom (the national electricity supplier) for the electrification of certain rural villages in Limpopo. On 16 May 2002 Mphaphuli and Bopanang concluded a written contract in terms of which the latter was engaged as a subcontractor to undertake certain of the work entailed in the project. On 16 January 2003, prior to completion of the work assigned to it, Bopanang vacated the site. Another entity, AA Electrical Ltd, was engaged to complete the work, and also to do certain remedial work. Disputes arose between the parties concerning the execution by Bopanang of the work undertaken by it, and whether either party was liable to make payment to the other.

[4] During April 2003 Bopanang issued summons out of the High Court claiming payment from Mphaphuli in the sum of R656 934,44 in respect of the work done by it (less payments on account). Bopanang also launched an urgent application for a

temporary interdict preventing Eskom from paying out certain moneys to Mphaphuli. These proceedings were settled on the basis that an interim interdict would issue and the dispute between the parties referred to arbitration.

[5] At a preliminary meeting on 21 July 2003 Mphaphuli and Bopanang agreed to appoint the arbitrator to undertake the arbitration and to exchange pleadings. On 1 August 2003 Bopanang submitted its statement of claim in which it claimed payment of the said amount of R656 934,44 (together with interest on the component amounts thereof from various dates), made up as reflected in the invoices annexed to the statement of claim. Attached to and forming part of the statement of claim were the papers filed by Bopanang in the High Court in the application referred to in paragraph 4 above. In those papers Bopanang had confirmed on oath that the invoices constituted an accurate record of the work it had done.

[6] Mphaphuli filed its statement of defence (alleging, inter alia, repudiation of the agreement by Bopanang) together with a counterclaim for moneys allegedly overpaid to Bopanang. Bopanang filed a reply to Mphaphuli's statement of defence and a plea to the counterclaim. A meeting was held between the parties and the arbitrator on 7 October 2003. The arbitrator was furnished with copies of all the pleadings that had been filed.

[7] On 16 October 2003 the parties finalised the terms of the reference to arbitration in a written agreement. Its relevant terms were as follows:

"ARBITRATION AGREEMENT

Whereas [Bopanang] instituted an arbitration action against [Mphaphuli] in terms whereof [Bopanang] claimed payment of an amount of R656 934,44; interest on the amount of R143 395,53 at 0.5% per week from 6 October 2002; interest on the amount of R208 937,54 at 0.5% per week from 21 April 2003; interest on the amount of R304 601,37 at 0.5% per week from 21 April 2003 and costs of suit;

And whereas [Mphaphuli] opposed the action and inter alia claimed payment of whatever amount appears to have been overpaid by [Mphaphuli] to [Bopanang];

And whereas the parties have reached an agreement regarding the finalisation of the arbitration proceedings and the mandate to be given to the Arbitrator, Mr Nigel Andrews;

Now therefore the parties agree as follows:

1. PURPOSE OF ARBITRATION

The purpose of the arbitration is to determine whether payment is due in terms of the contract concluded between the parties, and if it is determined that payment is in fact due, the extent of such payment due, having regard to the scope of the agreement; any agreed amendments or instructions for amendments thereto by [Mphaphuli] or ESKOM; the value of the work that has been done by [Bopanang]; the effect of any defects, if any, and the rectification thereof; any and all payments made to [Bopanang]. Therefore a final assessment of moneys reasonably due by any one of the parties to the other needs to be made by the arbitrator.

2. AWARD OF ARBITRATOR IS FINAL AND BINDING

The final award made by the arbitrator as described in clause 1 above shall be final and binding on the parties.

3. PAYMENT TO BE MADE IN TERMS OF AWARD OF ARBITRATOR

Any payment to be made by any of the parties in terms of the award made by the arbitrator shall be due and payable to the other party within 21 calendar days of the date of the written award made by the arbitrator.

4. PROVISION OF DOCUMENTATION

> The parties record that the arbitrator has already been provided with a bundle of documentation forming part of [Bopanang's] Particulars of Claim. In addition hereto, each party shall be entitled to submit such documentation as it may deem necessary to the arbitrator by not later than 10 October 2003 [sic].
>
> 5. REQUEST FOR ADDITIONAL DOCUMENTATION
> The arbitrator shall be entitled to require from any of the parties to make such further documentation available as he may require. The parties shall provide such requested documentation within 3 (three) days from such written request of the arbitrator.
>
> 6. LIASON WITH ESKOM
> The arbitrator shall be entitled to liaise with ESKOM's duly authorised representatives, and to request any documentation with regard to this project from ESKOM, who is hereby authorised by both parties to make such documentation available.
>
> 7. INSPECTION AND MEASUREMENT
> The arbitrator shall commence with the inspection and measurement of the work done on site on or about 27 October 2003. Each party shall provide their reasonable cooperation with the aim of completing the process as speedily as possible, and shall appoint representatives to attend the physical inspection and measurement.
> . . . .
> 10. FULL AGREEMENT
> This agreement constitutes the full and complete agreement reached between the parties and no variation, amendment, alteration, addition or omission shall be valid and binding on the parties unless reduced to writing and signed by all the parties or their duly authorised representatives."

[8] The arbitrator published his award on 23 August 2004. In terms thereof Mphaphuli was liable to Bopanang in the sum of R339 998, 82, with interest thereon as from 6 October 2002.

High Court proceedings

[9] On receipt of the award Mphaphuli's then attorney addressed a letter to the arbitrator stating that certain aspects of the award would require clarification and proposing a round table discussion thereanent. The response of the arbitrator was that the arbitration agreement did not provide for such a process. On 16 September 2004 Mphaphuli's attorney advised Bopanang's attorney that instructions had been received to take the matter on review to the High Court. Attempts by Mphaphuli to secure Bopanang's agreement for the remittal of the matter to the arbitrator were unsuccessful.

[10] When no application for review was forthcoming, Bopanang, on 18 October 2004, applied to the High Court in terms of section 31(1) of the Arbitration Act 42 of 1965[3] (Arbitration Act) for the award to be made an order of court and for judgment in its favour in the sum of R339 998, 83, plus interest.

[11] The application was opposed by Mphaphuli, which filed its answering affidavit on 13 December 2004. At the same time it launched a separate application in terms of section 32(2) of the Arbitration Act,[4] seeking relief in the form of an order—

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[3] Sections 31(1) and (3) provide as follows:

> "(1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.
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> . . . .
>
> (3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect."

[4] Section 32(2) provides as follows:

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

(i) reviewing and setting aside the award; and

(ii) remitting the matter to the arbitrator for a review of the award having regard to the issues raised in the founding affidavit.

Both the arbitrator and Bopanang were cited as respondents in this application.

[12] On 7 March 2005 the arbitrator lodged his reasons and what purported to be the record in the arbitration proceedings with the Registrar, in accordance with High Court Rule 53(1)(b).[5] The document filed with the Registrar reads as follows:

> "FIRST RESPONDENT'S REASONS IN TERMS OF RULE 53(1)(b).
>
> TAKE NOTICE that First Respondent hereby furnishes his reasons, as set out in the following documents:
>
> 1. First Respondent's decision dated 23 August 2004, annexed to Applicant's Founding Affidavit as Annexure 'L4';
>
> 2. Letter by First Respondent to Niland and Pretorius Inc. dated 18 October 2004, annexed to Applicant's Founding Affidavit as Annexure 'L8'; and
>
> 3. Preliminary site measurements dated 23 August 2004 attached hereto as Annexure 'NA1'.
>
> TAKE NOTICE further that First Respondent does not wish to supplement such reasons at this time."

[13] Mphaphuli's Pretoria attorney sought instructions from its Polokwane attorney regarding the site measurements included in the record and the possible

[5] The Rule required the arbitrator to lodge the record, together with such reasons as he may wish to furnish, with the Registrar within 15 days after receipt of the notice of motion, and to notify the applicant that he had done so.

supplementation or amendment of the founding affidavit and amendment of the notice of motion. The response was that the measurements were referred to Mphaphuli but that the latter did not consider that they took the matter any further; accordingly, the matter should be enrolled as soon as possible. The Pretoria attorney thereupon advised Bopanang's attorney that Mphaphuli did not wish to amend, add to or vary the terms of its notice of motion in terms of Rule 53(4),[6] and the filing of the opposing affidavits was called for. This was done by both the arbitrator and Bopanang on 18 May 2005.

[14] On 5 August 2005 Mphaphuli, having engaged new attorneys, filed an amended notice of motion supported by an affidavit styled a supplementary founding affidavit. The substantive relief sought was—

(i) an order reviewing and setting aside the award;

(ii) a declarator that Bopanang was indebted to Mphaphuli in certain stated sums, together with an order that the award be substituted with an order that Bopanang pay the said sums; and

(iii) as an alternative to (ii), an order remitting the matter to the arbitrator to review his award having regard to the issues raised in the original founding affidavit and the supplementary founding affidavit.

[6] The Rule provides as follows:

> "The applicant may within 10 days after the Registrar has made the record available to him, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit."

[15] There was also a prayer for condonation of the late bringing of the initial application and for the late filing of the amended notice of motion and the supplementary founding affidavit.[7]

[16] Both the arbitrator and Bopanang filed further answering affidavits in response to the supplementary founding affidavit of Mphaphuli. The latter in turn filed affidavits in reply thereto. It also filed affidavits in reply to the first answering affidavits of the arbitrator and Bopanang (filed in response to the original founding affidavit of Mphaphuli). Mphaphuli's reply to the further answering affidavit of the arbitrator elicited a rejoinder affidavit from the latter.

[17] On 18 January 2006 Mphaphuli filed a further amended notice of motion in which the third (alternative) prayer, referred to in paragraph 14 above, was substituted with a prayer for an order referring the dispute between the parties for trial, alternatively, for the hearing of oral evidence. A further prayer was added, for an order that the six week period stipulated in section 32(2)[8] be extended to provide for the admission of Mphaphuli's original founding affidavit, as supplemented by its supplementary founding affidavit.

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[7] As recorded in n 4 above, an application in terms of section 32(2) for the remittal of a matter to the arbitrator is required to be brought within six weeks of the publication of the award. Similarly, section 33(2) provides that an application for the setting aside of an award on any of the grounds set out in section 33(1) must be brought within six weeks of the publication of the award. (The full text of section 33(1) is reproduced in n 14 below.)

Section 38 of the Arbitration Act provides as follows:

> "The court may, on good cause shown, extend any period of time fixed by or under this Act, whether such period has expired or not."

[8] Above n 4.

[18] The two applications were heard together by the High Court. In the result, the Court granted Bopanang the relief it sought and dismissed Mphaphuli's application on the merits. In the course of its judgment the High Court recorded its dismissal of Mphaphuli's applications for condonation on the grounds both of an absence of a proper explanation for the delay and, more particularly, of a lack of merit in the cause of action invoked by Mphaphuli. (It may be noted that, as the High Court itself commented, the refusal of condonation had the result that there was in fact no application by Mphaphuli before it. The correct order would have been that the application be struck from the roll, not its dismissal. Be that as it may.)

The Supreme Court of Appeal proceedings

[19] The Supreme Court of Appeal upheld the High Court's decision not to grant condonation to Mphaphuli. While commenting that that should have been the end of the matter, the Court went on to give consideration to aspects relating to the merits. On that score, too, it found against Mphaphuli. It accordingly dismissed the appeal against the High Court judgment.

Condonation in this Court

[20] Mphaphuli's application for leave to appeal was filed one day late (although it was served timeously on the respondents). The reason for the late filing was unexpected pressing business exigencies on the last day for filing, resulting in the unavailability of the deponent to the affidavit in support of the application until late during that day. A proper case for condonation has been made out.

[21] The arbitrator and Bopanang also seek condonation for the late filing of their answering affidavits. In each case this was occasioned in the main by the intervention of the annual holiday season and the consequent unavailability of counsel. The grant of condonation is not opposed by Mphaphuli. A proper case for condonation has been made out.

The application for leave to appeal

[22] This Court only has jurisdiction to hear a matter if it is a constitutional matter or if it raises an issue connected with a decision on a constitutional matter.[9] That, however, is not decisive.[10] In addition, it must be shown that it is in the interests of justice that the application be granted.[11] Whether it is in the interests of justice for leave to appeal to be granted is based on a careful weighing up of all relevant factors, including the interests of the public and the prospects of success.[12]

Constitutional matter

[9] Section 167(3)(b) of the Constitution. See *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at para 30; *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 11.

[10] *S v Shaik and Others* [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC) at para 15; *Magajane v Chairperson, North West Gambling Board and Others* [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC) at para 29; *National Education Health and Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 25.

[11] See in this regard *Armbruster and Another v Minister of Finance and Others* [2007] ZACC 17; 2007 (6) SA 550 (CC); 2007 (12) BCLR 1283 (CC) at para 24; *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa, and Another* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 19.

[12] See the cases cited above in n 9.

[23] On behalf of Mphaphuli it was argued that, having regard to the judgments of both the High Court and the Supreme Court of Appeal, the application for leave to appeal raises a series of constitutional issues regarding the relationship between arbitrations, the courts and the Constitution. In particular, it was contended that three main issues arise:

(a) To what extent are the courts entitled and required to exercise some control over arbitration awards before adopting them as their own and making them orders of court?

(b) By concluding an arbitration agreement, can parties be taken to have waived fundamental aspects of their right to a fair hearing in terms of section 34 of the Constitution,[13] and if so, under what circumstances?

(c) What is the correct approach to the grounds of review set out in section 33(1) of the Arbitration Act,[14] when that section is properly interpreted in the light of the right to a fair hearing contained in section 34 of the Constitution?

It was stressed that the three aspects bear on Mphaphuli's right to a fair and impartial hearing in terms of the Arbitration Act read with section 34 of the Constitution.

[13] Section 34 reads as follows:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[14] Section 33(1) provides as follows:

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

[24] Other than providing that a constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution,[15] the Constitution itself does not define what a constitutional matter is. The decision whether a constitutional matter is at issue or whether an issue is connected with a decision on a constitutional matter reposes in this Court.[16]

[25] In my view a number of constitutional matters are at issue. First, the case involves the interpretation of section 34 of the Constitution and its application to arbitrations held in terms of the Arbitration Act. Allied thereto is the question of the correct approach to the grounds of review set out in section 33(1) of the Arbitration Act properly interpreted in the light of the right to a fair and impartial hearing guaranteed in section 34 of the Constitution. Relevant to these questions is an application of the provisions of section 39(2) of the Constitution.[17] Second, the question arises whether, and to what extent, the parties, by entering into an arbitration agreement, are to be taken to have waived the constitutional right (entrenched in the Bill of Rights) to a fair and impartial hearing. Third, the role of the courts in confirming or setting aside arbitration awards involves the administration of justice, and that too is a constitutional issue. As was said in the early case of *Burns & Co v Burne*[18] (where an arbitrator's award was sought to be assailed on grounds similar to those invoked by Mphaphuli in the present matter): ". . . the matter is not one affecting

[15] Section 167(7) of the Constitution.

[16] Section 167(3)(c) of the Constitution.

[17] The provisions of section 39(2) are quoted in full in n 31 below.

[18] 1922 NPD 461 at 462.

only the parties to this particular dispute, but it concerns the administration of justice generally."

[26] That the administration of justice is concerned is borne out by the following considerations:

(a) Arbitration awards made orders of court may be enforced in the same manner as any judgment or order to the same effect, including execution by state mechanisms.

(b) Arbitrators have no powers to enforce their awards and the effectiveness of the private process therefore rests on the binding, even coercive, powers the state entrusts to its courts.

(c) State execution of court orders, an integral part of the resolution of disputes between parties, and which is antithetical to self-help, is an important facet of the rule of law,[19] a core constitutional precept.

[27] Because the courts are requested to adopt, support and trigger the enforcement of arbitration awards, it is permissible for, and incumbent on, them to ensure that arbitration awards meet certain standards to prevent injustice.[20]

[19] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) at paras 39-43.

[20] South African Law Reform Commission Project 94 "Domestic Arbitration" *Report: May 2001* at para 2.16; Redfern and Hunter *Law and Practice of International Commercial Arbitration* 4ed (Sweet & Maxwell, London 2004) at 65-6; Kerr "Arbitration and the Courts – The UNCITRAL Model Law" (1984) 50 *Arbitration* 3 at 4-5; *London Export Corporation Ltd v Jubilee Coffee Roasting Co. Ltd* [1958] 1 WLR 271 at 278.

[28] In *Telcordia Technologies Inc v Telkom SA Ltd*[21] the Supreme Court of Appeal stressed the need, when courts have to consider the confirmation or setting aside of arbitral awards, for adherence to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimises the scope for intervention by the courts. The decision of the Supreme Court of Appeal in the present matter was informed by this principle.[22] Resolving, for the purposes of the present case, the tension between this principle and the duty of the courts to ensure, before ordering that an arbitration award be enforced by the state, that the award was obtained in a manner that was procedurally fair, as required by section 34 of the Constitution,[23] is the key constitutional issue that arises in this case.

[29] Two further issues require mention. First, the question whether the arbitrator acted as an arbitrator or a valuer, is an issue connected with the constitutional matters referred to above. Second, to the extent that the refusal by the High Court and the Supreme Court of Appeal to grant Mphaphuli condonation is to be ascribed to a failure properly to consider constitutional imperatives, a constitutional issue is involved. At the very least, the question is an issue connected with the constitutional matters referred to above.

Interests of justice

[21] [2006] ZASCA 112; 2007 (3) SA 266 (SCA); 2007 (5) BCLR 503 (SCA) at para 4.

[22] Above n 1 at para 14.

[23] Above n 13. The question of the applicability of section 34 to the present matter is considered below [69]-[78].

[30] The matter is of obvious importance to the parties. However, it has implications that go substantially beyond the narrow interests of the parties. As already recorded, the matter also concerns the administration of justice generally; and it does so in an area that is extremely important in the commercial world: recourse to arbitration proceedings to resolve disputes is extensive and is increasing. Moreover, important constitutional issues arise, including the extent to which an agreement such as that with which this matter is concerned can be read as amounting to a waiver of a constitutional right (the right to a fair and impartial hearing) in respect of which this Court has the benefit of the recent judgment of the Supreme Court of Appeal in *Telcordia*[24] together with the judgment of the same court in the present matter. It may be noted that while Mphaphuli did not in explicit language advert to a constitutional issue in the High Court or the Supreme Court of Appeal, the aspects invoked by it, by their nature, raised the constitutional issues referred to.[25]

[31] As will appear below, Mphaphuli has reasonable prospects of success in the appeal.

[32] I conclude accordingly that it is in the interests of justice to grant leave to appeal.

Condonation in the High Court

[24] Above n 21.

[25] Cf *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 27 which dealt pertinently with the provisions of the Promotion of Administrative Justice Act 3 of 2000.

[33] The judgment of the High Court recorded that three applications by Mphaphuli for condonation required to be considered:

(a) condonation of the late filing of Mphaphuli's replies to the answering affidavits of the arbitrator and Bopanang filed in response to Mphaphuli's initial founding affidavit;

(b) condonation of the late filing of Mphaphuli's supplementary founding affidavit;

(c) condonation of the late filing of the initial founding affidavit in view of the provisions of the Arbitration Act.

[34] As already recorded, condonation was refused on the grounds both of an absence of a proper explanation for the late filing and of the lack of merits in Mphaphuli's case. The former inquiry also embraced a consideration of the nature of the contents of the documents in question. At this stage only the first inquiry will be addressed. The merits will be considered separately at a later stage. However, it may be recorded that, as will appear below, the merits of Mphaphuli's case also favoured the grant of condonation.

[35] It is necessary briefly to list what complaints were raised in the two founding affidavits. Reference will, however, only be made to aspects that are relevant for purposes of this judgment.

[36] In the initial affidavit, Mphaphuli alleged that the arbitrator had awarded Bopanang amounts for work not done by it, nor even claimed by it, and amounts in excess of those claimed by it, and had not made allowance for remedial work done by AA Electrical.

[37] In the supplementary affidavit, Mphaphuli alleged that the arbitrator failed to perform his mandate in a number of respects, that he committed manifest material errors, that he failed to afford Mphaphuli a fair hearing, and that he was biased or at least that his conduct gave rise to a reasonable perception of bias. On this score Mphaphuli, in the first place, in substance repeated the allegations referred to in the preceding paragraph, giving details in amplification thereof, including the alleged non-adherence by the arbitrator to the pleadings and the terms of the agreement between the parties, and the award by him of interest on the total amount of the capital sum awarded as from 6 October 2002 while, at best, only the sum of approximately R140 000,00 was owing on that date. In addition, Mphaphuli invoked the fact that, as the record of the arbitration proceedings revealed, the arbitrator had held three "secret" meetings with the representatives of Bopanang without the knowledge and attendance of Mphaphuli as well as the fact, also revealed by the record, that correspondence having a material bearing on the dispute between the parties (to which Mphaphuli had not been made privy, and in which certain allegedly false and misleading information had been imparted by Bopanang) had passed between the arbitrator and Bopanang. In the result, the arbitrator had also misconducted himself or

committed gross irregularities in the conduct of the arbitration and/or had exceeded his powers.

[38] Apart from the contents of the various affidavits filed by Mphaphuli, a further aspect dealt with in the judgment of the High Court was the fact that after the arbitrator had notified the parties that the record had been lodged with the Registrar, Mphaphuli's then attorney advised Bopanang's attorney that Mphaphuli did not intend to amend its notice of motion. The Court noted that there was no indication that either Mphaphuli or its attorney had demanded sight of the record. The Court further commented that Mphaphuli was in any event in possession of all the documents contained in the record. The Court then recorded its finding that Mphaphuli had through its attorney taken a considered and informed decision not to amend its notice of motion.

[39] This approach cannot be endorsed. First, the record filed by the arbitrator with the Registrar was wholly deficient, and what was filed was not of any assistance to Mphaphuli in respect of the supplementation of its initial founding affidavit. Second, the comment that Mphaphuli was in any event in possession of all the documents contained in the record (or which should have been contained in the record) constituted a misdirection on the part of the Court: specifically, Mphaphuli was not in possession of the documents which revealed the material additional aspects adverted to in paragraph 37 above. Third, Mphaphuli recorded that it had not been consulted by the attorney in respect of the question of amending its notice of motion, and the

attorney in question confirmed that he had had no mandate on that score and that he had acted in ignorance. It is not necessary to consider the question whether Mphaphuli was bound by the actions of its attorney. The communication by the attorney to his counterpart did not constitute a waiver of the right to amend the notice of motion and to supplement the grounds relied upon for the relief sought in the sense that the issue could not thereafter be revisited (nor did the High Court suggest otherwise).

[40] For purposes of the present judgment it is necessary only to consider the applications for condonation of the late filing of the initial founding affidavit and of the supplementary founding affidavit.

[41] In its papers Mphaphuli set out comprehensive explanations of the delays in question. Save in one respect, to be referred to below, the High Court judgment did not advert to these explanations. Instead, the High Court focused its attention on the substantive contents of the affidavits and its interpretation thereof (an aspect to which I revert later). The basis of the finding that there was no proper explanation for the delays does not appear from the judgment.

[42] In sum, the explanation tendered by Mphaphuli for the late filing of the supplementary affidavit was as follows:

(a) On 8 June 2005 an employee of Mphaphuli's current attorneys attended at the office of the Registrar. On inspection of the court file it was discovered that it

only contained the pleadings in the matter, but no record. Enquiries of members of the Registrar's staff elicited the answer that despite a search for the record, it could not be located.

(b) Mphaphuli's attorneys then contacted the arbitrator's attorneys in order to procure a copy of the record. Agreement between the attorneys was reached that upon receipt of such copy from the arbitrator, the Registrar would be deemed to have made the record available to Mphaphuli for the purpose of Rule 53(3).[26] The record was collected and received by Mphaphuli on 18 July 2005. (The supplementary affidavit was filed on 5 August 2005, some four days beyond the 10 day period prescribed in Rule 53(4). It should be noted further that it was this record that revealed the additional aspects of the meetings and correspondence referred to in paragraph 37 above.)

(c) The arbitration record was voluminous, extending to more than 400 pages. Supplementation of Mphaphuli's papers required close scrutiny of the record and a comparison thereof with other relevant documentation. The process was extremely time consuming and it was not feasible for it to be completed within 10 days.

(d) No prejudice to the other parties resulted from the late filing.

(e) Mphaphuli would, however, be unjustly prejudiced if denied the opportunity of amplifying its case on the basis of the contents of the record.

[26] Rule 53(3) provides inter alia that the Registrar shall make available to the applicant the record despatched to him upon such terms as the Registrar thinks appropriate to ensure its safety.

[43] The only comments in the High Court judgment bearing on this explanation are that there was no indication that Mphaphuli or its attorney had demanded sight of the record filed with the Registrar, that Mphaphuli through its attorney took a considered decision not to amend its notice of motion or to supplement its founding affidavit and that it was only when a new set of attorneys appeared on the scene that Mphaphuli relied on the "so-called unavailability of the record to now amend its papers and to practically bring a new case before court."

[44] The comments are unpersuasive. On the other hand the explanation furnished by Mphaphuli adequately explains the delay in question.

[45] The High Court held that with the supplementary founding affidavit Mphaphuli was in fact bringing a completely new application on completely different grounds from those relied on in the initial founding affidavit. That is, of course, so (subject thereto that allegations made earlier, and amplified in the later affidavit, were incorporated in support of the new application). But what the High Court appears to have overlooked is that *the new case was dictated by what the record of the arbitration proceedings revealed*. I deal further with this aspect when considering the judgment of the Supreme Court of Appeal. Suffice it to say at this stage that in the circumstances the raising of the new case was justified, and it constituted no reason to refuse condonation. In adopting a contrary view the High Court erred. In doing so it failed, as will be shown below, to consider the true nature of the case presented by Mphaphuli: In short, it viewed Mphaphuli's case as an attempt in effect to appeal

against the award of the arbitrator in that it also engaged aspects that otherwise had a bearing on the merits of the award and it failed to recognise that what Mphaphuli invoked was the fundamental right to a fair hearing, although it did recognise that alleged bias on the part of the arbitrator was relied upon. (The manner in which the High Court dealt with the last aspect is referred to below.)[27]

[46] The High Court further commented that Mphaphuli's two affidavits in reply to the answering affidavits of the arbitrator and Bopanang in response to the supplementary founding affidavit, again sought to make out a new case and further and more detailed grounds of review were put forward. In this regard, however, the High Court substantially misread the affidavits and misdirected itself. In the main the affidavits, first, answered the allegations by the arbitrator and Bopanang and, second, restated and amplified allegations it had already made, without raising new matter. In limited respects new matter was raised, but this was of a relatively minor nature.

[47] In sum, the explanation tendered by Mphaphuli for the late filing of the initial founding affidavit was as follows:

(a) The affidavit was filed approximately 14 weeks after publication of the award, and was accordingly some eight weeks out of time.

(b) The dispute arose in January 2003 and was referred to arbitration during October 2003. The arbitration award was published in August 2004. In this

[27] Below at [138]-[142].

context, so it was contended, the further delay of some two months in bringing the review application was not an unduly long period.

(c) The fundamental basis of the review application was the schedule prepared by Mphaphuli and annexed to the founding affidavit marked "L7". The preparation of the schedule entailed an enormous amount of work, requiring inter alia a comparison of Bopanang's invoices and supporting documentation containing the quantities of the supply and installation of material claimed by it, with the quantities awarded by the arbitrator. The exigencies of Mphaphuli's normal business activities also hampered the preparation of the schedule, which required to be completed to enable Mphaphuli's attorneys to proceed with the review application.

(d) The attorneys made bona fide attempts to resolve the matter and thus obviate the necessity of bringing the review application. Communications were addressed to the arbitrator and Bopanang on 13 and 14 October 2004 in which Mphaphuli's objections to the award were made known. Mphaphuli could not, however, secure agreement that the reference be remitted to the arbitrator in terms of section 32(1) of the Arbitration Act.[28]

(e) Mphaphuli conducts business in Polokwane, a considerable distance from Pretoria, and difficulties in communication with its attorneys contributed to the time taken to prepare and finalise the papers.

(f) No prejudice suffered by Bopanang weighed against the grant of condonation.

[28] Section 32(1) makes provision for the parties to remit by written agreement any matter which was referred to arbitration, to the arbitrator for reconsideration.

(It may be repeated that the review application included a prayer for the remittal of the matter to the arbitrator, relief for which section 32(2) of the Arbitration Act makes provision.)[29]

[48] As already recorded, the High Court did not advert to the above explanation. In my judgement, an adequate explanation for the delay in question was furnished. In so finding I have not lost sight of the fact that, already in its own application and in its response to Mphaphuli's initial founding affidavit, Bopanang raised the issue of an absence of an application for an extension of time, and that same was only sought when the supplementary affidavit was filed.

[49] In *Giddey NO v JC Barnard and Partners*[30] this Court had occasion to deal with the question of the exercise of a discretion by the High Court in terms of the provisions of Rule 47(3), which empowers a court to require a litigant to furnish security for the costs of its opponent in the litigation in question. It was noted, inter alia, that for courts to function fairly, they must have rules that regulate their proceedings; these rules often require parties to take certain steps on pain of being prevented from proceeding with a claim or a defence; to that extent they constitute a limitation of the right to access to court; in the absence of a constitutional challenge to a particular rule having that effect a litigant's only complaint can be that the Rule was not properly applied by the court; very often the interpretation and application of the Rule will require a consideration of the provisions of the Constitution, as section 39(2)

[29] Above n 4.

[30] [2006] ZACC 13; 2007 (5) SA 525 (CC); 2007 (2) BCLR 125 (CC).

of the Constitution instructs;[31] a court that fails adequately to consider the relevant constitutional provisions will not have properly applied the rules at all.[32]

[50] Where the exercise of a discretion in the application of a rule contemplates that the court may choose from a range of options, it is a discretion in the strict sense.[33] The ordinary approach on appeal to the exercise of such a discretion is that the appellate court will not consider whether the decision reached by the court of first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law.[34]

[51] The issue of condonation in the present case required the exercise of a discretion in the strict sense. In the light of what has been set out earlier (and leaving aside considerations relating to the merits) the refusal of the High Court to grant the condonation sought was vitiated by misdirection, did not constitute a judicial exercise of discretion and resulted in an impermissible and unconstitutional denial of Mphaphuli's right of access to court. The refusal accordingly falls to be reversed.

Condonation in the Supreme Court of Appeal

[52] The Supreme Court of Appeal stated as follows:

[31] Section 39(2) of the Constitution provides as follows: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[32] Above n 30 at para 16.

[33] Id at paras 19-23.

[34] Id.

> "The grounds for any review, as well as the facts and circumstances upon which a litigant wishes to rely, have to be set out in its founding affidavit amplified insofar as may be necessary by a supplementary affidavit after the receipt of the record from the presiding officer, obviously based on the new information that has since become available.[35] The original founding affidavit filed by Lufuno comprised ten pages excluding annexures. Lufuno abused its right to amplify in this case by filing a supplementary affidavit of 80 pages in which it raised all manner of new allegations.
>
> The only new information that emerged from the record of the arbitration proceedings filed by Andrews in terms of rule 53(1)(b) was what Lufuno described as evidence of three 'secret meetings' between Andrews and Bopanang's representative. That new information could hardly justify the lengthy supplementary affidavit that had been filed, ostensibly in terms of rule 53(4). Leaving aside for the moment the secret meetings to which I will return, Lufuno sought in effect to make out a completely new case in its supplementary affidavit. That plainly was not authorised by rule 53 or by any other principle of our law. In those circumstances, it seems to me, the court below can hardly be faulted for having exercised its judicial discretion against Lufuno under s 38 of the Act. It has not been suggested that the discretion was exercised capriciously or upon a wrong principle or upon any other ground justifying interference by a court of appeal. That, one would have thought, would have been the end of the matter".[36] (Footnotes amended.)

[53] In a number of respects these comments cannot be endorsed. The first and fundamental aspect is that there can, in my view, be no objection in principle to a new case being made out in terms of Rule 53(4) *where the record in question provides justification therefor*.[37]

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[35] Reference was made to *Telcordia* above n 21.

[36] *Lufuno Mphaphuli* above n 1 at paras 15-6.

[37] Cf *Pieters v Administrateur, Suidwes-Afrika en 'n Ander* 1972 (2) SA 220 (SWA); *Muller and Another v The Master and Others* 1991 (2) SA 217 (N) at 220D-E. See also *Telcordia* above n 21 at para 32, which reads as follows:

> "The grounds for any review as well as the facts and circumstances upon which the applicant wishes to rely have to be set out in the founding affidavit. These may be amplified in a

[54] Second, neither the use of the word "abused" nor the comment "all manner of new allegations" was justified. Prolix in certain respects the affidavit may have been, but that is another matter, and an analysis of the affidavit (which, incidentally, also embraced the grounds for the applications for condonation) does not reveal that any material allegation therein was not germane to the case being put forward. As stated above, Mphaphuli was entitled to raise the allegations in terms of Rule 53(4), and it was also entitled to incorporate and amplify previously registered complaints, insofar as they were relevant, in support of the new case made out in the supplementary affidavit.

[55] Third, evidence of the three meetings was not the only new information disclosed by the record. In addition, evidence of correspondence between the arbitrator and Bopanang, to which Mphaphuli was not made privy, was also revealed. The Supreme Court of Appeal made no reference thereto. (Nor for that matter did the High Court.)

[56] The Supreme Court of Appeal approached the question of condonation on a restricted basis: in essence what it held (wrongly) to be an impermissible attempt by Mphaphuli to make out a new case in its supplementary affidavit. No consideration was given to the explanation of Mphaphuli for the delay, nor to constitutional imperatives.

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supplementary founding affidavit after receipt of the record from the presiding officer, obviously based on the new information which has become available." (Footnote omitted.)

[57] In my view, therefore, while the Supreme Court of Appeal did go on to consider aspects relating to Mphaphuli's complaints on the merits of its case (an aspect to which I revert later), its endorsement of the High Court's refusal of condonation cannot be supported.

Certain aspects arising out of the judgments of the High Court and the Supreme Court of Appeal

[58] It is unnecessary to consider in any detail the comments of the High Court concerning Mphaphuli's not having been entitled in effect to appeal against the arbitrator's award, which comments were valid (and in fact the High Court recorded that Mphaphuli abandoned any relief which would have fallen under the rubric of an appeal). That is not the case that Mphaphuli asks this Court to consider.

[59] Two observations require to be made, however, concerning the High Court's apparent interpretation of the arbitrator's mandate. First, as will be shown later, it was not simply, as the High Court judgment suggests, a matter of inspection and re-measurement. Second, the statement by the Court, said to be based on what the arbitrator had alleged, that after the re-measurement the parties reached agreement as to the work actually done by Bopanang, must be viewed against a reading of the arbitrator's affidavits in their entirety. While there are statements in his affidavits to the effect that the re-measurement would be conclusive as the parties had reached agreement on the work done by Bopanang and that was the work measured, he in fact

elsewhere made it clear that after the re-measurement (on which he said there was agreement) he was still required to embark on a determination of what part of the work re-measured had actually been done by Bopanang (on which there was not agreement). An earlier comment by the arbitrator had recorded that on the correspondence a "huge factual dispute" had arisen as to what remedial work had been done by AA Electrical and what work had actually been done by Bopanang, and it was imperative that he resolve that dispute as well.

[60] Similarly, certain comments by the Supreme Court of Appeal concerning the nature of Mphaphuli's case appear to have been misplaced. Paragraph 14 of the judgment reads, in part, as follows:

> "The legal principles applicable to an enquiry of this kind were recently set out by Harms JA on behalf of this court.[38] Applying those principles to the facts of this case, which I have set out in some detail in this judgment, illustrates, to my mind, that Lufuno fundamentally misconceived the nature of its relief. Moreover, Lufuno's founding papers assumed, erroneously so – as was subsequently conceded by it – that the private arbitration process was an administrative one, which had to be lawful, reasonable and procedurally fair.[39] That fundamental misapprehension permeated its founding application, which as I shall presently show, it subsequently sought in its supplementary papers, to remedy. The parties clearly intended Andrews to have exclusive authority to decide whatever questions were submitted to him and that each was precluded by virtue of the provisions of clause 2 of the arbitration agreement from appealing against his decision. The parties had accordingly waived the right to have the merits of their dispute re-litigated or reconsidered."[40] (Footnotes added.)

[38] Reference was made to *Telcordia* above n 21.

[39] Reference was made to *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) Pty Ltd* [2002] ZASCA 14; 2002 (4) SA 661 (SCA) at para 25.

[40] The reference was to *Telcordia* above n 21 at para 50.

[61] The first observation to be made is that, on the basis set out in paragraphs 15 and 16 of the judgment,[41] the Supreme Court of Appeal held that Mphaphuli's "attempt" to remedy what was referred to as its "fundamental misapprehension" was unsuccessful in that the "attempt" sought, impermissibly, to make out a new case in its later papers. I have already shown[42] that that approach was fundamentally flawed. The second observation is that the case that Mphaphuli seeks this Court to consider does not entail a re-litigation or reconsideration of the merits of the dispute.

[62] Mphaphuli's submission is in essence that it did not receive a fair hearing from the arbitrator and that at least a reasonable perception of bias on the part of the arbitrator arose. The submission is not only founded on the three meetings referred to earlier, the only aspect adverted to by both the High Court and the Supreme Court of Appeal; it is also based on the correspondence between the arbitrator and Bopanang to which Mphaphuli was not made privy, as well as on aspects of the award made in favour of Bopanang by the arbitrator.

[63] Despite the conclusion reached by the Supreme Court of Appeal on the issue of condonation it went on to consider certain issues relating to the merits.

[64] The Court held[43] that Mphaphuli could only challenge the award by invoking the statutory provisions contained in section 33(1) of the Arbitration Act,[44] "as any

[41] The paragraphs are quoted in [52] above.

[42] See [53]-[57] above.

[43] Above n 1 at para 14.

further ground of review, either at common law or otherwise, had by necessary implication been waived by it." In this regard it followed the approach in *Telcordia*.[45]

[65] In *Telcordia* the Supreme Court of Appeal held inter alia that—

(a) private arbitrations would, as a starting point, fall within the ambit of section 34 of the Constitution;[46]

(b) the rights contained in the section "may be waived unless the waiver is contrary to some other constitutional principle or otherwise contra bonos mores;"[47]

(c) by agreeing to arbitration, parties waive their rights *pro tanto*; they usually waive the right to a public hearing;[48]

(d) by agreeing to arbitration the parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Arbitration Act and nothing else;[49] and

(e) by agreeing to arbitration the parties limit interference by the courts to the grounds of procedural irregularities set out in section 33(1) of the Act, and, by necessary implication, they waive the right to rely on any further ground of review, "common law" or otherwise.[50]

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[44] The provisions of section 33(1) are set out in full in n 14 above.

[45] Above n 21 at paras 50-1.

[46] Id at para 47. The provisions of section 34 are set out in n 13 above.

[47] Above n 21 at para 48.

[48] Id.

[49] Id at para 50.

[50] Id at para 51.

[66] After an earlier comment that Mphaphuli, relying primarily on the "secret meetings", alleged that the arbitrator exhibited conscious bias in favour of Bopanang,[51] the judgment of the Supreme Court of Appeal proceeded as follows:

> "Were an arbitrator to discuss the merits of the matter with one of the parties to the exclusion of the other that, ordinarily at any rate, would constitute a serious irregularity, which may without more warrant the award being set aside.[52] But, against the backdrop of the arbitration agreement and the context of the arbitrator's mandate, those meetings were quite innocuous and had no effect whatsoever on Andrews. To describe them as 'secret meetings', as Lufuno does, is to give them a sinister connotation that is wholly unwarranted. The purpose of those meetings was simply to verify certain figures and to clarify the use of certain items. That fell within the parameters of Andrews' mandate. That being so, even if he had been wrong those would have been errors of the kind committed within the scope of his mandate.[53]
>
> Proof that Andrews misconducted himself in relation to his duties or committed a gross irregularity in the conduct of the arbitration is a prerequisite for the setting aside of the award. An error of fact or law, or both, even a gross error, would not per se

[51] *Lufuno Mphaphuli* above n 1 at para 16.

[52] Reference was made to *S v Roberts* 1999 (4) SA 915 (SCA) at para 23, which reads, in part, as follows:

> "That justice publicly be seen to be done necessitates, as an elementary requirement to avoid the appearance that justice is being administered in secret, that the presiding judicial officer should have no communication whatever with either party except in the presence of the other: *R v Maharaj* 1960 (4) SA 256 (N) at 258B-C. That is so fundamentally important that the discussion between the magistrate and the prosecutor in the instant case warranted on its own, without anything more, the setting aside of the sentence. Had such a discussion occurred before conviction in this matter there can be no question but that the conviction would have been fatally irregular: *S v Seedat* 1971 (1) SA 789 (N) at 792F."

[53] Reference was made to *Telcordia* above n 21 at para 86 which reads as follows:

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

justify the setting aside of the award.[54] It followed that Lufuno had to go further than that. For, as Smalberger ADP put it:

> 'A gross or manifest mistake is not per se misconduct. At best it provides evidence of misconduct . . . which, taken alone or in conjunction with other considerations, will ultimately have to be sufficiently compelling to justify an inference (as the most likely inference) of what has variously been described as "wrongful and improper conduct" . . . "dishonesty" and "*mala fides* or partiality" . . . and "moral turpitude".'[55]

Lufuno asserted bias. It was for it to establish a reasonable apprehension of bias.[56] The threshold for a finding of real or perceived bias is high.[57] The bias complained of was, according to Lufuno, grounded in the relationship between Andrews and Bopanang. Why Andrews would have shown an inclination to favour the one party to the dispute does not emerge on the papers. The three 'secret meetings', as I have just illustrated, were not only innocuous but also occurred within the scope of Andrews' mandate. The proceedings, on any yardstick, were thus not infected by them. No other overt act is relied upon in support of the proposition that the proceedings were contaminated and that the award is therefore susceptible to attack. Simply put, there are no reasonable grounds to think that Andrews might have been biased. It must follow that the award, on this score, is immune from interference."[58] (Footnotes amended.)

[67] I revert later to consider the validity of certain comments in these paragraphs.

[68] One of counsel's main attacks on the approach of the Supreme Court of Appeal related to the fundamental question whether parties, by referring their dispute to

[54] Reference was made to *Total Support* above n 39 at para 35.

[55] The quotation is from *Total Support* above n 39 at para 21.

[56] Reference was made to *S v Basson* [2004] ZACC 13; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) at para 30.

[57] Reference was made to *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) at para 15.

[58] Above n 1 at paras 18-20.

arbitration, waive their rights to invoke any grounds of review beyond those provided for in section 33(1) of the Arbitration Act. More specifically, the question is whether the parties agree that the fairness of the hearing will be determined solely by the provisions of the Act and are precluded from invoking the provisions of section 34 of the Constitution, which enshrines the right to a fair and impartial hearing.

[69] A preliminary question is whether section 34 of the Constitution applies to private arbitrations. In *Total Support*[59] the Supreme Court of Appeal commented that while at first blush it may seem that the fairness requirements of section 34 do apply to consensual or private arbitrations, closer analysis may lead to a different conclusion. The Court further noted that—

> "[i]t is a moot point whether the words 'another independent and impartial tribunal or forum' in their contextual setting apply to private proceedings before an arbitrator or whether they must be restricted to statutorily established adjudicatory institutions."[60]

The context referred to was the fact, as it was stated to be, that the word "fair" in the section qualifies "public hearing", and it was noted that parties to a private arbitration may by agreement exclude any form of public hearing. However, the further comment was that the ambit and application of the section had not been fully argued and its proper interpretation had therefore to be left open.

[59] Above n 39 at paras 27-8.

[60] Id at para 27.

[70] However, in my view, the word "fair" qualifies any "hearing" and not only a "public hearing", and the circumstance that the parties may waive the right to a public hearing (a proposition that was not disputed by counsel for Mphaphuli and in *Telcordia* it was stated that that was the usual position)[61] does not appear to be a reason why it should be questioned whether private arbitrations are subject to the provisions of the section, specifically the fairness requirements set out therein.

[71] As already recorded,[62] in *Telcordia* the Supreme Court of Appeal took the view that section 34 was applicable to arbitrations, which, it noted, was in accordance with the approach in the European Court of Human Rights, as per the decision in *Suovaniemi v Finland*.[63] The conclusion in *Telcordia* commends itself for acceptance. As counsel for Mphaphuli argued, the right provided for in section 34 is plainly capable of application in the private sphere, and it would be extraordinary if in deciding whether or not to make an arbitration award an order of court a judicial officer could turn a blind eye to a lack of fairness on the basis that section 34 was not of application.

[72] It is not clear why in *Telcordia* the Supreme Court of Appeal held that by agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Arbitration Act and nothing else, or that they limit interference by the courts to the grounds of procedural irregularities

[61] *Telcordia* above n 21 at para 48.

[62] Above at [65(a)].

[63] ECHR Case No. 31737/96 (23 February 1999), cited in *Telcordia* above n 21 at para 47.

set out in section 33(1) of the Act and by necessary implication waive the right to rely on any further ground of review. It is so, as was commented in *Total Support*,[64] that even if the fairness requirement of section 34 of the Constitution applies to private arbitrations there is nothing which precludes the parties themselves from defining what is fair. I have difficulty, however, with the comment following thereon, that the fairness requirement is satisfied where parties who resort to arbitration agree to forego a right of appeal and accept that the well-known and well-established principles governing arbitration will apply and that therefore viewing the Arbitration Act through the prism of the Bill of Rights does not justify any departure from those principles (if the comment is to be interpreted as offering support for the approach adopted in *Telcordia*).

[73] The principle of party autonomy, stressed in *Telcordia*, which requires a high degree of deference to arbitral decisions, and which implicitly informed the approach of the Supreme Court of Appeal in the present matter, is not a weighty consideration against a conclusion that the fairness requirement of section 34 is of application to arbitrations. *Telcordia* itself, and the authorities it referred to in emphasising the principle,[65] were matters which concerned errors of fact or law to which the well-known and well-established principles governing arbitrations do apply. Procedural irregularities giving rise to unfairness are, however, a horse of a different colour.

[64] Above n 39 at para 28.

[65] Above n 21 at para 4.

[74] In my view, there is no reason why the fairness requirement of section 34 of the Constitution cannot co-exist with the requirements imported by the provisions of section 33(1) of the Arbitration Act. On the contrary, there is every reason why co-existence should be accepted: the fairness requirement in section 34 is part of a fundamental constitutional right incorporated into the Bill of Rights and it is properly to be engrafted onto the principles applicable to arbitrations.

[75] This conclusion is in accordance with the principle that in interpreting any legislation the courts are enjoined to promote the spirit, purport and objects of the Bill of Rights,[66] including the right to a fair and impartial hearing guaranteed by section 34.[67]

[76] Reference may also be had to the South African Law Reform Commission Report on Domestic Arbitration,[68] in which recommendations were made concerning the contents of a proposed new Arbitration Act.

(a) In paragraphs 1.03 – 05 the Report records the following:

(i) the objective of a domestic arbitration is to obtain the fair resolution of disputes by an independent arbitral tribunal without unnecessary delay or expense;

[66] Section 39(2) of the Constitution, quoted above at n 31.

[67] See, for example, *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 22-6.

[68] South African Law Reform Commission Project 94 "Domestic Arbitration" *Report: May 2001*.

(ii) the second objective should be the promotion of party autonomy (arbitration being a consensual process in that the primary source of the arbitrator's jurisdiction is the arbitration agreement between the parties);

(iii) the third objective should be balanced powers for the courts: court support for the arbitral process is essential, the price thereof being supervisory powers for the court to ensure due process.

(b) In the summary of the Commission's recommendations it is stated:

> "True to the principle of party autonomy the tribunal's statutory powers can be excluded or modified by the parties in their arbitration agreement. They are also subject to the tribunal's statutory duty to conduct the proceedings in a fair and impartial manner."

[77] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,[69] a case dealing with statutory arbitrations under the Labour Relations Act[70] (the LRA), Ngcobo J made comments to the following effect. In order to give effect to the intention that, as far as possible, arbitration awards would be final and only interfered with in very limited circumstances, the drafters of the LRA, in section 145(2)(a) thereof, chose to provide for narrow grounds of review similar to those provided for in section 33(1) of the Arbitration Act, and did so aware of the jurisprudence under the latter Act.[71] But they were equally aware that in construing the provisions of section

[69] [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC).

[70] 66 of 1995.

[71] *Sidumo* above n 69 at para 245.

145(2)(a), in particular the ambit of the grounds of review in the section, the Labour Courts would have regard inter alia to the right to fair labour practices guaranteed to everyone in terms of section 23 of the Constitution and the interpretative injunction contained in section 39(2) of the Constitution.[72] The crucial inquiry (in assessing irregularities) is whether the conduct of the decision-maker complained of prevented a fair trial of issues.[73] The requirements of fairness in the conduct of arbitration proceedings are consistent with the LRA and the Constitution: section 138(1) of the LRA enjoins the commissioner to determine the dispute fairly; section 34 of the Constitution enshrines the right of everyone to, inter alia, a fair hearing. The right to a fair hearing before a tribunal lies at the heart of the rule of law, and a fair hearing before a tribunal is a pre-requisite for an order against an individual, and this is fundamental to a just and credible legal order.[74]

[78] Similarly, O'Regan J stated that it was beyond doubt that the functions performed by a commissioner in an arbitration under the LRA clearly fall within the terms of section 34 of the Constitution.[75] In my judgement, private arbitrations are, as a starting point, not to be subjected to a lower standard of procedural fairness – once an arbitration award is made an order of court the legal effect thereof is identical to that of an arbitration award under the LRA.

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[72] Id at para 246.

[73] Id at para 265.

[74] *Suovaniemi* above n 63. See too the similar comments in *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* [2001] ZACC 9; 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 (CC) at para 11, and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU)* [1998] ZACC 21; 1999 (4) SA 147 (CC); 1999 (2) BCLR 175 (CC) at para 35.

[75] *Sidumo* above n 69 at para 124.

[79] I conclude therefore that the mere fact of a submission to arbitration does not import a waiver of the fairness requirement. This conclusion finds support in *Suovaniemi*.[76]

[80] In the above discussion I have assumed that the constitutional right to a fair hearing may validly be waived.[77]

[81] The conclusion reached in paragraph 79 above is in accordance with common law principles regarding waiver of rights. Waiver is first and foremost a matter of intention; the test to determine intention to waive is objective, the alleged intention being judged by its outward manifestations adjudicated from the perspective of the other party, as a reasonable person.[78] Our courts take cognisance of the fact that persons do not as a rule lightly abandon their rights.[79] Waiver is not presumed; it must be alleged and proved; not only must the acts allegedly constituting the wavier

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[76] Above n 63. This case concerned an arbitration and the applicability of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides: "In the determination of his civil rights and obligations . . . everyone is entitled to a fair . . . hearing . . . by an independent and impartial tribunal".

At page 5 of the decision the following statement appears:

> "There is no doubt that a voluntary waiver of court proceedings in favour of arbitration is in principle acceptable from the point of view of Article 6 . . . Even so such a waiver should not necessarily be considered to be a waiver of all rights under Article 6."

In the result, it was held, on the facts, that there had been an enforceable waiver of the right to challenge the award on the basis of the alleged lack of impartiality of one of the arbitrators.

[77] See the discussion on the permissibility of the waiver of certain constitutional rights in *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) at paras 61-8.

[78] *Road Accident Fund v Mothupi* [2000] ZASCA 27; 2000 (4) SA 38 (SCA) at paras 15-7.

[79] *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* [1993] ZASCA 3; 1993 (2) SA 451 (A) at 469.

be shown to have occurred, but it must also appear clearly and unequivocally from those facts or otherwise that there was an intention to waive.[80] The onus is strictly on the party asserting waiver; it must be shown that the other party with full knowledge of the right decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it. Waiver is a question of fact and is difficult to establish.[81]

[82] What should be emphasised is that, as will appear from the authorities referred to below, the fairness rights invoked by Mphaphuli lie at the core of a legitimate arbitration and it would require extremely strong evidence for a conclusion to be sustained that Mphaphuli waived such rights. Yet, neither the arbitrator nor Bopanang alleged, let alone proved, that there had been a waiver of rights sufficient to allow the arbitrator to engage with Bopanang in the absence of Mphaphuli.

Arbitrator or valuer

[83] It was argued on behalf of Bopanang in the Supreme Court of Appeal (and in this Court too, albeit without vigour), that in this matter an arbitration *stricto sensu* was not intended, that in fact the arbitrator acted as a valuer and not as an arbitrator whose position was governed by the provisions of the Arbitration Act. Accordingly, the arbitrator had not been required to act in a quasi-judicial capacity in the discharge

[80] *Pretorius v Greyling* 1947 (1) SA 171 (W) at 177; *Mothupi* above n 78 at para 19.

[81] *Laws v Rutherford* 1924 AD 261 at 263. See too *Mahomed* above n 77 at paras 62 and 64; *Mothupi* above n 78 at para 19.

of his duties, but had merely to exercise an honest judgement.[82] While commenting that it seemed that the parties intended the Arbitration Act to apply to their dispute, the Supreme Court of Appeal found it unnecessary to decide the issue whether the arbitrator had in fact been a valuer, on the basis that this would not have affected its decision on the merits.[83] Suffice it to say that, while elements of the functions of a valuer might have been embraced in the arbitrator's mandate (and while it is understandable that the parties preferred to appoint someone who had expertise in the field covering their dispute), it is clear on a conspectus of all the circumstances that the arbitrator was required to act and in fact acted as an arbitrator (hence, Bopanang's application in terms of section 31 of the Arbitration Act for the award to be made an order of court). He was accordingly obliged to act in a quasi-judicial capacity.[84]

The arbitrator's duty to act in a quasi-judicial capacity

[84] A review of cases dealing with arbitrations reveals that the courts have emphasised the requirement of procedural fairness in the conduct of arbitral proceedings, where an arbitrator acts in a quasi-judicial capacity. It will be sufficient to consider some of these cases to illustrate the point. Needless to say of course that what they say must be understood in the context in which the issue arose.

[82] See *Estate Milne v Donohoe Investments (Pty) Ltd and Others* 1967 (2) SA 359 (A) at 373H-374C; and *Chelsea West (Pty) Ltd and Another v Roodebloem Investments (Pty) Ltd and Another* 1994 (1) SA 837 (C) at 843E.

[83] Above n 1 at para 22.

[84] See the comprehensive discussion of the different approaches required of arbitrators and valuers in *Chelsea West*, above n 82. I revert later to consider specific aspects arising out of the approach required of an arbitrator.

[85] In *Lazarus v Goldberg and Another*[85] the following passage appears:

> "According to the practice of the Roman-Dutch law, a submission to arbitration (Verblyf) was always subject to the *conditio tacita* that the arbitrator should proceed according to law and justice. Although our modern practice has somewhat departed from that of the Roman-Dutch law, in regard to the procedure for setting aside an award, the above principle, which has been well expressed by Cloete J, still exists at the present day. In *Croll qq. Kerr v. Brehm (2 Searle* at p. 229), that learned Judge says:
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> > 'Nothing is more clearly laid down in the textbooks than that arbitrators are judges in deciding the matters submitted to them, and that they ought to follow those broad rules laid down for judicial investigation; and no rule is more clear than that they should not proceed to examine parties or witnesses in the presence only of one party, that nothing may be done *inaudita altera parte* – so as to give the opposite party the opportunity of answering or rebutting such evidence.'
>
> A similar view was taken by Bell and Watermeyer JJ, in the same case, which is one quite in point in the present instance, and must be considered as a leading authority on the subject. This principle has always been strictly observed by the Court, even although, as put by Watermeyer J in *Croll's* case, 'substantial justice has been done between the parties', as appears from *MacDonald & Co v Gordon & Co* (1 R 251) and subsequent cases, as well as from the passage from Russell on Arbitration (7th ed. p. 191), cited at the Bar."[86]

[86] Citing a series of earlier cases, South African and English, the decisions in *Shippel v Morkel and Another*[87] and *Chelsea West*[88] followed suit. In the former case Van Winsen J is reported as follows:

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[85] 1920 CPD 154.

[86] Id at 157.

[87] 1977 (1) SA 429 (C).

"*Voet*, 4.8.1., states that 'there is a great correspondence between arbitrations and judicial proceedings' and that 'there is the same sequence of proceeding and proof' as in judicial proceedings (*Gane's* trans., vol. 1, p. 737); *Van Leeuwen*, bk. 5. ch. 94 (*Kotzé* trans.), says that arbitrators are required to 'pronounce an award according to the requirements of law and custom'. Our Courts have accepted that in deciding upon matters submitted to them arbitrators are required to follow, at any rate in broad outline, the precepts which govern the procedure employed in the course of judicial proceedings . . . . This would also appear to be the position in England . . . .

The similarity between proceedings in Court and before an arbitrator are also apparent from the terms of the Arbitration Act, 42 of 1965.

It can thus be said with confidence that it is well established by the cases in our Courts that the procedural rules applicable in an arbitration require that the proceedings should not be conducted in the absence of one of the parties. This appears from numerous cases in the South African Courts . . . .

Save in certain types of arbitration, the same principle has been applied by the English Courts . . . .

As Mr. Marais for second respondent rightly points out this rule can be modified were the parties to agree that the arbitrator be permitted to hear evidence in the absence of one of the parties. He submits that by clause 4 of the submission to arbitration the arbitrator may proceed ex parte 'in the event of either party failing after reasonable notice to . . . attend the hearing'.

If it could have been said that evidence has been received before the arbitrator in the absence of one party under the circumstances contemplated by clause 4 then that would have afforded protection to such proceedings."[89]

[87] In the latter case Seligson AJ expressed himself as follows:

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[88] Above n 82.

[89] Above n 87 at 434A-G.

"The position of an arbitrator in the true sense is very different [from that of a valuer]. He acts in a quasi-judicial capacity and must conduct himself accordingly. Whilst not obliged to observe the precision and forms of a court of law, the arbitrator must proceed in such a manner '. . . as to ensure a fair administration of justice between the parties' . . . . This includes the duty to afford the parties a proper hearing. Inherent therein is that the arbitrator must not examine parties or witnesses or conduct a hearing in the absence of one or either of the parties. If he does so he commits an irregularity which will result in his award being set aside. This rule has been established in a long line of cases . . .

> 'Courts of law jealously guard the rights of a person to be present at and heard at proceedings to which he is a party, and will only tolerate a departure from the rule which recognises this right in very special circumstances.'"[90]

[88] In *Burns & Co*[91] the following passage appears:

"Amongst the rules governing the administration of justice there is the elementary one which is stated in "Russell on Awards", 8th Ed. 134, in the following language:

> 'Except in the few cases where it is unavoidable, as where the arbitrator is justified in proceeding ex parte, both sides must be heard, and each in the presence of the other. However immaterial the arbitrator may deem a point to be, he should be very careful not to examine a party or a witness upon it, except in the presence of the opponent. If he err in this respect he exposes himself to the gravest censure, and the smallest irregularity is often fatal to the award.'

Nor does it matter whether the arbitrator was influenced by it. Lord ELDON, L.C. in *Walker v. Forbisher*, 6 Ves., 70, in setting aside an award, on the ground that evidence had been improperly admitted, although the arbitrator swore that the evidence had no effect on his award, said that no Court should permit an arbitrator to decide so delicate a matter as to whether a witness examined in the absence of one of

[90] Above n 82 at 845F-G.

[91] Above n 18.

> the parties had an influence on him or not; and in *Drew v. Drew*, 2 Macq, 1 Lord CRANWORTH said that the principles of universal justice required that the person who is to be prejudiced by the evidence ought to be present to hear it taken; and that an arbitrator entirely misconceived his duty who took upon himself to hear evidence behind the back of the party interested in controverting it.
>
> It has been decided by a long string of cases that infringement of that rule by an arbitrator is misconduct within the meaning of section 18 of our Arbitration Act, 24 of 1898. That being the principle of law which we are bound to apply".[92]

[89] In the result the arbitrator's award was declared abortive on the grounds that the arbitrator took evidence in the absence of one of the parties and that he had received a communication from one of the parties bearing on the merits of the matter. On the latter score the judgment included the following comment:

> "That may or may not have influenced the arbitrator in changing the view which he had expressed in the afternoon that an allowance should be made for this particular work. He says that it did not. But, as was said by Lord ELDON it is not permissible to say whether it did or not. That letter never came to the knowledge of the respondent until the award was made."[93]

[90] A similar approach was adopted in *Sapiero and Another v Lipschitz and Others*,[94] as appears from the following passage:

> "It is also a question whether the whole award is not bad on the ground of irregularity. Although it is true that an arbitration is usually regarded as a somewhat informal procedure still there are certain legal principles which govern that procedure. One of these principles is that no evidence must be given or produced

[92] Id at 462-3.

[93] Id at 464.

[94] 1920 CPD 483.

> before the arbitrator or the umpire in the absence of any one of the parties. It is common cause in this case that a certain letter was placed before Mr. Potgieter [the arbitrator] and that he read it. That letter was undoubtedly placed before Mr. Potgieter by Mr. Hotz with the object of influencing him. Mr. Potgieter very properly returned the letter to Mr. Hotz and said that he would take no notice of it but would decide the matter independently of the letter. The Court cannot now, however, go into the question as to whether Mr. Potgieter was influenced by the letter or not. I hold that the mere production and reading of that letter in the absence of the respondents constitute good ground for them to object to the award being made a rule of court." [95]

[91] In *Naidoo v Estate Mahomed and Others*[96] it was said, with reference to *Burns & Co*, that where an arbitrator hears evidence from one party in the absence of the opponent such action—

> "offends against the fundamental principles of justice, and although he may not appreciate in himself that he was doing an injustice, he in fact commits an injustice towards the other party to the submission, and his action would . . . be improper although not necessarily dishonest."[97]

[92] Even an agreement in the reference to arbitration that the arbitrator may take evidence without both parties being present does not dispense with the duty to observe the prescripts of natural justice. The headnote in *Landmark Construction (Pvt) Ltd v Tselentis*[98] reads as follows:

> "The parties had agreed to submit a dispute arising from a building contract to an arbitrator and it was agreed that further evidence would be taken without the presence

[95] Id at 486.

[96] 1951 (1) SA 915 (N).

[97] Id at 920.

[98] 1972 (1) SA 435 (R).

> of both parties at its taking. It appeared that the arbitrator had taken such evidence but had not apprised the respondent of the fact nor the contents of such evidence. In an application to have the award made an order of Court and a counter-application to have it set aside,
>
> *Held,* that, in deciding to receive further evidence, the arbitrator had to observe the requirements of natural justice, i.e. the need to apprise the parties of the content of the evidence so as to afford them a suitable opportunity for rebutting it or otherwise dealing with it, remained undisturbed.
>
> *Held*, accordingly, that the application should be dismissed and the counter-application should be granted."

[93] The principle that nothing must be done in the absence of any of the parties to the arbitration is nicely encapsulated in the following passage by McKenzie:[99]

> "The rule that nothing must be done *inaudita altera parte* has been strictly applied. Courts have refused to uphold awards in the following circumstances: where a party was given no opportunity of presenting his case, or was absent during the hearing, or during the giving of certain evidence; where a party was absent from a meeting with the arbitrators at which no new matter was introduced; and where one party was absent when another put a letter before the arbitrator who read it and handed it back with the remark that he would take no notice of it in reaching his decision. In one case where the parties had agreed that evidence could be taken without both parties being present, an award was nevertheless set aside on the grounds that where such evidence was taken the other party should have been apprised of the fact and given an opportunity to rebut such evidence. Where, however, a party was absent at a meeting of arbitrators at which the latter were not exercising any discretion or any judicial functions, but were merely calculating certain figures upon an agreed basis, it was held that there was no irregularity in the proceedings."[100]

[99] *The Law of Building and Engineering Contracts and Arbitration* 5ed (Juta: Cape Town, 1994).

[100] Id at 188-9.

[94] The same approach, in a criminal context, was taken by the Supreme Court of Appeal in *Roberts*,[101] and in this Court in *S v Jaipal*[102] where the following comment was made:

> "As stated above, contact between judicial officers and one party to the trial in the absence of the other does not accord with the ideals and imperatives of independent courts that function impartially and free from interference."[103]

[95] The common law principles applicable to arbitrations set out above are, in my judgement, not at odds with the Constitution; rather, the converse. It is to be emphasised that notwithstanding the parallels drawn between arbitrations and court proceedings in the authorities referred to, it is not suggested, nor does this judgment in any way do so, that the same level of procedural fairness required in court proceedings is to be required in arbitration proceedings. It is accepted that the concept of fairness in arbitrations is context-related.

[96] The arbitration agreement[104] in the present matter provided for the arbitrator to receive such documentation as either party wished to place before him, by a date preceding the commencement of the arbitration hearing, to require the parties to make

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[101] Above n 52.

[102] [2005] ZACC 1; 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC).

[103] Id at para 46. See too *SARFU* above n 77 at para 35 which reads as follows:

> "A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes."

[104] Quoted above at [7], clauses 4, 5 and 6.

available such further documentation as he stipulated and to liaise with Eskom's representatives and request Eskom to furnish him with such documentation as he required. Those provisions did not, however, entitle him to disregard the *audi alteram partem* rule.

Facts relating to the meetings and correspondence

[97] Two preliminary observations may be made. First, in their written submissions counsel for Mphaphuli echoed its stance in describing the meetings and correspondence in question as "secret". (During argument counsel preferred the less emotive and neutral epithet of "ex parte" when referring to the meetings and the correspondence.) This approach flowed from the fact that Mphaphuli only became aware of the meetings and the correspondence after receipt of the arbitration record. Had the review proceedings not been instituted, Mphaphuli would not have come to know thereof. Second, it is unnecessary in this judgment to give consideration to the first of the three meetings in question: counsel did not press reliance thereon during argument.

The two meetings

[98] It is common cause that the arbitrator held two further ex parte meetings with Bopanang, in the absence of Mphaphuli, at which matters relating to the arbitration were discussed, namely on 2 June 2004 and on 29 July 2004 (the latter meeting being shortly before the arbitrator published his award on 23 August 2004).

[99] The deponent to Mphaphuli's supplementary founding affidavit in the High Court states, inter alia, as follows: Mphaphuli has no idea what was discussed by the arbitrator and Bopanang at the meetings, other than what was stated by the arbitrator in his chronology. No notes of the contents of the meetings or the nature of the discussions were ever furnished to it. It presumed, however, that Bopanang furnished the arbitrator with comments.

[100] In its supplementary answering affidavit in the High Court, Bopanang stated, in respect of the meeting of 2 June 2004, inter alia, as follows: On 29 April 2004 the arbitrator sent a query to both parties indicating that it was not clear to him where particular items were to be installed as it was unclear from the drawings as to their intended usage. (It may be interposed here that in response to the query Mphaphuli, on 26 May 2004, furnished the arbitrator with a list of estimates of items which had been installed, but not measured; the list was copied by the arbitrator to Bopanang.) The arbitrator had clearly become confused when he could not find the relevant items specified in the schedule of quantities with reference to the drawings. Bopanang pointed out "the aforegoing" to the arbitrator during a telephonic conversation, but he found it difficult to follow the explanation. Bopanang then volunteered to visit the arbitrator at his office as it would be easier to furnish an explanation *inter praesentes*. That visit took place and the explanation was given. For that purpose Bopanang furnished the arbitrator with an explanatory sketch. The arbitrator recorded the explanation. Quantities were not addressed at the meeting as the items had already been measured. All that Bopanang did was to explain the "practical realities" – why

the particular items were there although same could not be related to the drawings. The technical aspects addressed were only for a better understanding by the arbitrator of the matters in question and in no way affected the quantities. As the items had already been measured the discussion did not concern the merits of the award, but only served to enlighten the arbitrator to a better understanding of the measurements already done and agreed to between the parties. The discussion, which was not of long duration, did not at all affect the ultimate award. Mphaphuli, knowing full well that the relevant items had already been measured, only had itself to blame if it elected not to point out to the arbitrator what the position was and to respond on the aspects of the technical issues in question.

[101] In respect of the meeting of 29 July 2004 Bopanang stated inter alia as follows: On 23 July 2004 Bopanang's attorney addressed a letter to the arbitrator inquiring about the progress in the matter. The arbitrator's written response, dated 26 July 2004, recorded that he had arranged a meeting with "Gerhard" (Bopanang's representative) on 29 July 2004 "*to resolve the final outstanding issues*" (my emphasis), and that the adjudication would follow shortly thereafter. These developments were to be seen against the background of the arbitrator's earlier request, on 9 July 2004, to both parties "to confirm certain outstanding queries". Bopanang responded by way of certain handwritten notes on the documentation received from the arbitrator. The arbitrator experienced difficulty in securing a response from Mphaphuli and therefore had "difficulties pertaining to the technical aspects". The quantities were already established by way of re-measurement and

deductions therefrom and agreed to by the parties. A telephonic conversation between Bopanang and the arbitrator brought the latter's apparent confusion to the fore. It was apparent that the arbitrator did not understand the structures and the materials used, as measured. Again, it proved difficult to furnish an explanation over the telephone and Bopanang then tendered its "technical explanation" to the arbitrator at his offices on 29 July 2004. The meeting lasted a maximum of thirty minutes and did not canvas the quantities already measured and agreed to on site, but only *why* the particular items had to be installed. The discussion had nothing to do with the merits or the ambit of the arbitrator's mandate, but only served "to enlighten him to a better understanding of *the issues involved*" (my emphasis). The ultimate award was not affected, the measurements having already been done.

[102] In his supplementary answering affidavit in the High Court the arbitrator confirmed the statements of Bopanang and intimated that he did not wish to comment further on Mphaphuli's averments, save that he added that the purpose of the meetings was "simply to calculate certain figures, and to clarify the use of certain items by the parties". He averred further that at no stage during the meetings was he expected to "exercise a judicial function or discretion".

[103] The arbitrator acknowledged, however, that when he arranged the meeting of 29 July 2004 with Bopanang:

> "I was during that period busy consolidating and finalising the results of our inspection and measurements with the aim of making the award. In this process, I picked up further crucial queries relating to the fundamental method of determining

> the total length of the cables . . . which I immediately forwarded to the parties under cover of a letter dated 27 July 2004."

He further stated:

> "After receipt of the above information [i.e. the responses from the parties to his queries, including what was conveyed to him orally by Bopanang], I was in a position to determine what work had been done by the Second Respondent and what amount (if any) Applicant owed it. I accordingly sat down and, after due consideration of all the facts placed before me, I firstly consolidated the results of our inspections and measurements on a single spreadsheet. Thereafter and on the basis of the figures contained therein, I completed the award."

[104] In response to the supplementary answering affidavits the deponent to Mphaphuli's replying affidavits pointed out, inter alia, that there were contradictions in the explanations proffered by Bopanang and the arbitrator and he registered a non-acceptance of the explanations. More importantly, the deponent placed on record that "the clarification of the use of certain items" related to allegations of fact which were still in dispute between the parties and were material to the dispute between them. A further averment was that the second meeting had resulted in the arbitrator rejecting certain of Mphaphuli's submissions in respect of Bopanang's claims and that "misconceptions" revealed in the arbitrator's findings could have been avoided had he liaised with Eskom. Bopanang's reply thereto was that Mphaphuli was impermissibly seeking to have his opinions preferred to those of the arbitrator. The response missed the point, that procedural unfairness was the subject of the complaint. In this regard it bears repetition that in its supplementary founding affidavit Mphaphuli averred, and it

was not denied, that Bopanang's comments to the arbitrator were at no stage communicated to it, Mphaphuli.

[105] It is apposite to add further that, by contrast, all discussions which the arbitrator had with Mphaphuli were held in the presence of Bopanang. This was pertinently alleged by Mphaphuli in its supplementary founding affidavit, and was not placed in dispute by either the arbitrator or Bopanang.

The correspondence

[106] The first aspect requiring mention is that in its first answering affidavit Bopanang pertinently alleged that the arbitrator had "requested further information and/or documentation from both parties *always* with copies thereof and replies sent to the other party." (My emphasis.)

[107] In its supplementary founding affidavit Mphaphuli confirmed that the record disclosed that all of its written comments in response to the arbitrator's various queries were copied to Bopanang or its attorneys. Initially, all correspondence from Bopanang to the arbitrator was similarly copied to Mphaphuli. (In my judgement, this procedure speaks volumes of the intention of the parties when concluding the arbitration agreement.) However, the arbitrator subsequently failed to adhere to the policy of copying communications received from Bopanang to Mphaphuli. Specifically, reference was made to three letters. Included was a letter dated 12 December 2003, addressed by Bopanang to the arbitrator in response to a request for

submissions on various aspects. Therein Bopanang criticised the contents of a fault report by Eskom dated 13 March 2003 and claims for remedial work made by AA Electrical. Counsel offered no submissions in respect of this letter, however, and focused on the two letters referred to below.

[108] The first was a letter dated 24 February 2004, addressed by Bopanang's attorneys to the arbitrator in which comments were furnished on, inter alia, certain claims registered by AA Electrical and certain transformer areas. It was correctly contended that these issues were closely connected to the arbitrator's assessment of amounts due. The arbitrator stated that the failure to favour Mphaphuli with a copy of the letter was the result of a bona fide oversight on his part.

[109] The second was a letter dated 19 July 2004, addressed by Bopanang to the arbitrator. It had been preceded by a letter dated 9 July 2004, addressed by the arbitrator to both parties in which a detailed list of queries was set out. Bopanang's letter of 9 July 2004 to the arbitrator furnished detailed answers to and comments on the arbitrator's queries.

[110] The queries raised by the arbitrator were substantive and technical in nature. They related, inter alia, to the following aspects:

(a) the occurrence of strain assemblies;

(b) whether a terminal assembly would occur at each pole, other than where it would be an intermediate assembly;

(c) whether Bopanang supplied Delta structures for the remaining transformers supplied by other entities.

[111] It was Mphaphuli's averment that Bopanang's comments to the arbitrator contained numerous material misrepresentations and allegations some of which were false or misleading, and all of which significantly influenced the arbitrator's award. Had Bopanang's comments been made available to it, Mphaphuli would have been able to point out to the arbitrator where the comments were false and/or misleading.

[112] By contrast, so Mphaphuli further averred, its comments on the query letter of the arbitrator, which were furnished on 16 August 2004, were copied to Bopanang's attorneys. This averment was not placed in dispute.

[113] In its supplementary answering affidavit Bopanang registered the complaint that it was not afforded the opportunity of responding to Mphaphuli's comments in that, in forwarding same to Bopanang, the arbitrator stated that no further submissions would be allowed unless specifically requested. It is clear, however, that no such request was made. If it had been, it would have had to be granted. Bopanang tendered no further response to the allegations of Mphaphuli set out above. In particular, it did not deny that its letter contained numerous material representations, or that some of them were false or misleading, or that they all significantly influenced the arbitrator's award.

[114] As with the first letter, the arbitrator ascribed his omission to forward a copy of Bopanang's response to his list of queries to Mphaphuli to a bona fide oversight on his part.

[115] The further response of the arbitrator to Mphaphuli's allegations proceeded as follows. He was not aware of any false and/or misleading allegations in Bopanang's comments, and in the absence of specific allegations on that score, he was unable to comment on the materiality or otherwise of his omission to copy Bopanang's comments to Mphaphuli. The arbitrator did not deny that the letter contained representations that were material to his award.

[116] In its replying affidavit Mphaphuli indicated various allegedly incorrect statements in Bopanang's reply to the arbitrator's queries. Counsel highlighted three aspects. I briefly note each in turn, together with the arbitrator's response thereto (contained in the rejoinder affidavit filed by the arbitrator in the High Court). The reason I do so will appear later.

[117] The first related to terminal assemblies and Mphaphuli indicated that on this score Bopanang's comments were incorrect in certain respects. The arbitrator's response was, however, that his award was in fact in accordance with Mphaphuli's objections.

[118] Mphaphuli's second objection was that Bopanang did not, as claimed, supply any Delta structures for transformers supplied by other contractors (as had in fact earlier been conveyed by Mphaphuli to the arbitrator on 26 May 2004). It was pointed out that Delta structures are installed only where a particular type of transformer is involved, and there were only three such transformers in the whole project. It was further stated that in terms of the arbitrator's award there were no transformers installed in eight of the 19 transformer zones, yet the arbitrator awarded 19 Delta structures with transformers despite the fact that Bopanang only claimed 14.

[119] The arbitrator responded as follows: In his letter of 9 July 2004 he had specifically asked whether Bopanang had supplied the Delta structures for the main transformers supplied by other contractors. The response of Bopanang was unequivocal and affirmative. Mphaphuli did not answer the question, and from its silence the arbitrator inferred that the contractor had indeed supplied these Delta structures. He found it difficult to understand how Mphaphuli could say that Bopanang had supplied no Delta structures: the price list initially contained a quantity of 19, which implied one Delta structure per transformer zone; the transformers were physically measured on site and the number (of Delta structures) included in the award was therefore correct.

[120] It may be noted *en passant* that this response of the arbitrator, contained in his rejoinder affidavit, was not in accordance with his response in his initial answering affidavit. Although this latter response referred also to the letter of 9 July 2004, it

appears that the arbitrator's comments therein related to the replies he received to an earlier letter of 29 April 2004. The comments read as follows:

> "I specifically requested the parties in my letters dated 29 April 2004 and 9 July 2004 to inform me what the estimated quantities thereof were and also to indicate who installed the Delta structures for the remaining transformers. In its reply, [the reference is to the letter of 26 May 2004 referred to in paragraph 118 above], Applicant [Mphaphuli] indicated that none of these items were used. I did not receive a specific response from Second Respondent [Bopanang]. However, I rejected Applicant's response for the simple reason that the pricing list makes it clear that all transformers had to be installed on Delta structures. Second respondent installed 19 transformers and for that reason I allowed for a corresponding number of Delta structures." (Footnotes omitted.)

[121] The third objection related to the quantity of strain assemblies. The complaint was that the arbitrator should have ascertained the correct state of affairs from Eskom's specifications and drawings.

[122] The arbitrator's response was that the Eskom drawings did not form part of the record as same had never been placed before him. He emphasised that what was on site was physically measured and his award was based on those results.

The arbitrator's mandate in respect of amounts to be awarded to Bopanang

[123] It will be remembered that when the parties reached agreement that their dispute be referred to arbitration they further agreed to exchange pleadings. Pursuant thereto Bopanang submitted its statement of claim in which it claimed payment of the sum of R656 934,44 (together with interest on the component amounts thereof from

various dates), made up as reflected in the invoices annexed to the statement of claim. Incorporated in the statement of claim were the papers filed by Bopanang in the High Court in its application for an interdict against Eskom, which included an affidavit by Bopanang's representative verifying that the invoices constituted an accurate record of the work it had done. Further pleadings were filed by both parties. At the meeting with the arbitrator on 7 October 2003 he was furnished with copies of all the pleadings that had been filed.[105]

[124] It is a fair inference that the above history was the genesis of the contents of the preamble to the arbitration agreement,[106] which recorded the details of Bopanang's claim as set out in its statement of claim.

[125] It is common cause that the arbitrator, in making his award, failed to adhere to the pleadings and that, in the first place, he in fact awarded Bopanang a series of amounts in excess of what it had claimed. Involved were some nine items in respect of which, in each case, the arbitrator's award substantially exceeded the amounts claimed by Bopanang. In the result, the award embraced a total of R352 007,50 in respect of the nine items as against a total of R91 100,00 claimed by Bopanang.

[126] In the second place the arbitrator ruled that the total amount of R339 998,83 awarded was "subject to interest at 0.5% per week from 6 October 2002, when the payment was originally due". This was not in accordance with the relief sought in

[105] Above [5]-[7]

[106] Quoted above at [7].

Bopanang's statement of claim, referred to in the preamble to the arbitration agreement, which sought interest on the amount of R143 395,53 from 6 October 2002 and interest on the balance of its claim only from 21 April 2003.

[127] From the outset of the review proceedings Mphaphuli adopted the stance that in terms of the arbitrator's mandate any amounts to be awarded to Bopanang would be limited to those claimed by it. In its initial founding affidavit it stated that the arbitrator was expected to verify the work allegedly done by Bopanang, as well as the costs invoiced therefor; he was not expected to award any costs for work not carried out or at prices higher than those provided for in the price list or for work never claimed by Bopanang.

[128] In its supplementary founding affidavit in the High Court, Mphaphuli persisted with the stance that the arbitrator was obliged to have regard to the pleadings of the parties and the supporting documents attached thereto, which had been furnished to him. It stressed that Bopanang had at no stage sought to amend its pleadings to increase the amount claimed. Yet, so it was contended, the arbitrator failed to have regard to the pleadings, which were not even mentioned in his award. Accordingly, he had failed to perform his mandate and had exceeded his powers. It was further stressed that the fact that the arbitrator could not award Bopanang higher quantities than those claimed by it was so obvious that neither party thought it necessary to remind the arbitrator thereof.

[129] It is also important to note that from the outset and on the basis of Mphaphuli's founding papers, both Bopanang and the arbitrator, as appears from their answering affidavits, understood that one of Mphaphuli's grounds of review was that the arbitrator exceeded his powers by failing to have regard to the pleadings and invoices.

[130] Bopanang's response to Mphaphuli's averments was in essence that Mphaphuli had misconstrued the arbitration agreement and submitted that in terms of clause 1 thereof[107] the arbitrator had to determine the value of the work done as determined by inspection and measurement by him as provided for in clause 7, with the co-operation of the parties; in other words that the arbitrator was not bound by the claim and invoices submitted by Bopanang.

[131] In answer to Mphaphuli's allegations in its initial affidavit set out above, the arbitrator initially stated that, having studied the documentation handed to him (which at that stage essentially comprised only the pleadings of both parties), he realised that he would not be in a position to determine if any payment was in fact due in terms of the contract unless the quantities were re-measured on site. The parties therefore agreed, at his instance, that his mandate be extended to include the physical measurement of the work done on site. This was formalised in the arbitration agreement concluded by the parties.[108] It was therefore envisaged that his adjudication should be based on a re-measurement of the work executed, to be done in co-operation with the parties.

[107] Above at [7].

[108] Above at [7], clause 7.

[132] I have already in another context recorded that the arbitrator made it clear that after the re-measurement (on which he said there was agreement) he was still required to embark on a determination of what part of the work re-measured had actually been done by Bopanang (on which there was not agreement).[109]

[133] His further response to Mphaphuli's allegations set out above was in consonance with this stance. He agreed that he had been obliged to verify the work done by Bopanang. However, so he said, it was at all times understood that Bopanang was to be compensated for work it had actually done, irrespective of what was reflected in its invoices, i.e. it was never the understanding that it would be bound by the invoices and would therefore not be able to claim for work it had done but had failed to invoice or had incorrectly invoiced. The invoices had had no other function than to serve as a basis for interim payments claimed by Bopanang during the currency of the agreement. That the parties had not understood his mandate to be restricted as contended for by Mphaphuli was borne out by the fact that neither party ever submitted that Bopanang would not be entitled to compensation for work actually done, but not included in an existing invoice.

[134] He further sought to emphasise that it would not have made any sense to limit Bopanang's claim, irrespective of the amount of work done, to only that amount which it had in fact claimed. Otherwise the re-measurement exercise would have been

[109] Above at [59].

a waste of time and resources if the sole purpose was only to "reduce" Bopanang's claim. It was inconceivable that Bopanang would have agreed to the arbitration under such conditions as it would have had nothing further to gain.

[135] In his answer to Mphaphuli's supplementary founding affidavit, however, the arbitrator stated as follows:

> "I respectfully agree that on a strict reading of the arbitration agreement, I was obliged to take into account the pleadings exchanged by the parties, and all supporting documents attached thereto.
>
> However, as I have repeatedly indicated above, the parties (as they were entitled to do) restricted my mandate during the arbitration process to the physical re-measurement of the work that had been done, and a determination of what was reasonably due by any of the parties to the other on the basis of such re-measurement."

To that he later added the following:

> "I categorically deny that it was at any stage contemplated that I could not award higher quantities than those claimed by [Bopanang] in its invoices and other documentation. The intention was, at all relevant times, that the result of the physical re-measurement would be conclusive."

[136] In his rejoinder affidavit the arbitrator made it clear that it was his contention that during the arbitration process the parties reached agreement that the result of the physical re-measurement would be conclusive. He then for the first time added that the agreement was also that the quantities and figures stated in the invoices submitted by Bopanang had to be ignored.

[137] As regards the award in respect of interest the arbitrator explained that he had to "make an equitable decision as far as interest was concerned", that it was "not possible to determine on what date [Bopanang] became entitled to payment in respect of any particular work it had done" and that "in view of this practical difficulty" he simply decided to take the date 6 October 2002 (which was in fact the earliest date possible) as the starting point for the running of interest on *all* the amounts.

The findings of the High Court and the Supreme Court of Appeal

[138] I have already noted[110] that for all practical purposes the High Court failed to consider whether the award was made following on unfair procedural irregularities. It did not consider or even mention the constitutional right to a fair hearing. Instead, it insisted on viewing the review application before it as an impermissible attempt in effect to appeal against the arbitration award because it also engaged on aspects which otherwise had a bearing on the merits of the award.

[139] After noting that the allegation of bias was founded on the meetings referred to earlier, the High Court briefly analysed what it considered were the relevant facts relating to the meetings and on the basis of that analysis it concluded that there was no merit in the submission that the arbitrator was biased in favour of Bopanang.

[110] Above at [38]-[48].

[140] In respect of the second meeting the High Court contented itself with the following observations. The arbitrator requested the parties on 29 April 2004 to supply him with certain information. Bopanang made oral submissions. Mphaphuli replied in writing. Both parties were therefore afforded the opportunity to be heard. They, however, chose to supply the arbitrator with the required information in their own way. In respect of the third meeting, the comments of the High Court were restricted to the following. This meeting too was the result of the parties responding to a query raised by the arbitrator. Again, Bopanang replied in writing and made oral submissions, and Mphaphuli only furnished a written reply. It was significant, however, that the arbitrator decided the question raised in the third meeting in favour of Mphaphuli.

[141] It would seem that it was the High Court's view that the circumstance that both parties were given an opportunity of being heard was all that was required of the arbitrator, and sufficient to dispose of the issue of bias (the only issue that the Court was considering at that stage).

[142] What the High Court overlooked, however, was that whatever Mphaphuli had communicated to the arbitrator was copied to Bopanang, but on the other hand Mphaphuli was not made privy to the "oral submissions" made by Bopanang to the arbitrator on either of the occasions in question. The High Court failed, and in so doing misdirected itself, to consider the fact that the two ex parte meetings constituted a material infraction of the arbitrator's quasi-judicial duties (which in respect of the

last meeting, was not undone by the decision reached by the arbitrator) laid down in the authorities referred to earlier[111] and the impact it had on the fairness of the arbitration proceedings. The remarks made below concerning the comments of the Supreme Court of Appeal on the third meeting are also relevant here.[112]

[143] The Supreme Court of Appeal's approach to the meetings is set out in paragraphs 18 and 19 of its judgment.[113] I deal below with certain factual issues arising out of the comments made in these paragraphs. At this stage attention will be given to certain legal aspects. I have already found that section 34 of the Constitution finds application in arbitration proceedings and that Mphaphuli did not waive its right to a fair hearing to which it was entitled in terms of the section. The approach of the Supreme Court of Appeal, as reflected in the stated paragraphs, does not take account of that right (and it may be pointed out in this regard that the inference referred to in the quotation from *Total Support* in paragraph 19 of the judgment of the Supreme Court of Appeal, relating to an arbitrator's state of mind, is not a requisite for a court to hold that the precepts relating to procedural fairness were not adhered to). This approach was due to its finding that Mphaphuli was restricted to invoking the grounds of review set out in section 33(1) of the Arbitration Act.

[111] Above at [84]-[94].

[112] Below at [145]-[146].

[113] Above n 1. See also above at [66].

[144] The Supreme Court of Appeal categorised the meetings as "innocuous".[114] The categorisation is flawed, for reasons of fact and law.

[145] The Supreme Court of Appeal's comment that "[t]he purpose of those meetings was simply to verify certain figures and to clarify the use of certain items" was based on one of the arbitrator's averments, recorded in paragraph 102 above. However, also recorded is the arbitrator's confirmation of the statements made by Bopanang. The latter's explanations[115] demonstrate that the meetings did not have the restricted purpose found by the Court, but were about substantive issues that were related to the issues to be determined by the arbitrator – notwithstanding Bopanang's claim that the discussions did not concern the merits of the award or affect the ultimate award. This is made the clearer by the arbitrator's own further comments[116] and Mphaphuli's response thereto.[117] The arbitrator held repeated telephone discussions and meetings with one party on relevant issues. His final meeting with the party was arranged in formal fashion, on three days' notice, but without notice to the other side. It took place at a time where, on his own version, he was finalising his results and had found it necessary to raise further "crucial queries". The purpose of the 29 July 2004 meeting was to "resolve the final outstanding issues" ahead of his decision which was to follow shortly thereafter. "Innocuous" was in the circumstances a wholly inappropriate epithet.

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[114] Above n 1 at para 18.

[115] Above [100]-[101].

[116] Above [103].

[117] Above [104].

[146] The Supreme Court of Appeal opined that the meetings were innocuous "against the backdrop of the arbitration agreement and the context of the arbitrator's mandate" and that the purpose of the meeting, as found by it, "fell within the parameters of [the arbitrator's] mandate."[118] (Seemingly, it is implied that all rights in terms of section 34 of the Constitution were waived by Mphaphuli.)

[147] This approach cannot be supported. As counsel for Mphaphuli argued, there is no factual basis for the conclusion that the arbitration agreement or the arbitrator's mandate permitted him to hold meetings with Bopanang in the absence of Mphaphuli. No explicit or implicit provision to that effect is contained in the arbitration agreement and, indeed, as shown below, neither the arbitrator nor Bopanang contended otherwise. On the contrary, clause 7 of the agreement provided expressly that "[e]ach party . . . shall appoint representatives to attend the physical inspection and measurement [by the arbitrator]." As counsel further pointed out, as a matter of fact, both parties took their right (and obligation) to be present at the inspection and measurement seriously. Bopanang recorded that both parties were represented at each site inspection and measurement held in terms of the arbitration agreement. In substance, the arbitrator confirmed this statement. In these circumstances counsel validly argued that once it is clear that the parties had a right and duty to be present at a physical inspection and measurement, it is inconceivable that it was their intention that following on the conclusion of the inspection and measurement, the arbitrator

[118] Above n 1 at para 18.

would be allowed to have discussions thereanent and about the arbitration with one party without the other being present.

[148] In fact, in its supplementary founding affidavit in the High Court, Mphaphuli states, directly contrary to the finding of the Supreme Court of Appeal, as follows:

> "The arbitration agreement did not mandate the Arbitrator to conduct meetings with the parties for the purposes of gathering evidence and in particular did not mandate the Arbitrator to convene such meetings with only one of the parties. Had [Mphaphuli's] attorneys not obtained the arbitration record, [it] would never have known that these meetings took place.
>
> Such meetings were not authorised by the arbitration agreement."

(Mphaphuli added that the meetings also "go to bias", an aspect to which I revert later.)

[149] Neither Bopanang nor the arbitrator takes issue with the above averments of Mphaphuli. Instead, in substance they seek to suggest only that the meetings did not affect the ultimate outcome of the arbitration (a stance, as will be shown below, which is impermissible in law).

[150] The finding is inescapable that what occurred amounted to a material procedural irregularity, resulting in unfairness sufficient, in terms of the authorities referred to earlier, to vitiate the arbitrator's award and warrant its setting aside by this

Court. [119] In reaching a contrary decision, the High Court and the Supreme Court of Appeal failed to interpret the Arbitration Act in accordance with the Constitution.

[151] For the sake of completeness, it may be added that the considerations discussed above at the same time vitiated the arbitrator's award on the basis that the arbitrator misconducted himself in relation to his duties as arbitrator and/or that he committed a gross irregularity in the conduct of the arbitration proceedings and/or that the award was improperly obtained, as envisaged in section 33(1) of the Arbitration Act.[120]

[152] However, even were the epithet "innocuous" to be apt, that would, as a matter of law, not avail against Mphaphuli's claim. Counsel for Mphaphuli accepted that in the case of some irregularities resulting in unfairness it may be permissible and necessary to look at the nature of the prejudice flowing therefrom. That issue, they argued, did not arise *in casu* where the nature of the infraction resulted in a failure of justice per se. I agree. Again, the authorities referred to earlier[121] (and those referred to below) have made clear that where a party is wrongly denied a hearing, where an ex parte meeting is held by the arbitrator with one of the parties and aspects bearing on or relating to the merits of the dispute between the parties are the subject of discussion, the result is a fundamental infraction of the requirements of fairness. It matters not, and the court does not enquire into, what the party denied its lawful opportunity would have said or whether, on the face of it, justice was done between the parties, or

[119] Above at [84]-[94]. See further the comments in [153] *et seq* below.

[120] Above n 14.

[121] Above [84]-[94].

whether or not the arbitrator was influenced by what was said at the meeting. Neither the arbitrator nor the other party is entitled to proffer such latter propositions. The Supreme Court of Appeal accordingly misdirected itself in making the comment, and relying thereon, that the meetings "had no effect whatsoever on [the arbitrator]".

[153] Courts should not lightly assume that the right to be heard has no application. As Goldstone J put it in *Traube and Others v Administrator, Transvaal, and Others*[122] (a matter involving an administrative decision):

> "As I understand the law, if a person is wrongly denied a hearing in a case where he should have been given one, no matter how strong the case against him, the denial of the hearing is a fatal irregularity. In *General Medical Council v Spackman* 1943 AC 627 at 664-5 Lord Wright said:
>
> > 'If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision.'"[123]

[154] In *Administrator, Transvaal, and Others v Zenzile and Others*[124] a similar approach was adopted:

> "It is trite, furthermore, that the fact that an errant employee may have little or nothing to urge in his own defence is a factor alien to the inquiry whether he is entitled to a prior hearing. Wade *Administrative Law* 6 ed puts the matter thus at 533-4:

[122] 1989 (1) SA 397 (W).

[123] Id at 403D-E.

[124] 1991 (1) SA 21 (A).

> 'Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly.'

The learned author goes on to cite the well-known dictum of Megarry J in *John v Rees* [1970] Ch 345 at 402:

> 'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'"[125]

[155] The comments in paragraphs 150 and 151 above are of application.

[156] As noted before,[126] neither the High Court nor the Supreme Court of Appeal canvassed the ex parte correspondence. This omission is inexplicable.

[157] The authorities referred to earlier[127] reflect that the same principles applicable to ex parte meetings between an arbitrator and one of the parties apply *mutatis mutandis* to ex parte correspondence between an arbitrator and one of the parties. Counsel for Mphaphuli accepted, correctly, that under appropriate circumstances the

[125] Id at 37C-F. See too the quotation from *Roberts*, above n 52; *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at para 204; and *Zondi v MEC for Traditional and Local Government Affairs and Others* [2005] ZACC 18; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 112.

[126] Above at [55] and [62].

[127] Above at [84]-[94].

question of materiality may have to be considered in relation to ex parte correspondence, depending on the nature thereof.

[158] It is not in dispute that the letter of 19 July 2004 canvassed aspects that were material to the issues between the parties.

[159] The resolution of the factual disputes between Mphaphuli and the arbitrator adverted to in paragraphs 116 to 122 above is not, and cannot be, the subject of this judgment. They do, however, underscore the materiality of the contents of the letter.

[160] The important aspect is that on a material issue the arbitrator, on his own showing, received (and acted on) representations made to him by Bopanang, without Mphaphuli being afforded an opportunity of responding thereto.

[161] It should be stated that the provisions of clause 5 of the arbitration agreement[128] are of no assistance to the arbitrator or Bopanang. The fact that the arbitrator was entitled to require any of the parties to make such documentation available as he may have required, did not entitle him to disregard the prescripts of natural justice. In terms of the authorities cited earlier,[129] he nevertheless incurred the obligation to refer Bopanang's ex parte correspondence to Mphaphuli.

[128] Quoted above at [7].

[129] Above [84]-[94], specifically, *Landmark Construction*, above n 97.

[162] The fact that the two letters in question were not sent by the arbitrator to Mphaphuli because of a "bona fide oversight" is not a relevant consideration. As was explained in *Rose v Johannesburg Local Road Transportation Board*:[130]

> "The fact that they or any of them [the members of the board] acted from excellent motives and feelings will not avail them if they have acted contrary to a well-settled principle of law in circumstances which may seem to affect the justice of their decision."[131]

[163] Again, the comments in paragraphs 150 and 151 above are of application.

[164] Neither the High Court nor the Supreme Court of Appeal adverted pertinently to the issue whether the arbitrator, in making any award in favour of Bopanang, was bound by Bopanang's pleadings, which detailed its claim as substantiated by the invoices incorporated in its statement of claim, or to the matter of amounts awarded which were in excess of those claimed. The High Court's relevant comments were that Mphaphuli's papers reflected an impermissible attempt in effect to appeal against the award of the arbitrator. The Supreme Court of Appeal commented that by submitting their dispute to arbitration the parties had waived their right to have the merits of their dispute re-litigated or reconsidered, and that an error of fact or law, even a gross error, would not per se justify the setting aside of the award – it would at best be evidence of misconduct.

[130] 1947 (4) SA 272 (W).

[131] Id at 289.

[165] In the remarks that follow I do not lose sight of the circumstance that it is often the case that arbitration is resorted to in order, inter alia, to avoid the niceties of pleading. However, I conclude that in fact the arbitrator was bound by the pleadings. The reasons for this conclusion follow.

[166] It should immediately be emphasised, first, that the preamble to the arbitration agreement[132] states in terms what claim Bopanang was pursuing, as instituted by it. Second, as clause 4 of the arbitration agreement recorded, the arbitrator was placed in possession of Bopanang's pleadings, which incorporated the invoices. Third, clause 10 of the arbitration agreement precluded any variation thereof unless same was reduced to writing and signed by, or on behalf of, the parties.

[167] Further, I do not lose sight of the fact that clause 1 of the agreement records that the purpose of the arbitration was to determine whether payment was due in terms of the contract between the parties, and if so, the extent thereof, and that a final assessment of moneys reasonably due by either party to the other was required to be made by the arbitrator. The fact remains that the claim of Bopanang was placed on record and, as would be the position in ordinary civil litigation, that was the claim which Mphaphuli came to the arbitration to meet.

[168] As was stated in *Interbulk Ltd v Aidan Shipping Co Ltd, The "Vimiera"*:[133]

[132] Above at [7].

[133] [1984] 2 Lloyd's Rep 66.

> "The essential function of an arbitrator, indeed a judge, is to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain alive issues. If an arbitrator believes that the parties or their experts have missed the real point – a dangerous assumption to make, particularly where, as in this case, the parties were represented by very experienced counsel and solicitors – then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of material justice to put the point to them so that they have an opportunity of dealing with it."[134]

[169] The arbitrator's initial response to Mphaphuli's averments[135] does not support his stance that he considered that he was entitled to ignore the pleadings or the invoices. Rather, on his own version, the agreement he refers to was simply that his mandate "was extended" to include the physical measurement, not that this would be the full extent of his mandate. However, he did later allege[136] that the common understanding was that Bopanang was to be compensated for work actually done by it, irrespective of what was reflected in its invoices. The comment may be made, however, that the basis on which the arbitrator sought to found this common understanding, namely that neither party ever suggested otherwise, is unpersuasive. An absence of contrary comment by either party would carry more weight in respect of a stance that Bopanang was bound by its pleadings. Moreover, as pointed out below, the arbitrator later changed tack, no longer relying on an understanding, but in fact alleging an actual agreement.

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[134] Id at 76.

[135] See above at [131].

[136] See above at [133].

[170] Two further averments in the arbitrator's initial response do not bear scrutiny. First, the contention (not raised by Bopanang) that the invoices, previously sent by Bopanang to Mphaphuli, had solely served as a basis for interim payments during the currency of the agreement, may be based on the arbitrator's interpretation of the contract between the parties. Nevertheless, it bears emphasis that the selfsame invoices were incorporated in Bopanang's statement of claim.

[171] Second, the arbitrator's comment that it would be a waste of time if the sole purpose of the re-measurement would be to reduce Bopanang's claim and that Bopanang would have had nothing to gain from the arbitration,[137] need only to be stated to be rejected. The very dispute between the parties was whether Bopanang had done the work it claimed for. Re-measurement would have contributed to the resolution of that issue, *but it could only have done so on the basis of the existing pleadings and invoices*. The gain that would have accrued to Bopanang was obvious: to the extent that the re-measurement, and the arbitrator's determination of what portion of the work re-measured was done by Bopanang, established Bopanang's existing claims, it would have been successful.

[172] The arbitrator's stance in his further answering affidavit and his rejoinder affidavit[138] was somewhat different to his initial response. He acknowledged that on a strict reading of the arbitration agreement he *was obliged to take into account the pleadings exchanged by the parties and all supporting documents attached thereto* (to

[137] Above at [134].

[138] Above at [135] and [136].

which the preamble to the arbitration agreement and clause 4 thereof made reference). But he contended that during the arbitration process the parties reached a further agreement and restricted his mandate to the physical re-measurement, the results of which would be conclusive, and that the invoices had to be ignored.

[173] However, in the first place, this contention, which in itself embraced contradictions and inconsistencies, did not square with his other averment that after the re-measurement he was still required to embark on a determination of what portion of the work re-measured had been done by Bopanang. This point was emphasised by Mphaphuli, which stated that the purpose of the inspections and measurements was to establish empirically what work had been done on site whereafter it had to be determined, in the light of the contract between the parties, which entity did what work and what compensation was due to Bopanang. Second, the arbitrator did not see fit to explain how or when it was that the further agreement was reached. Third, any such further agreement would have been invalid in the light of the non-variation provision in clause 10 of the arbitration agreement. Fourth, even if there had been such a further agreement (to the effect that the result of the physical measurement would be conclusive and eclipse the invoices), it would not have applied to at least some of the nine items referred to in paragraph 125 above, in that these items were not *measured* by the arbitrator, but the quantities thereof were the result of inferences based on assumptions by the arbitrator that the items would have been associated with other items that he did measure.

[174] The arbitrator's explanation[139] for the award of interest made by him does not constitute justification for his failure to adhere to the pleadings.

[175] The circumstance that the arbitrator regarded himself as unconstrained by the pleadings and the invoices, notwithstanding that they gave rise to the dispute, not only had the result that he exceeded his powers in terms of section 33(1)(b) of the Arbitration Act,[140] but also constituted a gross irregularity in the conduct of the proceedings in terms of the same section. It consequently adversely affected Mphaphuli's right to a fair hearing in terms of section 34 of the Constitution.

[176] This is made clear by the decision in *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another*.[141] The case concerned a review of the decision of a valuation court, but the principles adverted to apply equally to arbitrations. Schreiner J commented as follows.[142] For cognisance to be taken of irregularities there is no need that there be intentional arbitrariness of conduct or any conscious denial of justice. It is not only 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, it will amount to a gross irregularity. A mere mistake of law relating to the merits will not constitute a gross

[139] Above at [137].

[140] Above n 14. See *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others* [2007] ZASCA 163; 2008 (2) SA 608 (SCA) at paras 28-30.

[141] 1938 TPD 551. The decision was endorsed by the Supreme Court of Appeal in *Telcordia*, above n 21, in the context of the Arbitration Act.

[142] *Goldfields Investment* above n 141 at 560-1.

irregularity, but if the mistake leads to the tribunal'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 duty 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.

[177] These remarks find operation in the present case and the arbitrator, owing to his erroneous view of, and misconstruing, his functions in respect of the application of the pleadings and invoices to the matters that he had to decide, failed to deal with them in the manner contemplated by the arbitration agreement.[143] The resultant gross irregularity constituted sufficient unfairness to vitiate his award.

[178] Again, the comments in paragraphs 150 and 151 are of application.

Bias

[179] Counsel correctly did not persist in a contention of actual bias on the part of the arbitrator and confined their argument to the contention that there was a reasonable apprehension of bias on the arbitrator's part. Counsel further accepted that Mphaphuli bore the onus of establishing the existence of such apprehension and that the test is an objective one. In *Van Rooyen*,[144] this Court stated the following:

> "That the appearance or perception of independence plays an important role in evaluating whether courts are sufficiently independent cannot be doubted.

[143] *Hos+Med* above n 140.

[144] *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC).

> The reasons for this are made clear by the Canadian jurisprudence on the subject, particularly in *Valente v The Queen*
>
> . . . .
>
> The jurisprudence of the European Court of Human Rights also supports the principle that appearances must be considered when dealing with the independence of courts. When considering the issue of appearances or perceptions, attention must be paid to the fact that the test is an objective one. Canadian courts have held in testing for a lack of impartiality:
>
> > 'the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal . . . that test is 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude'."[145] (Footnote omitted.)

In *Jaipal*, the Court cited this dictum with approval in the context of criminal proceedings.[146]

[180] The threshold for a finding of perceived bias is high. In *South African Commercial Catering*[147] this Court discussed the apparent double requirement of reasonableness posed in *SARFU*,[148] that is a reasonable person and a reasonable apprehension, and stated:

> "[T]he two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance. As Cory J stated in a related context on behalf of the Supreme Court of Canada:

[145] Id at paras 32-3.

[146] Above n 102 at para 15.

[147] Above n 57.

[148] Above n 74 at para 45. See too *Roberts* above n 52 at para 32.

> 'Regardless of the precise words used to describe the test, the object of the different formulations is to emphasise that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity.'"[149] (Footnote omitted.)

The comments are of equal application where a quasi-judicial capacity is involved.

[181] It matters not, however (as I accept was the position *in casu*), that the arbitrator's intentions were good or that he bona fide thought that he was acting within the terms of his mandate or was unconscious of any apprehension of bias that might arise from his conduct.[150]

[182] For their contention of a reasonable apprehension of bias, counsel placed reliance on the meetings, the correspondence and the award of amounts in excess of those claimed by Bopanang and reflected in its pleadings and invoices.

[183] As already recorded,[151] both the High Court and the Supreme Court of Appeal addressed the issue of bias only with reference to the ex parte meetings, and the latter Court commented that no other overt act was invoked to found the contention of a reasonable apprehension of bias. That restricted approach was incorrect and misdirected. Further, the comment by the Supreme Court of Appeal that no reason

[149] Above n 57 at para 15.

[150] *Naidoo* above n 96 and *Goldfields Investment* above n 141. Cf *Sidumo* above n 69 at para 264 where Ngcobo J commented that for a gross irregularity to be found it is not necessary to find "intentional arbitrariness of conduct or any conscious denial of justice."

[151] Above at [66], [139] and [156].

emerges from the papers as to why the arbitrator would have shown an inclination to favour one party, was misplaced. A desire to favour one party does not require to be proved.

[184] In my judgement, the factors invoked by Mphaphuli, viewed objectively, both separately but more particularly cumulatively, must result in a finding that a reasonable apprehension of bias has been demonstrated: a reasonable person in Mphaphuli's position would reasonably apprehend that he/she had been the victim of bias, albeit unintentional, and that he/she had not received a fair hearing.

[185] Where a reasonable apprehension of bias is demonstrated, the court does not enter the debate whether there was actual influence and it is at pains not to measure the degree of the bias apprehended. In *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another*[152] (a case involving what was considered to be a quasi-judicial tribunal, the Industrial Court) the following passage appears:

> "Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing Court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended, then that is an end to the matter."[153]

[186] Again, the comments in paragraphs 150 and 151 above are of application.

[152] [1992] ZASCA 85; 1992 (3) SA 673 (A). Cf *James v Magistrate, Wynberg and Others* 1995 (1) SA 1 (C).

[153] Id at 694J-695A.

Conclusion

[187] In the light of the findings set out in this judgment, it is my view that Mphaphuli is entitled to the relief it seeks from this Court, and I would have granted Mphaphuli that relief with appropriate ancillary orders. However, this is a minority judgment and accordingly no order is made.

Jafta AJ and Nkabinde J concur in the judgment of Kroon AJ.

O'REGAN ADCJ:

[188] I have had the opportunity of reading the judgment prepared in this matter by my colleague, Kroon AJ. Unfortunately I cannot concur in it. In my view, although leave to appeal should be granted, the appeal should be dismissed. As will appear from the reasons that follow, there are two differences between my approach and that of Kroon AJ. First, in my view, section 34 of the Constitution does not apply to private arbitration although I do hold that it is an implied term of every arbitration agreement that it be procedurally fair. Secondly, it is my view that the arbitration agreement at issue in this case, properly construed, required the arbitrator to adopt an informal, investigative method of proceeding and not a formal, adversarial one.

[189] As Kroon AJ explains in his judgment, the applicant, Lufuno Mphaphuli & Associates (Pty) Ltd (Mphaphuli) is an electrical infrastructure contractor who was awarded a contract by Eskom (the national electricity supplier) for the electrification of certain rural villages in Limpopo Province. In May 2002, Mphaphuli entered into a subcontract with the second respondent, Bopanang Construction CC (Bopanang). In January 2003, Bopanang vacated the site early without completing its work on the ground that Mphaphuli had failed to pay moneys owing to it. Another contractor, AA Electrical, was then employed by Mphaphuli to complete the work and to undertake remedial work on the work performed by Bopanang.

[190] In April 2003, Bopanang issued summons in the High Court in Pretoria against Mphaphuli seeking payment of R656 934,44 from Mphaphuli for work it had done but for which it had not been paid. Bopanang also sought to interdict the client, Eskom, from paying Mphaphuli further. Bopanang and Mphaphuli then agreed that such an interim interdict should issue and that the dispute concerning the amount claimed by Bopanang should be referred to arbitration.

[191] Pursuant to this agreement, Bopanang prepared a statement of claim and Mphaphuli a statement of defence, as well as a counterclaim. Mr Nigel Andrews, the first respondent, was appointed as arbitrator on 21 July 2003, which appointment was confirmed when the arbitration agreement was signed on 16 October 2003. Mr Andrews was furnished with copies of all the pleadings.

[192] The arbitration process then followed. It is described in some detail later in this judgment. On 23 August 2004, Mr Andrews published his award in terms of which he found Mphaphuli to be liable to Bopanang in an amount of R339 998,83 and he ordered that interest be paid on that amount from 6 October 2002. Mphaphuli did not make payment in terms of the award, and, on 18 October 2004, Bopanang approached the High Court for the award to be made an order of court. Mphaphuli opposed this application and launched a separate application to set aside the arbitration award and to have the matter remitted to the arbitrator.[1] Mphaphuli was unsuccessful in both the High Court and subsequently the Supreme Court of Appeal.[2] It now seeks leave to appeal to this Court.

[193] There are several issues that arise. A preliminary issue is that Mphaphuli's application for condonation for the late filing of its founding affidavit and its supplementary founding affidavit was refused by the High Court, and this decision was upheld by the Supreme Court of Appeal. Kroon AJ concludes that both the High Court and the Supreme Court of Appeal misdirected themselves in this regard. Given the conclusion I reach on the merits, it is not necessary for me to traverse this issue at all and I refrain from doing so.

[1] Bopanang's application was launched in the High Court in Pretoria under case number 27225/04. Mphaphuli's separate application was launched in the same court under case number 33188/2004. The applications were consolidated and decided together – *Bopanang Construction CC v Lufuno Mphaphuli & Associates (Pty) Ltd; Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another*, Case Nos. 27225/04 and 33188/2004, North Gauteng High Court, Pretoria, 22 February 2006, unreported.

[2] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2007] ZASCA 143; 2008 (2) SA 448 (SCA); 2008 (7) BCLR 725 (SCA).

[194] Turning then to the issues in the case before us. Mphaphuli identifies the following three constitutional issues: to what extent are courts entitled to exercise supervision over arbitral proceedings; whether parties waive their constitutional rights in terms of section 34 of the Constitution when they agree to refer a dispute to private arbitration; and what the correct approach is to the grounds of review set out in section 33 of the Arbitration Act 42 of 1965 (the Arbitration Act). I think it may be more logical and helpful to pose the constitutional questions in the following manner: (a) does section 34 of the Constitution apply to private arbitrations? (b) what, if any, is the relevance of the Constitution to the terms of private arbitration agreements? and (c) what, if any, is the relevance of the Constitution to the judicial scrutiny of arbitration awards?

Private Arbitration

[195] In approaching these questions, it is important to start with an understanding of the nature of private arbitration. Private arbitration is a process built on consent in that parties agree that their disputes will be settled by an arbitrator. It was aptly described by Smalberger ADP in *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA)(Pty) Ltd and Another*[3] 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."[4]

[3] [2002] ZASCA 14; 2002 (4) SA 661 (SCA).

[4] Id at para 25.

[196] Private arbitration is widely used both domestically and internationally. Most jurisdictions in the world permit private arbitration of disputes and also provide for the enforcement of arbitration awards by the ordinary courts. With the growth of global commerce, international commercial arbitration has increased significantly in recent decades. This growth has been fostered, in part, by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)[5] which provides for the enforcement of arbitration awards in contracting states and which has had a profound effect on arbitration law in many jurisdictions.[6] It has also been served by the adoption of the Model Law on International Commercial Arbitration (the UNCITRAL Model Law) by the United Nations Commission on International Trade Law in 1985, which was amended in 2006 and which has been adopted in many jurisdictions.[7]

[197] Some of the advantages of arbitration lie in its flexibility (as parties can determine the process to be followed by an arbitrator including the manner in which evidence will be received, the exchange of pleadings and the like), its cost-

[5] The New York Convention was entered into in June 1958 in New York. It now has 144 signatories see http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (accessed on 16 March 2009). South Africa has ratified the Convention and brought it into force by enacting the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 (although the Act has been criticised by the South African Law Reform Commission – see South African Law Reform Commission Project 94 "Arbitration: An International Arbitration Act for South Africa" *Report: July 1998* at paras 3.13-3.15). The Convention has been described as the "most effective instance of international legislation in the entire history of commercial law" (Mustill "Arbitration: History and Background" (1989) 6(2) *Journal of International Arbitration* 43 at 49 quoted in the South African Law Reform Commission *Report: July 1998*, op cit, at para 3.3).

[6] See Sutton, Gill and Gearing *Russell on Arbitration* 23ed (Sweet & Maxwell, London 2007) at 21.

[7] For a discussion in the South African context see Christie "Arbitration: Party Autonomy or Curial Intervention II: International Commercial Arbitrations" (1994) 111 *South African Law Journal* 360; and Turley "The proposed rationalisation of South African arbitration law" (1999) 2 *Tydskrif vir die Suid-Afrikaanse Reg* 235.

effectiveness, its privacy and its speed (particularly as often no appeal lies from an arbitrator's award, or lies only in an accelerated form to an appellate arbitral body).[8] In determining the proper constitutional approach to private arbitration, we need to bear in mind that litigation before ordinary courts can be a rigid, costly and time-consuming process and that it is not inconsistent with our constitutional values to permit parties to seek a quicker and cheaper mechanism for the resolution of disputes.

[198] The twin hallmarks of private arbitration are thus that it is based on consent and that it is private, i.e. a non-state process. It must accordingly be distinguished from arbitration proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the Labour Relations Act 66 of 1995 which are neither consensual, in that respondents do not have a choice as to whether to participate in the proceedings, nor private. Given these differences, the considerations which underlie the analysis of the review of such proceedings are not directly applicable to private arbitrations.[9]

Does section 34 apply to private arbitration?

[199] The first question that arises then is whether section 34 of the Constitution applies to private arbitration. Section 34 provides that:

[8] For a fuller discussion, see Redfern and Hunter *Law and Practice of International Commercial Arbitration* 4ed (Sweet & Maxwell, London 2004) at 22-35.

[9] See *Sidumo and Another v Rustenberg Platinum Mines Ltd and Others* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) at paras 258-60. See also *Total Support Management* above n 3 at para 26, and see further discussion below at [211]-[218].

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

In *Chief Lesapo v North West Agricultural Bank and Another*,[10] Mokgoro J on behalf of a unanimous Court reflected on section 34 as follows:

> "An important purpose of section 34 is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law."[11]

[200] This comment makes clear that the primary purpose of section 34 is to ensure that the state provides courts or, where appropriate, other tribunals, to determine disputes that arise between citizens. A similar understanding of the section was expressed by Langa CJ in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd*[12] where he reasoned:

> "The first aspect that flows from the rule of law is the obligation of the State to provide the necessary mechanisms for citizens to resolve disputes that arise between them. This obligation has its corollary in the right or entitlement of every person to have access to courts or other independent forums *provided by the State* for the settlement of such disputes. Thus section 34 of the Constitution provides as follows . . . ."[13] (My emphasis.)

[201] On a straightforward reading, the section provides that everyone has the right to have disputes that are susceptible to legal determination decided in a fair, public

[10] [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC).

[11] Id at para 13.

[12] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC).

[13] Id at para 39. See also the remarks of Ngcobo J in *Zondi v MEC for Traditional and Local Government Affairs and Others* [2005] ZACC 18; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at paras 60-3.

hearing by a court or by another independent or impartial tribunal. Quite clearly, when parties decide to refer a dispute to be determined by an arbitrator, they are not seeking to have the dispute determined by a court. They are seeking to have it determined by an arbitrator of their own choice. The question that then arises is whether an arbitrator is "another independent and impartial tribunal or forum" as contemplated in the section. It seems to be beyond doubt that these words apply to other tribunals established by law such as the CCMA.[14] Such tribunals must also conduct "fair, public hearings" as provided for in section 34. The more difficult question, however, is whether these words apply to private dispute mechanisms established by parties by consent.

[202] In *Total Support Management,*[15] the Court grappled with the question as follows:

> "It is a moot point whether the words 'another independent and impartial tribunal or forum' in their contextual setting apply to private proceedings before an arbitrator or whether they must be restricted to statutorily established adjudicatory institutions. The word 'fair' qualifies 'public hearing' and the phrase 'fair, public hearing' relates not only to proceedings before a court but also before 'another independent and impartial tribunal or forum'. In a private arbitration the parties may by agreement exclude any form of public hearing – the need for anonymity or secrecy may well underlie the decision to resort to arbitration. The proper interpretation of s 34 may also involve the vexed question whether there may be a waiver of a constitutional right."[16]

[14] Established in terms of section 112 of the Labour Relations Act 66 of 1995. See *Sidumo* above n 9 at paras 123-4 and 207-9 and see the further discussion below at [233]-[235].

[15] Above n 3.

[16] At para 27.

[203] In *Telcordia Technologies Inc v Telkom SA Ltd*,[17] Harms JA concluded that "[o]n balance" the provisions of section 34 would apply to private arbitration. Kroon AJ in his judgment in this matter finds that this conclusion "commends itself for acceptance" and his judgment proceeds on the basis that section 34, and particularly the requirement of "fairness" within it, applies to private arbitration.[18]

[204] In reaching his conclusion, Harms JA relied on the jurisprudence of the European Court of Human Rights which has held that Article 6 of the European Convention on Human Rights is applicable to private arbitration.[19] The text of Article 6(1) is, of course, somewhat different to the text of section 34. Article 6(1) provides that:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

[205] In *Suovaniemi and Others v Finland*,[20] the applicants to the European Court of Human Rights complained that their right to a fair hearing in terms of Article 6(1) had been violated since the Finnish courts had upheld an arbitral award which the

[17] [2006] ZASCA 112; 2007 (3) SA 266 (SCA); 2007 (5) BCLR 503 (SCA) at para 47.

[18] Above at [71] and [73]-[74].

[19] *Telcordia* above n 17 at paras 47-8.

[20] ECHR Case No 31737/96 (23 February 1999).

applicants alleged had been made by an arbitrator lacking impartiality. One of the arbitrators who had made the award had previously acted as counsel to one of the parties. They also objected to the manner in which the second of the three arbitrators had conducted the proceedings. The Court held that a voluntary waiver of court proceedings in favour of arbitration is in principle acceptable.[21] However, the Court continued:

> "Even so, such a waiver should not necessarily be considered to amount to a waiver of all the rights under Article 6. As indicated by the cases cited in the previous paragraph, an unequivocal waiver of Convention rights is valid only insofar as such waiver is 'permissible'. Waiver may be permissible with regard to certain rights but not with regard to certain others. A distinction may have to be made even between different rights guaranteed by Article 6. Thus, in the light of the case-law it is clear that the right to a public hearing can be validly waived even in court proceedings (see, Eur.Court H.R., Håkansson and Sturesson v. Sweden judgment of 21 February 1990, Series A no. 171, pp. 20-21, §§ 66-67). The same applies, *a fortiori*, to arbitration proceedings, one of the very purposes of which is often to avoid publicity. On the other hand, the question whether the fundamental right to an impartial judge can be waived at all was left open in the Pfeifer and Plankl v. Austria case, as in any case in the circumstances of that case there was no unequivocal waiver."

[206] The European Court then went on to consider whether the fact that the parties had known before proceeding to arbitration that one of the arbitrators had previously acted as legal counsel to one of the parties constituted an impermissible waiver. The Court reasoned as follows:

> "In the present case and insofar as concerns arbitrator M., the Court considers that the waiver made during the arbitration proceedings was unequivocal . . . .

[21] Id at 5 and relying on *Bramelid and Malmstrőm v Sweden* ECHR Case Nos. 8588/79 and 8589/79 (12 December 1982).

> The Court considers that the Contracting States enjoy considerable discretion in regulating the question on which grounds an arbitral award should be quashed, since the quashing of an already rendered award will often mean that a long and costly arbitral procedure will become useless and that considerable work and expense must be invested in new proceedings . . . . In view of this the finding of the Finnish court based on Finnish law that by approving M. as an arbitrator despite the doubt, of which the applicants were aware, about his objective impartiality within the meaning of the relevant Finnish legislation does not appear arbitrary or unreasonable. . . . The Court furthermore notes that in the proceedings before the national courts the applicants had ample opportunity to advance their arguments, inter alia, concerning the circumstances in which the waiver took place during the arbitration proceedings. Without having to decide whether a similar wavier would be valid in the context of purely judicial proceedings the Court comes to the conclusion that in the circumstances of the present case concerning arbitral proceedings the applicants' waiver of their right to an impartial judge should be regarded as effective for Convention purposes."[22]

[207] The conclusion of the European Court was thus that, given that the applicants had known that one of the arbitrators had acted as legal counsel for one of the other parties prior to the arbitration, and given that Finnish law provided that such knowledge gave rise to a valid waiver, the applicants had effectively waived their right to impartiality in the arbitration proceedings in terms of the Convention, and concomitantly their right to object on that ground. The precise relationship between private arbitration and Article 6 remains difficult and is an issue increasingly drawing the attention of commentators.[23]

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[22] Id at 5-6.

[23] See, for example, the full discussion of the relationship between Article 6 and arbitration in Liebscher *The Healthy Award – Challenge in International Commercial Arbitration* (Kluwer Law International, The Hague 2003) at 61-80 and the authorities cited therein.

[208] Harms JA relied on *Suovaniemi* in *Telcordia.* Having found that section 34 did apply to private arbitration, like the judges in *Suovaniemi,* he then employed the concept of waiver. He reasoned as follows:

> "The rights contained in s 34 (as the ECHR accepted) may be waived unless the waiver is contrary to some other constitutional principle or otherwise *contra bonos mores.* Parties to a private dispute may, for instance, compromise their dispute and thereby forego all their rights under section 34. By agreeing to arbitration, parties waive their rights *pro tanto.* They usually waive the right to a public hearing. They may even waive their right to an independent tribunal. Counsel gave the example of two children who ask a parent to arbitrate their commercial dispute."[24] (Footnotes omitted.)

[209] The Court then held that parties who agree to refer a dispute to arbitration "necessarily agree that the fairness of the hearing will be determined" by the provisions of the Arbitration Act only, that they waive the right to an appeal (unless they agree to an arbitral appeal panel), and that they limit the interference by courts to the procedural irregularities set out in section 33(1) of the Arbitration Act.[25]

[210] I find it difficult to reconcile the latter portion of the reasoning with the former portion. It seems to me that if one accepts that parties to an arbitration have waived their rights under section 34 in such a manner that the fairness of the hearing will be determined only by reference to the Arbitration Act, and that interference by courts with arbitration shall be limited to the irregularities spelt out in section 33(1) of the Arbitration Act, it cannot be said that section 34 has any direct application to private

[24] *Telcordia* above n 17 at para 48.

[25] Id at paras 50-1.

arbitration at all. The thrust of the reasoning seems to me to be that when parties enter a private arbitration agreement, as long as that agreement is not contra bonos mores, they waive the rights that they would otherwise enjoy under section 34. However, we still need to consider whether section 34 does indeed apply directly to private arbitration.

[211] As it is clear that a private arbitrator is not a court, the question posed by Smalberger ADP in *Total Support Management* remains. When section 34 refers to another independent and impartial tribunal, does it include private arbitration? If it does not, then section 34 can have no application to private arbitration. In answering this question, one needs to read section 34 closely to see if its structure and purpose extend to private arbitration. It is clear that the section provides a right to have disputes resolved (a) by the application of law in (b) a fair (c) public hearing before (d) a court or (e) where appropriate an independent and impartial tribunal. Properly read, an independent and impartial tribunal (if appropriate) must hold fair, public hearings when it resolves disputes by the application of law. It is not possible textually to detach the requirement of fairness from the requirement of being in public: both requirements apply to proceedings before courts and independent and impartial tribunals.

[212] Underlying this right, as this Court has held, is the rule of law and the positive obligation upon the state to provide courts and, where appropriate, other fora for the

resolution of disputes.[26] Private arbitrators are, of course, not provided by the state but are private agents employed by parties for the resolution of disputes.

[213] In considering whether private arbitration fits into the framework of section 34, we have to acknowledge that private arbitration, as conventionally understood, is ordinarily not held in public. It is, as its name implies, a private process. Nor can it ordinarily be said that arbitrators have to be independent in the full sense that courts and tribunals must be. As the *Suovaniemi* case suggests, parties can knowingly consent to an arbitrator who may not be entirely independent.[27] Accordingly, it is not clear that arbitrators can accurately be described as "independent . . . tribunals". As private arbitration proceedings do not, and, if international practice is to be accepted, should not require public hearings, and similarly if private arbitrators need not, as long as parties knowingly accept this, always be "independent", then the language of section 34 does not seem to fit our conception of private arbitration.

[214] The only strong reason to read private arbitration to fall within the meaning of section 34 is the requirement imposed by that section that the hearing be "fair" and, indeed, it seems to be on that basis that Kroon AJ concludes that section 34 does apply to private arbitration. However, I am not persuaded that it is appropriate to understand the section to relate to private arbitration, which otherwise does not fit the language of the section, simply because it might be seen to be desirable to require arbitration

[26] See *Chief Lesapo* above n 10 at paras 13 and 22; *Modderklip* above n 12 at para 39; and *Zondi* above n 13 at paras 60-3.

[27] See also the remarks by Harms JA in *Telcordia* above n 17 quoted above at [209].

proceedings to be fair. The section must be interpreted on its own language and with integrity, and I cannot conclude, given the general lack of fit between private arbitration and the language of the section, that the section has direct application to private arbitration.[28]

[215] In concluding that section 34 does not have direct application to private arbitration, I do not finally consider what indirect application it may have, if any. Indirect application of rights in the Bill of Rights operates generally through section 39(2) of the Constitution which requires courts when interpreting statutes or developing the common law or customary law to promote the "spirit, purport and objects" of the Constitution. No argument was addressed to us on this issue but, mindful of the role courts have in giving effect to arbitration agreements, it seems to me that section 34 may have some relevance to the interpretation of legislation or the development of the common law.

[216] If we understand section 34 not to be directly applicable to private arbitration, the effect of a person choosing private arbitration for the resolution of a dispute is not that they have waived their rights under section 34. They have instead chosen not to exercise their right under section 34.[29] I do not think, therefore, that the language of

[28] No argument was addressed to us on the question of whether an arbitrator appointed by the parties would himself or herself directly bear obligations under section 34 of the Constitution within the contemplation of section 8(2) of the Constitution. It seems to me that for the reasons given in this judgment, the answer to that question is probably "no". However, I refrain from firmly deciding the matter given that no argument was addressed to this Court in this regard.

[29] For a discussion of the difference between waiver and a choice not to exercise a constitutional right, see *Mohamed and Another v President of the RSA and Another (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) at para 61, n 55. Some constitutional rights inhere in the individual and do not fall to be exercised and may,

waiver used by both the European Court of Human Rights in *Suovaniemi* and by the Supreme Court of Appeal in *Telcordia* is apt. Indeed, it may not be apt in relation to constitutional rights at all,[30] but that is a topic for another day.

[217] Despite the choice not to proceed before a court or statutory tribunal, the arbitration proceedings will still be regulated by law and, as I shall discuss in a moment, by the Constitution. Those proceedings, however, will differ from proceedings before a court, statutory tribunal or forum. The first difference is that the process must be consensual – no party may be compelled into private arbitration. The second is that the proceedings need not be in public at all. The third is that the identity of the arbitrator and the manner of the proceedings will ordinarily be determined by agreement between the parties. The party who opts for arbitration will have chosen these consequences.

[218] In the light of the foregoing, on a proper construction of section 34 it should be understood not to apply directly to private arbitrations. I differ in this respect, therefore, from the conclusion of Kroon AJ. This conclusion, however, does not mean that the Constitution will have no relevance to private arbitration, as I shall now discuss.

The relevance of the Constitution to the terms of arbitration agreements

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arguably, therefore never be waived (see the authorities in *Mohamed*, op cit). The question is a difficult one and need not be further elaborated here.

[30] See the interesting discussion by Woolman "Category mistakes and the waiver of constitutional rights: A response to Deeksha Bhana on *Barkhuizen*" (2008) 125 *South African Law Journal* 10.

[219] The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters.

[220] However, as with other contracts, should the arbitration agreement contain a provision that is contrary to public policy in the light of the values of the Constitution,[31] the arbitration agreement will be null and void to that extent[32] (and whether any valid provisions remain will depend on the question of severability). In determining whether a provision is contra bonos mores, the spirit, purport and objects of the Bill of Rights will be of importance.[33] As stated above, it is not necessary to determine what role section 34 might play in this analysis.

[221] At Roman-Dutch law, it was always accepted that a submission to arbitration was subject to an implied condition that the arbitrator should proceed fairly[34] or, as it

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[31] See the reasoning of Cameron JA in *Brisley v Drotsky* [2002] ZASCA 35; 2002 (4) SA 1 (SCA); 2002 (12) BCLR 1229 (SCA) at para 91, cited with approval in *Afrox Healthcare Bpk v Strydom* [2002] ZASCA 73; 2002 (6) SA 21 (SCA) at para 18; and also *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 59 (per Ngcobo J).

[32] See the similar but not identical reasoning in *Telcordia* above n 17 at para 48.

[33] See section 39(2) of the Constitution and the authorities cited above at n 31.

[34] Voet *Commentary on the Pandects* 4.8.26: "since every approval of an award still to be made by an arbitrator rests on this implied condition that the arbitrator shall have given a fair decision". See Gane (tr) *The Selective Voet, Being the Commentary on the Pandects* Vol 1 (Butterworth and Co (Africa) Ltd, Durban 1955) 760. Although the Latin word used in Voet is "tacita", I think this is, in modern usage, best translated as "implied" rather than "tacit". The distinction in our modern law was nicely explained by Corbett AJA in *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 532G-H as follows:

> "The implied term . . . is essentially a standardised one, amounting to a rule of law which the Court will apply unless validly excluded by the contract itself. While it may have originated partly in the contractual intention, often other factors, such as legal policy, will have

is sometimes described, according to law and justice.[35] The recognition of such an implied condition fits snugly with modern constitutional values. In interpreting an arbitration agreement, it should ordinarily be accepted that when parties submit to arbitration, they submit to a process they intend should be fair.[36] Fairness is one of the core values of our constitutional order: the requirement of fairness is imposed on administrative decision-makers by section 33 of the Constitution; on courts by sections 34 and 35 of the Constitution; in respect of labour practices by section 23 of the Constitution; and in relation to discrimination by section 9 of the Constitution. The arbitration agreement should thus be interpreted, unless its terms expressly suggest otherwise, on the basis that the parties intended the arbitration proceedings to be conducted fairly. Indeed, it may well be that an arbitration agreement that provides expressly for a procedure that is unfair will be contra bonos mores.

[222] The contractual obligation of fairness accords with the approach of recent legislation regulating arbitration in other jurisdictions. Most notably, perhaps, it accords with section 33 of the United Kingdom Arbitration Act, 1996 which provides that arbitrators have a general duty to act "fairly and impartially . . . giving each party

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> contributed to its creation. The tacit term, on the other hand, is a provision which must be found, if it is to be found at all, in the unexpressed intention of the parties. Factors which might fail to exclude an implied term might nevertheless negative the inference of a tacit term."

[35] See *Lazarus v Goldberg and Another* 1920 CPD 154 at 157.

[36] See in this regard section 1 of the United Kingdom Arbitration Act, 1996 which provides as follows:

> "The provisions of this Part are founded on the following principles, and shall be construed accordingly—
>
> (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
> (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest".

a reasonable opportunity of putting his case and dealing with that of his opponent".[37] This is a general duty that may not be varied by agreement between the parties. In a similar vein, Article 18 of the UNCITRAL Model Law provides –

> "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case".

[223] Of course, as this Court has said on other occasions, what constitutes fairness in any proceedings will depend firmly on context.[38] Lawyers, in particular, have a habit of equating fairness with the proceedings provided for in the Uniform Rules of Court. Were this approach to be adopted, the value of arbitration as a speedy and cost-effective process would be undermined. It is now well recognised in jurisdictions around the world that arbitrations may be conducted according to procedures determined by the parties. As such the proceedings may be adversarial or investigative,[39] and may dispense with pleadings, with oral evidence, and even oral argument.

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[37] In this regard see also the Report of the South African Law Reform Commission Project 94 "Domestic Arbitration" *Report: May 2001* which, in its draft Bill, proposes a similar provision to the provision in the United Kingdom Arbitration Act. They propose a general principles clause in section 2 of the Bill which would provide that "the object of arbitration is to obtain the fair resolution of disputes". See also the proposed section 28(1) which establishes a general duty of fairness similar to that contained in section 33 of the United Kingdom Arbitration Act.

[38] *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* [1998] ZACC 20; 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) at para 39.

[39] So, for example, section 34(1) of the United Kingdom Arbitration Act, 1996, provides that the tribunal may decide all procedural and evidential matters, subject to the agreement between the parties. Procedural and evidential matters are defined in section 34(2)(g) to include "whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law." I have opted to use the term "investigative" to describe a manner of proceeding in which the arbitrator, rather than the parties, takes the initiative in ascertaining the relevant facts and law. I could perhaps have used the term "inquisitorial", but have avoided it, preferring "investigative" which suggests immediately that what the arbitrator must do is investigate, in contrast to adversarial proceedings in which the contending parties lead evidence and proffer argument before the arbitrator.

The relevance of the Constitution to the judicial scrutiny of arbitration awards

[224] The final question that arises for consideration before turning to the facts of this case is the extent to which the judiciary may scrutinise arbitration awards. This is a matter which is regulated by section 33(1) of the Arbitration Act. This section provides relatively narrow grounds for setting aside an arbitration award as follows:

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

[225] The basis upon which a court may set aside an arbitration award is a difficult issue which has been the subject of much debate.[40] It should be noted that one of the important questions of modern arbitration law around the world is the extent to which courts may supervise arbitration awards. Both the New York Convention and the UNCITRAL Model Law limit the scope for intervention to a narrow range of complaints.

[226] In approaching this question, it should be borne in mind that arbitration awards are given effect by the ordinary courts. So if a party refuses to obey an award, the law provides for the enforcement of the award by the ordinary courts. Indeed, this is the

[40] See Christie "Arbitration: Party Autonomy or Curial Intervention III: Domestic Arbitrations" (1994) 111 *South African Law Journal* 552.

very purpose of the New York Convention which provides for the recognition and enforcement of arbitration awards in member jurisdictions even where the arbitration has taken place in another jurisdiction. The New York Convention provides only narrow grounds for a court to refuse to give effect to an award. Article V of the Convention provides as follows:

> "1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (a) The parties to the agreement . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid . . . ; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration . . . ; or
>
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties . . . ; or
>
> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority . . . .
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country."

[227] Article 34(2) of the UNCITRAL Model Law provides the grounds for setting aside an arbitral award by a court. Its terms are modelled on the provisions of Article

V of the New York Convention, so that the international regulation of arbitration sets the same standards for refusing to make an award an order of court as it does for setting aside the award. This has been described as "a pleasing symmetry".[41]

[228] A somewhat different approach to the courts' powers of intervention is provided in the United Kingdom Arbitration Act, 1996. Section 68 provides that a court may set aside an arbitration award on the grounds of serious irregularity if the court considers the irregularity "has caused or will cause substantial injustice to the applicant". The grounds of serious irregularity listed include a failure to comply with the section 33 duty to act fairly; failure to conduct the proceedings in accordance with the procedure agreed by the parties; and failure by the tribunal to deal with all the issues that were put to it. This approach thus requires both a serious procedural irregularity and a showing of substantive injustice. The explanation given for this section by the Departmental Advisory Committee on Arbitration Law in their *Report on the Arbitration Bill and Supplementary Report on the Arbitration Act 1996* included the following comments:

> "[Serious] irregularities stand on a different footing [from complaints concerning lack of jurisdiction]. Here we consider that it is appropriate, indeed essential, that these have to pass the test of causing 'substantial injustice' before the court can act. The court does not have a general supervisory jurisdiction over arbitrations. . . . The test of 'substantial injustice' is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could

[41] Redfern and Hunter above n 8 at 412.

> reasonably be expected of the arbitral process that we would expect the court to take action."[42]

[229] In considering the question of the powers of the courts to set aside arbitration awards, the South African Law Reform Commission, in its report on "Domestic Arbitration", noted the following:

> "One of the most controversial issues of arbitration law reform concerns the powers of the court in relation to arbitration. It is accepted that court support for the arbitral process, particularly as regards the enforcement of arbitration agreements and arbitral awards, is essential. It is also accepted that courts are entitled to certain supervisory powers as the price for their powers of assistance. A court cannot be expected to enforce an arbitral award which has been obtained as a result of an arbitral procedure which was fundamentally unfair and which has substantially prejudiced the losing party."[43] (Footnotes omitted.)

The report then notes that a difficult balance needs to be achieved between affording the courts appropriate powers to scrutinise arbitration awards and not empowering unscrupulous parties to use the courts to undermine the purpose of arbitration: the speedy resolution of disputes.[44]

[230] The authors of the report continue:

> "The drafters of the Model Law were well aware of this problem and gave careful attention to it. It is generally accepted that they achieved the right balance regarding the extent of the courts' powers and the time in the arbitration proceedings when they may be exercised. Even in England, which has traditionally been regarded as a

[42] See Sutton, Gill and Gearing above n 6 Appendix 2 at 693.

[43] South African Law Reform Commission *Report: May 2001* above n 37 at para 2.16.

[44] Id at para 2.20.

> jurisdiction where the courts have enjoyed excessive powers in the context of arbitration, there has been a clear and continuing trend since 1979 to curtail the powers of the courts."[45]

For these reasons, the Commission concludes by recommending that the powers conferred upon the courts to set aside an arbitration award should be modelled on the powers contained in the Model Law, in preference to the provisions of section 33(1) of the Arbitration Act.[46] In addition, it also proposes, in section 52(5) of its draft Bill, that an award in conflict with public policy (one of the Model Law grounds for setting aside an arbitration award) includes—

> "(a) an award made in breach of the tribunal's duty under section 28 such as to cause substantial injustice to the applicant; or
> (b) an award induced or affected by fraud or corruption."[47] (Footnote omitted.)

[231] This approach is in effect a hybrid between the Model Law and the United Kingdom Arbitration Act, 1996. The section 28 duty mentioned in section 52(5)(a) is the general duty of the arbitrator to act fairly (the equivalent of section 33 of the United Kingdom Arbitration Act),[48] so the effect of section 52(5)(a) is that an award can be set aside when a failure to act fairly causes substantial injustice.

[232] I set out the approach of the Model Law, as well as the United Kingdom approach and the debate in the South African Law Reform Commission, as I consider

[45] Id at para 2.21.

[46] Id at para 2.22.

[47] Id at 157.

[48] See [41] above.

it to be important background in considering how one should properly and constitutionally interpret section 33(1) of the Arbitration Act insofar as private arbitration is concerned. Kroon AJ in his judgment concerning the proper approach to the interpretation of section 33(1) of the Arbitration Act relies on the minority judgment of Ngcobo J in this Court in *Sidumo v Rustenburg Platinum Mines Ltd*.[49]

[233] In that case, the Court was concerned with a statutory arbitration before the CCMA in terms of the Labour Relations Act 66 of 1995. Section 145(2) of the Labour Relations Act sets out the grounds upon which an award made by the CCMA can be set aside by a court in terms nearly identical to those contained in section 33(1) of the Arbitration Act. In his reasoning, stating that the jurisprudence on section 33(1) provided a useful starting point for an analysis of section 145(2), Ngcobo J nevertheless emphasised the need not to overlook the differences in context between the two statutes. In this regard, he emphasised the importance of the fact that a CCMA commissioner "performs a public function and exercises public power".[50]

[234] The difference identified by Ngcobo J is indeed important, for it seems to me that the considerations set out in the preceding paragraphs which urge a court to be slow to set aside private arbitration awards are not directly applicable to the award of a statutory tribunal performing an important public power and protecting a constitutional right (the right to fair labour practices).[51] To that extent, therefore, I do

[49] Above n 9.

[50] Id at para 260.

[51] Section 23(1) of the Constitution.

not think that the reasoning in *Sidumo* can, without more, be of great assistance in determining the proper constitutional approach to the interpretation of section 33 of the Arbitration Act in the context of private arbitration.

[235] To return then to the question of the proper interpretation of section 33(1) of the Arbitration Act in the light of the Constitution. Given the approach not only in the United Kingdom (an open and democratic society within the contemplation of section 39(2) of our Constitution), but also the international law approach as evinced in the New York Convention (to which South Africa is a party) and the UNCITRAL Model Law, it seems to me that the values of our Constitution will not necessarily best be served by interpreting section 33(1) in a manner that enhances the power of courts to set aside private arbitration awards. Indeed, the contrary seems to be the case. The international and comparative law considered in this judgment suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. Section 33(1) provides three grounds for setting aside an arbitration award: misconduct by an arbitrator; gross irregularity in the conduct of the proceedings; and the fact that an award has been improperly obtained. In my view, and in the light of the reasoning in the previous paragraphs, the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration.

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

should not be equated with the process established in the Uniform Rules of Court for the conduct of proceedings before our courts. Secondly, there is no reason why an investigative procedure should not be pursued as long as it is pursued fairly.[52] The international conventions make clear that the manner of proceeding in arbitration is to be determined by agreement between the parties and, in default of that, by the arbitrator. Thirdly, the process to be followed should be discerned in the first place from the terms of the arbitration agreement itself. Courts should be respectful of the intentions of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If courts are too quick to find fault with the manner in which an arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of section 33(1), the goals of private arbitration may well be defeated.

Should the court grant the application for leave to appeal?

[237] After this somewhat lengthy introduction on the law and private arbitration, I turn now to consider whether this case raises a constitutional issue within the jurisdiction of the Court and one which it is in the interests of justice to hear. At the outset I should say that ordinarily the question whether a particular arbitration award should be set aside, turning as it must on the precise terms of the arbitration agreement

[52] In this regard, see section 34(2)(g) of the United Kingdom Arbitration Act, 1996, and Article 19(2) of the UNCITRAL Model Law which provides that in the absence of agreement between the parties, "the arbitral tribunal may . . . conduct the arbitration in such manner as it considers appropriate." This right is subject, of course, to the parties being treated equally in terms of Article 18 of the UNCITRAL Model Law.

which regulated it, will not raise a constitutional issue of sufficient substance to warrant being entertained by this Court.

[238] This case, however, being the first such challenge to be considered by this Court, is different. The Court has had to consider the relationship between private arbitration and the Constitution, the proper scope of section 34 of the Constitution and the approach to the interpretation of section 33(1) of the Arbitration Act in the light of the Constitution. All these are constitutional matters of substance falling within the jurisdiction of this Court and which, given the need to provide guidance in this regard, it is in the interests of justice for this Court to entertain. The application of these principles to the facts of this case, even if arguably not concerning a constitutional issue itself, concerns a matter connected to a decision on a constitutional issue which it is in the interests of justice to decide. In so doing, we will avoid the piecemeal determination of the case and provide an application of the principles set out above which will hopefully elucidate those principles in a helpful manner. I would therefore grant the application for leave to appeal.

Should the arbitration award be set aside?

[239] Mphaphuli argues that the arbitration award be set aside because, first, the arbitrator held what it terms three "secret" meetings with Bopanang during the course of the arbitration. Secondly, Mphaphuli points to the fact that not all correspondence between Bopanang and the arbitrator was furnished to Mphaphuli; and thirdly, Mphaphuli submits that the arbitrator committed a gross irregularity by "effectively

ignoring the pleadings filed before him" and awarding amounts in excess of what had been claimed and invoiced. Before turning to consider these complaints in detail, it will be helpful to give some further background to the arbitration.

The arbitration process

[240] As set out in the introductory paragraphs of this judgment, the arbitration agreement was entered into between the parties once litigation had been initiated by Bopanang to recover moneys it alleged Mphaphuli owed it in terms of a contract in which Bopanang had been appointed as a sub-contractor by Mphaphuli to electrify certain rural villages in Limpopo Province. In July 2003, Mphaphuli and Bopanang held a pre-arbitration meeting at which they agreed that Mr Andrews, a quantity surveyor, would be appointed as arbitrator. The note of this agreement reflected that Mr Andrews was appointed in the light of his qualifications and experience. The parties further agreed that Mr Andrews would be furnished with Bopanang's particulars of claim, together with a list of documents upon which it relied. Further, Mphaphuli was to lodge its plea and counterclaim (if any) and its list of documents by a certain date, which would then be followed by Bopanang's reply and plea to the counterclaim (if any).

[241] According to the arbitrator, once he had received this documentation he realised that he could not determine what, if anything, was due by Mphaphuli to Bopanang from the invoices alone and he concluded that he needed to re-measure the quantities on site. When the arbitration commenced on 6 October 2003, he informed the parties

of this and the parties agreed that the matter would have to be postponed, and the mandate of the arbitrator extended to include physical re-measurement on site. Thereafter, a further arbitration agreement reflecting this agreement was signed on 16 October 2003.

[242] Clause 1 of this agreement was titled "Purpose of Arbitration". It provided as follows:

> "The purpose of the arbitration is to determine whether payment is due in terms of the contract concluded between the parties, and if it is determined that payment is in fact due, the extent of such payment due, having regard to the scope of the agreement; any agreed amendments or instructions for amendments thereto by the Defendant or ESKOM; the value of the work that has been done by the Plaintiff; the effect of any defects, if any, and the rectification thereof; any and all payments made to the Plaintiff. Therefore a final assessment of the moneys reasonably due by any one of the parties to the other needs to be made by the arbitrator."

The clear purpose of the arbitration was therefore to determine what, if anything, was owed by Mphaphuli to Bopanang.

[243] In relation to the procedure to be followed, the agreement provided in clause 4 that—

> "The parties record that the arbitrator has already been provided with a bundle of documentation forming part of the Plaintiff's Particulars of Claim. In addition hereto, each party shall be entitled to submit such documentation as it may deem necessary to the arbitrator by not later than 10 October 2003 [sic]."

[244] Clause 5 provided that the arbitrator "shall be entitled to require from any of the parties to make such further documentation available as he may require". It further stated that the parties would furnish the documentation to the arbitrator within three days of his request. Clause 6 provided that the arbitrator could liaise with representatives of Eskom and request Eskom to furnish any relevant documentation. Neither clause 5 nor 6 expressly stated that the documentation received by the arbitrator would be furnished to the parties. Clause 10 of the agreement stipulated that the terms of the agreement were the full agreement between the parties and were not to be varied save in writing.

[245] Clause 7 of the agreement provides that the arbitrator would commence the "inspection and measurement of the work" on site on 27 October 2003. It specifically added that each party should appoint representatives to attend the inspection and measurement.

[246] I should pause here to note that the agreement makes no express provision for formal adversarial adjudicative proceedings at all in which evidence would be led or legal argument submitted. Both Mphaphuli and Bopanang accept this. The agreement provided only for the furnishing of documents to the arbitrator by the parties and Eskom (with a power for the arbitrator to request further documents should he consider it necessary) and for a re-measurement process to take place on site. It was only in relation to the re-measurement process that the agreement stipulated that

parties would appoint representatives. It is again worth noting that the representatives appointed were not lawyers.

[247] The date for the inspection was delayed till 12 and 13 November 2003. In his affidavit, the arbitrator describes, in a largely undisputed version, what happened on those days as follows:

> "Tatjane is a rural area situated in a remote and mountainous part of Limpopo province. It is a large area (totalling approximately 20-30 km^2) and for most of it, inaccessible to vehicles. Since it became clear to all of us that the inspection and measurements would have had to be done on foot, it was decided after consultation with the parties, that we split into two teams. Each team would comprise of representatives of both parties and would be tasked physically to re-measure all work done by Second Respondent. In the evening, we would then get together and combine the results of both teams. The first team comprised of myself, Mr Lufuno Mphaphuli . . . and Mr Shawem Kigole who represented the Second Respondent. The second team comprised of Mr Gerhard Esterhuizen (who represented the Second Respondent) and one Moses (who represented the Applicant)."

[248] Rain washed out most of the efforts at measurement on 12 November 2003 and the teams agreed to meet again on 1 December 2003. In the meanwhile, the arbitrator consolidated the results of the inspection and forwarded them to the parties. The arbitrator notes that the equipment installed by Bopanang was physically counted and measured. He emphasises that work installed by other contractors was not measured. The arbitrator further states that on 1 and 2 December 2003, the remainder of the area was inspected and re-measured. He notes that it became clear during the inspection process that Bopanang had to supply electricity to considerably more informal dwellings than had originally been estimated by Mphaphuli and that many of the

dwellings in the area were new. It was also accepted, says the arbitrator, that Bopanang was entitled to be compensated for these additional installations. He also noted that the mountainous nature of the area had resulted in the need to re-route some of the electricity cables. By 18 December 2003, the arbitrator had completed a schedule reflecting the results of the inspection and re-measurement process which he sent to the parties for their comment.

[249] A flurry of correspondence occurred in the early months of 2004 when the parties wrote to the arbitrator setting out various concerns. From this correspondence and from his work on the measurements, the arbitrator recounts that it became clear that some measurements had been omitted and also that there was a significant factual dispute between the parties as to the remedial work that had been undertaken by AA Electrical. He accordingly suggested a further meeting on site with representatives of AA Electrical to resolve this dispute and to complete the omitted measurements. The meeting took place on 24 March 2004. The arbitrator once again consolidated the results of the re-measurement and inspection of 24 March and forwarded it to the parties.

[250] At this stage, I should note that Mphaphuli now objects to the procedure followed by the arbitrator on the basis that once the arbitrator had done the measurements, he should again have referred to the invoices and claims of the second respondent to limit the amount due to the amount claimed by Bopanang. The arbitrator rebuts this argument on the basis that he had advised the parties that a

determination on the invoices would be impossible and that inspection and re-measurement were required. He states that once the parties had agreed on re-measurement, it would have made no sense to seek to do that in the light of the invoices. I shall return to this issue in a moment.

[251] On 29 April 2004, the arbitrator wrote to the parties identifying certain outstanding issues upon which he needed guidance. Mphaphuli responded to this request in writing, but Bopanang felt that it could not explain its responses in writing. Accordingly, a meeting was held between the arbitrator and a representative of Bopanang on 2 June 2004 where Bopanang's clarification was provided to the arbitrator. This was the second of the so-called secret meetings. According to the arbitrator, the result of this meeting was that the arbitrator wrote to the parties on 9 July 2004 in which he asked both parties to comment on the tentative conclusions he had drawn in the light of the meeting of 2 June 2004.

[252] Bopanang responded to this letter with a series of cryptic yes-or-no answers pencilled onto the faxed copy of the original letter. A copy of this response was not sent to Mphaphuli. However, the same questions had been put to Mphaphuli who did not respond immediately. Finally, after being reminded to do so by the arbitrator in writing on 6 August 2004, Mphaphuli, on 16 August 2004, furnished its responses to the queries of 9 July. It did not respond to all the queries raised by the arbitrator but where it did not respond, the arbitrator accepted that Mphaphuli did not disagree with his (the arbitrator's) tentative proposed conclusion.

[253] One final issue needs to be described here. When the arbitrator received Bopanang's cryptic responses to his letter of 9 July 2004, the answer in relation to one issue was unclear to the arbitrator. That issue related to a proposed revision of prices. The arbitrator held a further meeting with Bopanang, in the absence of Mphaphuli, on 29 July 2004 to discuss this issue. This was the third so-called secret meeting and is discussed in greater detail below. After that meeting, the arbitrator rejected Bopanang's proposal that revised prices should be awarded, and held in favour of Mphaphuli that Bopanang was not entitled to the revised prices as they had never been agreed in writing – the original contract required amendments to be in writing.

The proper interpretation of the arbitration agreement

[254] Construed in its context, it seems to me that this arbitration agreement contemplated that the arbitrator would adopt an informal, investigative method of proceeding. The factors are the following. First, the arbitrator is a quantity surveyor, expressly stated to have been appointed because of his expertise and experience. This fact suggests that the parties understood the process to be primarily a quantitative exercise which would require the accurate measurement of work done by Bopanang to determine the indebtedness of Mphaphuli.

[255] Secondly, the terms of the arbitration agreement itself contemplate that the purpose of the arbitration was to determine—

> "whether payment is due in terms of the contract concluded between the parties, and if it is . . . due, the extent of such payment due, having regard to the scope of the agreement; any agreed amendments or instructions for amendments thereto by the Defendant or ESKOM; the value of the work that has been done".

It concluded by stating that "a final assessment of moneys reasonably due by any one of the parties to the other needs to be made by the arbitrator". Again, this emphasises that the function of the arbitrator was primarily quantitative.

[256] Thirdly, the agreement contemplates that "each party shall be entitled to submit such documentation as it may deem necessary to the arbitrator". There is no express provision for the exchange of documentation between the parties. Similarly, the arbitrator is entitled to request documentation from the parties without an express provision for an exchange of the documentation. Fourthly, the arbitrator was authorised to liaise with Eskom directly which was in turn authorised to furnish the arbitrator with any documentation he required. Again, the agreement does not stipulate that such documentation would be furnished to the parties. Fifthly, there is only one express provision that requires the presence of the parties and that is at the re-measurement process itself. Sixthly, the agreement makes no provision at all for the leading of oral evidence or the submission of oral argument.

[257] I am strengthened in my conclusion that an informal, investigative process was envisioned by the process that was in fact adopted as I have described it above. That process was one where the arbitrator received evidence, prepared a schedule of quantities based on the evidence he received, gave both parties a copy of the schedule

or a letter setting out his concerns and gave each an opportunity to comment. A revised schedule containing the re-measured quantities was circulated to the parties at least three times during the arbitration: on 17 November 2003, 18 December 2003 and at the end of March 2004 (after the meeting with AA Electrical). In addition, the arbitrator wrote to the parties at least three times asking for their comments on preliminary conclusions he had reached: on 18 December 2003, 25 February 2004 and on 9 July 2004. Neither of the parties complained about the procedure followed to the arbitrator during the proceedings, and one can only assume that this was the process the parties had contemplated.

[258] I conclude therefore that on a proper interpretation of this arbitration agreement, the parties intended the arbitrator to follow an informal, investigative process and one in which no oral evidence would be led. The procedure was by and large aimed at the determination of facts and in particular the amount owed by Mphaphuli to Bopanang, if anything. No provision was accordingly made for legal argument. The question that now arises is whether the conduct complained of by Mphaphuli constitutes a gross irregularity within the meaning of section 33(1) of the Arbitration Act in the light of this understanding of the arbitration agreement. I shall deal with each of the three complaints separately. Before doing so, I wish to deal briefly with the cases cited by Kroon AJ concerning the need for both parties to be present at all stages during arbitration proceedings.

[259] Kroon AJ relies on *Lazarus v Goldberg and Another*[53] which cites Cloete J in *Croll qq. Kerr v Brehm* to state that "no rule is more clear than that they [arbitrators] should not proceed to examine parties or witnesses in the presence only of one party, that nothing may be done *inaudita altera parte*". This rule is clearly correct in the context of an adversarial process. It is not clear to me, however, that it is applicable to investigative proceedings of the sort under examination here. Can it be said that it is unfair to one party for an arbitrator to obtain information, to form a preliminary view on the basis of that information and then to give both sides an opportunity to rebut that preliminary view? I do not think so.

[260] Another case relied upon by Kroon AJ is *Shippel v Morkel and Another*[54] in which Van Winsen J relied on a passage from Voet and concluded that

> "our Courts have accepted that in deciding upon matters submitted to them arbitrators are required to follow, at any rate in broad outline, the precepts which govern the procedure employed in the course of judicial proceedings."[55]

In my view, this conclusion is incorrect. There is nothing in the Arbitration Act which excludes investigative proceedings, as I have reasoned above, and judges should be cautious not to interpret section 33(1) of the Act so as to require arbitrators to proceed as if they were courts of law. Such an interpretation would undermine the purposes of arbitration which are to provide flexible and affordable alternatives to judicial dispute resolution. Van Winsen J's conclusion that "it is well established . . . that the

[53] 1920 CPD 154, cited above at [86] of Kroon AJ's judgment.

[54] 1977 (1) SA 429 (C).

[55] Id at 34.

procedural rules applicable in an arbitration require that the proceedings should not be conducted in the absence of one of the parties" seems to me (particularly given the previous dictum) to assume that the proceedings must be adversarial. That is an assumption that should not be made.

[261] It is not necessary to deal with each and every one of the authorities cited by Kroon AJ. Suffice it to say that, in the light of modern arbitration practice and procedure, courts should be careful not to require arbitrators to proceed in an adversarial fashion. To the extent that these authorities stipulate requirements of fairness relevant to adversarial proceedings, they cannot be faulted. To the extent, however, that they suggest that investigative procedures may not be followed by arbitrators, they cannot be accepted. This does not mean that anything goes in an investigative process. The requirement of fairness obtains there, as it does in adversarial proceedings. Its content is simply different. In each case, the question will be whether the procedure followed afforded both parties a fair opportunity to present their case.

The "secret" meetings

[262] The three "secret" meetings Mphaphuli refers to were held on 17 March 2004, 2 June 2004 and 29 July 2004. According to Bopanang, all that happened at the first meeting was that the arbitrator and a representative of Bopanang agreed to a date for a site meeting to discuss the extent of the remedial work conducted by AA Electrical. The meeting took place following a letter by Bopanang to the arbitrator enquiring

about progress. Following the meeting of 17 March, the arbitrator immediately wrote to Mphaphuli to advise it of the date set for the site meeting, being 24 March.

[263] In assessing whether this meeting constituted a gross irregularity, it should be added that it is clear from the record that there were a number of occasions on which the arbitrator contacted one or other party to arrange a meeting or some similar administrative arrangement.[56] It is clear from the record that the process was an informal one and that neither party objected to this during the arbitration. It is also clear that nothing that happened on 17 March 2004 prevented Mphaphuli from presenting its case to the arbitrator within the framework of the arbitration procedure adopted. Given that the proceedings followed were informal and investigative and based on a methodology whereby the arbitrator repeatedly placed his preliminary views before the parties and gave them an opportunity to respond, the meeting of 17 March 2004 does not constitute a gross irregularity, if it constitutes an irregularity at all.

[264] The second meeting took place on 2 June 2004.[57] That meeting was held because Bopanang found it hard to respond in writing to the queries sent by the arbitrator to both parties on 29 April 2004. In the meeting, Bopanang's representative explained to the arbitrator the way in which certain equipment had been installed. On the arbitrator's version, the result of this meeting was that the arbitrator wrote a letter

[56] So, for example, on 16 October 2003, Mphaphuli's representative contacted the arbitrator to inform him that the revised arbitration agreement had been signed and to suggest a site meeting with representatives on 27 October 2003. Again at the site meeting of 24 March 2004, Mr Mphaphuli declined to accompany the arbitrator on a site inspection saying he had to attend another meeting.

[57] It is discussed above at [251].

on 9 July 2004 to both parties setting out his initial and tentative conclusions on some of the equipment issues and asked both parties to respond. Both parties did eventually respond.

[265] It may have been unwise for the arbitrator to meet alone with a representative of Bopanang. The question that arises in this instance is whether it was unfair in the sense that it denied Mphaphuli an opportunity fairly to state its case. Mphaphuli was given an opportunity to respond to the explanations given by Bopanang to the arbitrator, in that the arbitrator formulated the issues and sent them to both parties requesting confirmation. This followed the process that had been adopted throughout the arbitration. The arbitrator reached preliminary conclusions and then gave the parties an opportunity to comment thereon. At times, by consent, those conclusions were reached in the absence of one or other of the parties. As noted above, for example, the site inspection on 24 March 2004 had gone ahead in the absence of Mr Mphaphuli as he chose to attend another meeting. It is to be assumed that he was willing to do this because he understood that the arbitrator would give him an opportunity to comment on the results of the inspection. This the arbitrator did in due course.

[266] Given the nature of the proceedings agreed upon, and particularly the fact (consistent with the conduct of the arbitration throughout) that the arbitrator set out the preliminary conclusions he had reached arising from this meeting and gave both parties an opportunity to comment thereon, it cannot be said that the meeting

prevented Mphaphuli from presenting its case fairly to the arbitrator. It was indeed given an opportunity to do so. I cannot conclude therefore that the second meeting constituted a gross irregularity.

[267] The third meeting took place on 29 July 2004. In this meeting, the representative of Bopanang sought to persuade the arbitrator to award certain revised prices. According to the arbitrator, he decided after consideration that these revised prices were not payable by Mphaphuli and ruled in its favour in this regard. I should add here (though it is not an issue upon which Mphaphuli relies) that Bopanang's version of this meeting is less crisp. It is clear from its version too that it related to the arbitrator's desire to get clarity in relation to the cryptic responses Bopanang had given to his queries of 9 July 2004, but it suggests that the discussion may have ranged more broadly than the question of revised prices.

[268] Again this meeting should not have been held alone with the representative of Bopanang. Yet, at the time, the arbitrator was having difficulty contacting Mphaphuli at all which had still not responded to the letter of 9 July. When it did finally respond to the letter of 9 July, it appears to have agreed with many of the preliminary conclusions reached by the arbitrator in that it did not dispute them and instead mainly raised issues relating to quantities in the re-measurement schedule. Finally, on the arbitrator's version, the result of the meeting favoured Mphaphuli. In all these circumstances, it does not seem to me that this meeting should be found to constitute a

gross irregularity in the context of this arbitration sufficient to warrant the award being set aside.

Failure to disclose all correspondence

[269] The second irregularity to which Mphaphuli points is the failure by the arbitrator to ensure that all correspondence received from Bopanang was forwarded to Mphaphuli. The arbitrator states that, to the extent that this happened, it was an oversight in his office, and that the vast majority of the correspondence received was circulated to both parties.

[270] Mphaphuli points to three letters in this regard (though in written and oral argument only the second and third letters were raised). The first letter was a letter sent by Bopanang to the arbitrator on 12 December 2003 raising a report by Eskom and the remedial works done by AA Electrical. Whatever impact this letter may have had, if any, on the arbitrator's conclusions, Mphaphuli would have had an opportunity to respond given that the arbitrator furnished it with his tentative conclusions in a schedule of measurements at least twice after the letter was received. Although it may well have been a regrettable oversight not to have forwarded the letter to Mphaphuli, it cannot be said that the failure to do so constituted an irregularity so material as to require this Court to set aside the arbitration award.

[271] The second letter was a letter of 24 February 2004 in which Bopanang wrote to the arbitrator furnishing comments on the claims of AA Electrical. This letter was one

of a flurry of letters between the parties and the arbitrator at that time. The arbitrator generally forwarded letters of one party to the other, but in this case he admits the letter was not forwarded due to an oversight. However, it is also clear that this flurry of letters made plain to the arbitrator that there was a serious dispute of fact between the parties concerning the work done by AA Electrical. As a result, the arbitrator called a further site meeting to be attended by both parties and AA Electrical to resolve this factual dispute.[58] After that meeting the arbitrator reworked his measurements and sent them to the parties again at the end of March.

[272] Accordingly, although it may have been unfortunate that the arbitrator failed to provide Mphaphuli with a copy of Bopanang's letter of 24 February 2004, it cannot be said that this undermined Mphaphuli's ability fairly to make its case. It was given a full opportunity on 24 March 2004 to assist in the determination of the dispute concerning what work had been done by AA Electrical, and again once the revised measurements were sent to it at the end of March. The failure to provide Mphaphuli with a copy of the letter of 24 February, therefore, cannot be said to have amounted to a serious irregularity which would warrant setting aside the arbitration.

[273] The third letter to which Mphaphuli points in this regard is a letter from Bopanang to the arbitrator dated 19 July 2004. This letter is the cryptic response to the arbitrator's letter of 9 July 2004 described above at paragraph 64. It will be recalled that the arbitrator had given the parties a list of preliminary conclusions upon

[58] See [249] above.

which he wanted their comment before finalising his award. It is clear that both parties were given an opportunity to respond to this preliminary set of conclusions. Although there is no doubt that it would have been desirable as a matter of practice for the arbitrator to have furnished a copy of Bopanang's letter of 19 July to the applicant, I am not persuaded that anything turns on this at all. The process adopted is quite clear. The arbitrator made preliminary findings and asked each party for comment. This is a classic investigative process. Mphaphuli was given a fair opportunity to make out its own case. There is no suggestion that the arbitrator contemplated an adversarial exchange between the parties on his preliminary conclusions. He simply asked each party whether the approach he adopted was correct or not.

[274] Each party then had an opportunity to persuade the arbitrator that his preliminary conclusions were wrong. In respect of several of the preliminary conclusions he had suggested in his letter of 9 July 2004, the arbitrator ruled in favour of Mphaphuli. Moreover, Bopanang's responses were cryptic as has been described. By and large, they were yes-or-no answers. In my view, there is not much that Mphaphuli could have said to rebut these simple yes's or no's beyond what it said in its own response to the very same queries. I conclude on this point too that Mphaphuli has not established a gross irregularity in this regard.

Ignoring the pleadings/arbitral mandate

[275] The final argument made by Mphaphuli is that the arbitrator, in pursuing a full re-measurement of the work undertaken by Bopanang, ignored the pleadings and thus

misconstrued his mandate. This complaint goes to the question of the proper construction of the arbitration agreement. In this regard, I disagree with my colleague Kroon AJ. In my view, it is clear from the record that it was the arbitrator's view that it was impossible to determine on the basis of the invoices alone what money if any was owing to Bopanang. The arbitrator told the parties this and suggested that a fair process would be to conduct a re-measurement on site to identify what work Bopanang had in fact undertaken.

[276] It was further his view that once that re-measurement had been undertaken he would deduct from the re-measurement the amount Mphaphuli had paid Bopanang. The arbitrator states that it was not the intention of the parties that the amounts owing would be limited to the amounts originally claimed by Bopanang or as stipulated in the contract. In asserting this, the arbitrator points to the fact that it became apparent during the site inspection that far more dwellings needed to be electrified than had originally been provided for in the contract, and that the parties agreed that Bopanang was entitled to remuneration for work actually done. This Mphaphuli now disputes.

[277] During the arbitration, it must have been clear to Mphaphuli from the measurements repeatedly sent to it by the arbitrator that this is how the arbitrator construed his task. The arbitration agreement properly construed did not require both the re-measurement and determination of what was due on the basis of the re-measurement, and also the determination of what was due on the invoices and, in the light of the invoiced amounts, somehow curtailing the amount found to be due on the

re-measurement. Such an approach was inconsistent with the agreement that a re-measurement was necessary, and that it would form the basis of a new schedule setting out the amounts Bopanang was entitled to in terms of the price schedule in the contract. Mphaphuli participated fully in this process. What is more, it was afforded at least three opportunities during the proceedings to dispute the re-measured quantities when the arbitrator furnished his preliminary re-measurements. One can only conclude that Mphaphuli did not dispute this manner of proceeding because its understanding of the arbitration agreement was precisely the understanding proffered by the arbitrator – the arbitration was to be based on the re-measured quantities and not on the invoiced amounts.

[278] I conclude in this regard that the arbitrator correctly understood his mandate and that Mphaphuli's complaint in this respect must fail. Counsel for the applicant did not press the argument relating to bias on the part of the arbitrator in either written or oral argument. Given the conclusion I have reached, there is no basis for concluding that the manner in which the arbitrator conducted himself gave rise to a reasonable perception of bias. No more need be said on this score.

Costs

[279] Mphaphuli has raised a constitutional issue in this Court. The respondents were brought to this Court to answer that argument. They did not rely on any constitutional right of their own but disputed the constitutional argument made by the applicant. Properly construed, therefore, this is private litigation relating to a commercial matter

and the applicant has lost. In my view, it should pay the costs, including those consequent upon the employment of two counsel.

Order

[280] For the reasons set out above, I make the following order:

(a) The application for leave to appeal is granted.

(b) The appeal is dismissed.

(c) The applicant is ordered to pay the costs of both respondents in this Court, such costs to include the costs of two counsel.

Langa CJ, Mokgoro J, Van der Westhuizen J and Yacoob J concur in the judgment of O'Regan ADCJ.[*]

NGCOBO J:

[281] I have read the judgments prepared by my colleagues O'Regan ADCJ and Kroon AJ. They both agree that the application for leave to appeal raises a constitutional matter and that it is in the interests of justice to grant leave to appeal. However, they reach different outcomes. I accept that the contentions advanced by

[*] Although Madala J sat in the case, ill health prevented him from participating in the judgment.

Mphaphuli raise a constitutional matter. However, I am unable to agree with my colleagues that it is in the interests of justice to grant leave to appeal. In my view, the application falls to be dismissed with costs. And for reasons set out in this judgment, I do not therefore express any view on the constitutional matter that Mphaphuli raises in this Court.

[282] The facts are set out in the judgments of my colleagues. I do not propose to repeat them in this judgment except to the extent necessary for this judgment.

[283] Suffice it to say that this litigation that has its genesis in a subcontract entered into between Mphaphuli and Bopanang on 16 May 2002. A dispute that ensued between Mphaphuli and Bopanang over payment and execution of the agreement led to Bopanang vacating the subcontracted site during January 2003. High Court litigation ensued. This culminated in an arbitration agreement signed by the parties on 16 October 2003. The arbitrator published his award on 23 August 2004. He found Mphaphuli liable to Bopanang in an amount of R339 998.83 together with interest on that amount calculated from 6 October 2002. The attempt by Mphaphuli to have the award reviewed and set aside failed in the High Court in Pretoria. An appeal to the Supreme Court of Appeal suffered the same fate. Hence this application for leave to appeal.

[284] In its application for leave to appeal to this Court, Mphaphuli alleged that the crisp question on which it seeks the ruling of this Court is whether or not, in behaving

irregularly, the arbitrator compromised one of its constitutional rights. The constitutional right implicated was said to be the right of access to court, which is enshrined in section 34 of the Constitution. In its written argument, it contended that the issue which lies at the heart of its application for leave to appeal is the relationship between arbitrations, the courts and the Constitution.

[285] It submitted that the application raises in particular:

i) To what extent are the courts entitled and required to exercise some control over arbitration awards before adopting them as their own and making them orders of court?

ii) Does the mere conclusion of an arbitration agreement mean that the parties had undertaken to waive fundamental aspects of their right to a fair hearing in terms of section 34 of the Constitution, and, if so, under what circumstances?

iii) What is the correct approach to the grounds of review set out in section 33 of the Arbitration Act 42 of 1965 when that section is properly interpreted in the light of the right to a fair hearing contained in section 34 of the Constitution?

[286] These contentions by Mphaphuli no doubt raise a constitutional matter. But these issues are being raised for the first time in this Court. They were neither raised in the High Court nor in the Supreme Court of Appeal. And these are the kind of issues that, on Mphaphuli's version, arise from the manner in which the arbitrator

conducted himself. They are, therefore, issues which were always there and did not arise subsequent to the decisions of the High Court or of the Supreme Court of Appeal. The question is whether it is in the interests of justice to grant leave to appeal in these circumstances. It is instructive to trace Mphaphuli's cause of action as it developed in a series of affidavits filed by it in the High Court.

[287] The cause of action relied upon by Mphaphuli in its founding affidavit of 10 December 2004 was based on administrative action. It alleged that the arbitration process constitutes administrative action and should therefore be lawful, reasonable and procedurally fair as required by section 33(1) of the Constitution. In support of this cause of action, Mphaphuli alleged that the arbitrator had awarded Bopanang costs for work that was neither performed nor claimed for by Bopanang. In its opposing affidavit, dated 12 May 2005, Bopanang raised among others, two points. The first was that the arbitration process does not constitute administrative action, and that the provisions of section 33(1) of the Constitution do not apply. The other point was that none of the grounds of review set out in the founding affidavit amounts to those envisaged in section 33(1)(a)-(c) of the Arbitration Act.[1]

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

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

[288] In a supplementary founding affidavit, dated 3 August 2005, filed ostensibly to deal with matters raised in the record filed by the arbitrator, Mphaphuli conceded that the private arbitration process does not constitute administrative action. It now alleged that the process should be more accurately described "as a judicial or quasi-judicial process." In amplification of this, Mphaphuli alleged that the arbitrator failed to perform his mandate, he was biased in favour of Bopanang and there were manifest errors in the award. In response, Bopanang alleged that the arbitrator followed a transparent process which was fair to both parties and that he had applied his mind consistently with his mandate.

[289] In its four further replying affidavits filed between 3 October and 22 December 2005, Mphaphuli stood by its allegations that the arbitrator failed to perform his mandate and that there were manifest errors in the award. In particular, in its replying affidavit, dated 22 December 2005, to Bopanang's first answering affidavit, Mphaphuli stated that it had been advised that in the initial application for review, it had erroneously invoked section 33 of the Constitution. Mphaphuli claimed that this was due to its ignorance of the law and the fact that it relied upon its legal representatives.

[290] Now I have referred to these affidavits filed on behalf of Mphaphuli in order to show that despite modifying its cause of action as the litigation progressed, Mphaphuli did not raise any of the constitutional issues that it now seeks to raise. Nor did it raise these issues in its 15-page application for leave to appeal to the Supreme Court of

Appeal. These issues were not raised in the Supreme Court of Appeal either. Any doubt on this score is immediately removed by an affidavit filed by Mphaphuli's attorney in this Court in support of the application for condonation.

[291] In that affidavit, the attorney tells us that:

> "At the outset I must confess that although I have been a practising attorney specialising in litigation for nearly 13 years, I have not ever dealt with a constitutional matter before this one. In addition, senior and junior counsel who appeared on behalf of the Applicant before the Supreme Court of Appeal are also highly experienced in litigation, but have not previously appeared before the Constitutional Court. Accordingly I deemed it necessary and received an instruction from the Applicant, to brief a new counsel with specialist experience in constitutional matters. Initially the brief to new counsel was to consider whether there were reasonable prospects of success with an appeal to the Constitutional Court. In other words, was there a constitutional issue which was implicated in the matter?"

[292] Mphaphuli itself confirms that the constitutional issues are being raised for the first time in this Court. In dealing with the interests of justice, it acknowledges the reluctance of this Court "to hear matters concerning constitutional issues that have not first been ventilated in other courts." It goes on to say, however, that "[w]hilst it is true that the constitutional issue was not couched as crisply as it has been in these papers, the same or similar issues were nevertheless raised (albeit more obliquely) in the Supreme Court of Appeal." But Mphaphuli goes on to admit that "the point remains that the constitutional argument was never articulated the way it has been done here and was therefore not adequately ventilated in the judgment of the . . . Supreme Court of Appeal."

[293] It is patently clear from these statements that the constitutional issue was raised as an after thought in order to get the ear of this Court.

[294] The Supreme Court of Appeal and the High Courts have jurisdiction to hear constitutional matters. The Constitution contemplates that this Court will ordinarily sit as a final court of appeal on constitutional matters except in those instances where it has original jurisdiction or where direct access to it is appropriate in the interests of justice. A litigant who intends to raise a constitutional issue must, therefore, do so in the court of first instance. Parties should not, in an attempt to appeal further from the Supreme Court of Appeal, raise, for the first time in this Court, a constitutional issue. This practice deprives both the High Court and the Supreme Court of Appeal the opportunity to consider constitutional matters. But more importantly, it deprives this Court of the views of both the High Court and the Supreme Court of Appeal on the issue. In *Carmichele,*[2] we held that:

> "There is an obligation on litigants to raise constitutional arguments in litigation at the earliest reasonable opportunity in order to ensure that our jurisprudence under the Constitution develops as reliably and harmoniously as possible. In the result this Court has not had the benefit of any assistance from either court on either stage of the inquiry referred to above."[3]

[2] *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC).

[3] Id at para 41.

[295] This Court has, on many occasions, indicated that it is undesirable to determine constitutional questions as the court of first and last instance.[4] This is even more so in a matter such as this which concerns the interpretation and the application of a private arbitration agreement. In *S v Bierman*,[5] we said the following concerning the failure to raise a constitutional issue in the lower courts:

> "The applicant's failure to raise the constitutional issues concerning the admissibility of the Rev Bothma's evidence in her application to the Supreme Court of Appeal inhibits her ability to raise them now in this Court. As a result of that failure, this Court has not had the benefit of that Court's consideration of these issues which relate directly to established principles of the common law and to the application of such principles. The applicant's failure to raise the constitutional issues upon which her application to this Court is based in the Supreme Court of Appeal may well have been sufficient of itself to mean that her application to this Court should have been refused".[6]

[296] It is no answer for Mphaphuli to suggest that this Court has the benefit of the judgment of the Supreme Court of Appeal in *Telcordia*[7] on the constitutional issues raised together with the judgment of the Supreme Court of Appeal in the present matter. In the present matter, the Supreme Court of Appeal did not consider the role of section 34 in private arbitrations nor did it consider any of the questions now raised by Mphaphuli in its application for leave to appeal. That judgment is therefore of no benefit to this Court on the issues that Mphaphuli seeks to raise.

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[4] *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another* [2006] ZACC 5; 2006 (6) SA 103 (CC); 2006 (6) BCLR 669 (CC) at para 26 and the cases cited therein.

[5] [2002] ZACC 7; 2002 (5) SA 243 (CC); 2002 (10) BCLR 1078 (CC).

[6] Id at para 8.

[7] *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266 (SCA); [2007] 2 All SA 243 (SCA); 2007 (5) BCLR 503 (SCA).

[297] In *Telcordia*, the Supreme Court of Appeal did not consider any of the questions that Mphaphuli is inviting us to consider in its intended appeal. What the Supreme Court of Appeal considered in that case is whether section 34 was applicable to private arbitration and held that it was.[8] It is true, the court held, that "there is nothing to prevent parties from defining . . . what is fair for the purposes of their dispute."[9] It also held, relying on the approach of the European Court of Human Rights, that the rights contained in section 34 may be waived unless the waiver is contrary to some other constitutional principle or is otherwise contra bonos mores.[10] But it also held that by agreeing to arbitration, the parties "necessarily agree that the fairness of the hearing will be determined by the provisions of the [Arbitration] Act".[11] This case therefore does not help us to resolve the issues that Mphaphuli seeks to raise in its intended appeal.

[298] What must be stressed here is the role of this Court and that of the Supreme Court of Appeal. This Court is not just another court to which an appeal from the Supreme Court of Appeal lies. This Court has a special role to play in the context of our judicial system. It is the highest court, not in all matters, but in constitutional matters only. It follows from this that its appellate jurisdiction is limited to appeals against decisions on constitutional matters. This means that the appellate jurisdiction of this Court may be invoked only in respect of a constitutional matter that has been

[8] Id at para 47.

[9] Id.

[10] Id at para 48.

[11] Id at para 50.

raised and considered by the lower courts. As we have recently held, albeit in a different context, "the jurisprudence of this Court is greatly enriched by being able to draw on considered opinion of other courts."[12]

[299] Apart from this, the Constitution carves out our jurisdiction from that of the Supreme Court of Appeal. The Supreme Court of Appeal is "the highest court of appeal except in constitutional matters".[13] By constituting the Supreme Court of Appeal as the final court of appeal in "non-constitutional" matters, the Constitution seeks to achieve finality in litigation. If parties were to be allowed to raise a constitutional matter for the first time in this Court, this would not only undermine the role of the Supreme Court of Appeal, but it would also undermine the principle of finality in litigation.

[300] For these reasons, this Court should be very reluctant to entertain a constitutional matter that could have been, but was not, raised in the High Court or the Supreme Court of Appeal. This does not mean that this Court would never entertain a constitutional issue that is raised for the first time in the appeal before it. There may be circumstances where the interests of justice may well require this Court to entertain a constitutional issue raised for the first time in an appeal before it. However, such circumstances "would . . . be rare and . . . would have to be exceptional."[14]

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[12] *The AParty and Another v Minister for Home Affairs and Others* [2009] ZACC 4 at para 56.

[13] Section 168(3) of the Constitution.

[14] *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at para 44.

[301] The applicant has not demonstrated the existence of exceptional circumstances.

[302] There are two further considerations which militate against granting leave to appeal. The first relates to the prospects of success.

[303] As is clear from the arbitration agreement, the parties could not agree on the value of the work performed by Bopanang. To this extent they agreed on arbitration and defined as one of the purposes of the arbitration to "determine the value of the work that has been done by [Bopanang]" (Clause 1 of the arbitration agreement). With this purpose in mind, they looked for an arbitrator with skills in evaluating work done. They agreed on Mr Andrews, a practising quantity surveyor and a project manager from Johannesburg. In order to enable the arbitrator to carry out his mandate effectively, they gave him the power "to require from any of the parties to make such further documentation available as he may require" (Clause 5); they authorised him "to liaise with ESKOM . . . and to request any documentation" from Eskom (Clause 6); and, in turn, they authorised Eskom to make available to him any documentation that he required (Clause 6). Perhaps more importantly, they gave the arbitrator the power to inspect and measure work done on the site (Clause 7). And, as O'Regan ADCJ finds, neither clause 5 nor 6 expressly stated that the documentation received by the arbitrator would be made available to the parties.

[304] This was an investigative arbitration where the arbitrator had to play an active role in identifying and requesting information that was required for the purposes of

carrying out his mandate. I therefore agree with the High Court that Mphaphuli misconceived the nature of the proceedings before the arbitrator. This was not a formal hearing where evidence was to be led and the arbitrator was obliged to receive submissions from the parties. The arbitrator had to inspect and re-measure the work done. The arbitrator's qualification bears this out.

[305] And for the reasons advanced by O'Regan ADCJ, I agree that the arbitration agreement contemplated that the arbitrator would adopt an informal, investigative method of arbitration as opposed to a formal, adversarial one.

[306] My colleague O'Regan ADCJ has analysed the facts and reached conclusions on the nature of the arbitration process involved here, the "secret" meetings, the failure to disclose all correspondence and the alleged ignoring of pleadings or arbitral mandate. I find her analysis and conclusions persuasive. However, in the view I take of the matter, it is sufficient for me to say that her analysis and conclusions amply demonstrate that Mphaphuli has no prospects of success in the intended appeal.

[307] The other consideration relates to the ultimate dispute between the parties. The judgments by my colleagues amply demonstrate that this case is essentially about the proper meaning and application of an arbitration agreement between the parties. Reduced to its essence, this case is therefore about whether or not the arbitrator's award draws its essence from the arbitration agreement. As is apparent from what I

have said above, the purpose of raising the constitutional issues was merely to get the opportunity of a further appeal. This, in my view, cannot be countenanced.

[308] For all these reasons, I consider that it is not in the interests of justice to grant leave to appeal. The application therefore falls to be dismissed with costs including the costs of two counsel.

Counsel for the applicant:	Advocate G Marcus SC and Advocate S Budlender instructed by Knowles Hussain Lindsay Inc.
Counsel for the first respondent:	Advocate BC Stoop instructed by Barnard Inc.
Counsel for the second respondent:	Advocate F du Toit SC instructed by Schulz Lewis Inc.