REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2021/30068

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

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B.C. WANLESS **17 January 2023**

In the matter between:

STRATEGIC PARTNERS GROUP CONCESSIONS (PTY) LTD Applicant

and

BOMBELA OPERATING COMPANY (PTY) LTD First Respondent

RATP DEVELOPMENT SA Second Respondent

RETIRED JUSTICE NV HURT Third Respondent

THE ARBITRATION FOUNDATION OF SOUTH AFRICA Fourth Respondent

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 17 January 2023.

JUDGMENT

WANLESS AJ

Introduction

[1] In this application, heard as a Special Motion by this Court and set down for two days of argument, STRATEGIC PARTNERS GROUP CONCESSIONS (PTY) LTD *("SPGC")* seeks to review and set aside an arbitration award *("the Award")*. This is based on the grounds that RETIRED JUSTICE NV HURT *("the Arbitrator")*, who is the Third Respondent in the application, failed to consider and determine whether a certain implied, *alternatively*, tacit term existed and applied in an annexure to the shareholders' agreements entered into between the parties to the arbitration proceedings.

[2] BOMBELA OPERATING COMPANY (PTY) LTD *("BOC"),* who is the First Respondent in the application, is the operator of the Gautrain. SPGC and RATP DEVELOPMENT SA *("RATP"),* the Second Respondent in the application*,* are the shareholders of BOC. RATP played no part in the arbitration proceedings and elected to abide by the decision of the Arbitrator. The parties who *were* involved in the arbitration proceedings are SPGC and BOC. Whilst there is no formal notice to this effect, it would appear from the application papers before this Court that RATP has played no part in the present application. The Arbitration Foundation of South Africa *("AFSA")* is the Fourth Respondent in the application. Both the Arbitrator and AFSA have filed a notice in terms of which they have elected to abide by the decision of this Court.

The facts

[3] The aforementioned parties *(SPGC, BOC and RATP)*, together with certain other parties, entered into two shareholders' agreements. The first and original shareholders' agreement was concluded on 28 September 2006 *("the First Shareholders' Agreement").* A second shareholders' agreement was concluded on 23 October 2017 *("the Second Shareholders' Agreement")* which replaced the First Shareholders' Agreement. The disputes in the arbitration proceedings, as already referred to above, primarily concerned SPGC and BOC.

[4] Both shareholders' agreements referenced a *"Company Empowerment Plan"* annexed to the shareholders' agreements and referred to in the arbitration

proceedings as *"Annexure D".* The arbitration proceedings and the Award turned on an interpretation of Annexure D.

[5] Disputes arose between SPGC, BOC and RATP with regard to SPGC's rights in terms of Annexure D. The matter was referred to arbitration and during February 2019, SPGC delivered its statement of claim. The relief sought by SPGC in terms thereof at the arbitration proceedings was defined by the pleadings and thus the issues which the Arbitrator was called upon to decide, were the following:-

> " WHEREFORE Claimant claims an award in the following terms:
>
> 1. *Directing that:*
>
> *1.1 Claimant either in co-operation with a technology partner or through its own members is entitled to participate, by way of supply of goods and services to the Company, to an agreed value of twenty percent of the total expenditure reserved for such goods and services;*
>
> *1.2 Claimant is entitled on demand alternatively at reasonable intervals to receive a proper accounting from the Company in regard to the expenditure for the supply of goods and services in the period of the First and Second Shareholders' Agreements to the Company as contemplated in clause 3 of Annexure D thereto;*
>
> *1.3 The Company furnish to Claimant within thirty days from date of award, a proper accounting in regard to the expenditure for the supply of goods and services in the period of the First and Second Shareholders' Agreements to the Company as contemplated in clause 3 of Annexure D thereto;*
>
> 2. *Declaring that to the extent that the Company did not afford Claimant its rights of participation as contemplated in clause 3 of Annexure D, then and in such event the Company will have been in breach of such provision and liable to the Claimant for damages in an amount to be determined.*
>
> 3. *Directing that the Company second Keith Patterson, an employee of the Claimant, to be part of the Company's*

Procurement Committee or any other structure of the Company dealing with procurement."

[6] It must be noted that references to *"the Company"* in SPGC's statement of claim are references to BOC and any references to *"the Claimant"* are references to SPGC.

[7] It is common cause in this application *(qualified to a certain extent by argument placed before this Court on behalf of BOC and dealt with later in this judgment),* that in its statement of claim, SPGC relied on the existence and application of an implied, *alternatively*, tacit term[1] to the effect that:-

> " 1. *Subject to SPGC being able to demonstrate (in accordance with the requirements of in clause 3 of Annexure D), (a) technical and financial capacity; (b) the ability to deliver timeously; (c) the ability to provide goods and services of an appropriate quality (meeting the requirements specified in the O & M (an abbreviation for Operations and Maintenance) Agreement; and (d) its pricing being at least as good as the market related price, SPGC would be entitled on demand alternatively at reasonable intervals to receive a proper accounting from the Company in regard to the expenditure for the supply of goods and services to the Company as contemplated in clause 3 of Annexure D.*
>
> *2. To the extent that the Company did not afford SPGC its rights of participation contemplated in clause 3 of Annexure D, then and in such event the Company will have been in breach of such provision and liable to SPGC for damages."*

[8] In its plea in the arbitration proceedings BOC specifically denied the implied, *alternatively,* tacit term relied upon by SPGC. Furthermore, BOC pleaded that SPGC had, at all material times, participated in the supply of goods and

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[1] *Paragraph 6 of the statement of claim; paragraph 12 of the statement of claim where reference is made to clause 15 read with clauses 15.2 and 15.3 of the First Shareholders' Agreement which clauses read as follows;*

> *"15.* ***Rights to Information***
> *The Parties shall procure that:*
> *15.2 each Party shall be entitled, on reasonable notice in writing to the Company to examine all books, records, accounts, personnel data, operational plans, management accounts, budgets, expenditure reports, audit reports, operational schedules, any other information and financial statements of the Company, relating to the performance of its obligations by the Company under the Concession Agreement.*
> *15.3 the Company shall furnish to each party, in such format and in such manner as it may reasonably require from time to time, all such further information concerning the affairs of the company as it may reasonably require;…" (Emphasis added).*

services to BOC to the value of 20% of the total expenditure reserved for such goods and services.

The Award and the grounds of review

[9] SPGC submits that the Award does not deal with or determine, as required, the aforesaid implied, *alternatively,* tacit term raised in the statement of claim and denied in the plea. In the premises, SPGC contends that the Award falls to be reviewed in terms of subsection 33(1)(b) of the *Arbitration Act 42 of 1965 ("the Act")* in light of the fact that the Arbitrator failed to determine all of the issues submitted to him for determination and, in particular, failed to consider and determine the material pleaded issue being the existence and application of the implied, *alternatively,* tacit term relied upon by SPGC. In amplification of the aforegoing, SPGC contends that the Arbitrator's said omission renders the Award reviewable by this Court and liable to be set aside. It is further submitted by SPGC that the Arbitrator was bound contractually to determine all of the issues submitted to him for arbitral determination. Hence the relief sought by SPGC in this Special Motion.

The grounds of opposition by BOC

[10] BOC disputes that there is any irregularity and contends that the existence of the implied, *alternatively,* tacit term was the route to the relief sought by SPGC in the arbitration proceedings. Ultimately, says BOC, the relief sought by SPGC is as set out in the prayers to the statement of claim which constituted the issues the Arbitrator was obliged to determine. This, it is submitted, is the same view taken and the approach adopted, by the Arbitrator and which is clear from, *inter alia*, paragraph 9 of the Award.

[11] Further to the aforegoing, BOC refers to paragraphs 5, 6 and 9 of the Award and contends that the findings of the Arbitrator, as set out therein, constitute the rejection by him of the implied, *alternatively,* tacit term relied upon by SPGC.

[12] The aforegoing constitutes a broad summary of the arguments placed before this Court on behalf of SPGC and BOC. In order to have a true understanding thereof, it is necessary to consider those submissions in greater detail.

SPGC's argument

[13] At the outset, SPGC emphasises that Annexure D (entitled "*the Company Empowerment Plan"*) to both the First and Second Shareholders'

Agreements, records that it seeks to outline the measures to be taken to enhance SPGC's revenues and cashflows in respect of BOC and the services to be provided, having regard to an agreement which was concluded on 3 September 2006 and which is described as *"the Protocol Agreement".* It was submitted that the Protocol Agreement is important context for Annexure D and that it is apparent that Annexure D was intended to ensure protection of SPGC's interests. It was to further ensure that SPGC was not deprived of its rights and legitimate beneficial interests under the Protocol Agreement. In this regard, SPGC points out that it was common cause at the arbitration hearing that the founding shareholders, including SPGC, raised funds on an equal basis; that SPGC was not given any workshare in the development phase and that the Protocol Agreement constituted an agreement concluded between the founding shareholders in BOC for the purpose of compensating SPGC for having to forego revenue during the development phase.

[14] SPGC further submitted that Annexure D records that it represents a framework and commitment to facilitate and ensure SPGC's empowerment through preferential participation in all aspects of the services detailed therein. It provides that such preferential participation will enable SPGC to input people into the project in the medium to long term and enable SPGC to begin to engage with technical commercial partners based on a defined workshare and the parameters set out therein. SPGC also pointed to the fact that it was recorded that there are no conditionalities to SPGC's participation other than as set out therein; in the First Shareholders' Agreement of the concessionaire and in the BOC shareholders' agreement. Moreover, Annexure D records agreement between the parties that SPGC, either in co-operation with a technology partner or through its own members, will participate, by way of supply of goods and services to the Company, to an agreed value of 20% of the total expenditure reserved for such goods and services. Such participation is subject to SPGC being able to demonstrate (a) technical and financial capacity;(b) the ability to deliver timeously;(c) the ability to provide goods and services of an appropriate quality (meeting any requirements specified in the O & M Agreement) and (d) its pricing being at least as good as the market related price for delivery of comparable services.

[15] It was also emphasised by SPGC that the parties agreed that SPGC would second an employee to BOC to be part of BOC's Procurement Committee, or any other structure of BOC dealing with procurement. The parties also agreed that SPGC would have a preferred status with regard to the items listed therein. It was recorded that the list was indicative and not definitive in identifying the final areas of participation. Moreover, the agreed participation levels would not

decrease, save for the performance related conditionalities already contained therein.

[16] In further amplification of its argument, SPGC drew the attention of this Court to the fact that, in terms of Annexure D, it was further agreed that the parties understood and agreed that the elements within the identified workshare may vary from time to time depending on price fluctuations, program changes, design variations and any other changes as may be reasonably anticipated and/or are normal for a project of the nature of the project in question. It was for these reasons, submitted SPGC, that BOC undertook to timeously and on an ongoing basis, provide SPGC with access to all relevant information in order to assist SPGC in, *inter alia,* identifying and planning for new elements within the identified workshare variations, such information to include but not be limited to, BOC's base case and changes thereon, program information and changes thereon, as set out, *inter alia*, in clause 4 of Annexure D.

[17] When considering the grounds of opposition by BOC to the relief sought by it, SPGC noted that in its answering affidavit, BOC disputes that there is any irregularity in respect of the Award and contends that the existence of the implied, *alternatively*, tacit term was the route to the relief sought by SPGC; the relief sought by SPGC in its prayers constituted the issues that the Arbitrator was obliged to determine and that this was the same view which the Arbitrator took as appears from paragraph 9 of the Award.[2]

[18] It was submitted on behalf of SPGC that these contentions by BOC are incorrect because the Arbitrator was obliged to determine all issues in accordance with the case made out by SPGC and (b) the Arbitrator does not deal, in paragraph 9 of the Award, with the implied, *alternatively*, tacit term contended for by SPGC, nor did it form part of the route to the conclusion reached by the Arbitrator. That route, submitted SPGC, is to be understood with reference to the express terms of the Award and the Arbitrator's reasoning.

[19] In its plea, BOC refers to paragraphs 5, 6 and 9 of the Award and contends that such findings constitute the rejection by the Arbitrator of the implied, *alternatively*, tacit term contended for by SPGC. However, SPGC submitted that the Arbitrator failed to address or determine the pleaded implied, *alternatively*, tacit term, particularly with reference to clauses (1) and (3) of annexure D and clause 15 of the First Shareholders' Agreement. It was further submitted that in paragraphs 5 and 6 of the Award the Arbitrator only interpreted one single clause of Annexure D being clause 4. With regard thereto (the interpretation of clause 4), SPGC submitted that in doing so the

[2] *Paragraph [10] ibid.*

Arbitrator only made reference to the second paragraph of clause 3 (dealing with SPGC's right to second an employee to the Company *(BOC)* to be part of the Company's *(BOC's)* Procurement Committee or any other structure dealing with Procurement. This, SPGC further submitted, was incorrect for the reasons more clearly set out hereunder.

[20] In the first instance, SPGC submitted that the Arbitrator made no reference in such paragraphs to clause 1 and to the first and third paragraphs of clause 3 of Annexure D, which, SPGC submitted, are critical to an interpretation of Annexure D and, more particularly, to the implied, *alternatively,* tacit term contended for by SPGC.

[21] In this regard, SPGC once again submitted that the provisions in clause 1 that Annexure D seeks to outline are the measures to be taken to enhance SPGC's revenue and cashflows in respect of BOC and that Annexure D represents a framework and commitment to facilitate and ensure SPGC's empowerment through preferential participation.

[22] Furthermore, SPGC points to the fact that the Arbitrator made no specific reference to the provision in the first paragraph of clause 3 that SPGC will participate by way of supply of goods and services to BOC to an agreed value of twenty percent of the total expenditure reserved for such goods and services.

[23] SPGC also drew to the attention of this Court the provision in the third paragraph of clause 3 of Annexure D that SPGC would have a preferred status with regard to the packages set out therein and that such list is indicative and not definitive in identifying the final areas of participation.

[24] It was further submitted by SPGC that the Arbitrator failed to consider or determine the pleaded implied, *alternatively,* tacit term in that he:-

1. made no reference to clause 15 read with clauses 15.2 and 15.3 of the First Shareholder's Agreement which is critical to the implied, *alternatively*, tacit term contended for by SPGC;

2. made no reference to the fact that both the First and Second Shareholders' Agreements refer to Annexure D as the Company's Empowerment Plan;

3. made no reference to the undisputed evidence of SPGC's witness Mr Diliza with regard to the background in which Annexure D was

concluded and the purpose for which it was concluded;

4. made no reference to the case pleaded and argued by SPGC in regard to the implied, *alternatively*, tacit term contended for by SPGC.

[25] This Court understood SPGC to deal with the fact that BOC had raised various other defences in the present application which had also been raised at the arbitration proceedings but which, SPGC submitted, were also not dealt with by the Arbitrator in the Award. These further grounds of opposition were dealt with by SPGC, to a far lesser extent, during the course of argument. In the opinion of this Court, same are irrelevant for the purposes of this Court deciding the central or principal issue being whether or not the Award should be set aside. Further, this Court did not understand either Counsel for BOC to persist with these defences as grounds of opposition to the relief sought by SPGC in the present matter or Counsel for SPGC to place any great reliance thereon in support of the relief sought before this Court. In the premises, this judgment will not be burdened unnecessarily by dealing therewith.

[26] Counsel for SPGC referred this Court to a number of decisions which, it was submitted, are authority for various legal principles which support the aforesaid submissions made on behalf of SPGC. In the first instance, it was noted that the expression *"gross irregularity in the conduct of the proceedings"*, as used in subsection 33(1)(b) of the Act, relates to the *conduct* of the proceedings and *not* the *result* of those proceedings.[3]

[27] Further, *"..an irregularity in the proceedings does not mean an incorrect judgment; it refers not to the result but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined."*[4]

[28] Also, in the matter of *Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO and Others*[5] Basson J regarded the non-exercise of a power when there was an obligation to do so as an instance of exceeding of powers (this obviously in respect of the expression *"….or has exceeded its powers;…."* in subsection 33(1)(b) of the Act). In the matter of *Stocks Civil Engineering (Pty) Ltd v Rip NO & Another* [6] the Labour Appeal Court held[7] that this would be

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[3] *Bester v Easigas (Pty) Limited 1993 SA 30 (C) 42 I – J; Emphasis added.*

[4] *Ellis v Morgan and Desai 1909 TS 576 at 581.*

[5] *[2000] 10 BLLR 1219 (LC).*

[6] *(2002) 23 ILJ 358 (LAC).*

[7] *At paragraph 61.*

better accommodated under either " misconduct"[8]or "gross irregularity".[9]

[29] Adv Subel SC, on behalf of SPGC, placed great reliance on the decision of this Court in the matter of *Croock v Lipschitz.*[10] In that matter the Court reviewed and granted an application to set aside an arbitration award under subsection 33(1)(b) of the Act on the grounds that the arbitration panel had committed a gross irregularity by failing to consider and determine one of the pleaded defences. In that matter the pleaded defence was that the terms of an agreement were contrary to public policy and accordingly invalid. It was submitted that this decision was on point with the present matter; supported the case for SPGC in that in both matters a pleaded issue was not considered at the arbitration proceedings and was against BOC since the Court in *Croock* did not accept the same argument that had been placed before this Court on behalf of BOC in the present application.

[30] It was conceded (correctly) by Counsel for SPGC, that it is a well-established principle that the Court must be satisfied that the irregularity has caused a substantial injustice before it will set an arbitration award aside.[11]

[31] Counsel for SPGC also referred this Court to *Halsbury's Laws of England (Volume 2)* where, with regard to arbitration, it is stated:

> *"Where an arbitrator fails to comply with the terms, express or implied, of the arbitration agreement, that will amount to misconduct"*

[32] It was further submitted that on the acceptance of his appointment the Arbitrator became contractually obliged to determine the disputes as defined in the pleadings, including the dispute with regard to the implied, *alternatively,* tacit term. In this regard the Court was referred to the well-established principle in the matter of *Millar v Kirsten*[12] that when two persons approach and appoint a third person to arbitrate a dispute between them, a contract of mandate comes into existence between them. In support of this proposition, Counsel for SPGC also referred this Court to subsection 34(1) of the Act which envisages a contract between the arbitrator and the parties relating to the arbitrator's fees.

[33] Counsel for SPGC also relied on the matter of *Irish and Co Inc (Now Irish & Menell*

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[8] *Subsection 33 (1)(a) of the Act.*

[9] *Subsection 33 (1)(b) of the Act.*

[10] *2020 JDR 0758 (GJ).*

[11] *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd 2002 (4) SA 661 (SCA) at 677H; The Law of Arbitration: Peter Ramsden; second paragraph at page 203).*

[12] *1917 (TPD) 489.*

Rosenberg Inc) v Kritzas[13] In this matter it was held:

> *"On a proper reading of the terms of reference to the arbitrator, he would be obliged to enter upon and come to a decision on the various claims raised by Respondent both as to quantum and relevance….."*[14]

And:

> *It was also the arbitrator's duty to give effect to the agreement between the parties so that his award should be final and decisive between them and that the party in whose favour the award was given would be entitled to proceed upon the basis of the award being res iudicata."*[15]

Finally:

> *"It was the duty of the arbitrator to see that his award was a final decision on all matters requiring his determination. See Law of South Africa Vol 1, para 479 at 272."*[16]

[34] In *Seardel*[17] it was also held that the arbitrator's conduct in not abiding to the terms of reference of the arbitration agreement constituted misconduct.

[35] In *Hosmed Medical Aid Scheme v Thebe Ya Bopelo Healthcare Marketing & Consulting (Pty) Ltd and Others*[18] it was held[19] that the only source of an arbitrator's power is the arbitration agreement between the parties and an arbitrator cannot stray beyond the submission of the parties where they have expressly defined and limited the issues to the matters pleaded.

[36] In light of the aforegoing, it was submitted on behalf of SPGC that:

36.1 the Award falls to be reviewed in terms of subsection 33(1)(b) of the Act in light of the Arbitrator's failure to consider and determine the material pleaded issue being the existence and application of the implied, *alternatively*, tacit term relied on by SPGC which constitutes a material malfunction and a gross irregularity; and

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[13] *1991 (2) SA 608 (WLD).*
[14] *At 627F-G.*
[15] *At 634A.*
[16] *At 634C.*
[17] *At paragraphs 78 to 80.*
[18] *2008 (2) SA 608 (SCA).*
[19] *At paragraph 30.*

36.2 BOC should be directed to pay the costs of the application, such costs to include the costs of two Counsel.

BOC'S argument

[37] At the outset, Adv Graves SC referred this Court to what he (correctly in this court's opinion) referred to as the "controversial" excerpt from Annexure D which, it was submitted, has primarily given rise to this interpretational dispute. This is the first (unnumbered) part of clause 3 of Annexure D which reads as follows:-

> *"The parties agree that SPGC, either in co-operation with a technology partner or through its own members, will participate, by way of supply of goods and services to the Company* [BOC]*, to an agreed value of 20% of the total expenditure reserved for such goods and services. Such participation Is subject to SPGC being able to demonstrate (a) technical and financial capacity; (b) the ability to deliver timeously; (c) the ability to provide goods and services of an appropriate quality (meeting any requirements specified in the O&M Agreement); and (d) its pricing being at least as good as the market related price for delivery of comparable services."*

As will become clear in this judgment the "controversy" referred to is not in the interpretation of the clause itself but rather as to whether the Arbitrator considered and applied same as an implied, *alternatively*, tacit term when making the Award.

[38] BOC noted that largely (but not exclusively) based on this paragraph, SPGC contended at the arbitration proceedings that it was entitled to 20% of BOC's total expenditure on goods and services. It was further noted by BOC that SPGC also contended that, properly interpreted and subject to SPGC being able to demonstrate compliance with (a) to (d) of clause 3, Annexure D entitled SPGC to receive a "*proper accounting*" from BOC in regard to BOC's expenditure on goods and services, *alternatively,* it was said that Annexure D contained an implied or tacit term to this effect. Throughout the argument before this Court, Counsel for BOC referred to this as "*the accounting term"*. This Court shall do likewise throughout the remainder of this judgment.

[39] Also towards the beginning of his argument, Adv Graves SC made note of the fact that SPGC had sought further relief at the arbitration proceedings, namely that if BOC did not afford SPGC its rights to participate in the supply of goods and services (in the manner contemplated by Annexure D), BOC would be

in breach of Annexure D and liable to SPGC for damages, *alternatively,* as pleaded by SPGC, Annexure D contained an implied, *alternatively*, tacit term to this effect. Throughout his argument before this Court, Counsel for BOC referred to this as "*the breach term*". This Court shall do likewise throughout the remainder of this judgment.

[40] Counsel for BOC, in criticizing the argument put forward on behalf of SPGC, with particular reference to the approach adopted by SPGC in interpreting the Award, commenced by dealing with the correct principles applicable to the interpretation of an arbitral award. In this regard, it was submitted that the principles applicable to interpreting a judgment or order apply equally to the interpretation of an arbitral award. As to the rules of interpretation, BOC's Counsel referred this Court to the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[20] where it was held*:*

> *"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."*[21]

[41] The Arbitrator's intention is to be ascertained primarily from the language of

[20] *2012 (4) SA 593 (SCA).*
[21] *At paragraph [18]*

the award in accordance with the usual, well-known rules relating to the interpretation of documents. As is the case with a document the award and the tribunal's reasons for giving it must be read as a whole to ascertain its intention.[22] In the context of a challenge to an arbitral award in terms of subsection 33(1)(b) of the Act the Supreme Court of Appeal *("SCA")* in the matter of *Enviroserv Waste Management (Pty) Ltd v Wasteman Group (Pty) Ltd*[23] has held that the structure of the award is cardinal in deciding what the tribunal decided and why.[24] The SCA further held:

> *"A court faced with an application under Section 33(1)(b) of the Act which requires it to construe an award must at least be sure that it fully grasps the logic employed by the tribunal before it can contemplate the setting aside of the award."*[25]

[42] According to BOC the case sought to be made out by SPGC in this review adopts an approach to the Award which is incorrect having regard to the above authorities and is further factually unwarranted. The approach of SPGC is to itemize the particular allegation in its statement of claim regarding the alleged implied, *alternatively,* tacit term and then to criticize the Arbitrator for not *"mentioning"* these pleaded allegations or not mentioning a point argued. This novel approach, submitted Counsel for BOC, does not accord with the authorities referenced above or with those dealt with below.

[43] In amplification of this argument, BOC's Counsel drew the attention of this Court to the fact that in the Award the Arbitrator noted that SPGC construed Annexure D as creating an obligation upon BOC to account to SPGC. The Arbitrator then went on to explain why, on his interpretation of Annexure D, the duty on BOC was ***to provide access*** to certain information, rather than an accounting.[26]

[44] Following thereon, it was submitted on behalf of BOC that the Arbitrator fully understood what he was required to resolve in the arbitration as he stated in the Award:-

> "*The dispute concerns the scope of annexure D as well as the mechanism provided for its operation. There is no disagreement between the parties about the purpose of annexure D which is set out*

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[22] *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others 2013 (2) SA 204 (SCA), at paragraph [13].*
[23] *[2012] JOL 28939 (SCA).*
[24] *At paragraph [16].*
[25] *At paragraph [16].*
[26] *Paragraphs [6] and [9] of the Award.*

clearly in clause 1 of the document."[27]

[45] BOC submits that it is idle to suggest that the Arbitrator either failed to realize that part of SPGC's case concerning the interpretation of Annexure D included reliance on the implied, *alternatively,* tacit term, or that he failed to determine the issues before him. This, submits Adv Graves SC, arises out of an apparent misapprehension on the part of SPGC concerning its own pleaded case. In this regard, BOC makes the further submissions, as set out hereunder.

[46] Firstly, the introductory portion to paragraph 7 of SPGC's Heads of Argument[28] is *not* an accurate rendering of what was *actually* pleaded in the *amended* subparagraph 12.2. of SPGC's statement of claim. What *was* pleaded in an amended introductory portion of SPGC's statement of claim was the following:

> *"12.* ***On a proper construction*** *of the first shareholders' agreement (and in particular paragraphs 15 read with 15.2 and 15.3 thereof, which survive the termination of the first shareholders' agreement) read with Annexure 'D' thereto and of the second shareholders' agreement read with Annexure 'D' thereto,* ***alternatively it being tacit alternatively implied terms of the first shareholders' agreement and of the second shareholders' agreement****: …"*[29]

[47] In the premises, it was submitted on behalf of BOC that, on a plain reading, the statement of claim conjoined reliance upon a proper interpretation *with* reliance upon an implied or tacit term contained in both shareholders' agreements. This, submitted Counsel for BOC, is an important feature bearing on SPGC's criticism of the Award.

[48] In amplification of its argument, BOC proceeded to deal with the principles applicable to the determination and interpretation of implied and tacit terms. It was submitted that a tacit term, if found to exist, is not a separate discrete part of the contractual agreement with a different status. Rather, such a term is part of the contract. As authority for this proposition, Adv Graves SC relied upon what he described as the powerful dissenting judgment of Corbett AJA (as he then was) in *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration*[30] where the learned Judge not only set out a clear explanation

[27] *Paragraph [2] of the Award.*
[28] *As incorporated into paragraph [7] of this judgment ibid.*
[29] *Emphasis added.*
[30] *1974 (2) SA 506 (A).*

of the meaning of implied and tacit terms respectively but also how these respective terms find application. An implied term (in the sense explained by Corbett AJA) is an unexpressed provision of a contract which the law imports without reference to the actual intention of the parties. It is a *naturalium* of the contract.[31] A tacit term (being the second possible meaning of the expression *"implied term"*) was described thus:

> *"In the second place* 'implied term' *is used to denote an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying an implied term the Court, in truth, declares the whole contract entered into by the parties. In this context, the concept, common intention of the parties, comprehends, it would seem, not only the actual intention but also an imputed intention. In other words, the Court implies not only terms which the parties must actually have had in mind, but did not trouble to express but also terms which the parties, whether or not they actually had them in mind, would have expressed if the question, or the situation requiring the term, had been drawn to their attention …"*[32]

[49] Arising therefrom, BOC submits that the inquiry that the Arbitrator was required to engage on was *not* to determine, separately, whether the documents in question had the meaning contended for on a proper construction, *alternatively,* constituted tacit or implied terms. According to BOC the duty of the Arbitrator was to determine the correct meaning of clauses 15.2 and 15.3 of the First Shareholders' Agreement read with Annexure D and of the Second Shareholders' Agreement read with Annexure D. BOC submits that the Arbitrator properly fulfilled this duty for, *inter alia*, the reasons set out below.

[50] A tacit term is said to arise when it is necessary in the business sense to give efficacy to the contract.[33] A tacit term should not be imported on any question to which the parties have applied their minds and for which they have made express provision in the contract and particularly where the term is not necessary to render the contract fully functional.[34]

[51] BOC submits that the Arbitrator rejected the tacit term contended for.[35] He

[31] *At 531D-H.*

[32] *At 531H-532A; This minority judgment has frequently been referred to with approval and can be regarded as the leading authority on implied and tacit terms. See also City of Cape Town (CMC Administration) v Bourbon-Leftley and Another NNO 2006 (3) SA 488 (SCA) at [19] and [20].*

[33] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506(AD) at 533B.*

[34] *Wilkins v Voges 1994 (3) SA 130 (A) at 137.*

[35] *Paragraphs 5 and 6 read with paragraph 9 of the Award.*

also considered the relief arising from the breach term and because the facts did not support the existence of a breach, declined to grant the relief sought. By considering whether BOC had breached the agreement the Arbitrator, by necessary implication, assumed the existence of the breach term which the Applicant contended for. Had no such term existed, there would have been no reason for the Arbitrator to consider whether the agreement had been breached. So BOC submits that SPGC accordingly cannot contend that the Arbitrator failed to make any finding in respect of the breach term. This was pointed out by BOC in answer. Similarly, by finding that BOC was not obliged to account to SPGC but was only obliged to provide SPGC with access to certain information the Arbitrator rejected the accounting term.

[52] Counsel for BOC further submitted to this Court that confronted with this difficulty, SPGC sought to bolster its case in reply. Whilst still maintaining that the Arbitrator had not determined the existence and application of the implied, *alternatively*, tacit terms contended for, SPGC now also said that:

52.1 the Arbitrator made no reference to clause 1 and to the first and third paragraphs of clause 3 of Annexure D;

52.2 he made no reference to clause 15 of the First Shareholders' Agreement;

52.3 he made no reference to the fact that the First and Second Shareholders' Agreements described Annexure D as BOC's "Company Empowerment Plan";

52.4 he made no reference to the evidence of Mr Diliza with regard to the background to Annexure D; and

52.5 he made no reference to the case pleaded and argued by SPGC with regard to the implied, *alternatively*, tacit term.

[53] Following thereon, BOC submitted that SPGC's case was now that the Arbitrator did not consider all of the *arguments* advanced in support of the implied, *alternatively*, tacit term, rather than a contention that he failed to consider the said term at all. According to BOC, this new approach is little more than an unsustainable attempt by SPGC to undo the *result* of the Award to the effect that SPGC had failed to discharge the onus of proving the existence of both the accounting and the breach terms at the arbitration proceedings. In the premises, BOC submitted that the claimed reliance by SPGC on Section 33(1)(b) of the Act is, in truth, no more than a challenge

to the interpretation of Annexure D as found by the Arbitrator at the arbitration proceedings and as set out in the Award. It is *not* a review based on the fact that the Arbitrator failed to consider all of the material terms pleaded at the arbitration hearing.

[54] In further support of the aforegoing, BOC relied upon the judgment of the SCA in the matter of *Telcordia Technologies Inc. v Telkom SA Ltd*[36] where the SCA comprehensively analyzed the essential features of "*gross irregularity*" as contemplated in subsection 33(1)(b) of the Act. An irregularity in the proceedings does not mean an incorrect judgment because it refers not to the result, but to the methods of the hearing which prevents the aggrieved party from having his case fully and fairly determined.[37] So, as pointed out by Harms JA, it is wrong to confuse the reasoning with the conduct of the proceedings.[38] It was therefore submitted on behalf of BOC that even if the Arbitrator in the present case had misinterpreted Annexure D or failed to apply the law correctly, it would not mean that he misconceived the nature of the enquiry or his duties. It would only mean that he erred in the *performance* of his duties. An Arbitrator "*has the right to be wrong*" on the merits of the case and it is incorrect to label such mistakes as a misconception by the Arbitrator of the nature of the inquiry.[39] BOC made it clear to this Court that it did not concede that the Arbitrator was wrong in his interpretation but submitted that even *if* the Arbitrator *was* wrong, this would *not* mean that the *conduct* of the proceedings was such as to prevent SPGC from having its case fully and fairly determined.

[55] BOC further submitted to this Court that the contention that the Arbitrator made no reference to certain features of Annexure D or to the limited clauses of the First Shareholders' Agreement relied upon, is both factually and legally incorrect.

[56] The contractual features referred to by SPGC in reply[40] are, submitted BOC, to the extent required, dealt with in paragraphs 1, 3 and 4 of the Award.

[57] BOC further submitted that SPGC had also misconceived the legal position in suggesting that the Arbitrator's failure to mention a specific feature of pleadings or argument is a gross irregularity. In this regard, Counsel for BOC referred this Court to the matter of *Carleo Enterprises (Pty) Ltd v Holford*[41]

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[36] *2007 (3) SA 266 (SCA).*
[37] *Telcordia at paragraphs [72] to [75] and the cases cited therein.*
[38] *At paragraph [76].*
[39] *Telcordia at paragraphs [76]; [85] and [86].*
[40] *Paragraph [24] ibid; Subparagraph 15.2 of the First Respondent's replying affidavit*
[41] *2013 JDR 1827 (GNP).*

which concerned a review against an appeal arbitration panel in terms of subsection 33(1)(b) of the Act and considered the authorities dealing with subsection 68(2)(d) of the *UK Arbitration Act, 1996*[42]

[58] With reference to those English authorities, it was held in *Carleo*, *inter alia*, that:

58.1 in terms of Section 68(2)(d) of the UK Arbitration Act an irregularity will only result where the tribunal has not dealt at all with a critical aspect of the case in the sense that the arbitrator has not dealt with the case at all;

58.2 the tribunal does not have to deal with every point which was raised in the proceedings;

58.3 if an award expresses no conclusion at all as to a specific claim or defence then that is a clear failure to deal with the issue;

58.4 an award does not have to set out each step by which a conclusion is reached.

[59] It was further held in *Carleo* that where an arbitrator does not deal fully with an issue this does *not* mean that he did not apply his mind to the issue at all. If it is clear, within the context of the arguments advanced and the evidence placed before the arbitrator that he must, by necessity, have applied his mind to the issue, the mere fact that it is not spelt out in his award, does not mean that there was a gross irregularity.[43] Also, the court cited with approval[44] the judgment of the Court of Appeal in *Middlemiss and Gould (a firm) v Hartlepool Corporation*[45] where it was held:

> *"The failure to deal with a particular factual sub issue does not mean that the arbitrator misunderstood the nature of the inquiry. It also does not mean that the arbitrator ignored them. It is equally conceivable that*

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[42] *"68(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –*
(a) …
(c) …
(d) Failure by the tribunal to deal with all the issues that were put to it;
(e) …
(i) …"

[43] *At paragraph [142].*

[44] *At paragraph [144.*

[45] *[1973] 1 ALL ER 172 (CA).*

he thought that the issue was not worth pursuing in the light of some of his other findings …"

[60] Counsel also referred to the matter of *Checkpoint Limited v Strathclyde Pension Fund*[46] This matter concerned a challenge based upon Section 68(2)(d) and it was held:

> *"In my judgment 'issue' certainly means the very disputes which the arbitration has to resolve. In this case the dispute was about the open market rent for this property. The arbitrator decided that in order fairly to resolve that dispute the arbitrator may have subsidiary questions, 'issues' if one likes, to discuss en route. Some will be critical to his decision. Once some are decided, others may fade away."*[47]

[61] This, submitted BOC, is analogous to the present situation. The Arbitrator was required to interpret Annexure D to permit him to determine the accounting term and the breach term. He interpreted Annexure D and reached the conclusion that SPGC's reliance on the first sentence of clause 4 of Annexure D[48] could not be construed as creating an obligation on BOC to account regularly to SPGC.

[62] The following part of the award, it was submitted on behalf of BOC, clearly illustrates the Arbitrator's interpretation:

> *"[6] In the first place, the wording of the second sentence of clause 4 does not, in my view, impose a positive obligation on BOC to account regularly to SPGC for its activities in the field(s) in which SPGC is providing goods and services. The clause simply records an undertaking by BOC 'to provide SPGC with access to all relevant information'. It is of some significance, in my view, that the 'relevant information' is such as to 'assist SPGC in identifying and planning for new elements within the identified workshare variations'. It is not informative relating to retrospective transactions or recording details of past expenditure which an accounting would require. But even if the phrase 'to all relevant information' could be read as unqualified by the words which follow, BOC's obligations would not be elevated to a duty to provide a regular account. The obligation is defined as one to 'provide SPGC with **access** to all relevant information'. This is a far cry from a duty to provide an*

[46] *[2003] EWCA Civ 84.*
[47] *At paragraph 49.*
[48] *Paragraph [5] of the Award.*

accounting. It seems to me that this limited approach to BOC's duty is supported by the inclusion in Annexure 'D' of the secondment provision in the second paragraph of clause 3. The seconded employee would presumably have access to the expenditure figures and would be able to assess whether SPGC was getting its quota of the work."[49]

[63] It was pointed out by Counsel for BOC that SPGC had shifted its stance (at the argument stage) by adding to its list of grievances. Firstly, it is said that no reference was made to the undisputed evidence of SPGC's witness, Mr Diliza, regarding the background to Annexure D and the purpose thereof and secondly, that no reference was made to the case pleaded and argued by SPGC regarding the tacit or implied term.

[64] With regard to the latter, this has largely been dealt with by BOC's earlier submissions. It was further submitted on behalf of BOC that the case argued for SPGC before the Arbitrator could only address matters raised in SPGC's pleadings and the pleaded case was properly dealt with by the Arbitrator. If it is suggested that SPGC, in its argument before the Arbitrator, sought to raise matters extraneous or unrelated to the pleadings (which are not identified) then these were not matters properly requiring consideration or determination by the Arbitrator.

[65] As to the former, it was submitted on behalf of BOC that the reference to the evidence of Mr Diliza is a distraction. The heading to Annexure D is entitled *"Company Empowerment Plan (SPGC Participation)"*. The second paragraph under the Introduction records the purpose of Annexure D being to enhance SPGC's revenues and cashflows in respect of the Company (BOC) and the Services having regard to the Protocol Agreement. The following paragraph records that the document *"represents a framework and commitment to facilitate and ensure SPGC's empowerment through preferential participation in all aspects of the services detailed more fully below"*. The document unmistakably articulates its purpose and scope. In the premises, it was submitted on behalf of BOC that the Arbitrator cannot be criticized because he did not record or reference in the Award the *ipsissima verba* of this document, which forms part of the pleadings and which was extensively canvassed in evidence during the arbitration proceedings.

[66] The Arbitrator was appointed pursuant to clause 25.1 of the Second Shareholders' Agreement which requires any dispute between the parties (as contemplated in that clause) to be settled and resolved by arbitration under

[49] *Emphasis added.*

the Rules of the Arbitration Foundation of Southern Africa. This clause accords with the definition of *"arbitration agreement"* in Section 1 of the Act, which means a written agreement providing for reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement. The Arbitrator was required to determine disputes between the parties. As correctly recorded by the Arbitrator, the purpose of Annexure "D" was not in dispute[50] and Mr Diliza's evidence regarding the background to the conclusion of this agreement was not relevant to the disputes required to be determined by the Arbitrator concerning *interpretation.*

[67] It was further submitted on behalf of BOC that neither the founding affidavit nor the replying affidavit in this application makes any reference to the evidence of Mr Diliza (in the context of whether the terms contended for form part of the agreement) nor to the fact that there was any necessity for the Arbitrator to have regard to his evidence for the purpose of the implied, *alternatively*, tacit term contended for.

[68] It was therefore submitted by BOC's Counsel that it was only in argument before this Court that it was suggested that the Arbitrator ought to have had reference to *"the undisputed evidence of … Mr Diliza in regard to the background in which Annexure D was concluded and the purpose for which it was concluded"*. Furthermore, it was submitted that there is no evidence on the record to support this argument or to show that such evidence was of any relevance to the question at hand.

[69] Further and in this regard, it was pointed out by Adv Graves SC that the SCA has cautioned that evidence to contextualize the document sought to be interpreted must be used as conservatively as possible.[51] This principle has been reaffirmed by the SCA in the matter of *Tshwane City v Blair Athol Homeowners Association*[52] where it was held[53]:

> *"[63] This court has consistently stated that in the interpretation exercise the point of departure is the language of the document in question. Without the written text there would be no interpretive exercise. In cases of this nature, the written text is what is presented as the basis for a justiciable issue. No practical purpose is served by further debate about whether evidence by the parties about what they intended or understood*

[50] *Paragraph [2] of the Award.*
[51] *KPMG Chartered Accountants (SA) v Securefin Ltd & Another 2009 (4) SA 399 (SCA) at paragraph [39] and the cases cited therein.*
[52] *2019 (3) SA 398 (SCA).*
[53] *At paragraphs [63] and [64].*

the words to mean serves the purpose of properly arriving at a decision on what the parties intended as contended for by those who favour a subjective approach, nor is it in juxtaposition helpful to continue to debate the correctness of the assertion that it will only lead to self-serving statements by the contesting parties. Courts are called upon to adjudicate in cases where there is dissensus. As a matter of policy, courts have chosen to keep the admission of evidence within manageable bounds. This court has seen too many cases of extensive, inconclusive and inadmissible evidence being led. That trend, disturbingly, in [sic] *on the rise."*

"[64] This court's more recent experience has shown increasingly that the written text is being relegated and extensive inadmissible evidence has been led. The pendulum has swung too far. It is necessary to reconsider the foundational principles set out in KPMG Chartered Accountants (SA) v Securefin Ltd & Another 2009 (4) SA 399 (SCA) …"

[70] In light of the aforegoing, it was submitted by BOC that SPGC had failed to discharge the onus of showing its entitlement to the relief sought and BOC sought the dismissal of SPGC's application with costs, such costs to include the costs of two Counsel.

Findings

[71] Both clause 32 of the First Shareholders' Agreement and clause 25 of the Second Shareholders' Agreement, provide as follows:

"Save as otherwise provided in this Agreement, if any dispute ("Dispute") of any nature arises in regard to the interpretation or effect of, the validity, enforceability or rectification (whether in whole or in part) of, the respective rights or obligations of the Parties under, a breach or the termination or cancellation, of this Agreement, any Party shall be entitled, by giving written notice to the other Parties, to require that the dispute be finally settled and resolved by arbitration under the rules of the Arbitration Foundation of Southern Africa ("AFSA") by an arbitrator or arbitrators appointed by AFSA."

[72] As already dealt with earlier in this judgment the disputes which were referred to arbitration in this matter are as set out in SPGC's statement of claim (which raised the implied, *alternatively,* tacit term) and BOC's plea thereto (which

disputed the implied, *alternatively*, tacit term).

[73] Subsection 33 (1) of the Act states:-

> *"(1) 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."*[54]

[74] The relevant paragraphs of the Award, insofar as these paragraphs are the paragraphs primarily relied upon by the parties in their respective arguments, are paragraphs [5], [6] and [9] thereof. Paragraph [6] has already been set out earlier in this judgment.[55] Paragraphs [5] and [9] of the Award read as follows:

> "[5] The first sentence of clause 4 merely records that the parties "understand and agree that the elements within the identified work share may vary from time to time" and then goes on to state
>
> > "For this reason, the company undertakes to timeously, and on an ongoing basis, to provide SPGC with access to all relevant information in order to assist SPGC in identifying and planning for new elements within the identified work share variations, such information shall include but not (be) limited to the company's base case and changes thereon, program information and changes thereon etc."
>
> The Claimant has construed this as creating an obligation on BOC to account regularly to SPGC to establish that it (BOC) was complying with its obligations to award SPGC 20 % of its

[54] *Emphasis added.*
[55] *At paragraph [61] ibid.*

total spend on the categories of service and/or goods in which SPGC was a participant provider from time to time during the contract period. But this construction, in my view, misplaces the emphasis of paragraph 4 of Annexure D and overlooks the significance of the second paragraph of clause 3."

[9] "Paragraphs 1.2 and 1.3 relate to an accounting. Paragraph 1.2 is couched in the form of a declaratory and paragraph 1.3 as an executory order pursuant to a declaratory. Both of these depend, for their enforceability, on the validity of the contention that BOC is supposed, under annexure D, to account to SPGC for the work which it awards to SPGC. I have already expressed the view that no such duty was imposed on BOC by the provision that it was obliged to give SPGC "access to all relevant information." Furthermore, the period over which the accounting is demanded in the prayer appears to me to be unjustified by the facts. As I understand it, the period over which the accounts are to be framed is from 2011 (or perhaps 2015) to date. I understand also that the purpose for which this accounting is sought is to substantiate a possible short-fall in the 20% share over the past years, in respect of which SPGC wishes to frame a claim for damages. But the first the SPGC would have to show, in support of such a claim, and particularly in the absence of any complaint or demand for additional work during the period, would be that it was in a position to provide the work in accordance with the four conditions contained in clause 3. It has not done this. All that has been presented is certain vague comments, mainly by Ms Goldblatt, to the effect that SPGC would have been able to provide a considerable array of goods as well as services. I therefore do not consider that SPGC is entitled to an award on these prayers."

[75] For precisely the same reasons the relevant clauses of Annexure D are clauses 1, 3 and 4. These clauses read as follows:

"1 **INTRODUCTION**

In this Annexure D, words and expressions which are capitalised shall bear the meanings ascribed thereto in the Shareholders Agreement to which this is attached.

This Annexure D seeks to outline the measures to be taken to enhance SPGC's revenues and cash flows in respect of the Company and the services having regard to the Protocol Agreement signed on 3 September 2006 between SPGC and certain other parties represented therein by Mr. M. Dilliza and Mr. N. Flanagan respectively.

This Annexure represents a framework and commitment to facilitate and ensure SPGC's empowerment through preferential participation in all aspects of the Services detailed more fully below.

The preferential participation opportunities will

- enable SPGC to input people into the Project in the medium to long term, and

- enable SPGC to begin to engage with technical and commercial partners, based on a defined workshare and the parameters set out below.

There are no conditionalities to SPGC's participation other than as set out -

- Herein;

- the Shareholders Agreement of the Concessionaire; and

- the Shareholders Agreement of which this is Annexure D."

3 SUPPLY PARTICIPATION

"The parties agree that SPGC, either in co-operation with a technology partner or through its own members, will participate, by way of supply of goods and services to the Company, to an agreed value of 20% of the total expenditure reserved for such goods and services. Such participation is subject to SPGC being able to demonstrate (a) technical and financial capacity; (b) the ability to deliver timeously; (c) the ability to provide goods and services of an appropriate quality (meeting any requirements

specified in the O&M Agreement); and (d) its pricing being at least as good as the market related price for delivery of comparable services.

The parties have agreed that SPGC will second an employee into the Company to be part of the Company's Procurement Committee, or any other company structure dealing with procurement.

The parties have agreed that SPGC will have a preferred status with regards to the following packages and the basis set out. This list is indicative and not definitive in identifying the final areas of participation. The parties however agree that the agreed participation levels will not decrease, save for the performance related conditionalities already contained herein."

4 **VARIATIONS & ACCESS TO INFORMATION**

"The Parties understand and agree that the elements within the identified work share may vary from time to time depending on price fluctuations, program changes, design variations, and any other changes as may be reasonably anticipated and/or are normal for a project of the nature of the Project. For this reason, the Company undertakes to timeously, and on an ongoing basis, to provide SPGC to access to all relevant information in order to assist SPGC, in identifying and planning for new elements within the identified work share variations, such information shall include but not (be) limited to, the Company's base case and changes thereon, program information and changes thereon, etc."

[76] The clauses of the Shareholders' Agreements primarily relied upon by the parties in their respective arguments are clauses 15, 15.2 and 15.3. These clauses have already been set out in this judgment.[56]

[77] Despite the rather complex arguments and counter-arguments by the parties as placed before this Court and encapsulated in this judgment, there nevertheless exists extensive common ground between the parties pertaining to the correct principles to be applied in this matter. This is in respect of both

[56] *At footnote 1 ibid.*

the legal principles to be applied to the interpretation of an arbitral award and those in respect of an application for the review and setting aside of an arbitral award in terms of subsection 33(1)(b) of the Act. These principles have already been set out in this judgment when dealing with the respective arguments of both SPGC and BOC. All of these principles were (correctly) accepted by both parties and this Court did not understand any of the said principles to be in dispute.

[78] The *real* dispute between the parties was the *manner* in which those principles should be applied in the interpretation of the Award. In order for this Court to arrive at the correct decision as to whether the Award should be set aside on the basis that the Arbitrator failed to consider and apply the implied, *alternatively*, tacit term as pleaded by SPGC and which would therefore constitute, *inter alia*, a gross irregularity in terms of subsection 33(1)(b) of the Act entitling this Court to set the Award aside, it is incumbent upon this Court not only to apply those principles in the interpretation of the Award but also to examine the different methods employed by the parties in doing so.

[79] As dealt with earlier in this judgment,[57] SPGC went to great lengths to place Annexure D in context. SPGC submitted that this was vital in understanding whether the Arbitrator considered the implied, *alternatively*, tacit term when making the Award. This will be referred to as *"the contextualized approach".*

[80] This Court accepts, as a general proposition, that when interpreting an arbitral award a court is obliged to consider, *inter alia*, not only the context of the arbitral award itself but also the context of the documents referred to therein.[58] However, this Court also accepts the submissions made by Counsel for BOC[59] and, in applying the *dicta* of the SCA in *KPMG*[60] and *Tshwane City*,[61] this Court holds that (a) the contextualized approach should not be over-emphasized to the detriment of other relevant rules of interpretation, and (b) it is clear, from the earlier references in this judgment to both the Award and Annexure D itself, that the Arbitrator was acutely aware of the context in which Annexure D should be considered and did, as a fact, consider Annexure D in that context.

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[57] *Paragraphs [13] to [16] ibid.*
[58] *Endumeni at paragraph [18].*
[59] *Paragraph [69] ibid.*
[60] *Paragraph [69] ibid.*
[61] *Paragraph [69] ibid*

[61]

[81] The *principal* point of departure between the parties is the approach adopted by SPGC and criticized by BOC of, as submitted by BOC, SPGC itemizing particular allegations in the statement of claim regarding the alleged implied, *alternatively*, tacit term and then criticizing the Arbitrator for not *"mentioning*" these pleaded allegations or not mentioning a point argued. That this approach was the approach adopted by SPGC is beyond doubt and is clear, *inter alia*, from that set out earlier in this judgment when dealing with SPGC's criticism of BOC's opposition to the relief sought in the application.

[82] It was noted earlier in this judgment that Counsel for SPGC placed great reliance on the decision of this Court in *Croock.* In *Croock* the Court correctly held that an arbitration panel was obliged to consider a plea of unenforceability due to the agreement being *contra bonis mores.* Adv Subel SC relied upon this matter in two respects. Firstly, in support of SPGC's argument that where a pleaded term had been overlooked, this constituted a gross irregularity which entitled a court to set an award aside in terms of subsection 33(1)(b) of the Act. Secondly, it was submitted that the decision of Wepener J went against BOC in that the same ground of opposition that had been raised in the *Croock* matter and dismissed by the court had been raised by BOC in the present matter.

[83] At paragraph [7] of the judgment, Wepener J stated the following:

> *"If regard is had to the award there is no mention of public policy or contra bonis mores. Although the arbitrators summarized the issues to include "further objections to the claim which preclude the relief sought" it appears irrefutable that the arbitrators did not consider this substantive plea of Croock."*

[84] From the aforegoing, it would appear (a) that the award in *Croock* was completely devoid of any mention whatsoever in respect of the special plea and (b) there was no doubt whatsoever that the arbitrators had failed to consider that plea.

[85] In the Heads of Argument for SPGC, the following, with reference to *Croock*, is stated, namely *"There too the respondent had sought to (unsuccessfully) argue that the arbitrators had implicitly considered and rejected that defence. The Court found otherwise and accordingly upheld the review."* This court can find nothing in the judgment itself to support this contention. However, for the sake of argument, this Court will accept that this was the case put forward on behalf of *Lipschitz* which was rejected by the court in *Croock*.

[86] What *was* stated by Wepener J in *Croock*,[62] is the following :

> *"The argument advanced by counsel for Lipschitz was that a court cannot expect of the arbitrators to consider and mention each and every point in a matter before them. For this proposition counsel relied on Russel. The reasoning and principle referred to are instructive. However, when a party enters a substantive plea that an agreement is unenforceable due to the fact that it is against public policy, one expects the arbitrator to deal with the issue pertinently and record why the plea cannot or should not be upheld. There is nothing in the award that deals with or rejects the plea that (the) agreement is against public policy and thus, unenforceable."*

[87] In light of the aforegoing, it is the opinion of this Court that *Croock* is distinguishable from the present matter on the basis that:

87.1 It is not clear from the Award in the present matter that the Arbitrator failed to consider the implied, *alternatively*, tacit term (hence the *"interpretational dispute"* which has arisen between the parties) whilst in *Croock,* Wepener J held that "*it appears* ***irrefutable*** *that the arbitrators did not consider this substantive plea of Croock."*

87.2 The plea of unenforceability due to public policy or *contra bonis mores* in *Croock* is a substantive plea which, of necessity, would require specific mention in an award. On the other hand, the implied, *alternatively*, tacit term in the present matter, whilst certainly requiring consideration by the Arbitrator, need not be specifically mentioned or "singled out" in the Award;

87.3 This Court did not understand BOC's case to be that the Arbitrator had implicitly considered the implied, *alternatively*, tacit term (as Counsel for SPGC submitted was the unsuccessful case for *Lipschitz* in *Croock*). Rather, it was BOC's case that the Award reflected that the Arbitrator had expressly considered the implied, *alternatively*, tacit term relied upon by SPGC. This consideration, according to BOC, was *en route* (by necessity) to reaching the decision that he did in deciding the accounting and breach terms which is very different to an *"implicit consideration".*

[88] As a general proposition, this Court accepts the criticism levelled on behalf of BOC at the approach adopted by SPGC in this matter and as set out in this

[62] *At paragraph [9].*

judgment to be correct. The acceptance thereof is based upon the fact that (a) no authority was placed before this Court in support thereof; (b) this Court is unaware of any authority which would support the implementation of such a method of interpretation; and (c) such an approach falls foul of the accepted principles to be applied in the interpretation of an arbitral award (which, as dealt with earlier in this judgment, are either common cause between the parties or were never placed in dispute).

[89] Taking all of the aforegoing into account it is necessary for this Court to interpret the Award and decide whether the Arbitrator considered the implied, *alternatively*, tacit term as pleaded by SPGC and denied by BOC at the arbitration proceedings.

[90] Having dispensed with the somewhat complex method of interpreting the Award as postulated by SPGC, it is, in the opinion of this Court, a much simpler task to interpret the Award whilst applying the correct legal principles applicable thereto.

[91] When carrying out the exercise of interpretation, it would clearly be incorrect to place more emphasis on one rule to the detriment of the remaining applicable rules. This is clearly not what the SCA had in mind in the matter of *Endumeni.* Not only would this approach be incorrect but it could possibly bring one within the realms of the approach as employed by SPGC. What *is* required is for a court to adopt a holistic approach to interpretation. This should be even more so in the case where the parties have referred their dispute to arbitration and the Court is then required to review the award in terms of subsection 33(1) of the Act.

[92] The structure of the Award in the present matter which, as held by the SCA, is cardinal in deciding what the Arbitrator decided and why,[63] is relatively straightforward. It is also indicative of the logic employed by the Arbitrator when interpreting Annexure D and making the Award which is another significant factor that this Court should consider when deciding this application in terms of subsection 33(1)(b) of the Act.[64]

[93] In ***paragraph [1] of the Award*** the Arbitrator sets out the background to the relationship between the various parties. In doing so, he places the various documents in *context* and notes that the protocol agreement subsequently took effect in the form of Annexure D to the First Shareholders' Agreement. Importantly, as already noted in this judgment, the Arbitrator clearly indicated,

[63] *Finishing Touch (supra).*
[64] *Enviroserv (supra); Paragraph [40] ibid.*

from the outset of the Award, that he was fully aware of the issues to be decided when he stated in this paragraph *"The debate in this arbitration has centred (sic) around the meaning and effect of Annexure D".* This was immediately followed up in ***paragraph [2] of the Award*** wherein it is stated *"The dispute concerns the scope of annexure D as well as the mechanism provided for its operation. There is no disagreement between the parties about the purpose of annexure D which is set out clearly in clause 1 of the document. ".*

[94] The Arbitrator then proceeds to deal with specific and relevant clauses of Annexure D. In doing so the Arbitrator is able to, *inter alia*, set out the provisions of these clauses to enable them to be discussed and applied in the Award at the appropriate stages. At the same time the Arbitrator carries out the exercise of interpreting the relevant clauses of the relevant documents placed before him at the arbitration proceedings.

[95] ***Clause 3 of Annexure D*** is dealt with in ***paragraphs [3] and [4] of the Award***. For the purposes of this judgment it is relevant to note that the Arbitrator was fully aware of the recordal in clause 3, paragraph 1, as set out in paragraph [4] of the Award. This is relevant when this Court deals with the breach term later in this judgment.

[96] In the ***last sentence of paragraph [4] of the Award*** it is stated:

> *"There was some debate between the parties in regard to the precise meaning of this part of clause 3, but I do not think that the debate needs to be resolved for the purpose of this award".*

[97] This Court agrees therewith. Moreover, in the opinion of this Court, there was nothing contentious in either clause 1 or clause 3 of Annexure D that required an interpretation by the Arbitrator in the Award.[65]

[98] In ***paragraphs [5] and [6] of the Award*** the Arbitrator deals with ***clause 4 of Annexure D***. It is this clause which is relevant to the accounting term.

[99] ***Paragraph [5] of the Award*** has been set out in paragraph [74] of this judgment.

[100] ***Paragraph [6] of the Award*** has also been set out earlier in this judgment.[66]

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[65] *See paragraph [37] ibid.*
[66] *At paragraph [61] ibid.*

[101] Following a thorough analysis of the wording; meaning and intent of ***clause 4 of Annexure D***, both in isolation; in conjunction with other clauses of Annexure D and in the context as outlined in earlier paragraphs of the Award, the Arbitrator concluded that there was no obligation upon BOC to provide an accounting to SPGC.

[102] It is clear from the aforesaid references to the Award that what the Arbitrator regarded as the issue for determination was the meaning (interpretation) of clause 3 of Annexure D (giving consideration to SPGC's contentions regarding the significance of clause 4 of Annexure D). In this assessment the Arbitrator was correct and the interpretation of Annexure D was the *issue* that fell to be determined. It will be recalled that the Arbitrator identified the dispute as concerning *"the scope of annexure D as well as the mechanism provided for its operations"*. In his reasoning in ***paragraph [6] of the Award*** it is clear that the Arbitrator was aware that the inevitable point of departure is the language of the document (Annexure D) in question. The Award also considered the *purpose* of Annexure D and the background to this document. It is important to note that the Arbitrator made express reference to the Protocol Agreement, which he found *"subsequently took effect in the form of annexure 'D' ",*[67] noting that the obligation of BOC was more limited than providing an accounting,[68] for which the Arbitrator found support from the inclusion in Annexure "D" of the secondment provision.[69]

[103] In ***paragraph [7] of the Award*** the Arbitrator noted that *"On the basis of the …interpretation…"*; then turned to consider the claims of SPGC in the arbitration and immediately set out the prayers to SPGC's statement of claim (as amended).[70]

[104] The remainder of the Award,[71] for the purposes of the present matter, deals with, *inter alia*, the *merits* of the accounting and breach terms. As such, these paragraphs (with the exception of where BOC has referred to ***paragraph [9] of the Award*** insofar as this paragraph confirms findings made by the Arbitrator in paragraphs [5] and [6] of the Award) take the matter no further.

[105] This Court is not called upon and indeed, is not permitted, to determine the merits as to whether or not the terms SPGC contends for exist nor whether and how they apply. The parties agreed that a dispute of that kind is to be determined by way of arbitration. The sole question in this application is

[67] *Paragraph [1] of the Award.*
[68] *Paragraph [6] of the Award.*
[69] *Paragraph [4] of the Award.*
[70] *Paragraph [5] ibid.*
[71] *Paragraphs [8] to [14].*

whether the Arbitrator in fact considered the implied, *alternatively*, tacit term and decided upon it (whether that decision was right or wrong being of no relevance whatsoever in the present matter).

Conclusion

[106] This Court finds that the Arbitrator did consider and apply the implied, *alternatively*, tacit term as pleaded by SPGC and denied by BOC, at the arbitration proceedings, in the Award.

[107] The aforesaid decision is based upon the application of the correct rules of interpretation when interpreting the Award.

[108] When arriving at the conclusion that the Arbitrator did consider and apply the pleaded term without specifically stating he did so, this Court has endeavored to interpret the Award through the application of all the recognized rules of interpretation. In the first instance, as already dealt with earlier in this judgment, the ***structure*** of the Award is of great importance. In this regard the Arbitrator went to great lengths not only to set out the relevant provisions of those documents which had a bearing on the real issues to be decided by him at the arbitration proceedings (which he had recognized and clearly identified in the Award) but he then proceeded to thoroughly discuss those provisions and the meanings thereof.

[109] It was in this structure that the Arbitrator, in clear and unambiguous ***language***, having already placed the documents and their various provisions in context, proceeded to interpret them. This Court was at all times fully aware, in interpreting the Award of all of the surrounding ***circumstances*** giving rise to the Award; in which the Award had been considered by the Arbitrator and ultimately delivered by the Arbitrator. Moreover, when interpreting the Award this Court is aware of the fact that sight should not be lost of the important fact that it is an ***arbitral award.*** As such, it should be interpreted in that ***context*** and in the context of the relationship and dispute between SPGC and BOC. In doing so, the ***whole*** of the Award should be looked at and not specific paragraphs of the Award in isolation or specific clauses and/or paragraphs of certain documents referred to (or not referred to) in the Award. A ***holistic*** approach should be adopted. All of the aforegoing was carried out by this Court in an ***objective*** manner when coming to its decision and, in so doing, adopting a ***sensible*** and ***businesslike*** approach to the interpretation of the Award.

[110] In addition, the Arbitrator correctly applied all of the applicable principles of interpretation when considering the relevant documentation placed before him and the issues to be decided in terms of the pleadings at the arbitration proceedings. In doing so, he fully considered and applied the relevant clauses of Annexure D, namely clauses 3 and 4. There was no need for him to consider any other documentation or *viva voce* evidence as suggested by SPGC other than to the extent that he did.

[111] In reaching the conclusion that it has, this Court must also agree with the submission made by Adv Graves SC on behalf of BOC that the difficulties with SPGC's case is what appears to be a misunderstanding of its own pleadings and/or its own case at the arbitration proceedings. Put a different way, it may not even have been necessary for SPGC to amend its statement of claim at all. This is simply because, once again, it is not possible to determine the accounting and breach terms without considering and then deciding the meaning of clauses 3 and 4 of Annexure D and whether there had been compliance by SPGC of the requirements of clause 3. It was in this respect that the fact that SPGC relied on the existence and application of the implied, *alternatively*, tacit term in its statement of claim was not common cause between the parties in this application.[72]

[112] Insofar as the further criticism levelled by SPGC is concerned that the Arbitrator failed to deal specifically with the clauses of the shareholders' agreement or the Memorandum of Incorporation *("the MOI")*, there was no need for him to do so, because the Arbitrator was satisfied that this obligation was found in clause 4 of annexure "D".

[113] Having undertaken a detailed examination of the Award, there is no evidence whatsoever to suggest to this Court that there was an irregularity in the arbitration proceedings that has prevented SPGS from having its case fully and fairly determined. At the end of the day, that is the true test in deciding whether the Award should be set aside.

[114] In summary, this Court holds that:-

114.1 the method of interpreting the Award as employed by SPGC in support of its contention that the Arbitrator did not consider and apply the implied, *alternatively*, tacit term is rejected;

114.2 when interpreting the Award to determine whether the Arbitrator considered and applied the term in question the correct

[72] *Paragraph [7] ibid.*

approach to be followed is to apply the relevant rules of interpretation as established in *Endumeni,* read with *Finishing Touch* and *Enviroserv*;

114.3 in doing so, it is clear that one rule of interpretation should not be over emphasised to the detriment of the remaining rules and in a review application of an arbitral award in terms of subsection 33(1)(b) of the Act, a court should adopt a holistic approach;

114.4 the submissions made on behalf of BOC that, upon a proper interpretation of the Award, it is clear that the Arbitrator did consider and apply the said term *en route* to deciding the accounting term and the breach term, are accepted;

114.5 the mere fact (as correctly held in *Carleo*) that the Arbitrator did not spell out in the Award that he had considered and applied the implied, *alternatively*, tacit term, does not mean that he did not do so or that this constituted a gross irregularity;

114.6 in the premises, it cannot be said that the Arbitrator acted outside his mandate by neglecting to consider and apply a material pleaded issue placed before him as part of his mandate in the arbitration proceedings;

114.7 it must follow therefrom that there was no gross irregularity in the conduct of the proceedings within the meaning thereof as contemplated in subsection 33(1)(b) of the Act;

114.8 as a result thereof, SPGS has failed to prove that the Award should be set aside in terms of the said subsection of the Act; and

114.9 in the premises, the application that the Award be set aside in terms of subsection 33(1)(b) of the Act should be dismissed.

Costs

[115] It is trite that a Court has a discretion in respect of the issue of costs and that the award of costs generally follows the result unless exceptional or unusual circumstances exist. There are no such circumstances in this matter. In addition thereto, no submissions were made by either party at the hearing of

this Special Motion in respect of the scale of costs or why the awarding of costs should not include the costs of two Counsel.

[116] In respect of the scale of costs, no factors have been brought to the attention of this Court that could possibly warrant the ordering of costs on a punitive scale. With regard to the issue of the costs of two Counsel, this Court is satisfied that such an order is warranted. This is in light of, *inter alia*, the complexity of the matter; the importance of the matter; the volume of the papers in the matter and the fact that both parties elected to be represented by Senior and Junior Counsel. In the premises, SPGC should pay the costs of the application, such to include the costs of two Counsel.

Order

[117] This Court makes the following order:

1. The application in terms of subsection 33(1)(b) of the Arbitration Act 42 of 1965 (as amended) that the Award of the Third Respondent dated 12 May 2021 be reviewed and set aside, is dismissed;

2. The Applicant is to pay the costs of the application, such to include the costs of two (2) Counsel.

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B.C. WANLESS
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 27 July 2022
Judgment: 17 January 2023

Appearances

For Applicant:	A Subel SC (with JL Kaplan)
Instructed by:	Ian Levitt Attorneys
For First Respondent:	NJ Graves SC (with KD Iles)
Instructed by:	Pinsent Masons South Africa Inc.