REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Numbers: 54327/2021; 38025/2021; 04842/2022

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

26 January 2023

SIGNATURE

In the matter between:

INSURANCE UNDERWRITING MANAGERS (PTY) LTD	First Applicant
MONT BLANC FINANCIAL SERVICES (PTY) LTD	Second Applicant
and	
BLUE CREST HOLDINGS (PTY) LTD	First Respondent
NI JOFFE (RETIRED JUDGE) N.O	Second Respondent
ARBITRATION FOUNDATION OF SOUTHERN AFRICA	Third Respondent

In the matter between**:**

BLUE CREST HOLDINGS (PTY) LTD	Applicant
and	
INSURANCE UNDERWRITING MANAGERS (PTY) LTD	First Respondent
MONT BLANC FINANCIAL SERVICES (PTY) LTD	Second Respondent

M JOFFE (RETIRED JUDGE) N. O Third Respondent

(In his capacity as appointed arbitrator by the Fourth Respondent)

ARBITRATION FOUNDATION OF SOUTHERN AFRICA Fourth Respondent

Coram: MUDAU, J:
Heard: 10 October 2022
Delivered: On 26 January 2023

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII.
The date and time for hand-down is deemed to be 10 am on 26 January 2023.

Summary: Arbitration – review of award – Arbitration Act 42 of 1965, s 33(1)(a) and (b) – alleged misconduct of arbitrator – gross irregularity in the conduct of proceedings -– gross irregularity not established –applications dismissed with costs.
the arbitrator's awards made an order of court in terms of Section 31(1) of the Arbitration Act

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JUDGMENT

MUDAU, J:

[1] This is a consolidated hearing for three applications and a counterapplication. By the directive of the Deputy Judge President, the applications have been consolidated as a special allocation before this Court pursuant to Rule 11 of the Uniform Rules of Court ("the Rules").

[2] In the first application (38025/21), being the section 3 of the Arbitration Act, 42 of 1965 ("the Arbitration Act") application, Insurance Underwriting Managers ("IUM") and Mont Blanc Financial Services ("MBFS") seek substantive-related alternative orders. First, declaring that the arbitration agreements between them and a third party, Meadow Star Investments 85 (Pty) Ltd ("Meadow Star") were cancelled by consent. Second, ordering that the arbitration agreements with Meadow Star shall cease to have effect with reference to the disputes

referred. Third, an order setting aside the disputes between IUM and MBFS and Blue Crest that had been referred to arbitration (“the arbitration”). The applicants seek relief in terms of section 3(1) alternatively, section 3(2)(c), further alternatively, section 3(2)(b) of the Arbitration Act.

[3] Section 3(1) of the Arbitration Act relied upon provides that "[u]nless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto". Section 3(2) provides that "[t]he court may at any time on the application of any party to an arbitration agreement, on good cause shown—(b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration or (c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred”.

[4] In the second application (54327/21), being the jurisdiction application, IUM and MBFS seek to set aside: firstly, the dismissal by retired Judge Joffe (“the arbitrator”) of a postponement application brought by IUM and MBFS in the arbitration; second, the finding by the arbitrator that he had the necessary jurisdiction to hear the arbitration (“the jurisdiction awards”). In the second application, Blue Crest has counter-applied for an order making the jurisdiction awards into orders of court.

[5] Section 33(1)(b) of the Arbitration Act relied upon provides that:

> "(1) Where—
> …
> (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers
> …
> the court may, on application of any party to the reference after due notice to the other party or parties, make an order setting the award aside."

[6] In the third application (004842/22 - being the merits application): Blue Crest seeks orders making the arbitrator's awards on 27 April 2022, on the merits in the arbitration (“the merits awards”), into orders of court. IUM and MBFS have counter-applied for an order reviewing setting aside the merits awards.

[7] The central issue for determination in the section 3 application and the jurisdiction application is whether or not there are binding arbitration agreements between, on the one hand, IUM and MBFS, and on the other hand, Blue Crest. If this Court holds that binding arbitration agreements do not exist between the parties, then: The section 3 application and the jurisdiction application should be granted; Blue Crest's counter-application for an order making the jurisdiction awards into orders of court should be dismissed; Blue Crest's application for an order that the merits award should be made an order of court should be dismissed; and IUM and MBFS's counter-application to review the merits award should be granted.

[8] However, if the Court holds that binding arbitration agreements exist, then both the section 3 and the jurisdiction applications should be dismissed, and Blue Crest's counter-application to make the jurisdiction awards into orders of court should be granted.

[9] From a consolidated practice note however, the parties reached agreement that this dispute is primarily resolved by an interpretation of the documents that it is common cause applied to IUM, MBFS and Blue Crest, and considering the evidence filed on record, namely: the written agreements concluded and signed between Blue Crest, IUM and MBFS on 15 October 2015 (“the October 2015 variation agreements”); the written agreements signed by Blue Crest and IUM and MBFS expressly incorporate by reference the lease agreements concluded by IUM and MBFS and Blue Crest's predecessor, Meadow Star on 20 August 2014 (“the original leases”).

[10] The parties also agree, and it is accordingly not disputed that, the original leases contain an arbitration clause, being clause 48, which allows Blue Crest (the landlord) to submit all disputes in connection with, *inter alia*, the validity, termination or cancellation of the agreement to arbitration.

[11] On the other hand, the parties differ strenuously on whether the October 2015 variation agreements or the original leases make reference to or incorporate the agreements that the applicants allege that they concluded with Meadow

Star in September 2014 (“the September 2014 agreements”). The parties also differ on whether, as a matter of fact, the September 2014 agreements were concluded; and as a matter of fact, interpretation and law, the September 2014 agreements form part of the agreements between parties.

[12] In the event that this Court holds that the arbitration agreements are binding, then for the purposes of the merits application, the Court is asked to determine the issue of whether the IUM and MBFS's review of the merits award are valid. This in turn will require this Court to determine whether the arbitrator committed a reviewable irregularity when he held that IUM and MBFS had not shown good and sufficient cause to be absent from the arbitration and then proceeded to continue with the hearing into the merits.

Background Facts

[13] The necessary history of the matter, as extracted from the papers may be stated as follows. On 20 August 2014, IUM and MBFS concluded separate lease agreements with Blue Crest's predecessor in title (Meadow Star) for premises at Erf 2962, Bedford Ext 111, Gauteng (“the property”). These leases are “the original leases”. It is not in dispute that, Meadow Star, IUM and MBFS were all related parties, with common owners and management.

[14] The original leases contained arbitration clauses in which the landlord could submit any disputes between the parties to arbitration, including any disputes in connection with “the parties” respective rights and obligations in terms of or arising out of, or breach or termination of or in connection with “the validity, enforceability, rectification, termination or cancellation of, whether in whole or in part of the original leases”.

[15] In May 2015, Blue Crest concluded a sale of property agreement with Meadow Star (“the sale agreement”) for the purchase of a tenanted property. The property was tenanted by 13 tenants, that included IUM and MBFS, which were affiliated to each other and with Meadow Star through brothers Antonio lozzo (Antonio) and Nicola lozzo (Nicola). Following the sale agreement and as part

of a due diligence, Blue Crest, through its agent (Cenprop) called for and was sent all of the leases applicable to the property, including the original leases.

[16] Meadow Star provided the lease agreements to Blue Crest as part of the due diligence being the original lease agreements dated 20 August 2014 (annexure "E" and "G" to the founding affidavit in Case No 38025/2021). Blue Crest was also provided with invoices that had been rendered to and paid by IUM and MBFS historically. From the invoices, there is no disputing that rates were being charged by Meadow Star at above the baseline amounts provided for in clause 3.7.3 of the original leases, and in accordance with clause 3.8.2 of the lease and clause 8.2 of the annexure to the lease. By operation of law, Blue Crest substituted Meadow Star as the landlord in terms of the lease agreement concluded on 20 August 2014.

[17] On 15 October 2015, Blue Crest, IUM and MBFS concluded separate variation agreements (the October 2015 variation agreements). The preamble to the October 2015 variation agreements provides that the parties “entered into an Agreement of Lease on 20 August 2014”, (i.e. the original leases) and that the parties “have agreed to extend the Lease”. The October 2015 variation agreements also recorded that “[a]ll other terms and conditions of the original Agreement of Lease apply to this Variation Agreement”.

[18] In October 2015, Blue Crest took over as landlord to IUM and MBFS and continued to charge them, *inter alia*, escalated rates as allowed under clause 3.8.2 and clause 8.2 of the General Conditions of Lease of the original lease agreements of 20 August 2014. IUM and MBFS honoured those invoices and the invoices when the rates were subsequently increased by Blue Crest in reliance on clauses 3.8.2 and 8.2 of the General Conditions of Lease. From 7 March 2020 however, IUM and MBFS ceased to make consistent payment of their rental and other ancillary payment obligations such as refuse, electricity and water.

[19] Consequently, by October 2020, MBFS was in arrears of R1 315 714,96, and IUM was in arrears of R2 304 991,64. Both entities refused to vacate the premises despite the effluxion of the original leases, as extended by the October 2015 variation agreements. Consequently, Blue Crest engaged IUM and MBFS through their attorneys for several months in written correspondences over this dispute to no avail. On 23 November 2020, Blue Crest referred the disputes that had arisen to arbitration under clause 48 of the original lease agreements between it and IUM and MBFS by which it sought the payment of arrear rental and ancillary charges such as refuse, electricity and water, as well as the costs of the arbitration as indicated.

[20] On 5 April 2021, AFSA appointed retired Judge Joffe, the third respondent under article 8(1) of the AFSA Commercial Rules, to act as the arbitrator in both of the pending arbitrations in order to determine the IUM and MBFS's respective jurisdictional challenges.

[21] On 13 May 2021, Blue Crest attended a pre-arbitration before the Arbitrator, who fixed a timetable for the filing of further pleadings in the matter. On 14 May 2021, IUM and MBFS filed statements of defence in the arbitrations addressing the question of jurisdiction as special pleas. After the exchange of further pleadings, on 28 June 2021, Blue Crest, IUM and MBFS held a pre-arbitration meeting before the Arbitrator and the Arbitrator, *inter alia*, heard submissions on whether the jurisdictional challenge should be ventilated in arbitration or before the Court.

[22] The 28 June 2021 meeting was attended by counsel and attorneys representing both parties. The minute of the parties agreed that the evidence, hearing and argument in the two arbitrations on the question of jurisdiction would be consolidated for simultaneous hearing; in addition, that the arbitrator would deliver a separate award in each arbitration**.** The arbitrator recorded that “planning for the arbitration would continue as if the arbitration were proceeding

and that the Defendants (“IUM and MBFS”) remained free to take whatever steps they deemed appropriate”.

[23] The parties further agreed that the hearing of the arbitration would take place on 22, 23 and 24 September 2021. On 11 August 2021, IUM and MBFS brought an application under section 3 of the Arbitration Act, to set aside the referrals to arbitration, which is the pending application between the parties under case number 38025/21. Notably, the application was not launched within 20 days from the delivery of the duplication, as undertaken by IUM and MBFS therein. Also, the application was brought in the ordinary course and no urgent relief was sought to stay the arbitration from proceeding.

[24] On 22 September 2021, the arbitration on the question of the Arbitrator's jurisdiction was held. The proceedings commenced with IUM and MBFS seeking a postponement, which postponement was subsequently dismissed. IUM and MBFS withdrew from the proceedings, and thereafter the Arbitrator heard evidence and submissions by Blue Crest. On 19 October 2021, the Arbitrator delivered his awards on jurisdiction ("the jurisdiction awards"), in which he *inter alia* dismissed IUM and MBFS’ special pleas of jurisdiction, and directed them to pay the costs of the arbitration on the attorney and client scale as per the original lease agreements.

[25] On 8 November 2021, the Arbitration Foundation of Southern Africa (“AFSA”) appointed the arbitrator, to determine Blue Crest's substantive claims in the arbitration. IUM and MBFS invited Blue Crest to call a pre-arbitration meeting and advised that they had briefed counsel, Ferreira SC for the aforementioned purposes. They further suggested that counsel formalise the pre-arbitration discussions. On 17 November 2021, IUM and MBFS issued an application under section 33 of the Arbitration Act to set aside the jurisdiction awards. This is the application pending under case number 54327/21.

[26] On 11 January 2022, the arbitrator held a pre-arbitration meeting to fix a timetable for further pleadings, and a date for the hearing. But, IUM and MBFS did not attend. Subsequently, on 24 January 2022, the arbitrator issued a notice under section 15 of the Arbitration Act, cautioning IUM and MBFS that: the arbitration proceedings will be held at 09h30 on 14 to 18 March 2022 by video-conference; each party may be present personally or by representative and may be heard at the proceedings; and that if any party fails to attend without having shown previously good and sufficient cause for such failure, the arbitration may proceed in the absence of such party.

[27] IUM and MBFS then launched an urgent application to interdict the hearing of the arbitration, pending the finalisation of the pending applications, which unsurprisingly, was struck off the roll due to a lack of urgency on 8 March 2022. On 8 March 2022, IUM and MBFS addressed correspondence to the arbitrator (Annexure WRD1), in response to the section 15 notice and the minute of the 11 January 2022, pre-arbitration. WRD1 invited the arbitrator, in the exercise of discretion as an arbitrator not to proceed with the arbitration on the merits, pending the outcome of the section 3 application and review applications, which according to IUM and MBFS, constituted good and sufficient reason for their refusal to appear in the arbitration.

[28] In its letter in response to this as per Annexure RA2, dated 9 March 2022, Blue Crest contended that IUM and MBFS failed to show good and sufficient cause for absenting themselves from the arbitration since: Section 15(2) of the Arbitration Act applies to an excusable inability to attend proceedings, and not to a wilful refusal to attend. IUM and MBFS's remedy, if any, was to formally seek a postponement of the arbitration, an avenue previously and unsuccessfully pursued by IUM and MBFS in September 2021, and hopeless in the present circumstances; IUM and MBFS had exercised an election not to participate in the arbitration proceedings; having done so, they had taken the risk that by not attending the hearing on the merits an award could be made against them in their absence; and that this consequence would be of their own

making. The arbitrator was accordingly requested to continue with the arbitration as he was entitled to do under section 15(2) of the Arbitration Act with reference to *Van Zijl v Von Haebler*.[1]

[29] Consequently, the arbitration proceedings were therefore conducted on 14 to 15 March 2022. IUM and MBFS failed to attend or participate in those proceedings. Subsequently, on 27 April 2022, the arbitrator delivered separate awards in respect of merits, being the merits awards.

[30] Initially and as indicated, Blue Crest's claim sought arrear rental and other charges, and the eviction of IUM and MBFS, the latter relief has subsequently been amended after IUM and MBFS vacated the premises. Consequently, Blue Crest sought the costs of re-instatement of the premises to the state they were in upon initial occupation by IUM and MBFS. IUM and MBFS, as indicated above, filed special pleas of absence of jurisdiction on the basis, *inter alia*, that on 29 September 2014, they and Meadow Star concluded written variation agreements to the written lease agreement, which provides *inter alia* as follows: "[c]lause 48 of the general conditions of the lease agreement is deleted." In consequence of the deletion of clause 48 of the General Conditions of Lease, IUM and MBFS denied in their respective pleas that the "arbitrator has jurisdiction to determine the dispute and/or has jurisdiction to grant any award in favour of the claimant", Blue Crest.

[31] The arbitrator, as indicated, refused the postponement application and furnished reasons in two similar awards dated 29 October 2021 ("the Award") in favour of Blue Crest. It is trite that the ultimate test of whether an arbitrator's conduct constituted gross irregularity is whether the conduct of the arbitrator or arbitral tribunal prevented a fair trial of the issues[2].

[32] In dismissing the application for postponement the arbitrator found that IUM and MBFS should and could have instituted urgent proceedings seeking relief

[1] 1993 (3) SA 654 (SE).
[2] See Eskom Holdings Limited v The Joint Venture of Edison Jehano (Pty) Ltd and KEC International Limited and Others (case no 177/2020) [2021] ZASCA 138 (06 October 2021) at para 22.

interdicting and restraining the continuation of the arbitration proceedings. The arbitrator relies upon *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd and Another*,[3] which deals with the approach that an arbitrator should take when confronted with challenges to his own jurisdiction. Despite that, a court must decide jurisdictional issues *de novo*. The SCA explained in *Radon Projects* at para 28 that, “[w]hen confronted with a jurisdictional objection an arbitrator is not obliged forthwith to throw up his hands and withdraw from the matter until a court has clarified his jurisdiction”.

[33] The arbitrator also sought guidance, correctly, from the SCA decision in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd*[4] in which it was held at paragraph 16 that: "[i]t is in principle possible for the parties to agree that the question of the validity of their agreement may be determined by arbitration even though the reference to arbitration is part of the agreement being questioned." On 27 April 2022, the Arbitrator issued arbitration awards (the merits awards) on the merits in the disputes between the applicant and first and second respondents.

The October 2015 variation agreements

[34] The source of an arbitrator’s power is the agreement between the parties. It is evident and not disputed that the only agreement to which Blue Crest, IUM and MBFS are expressly party to is the October 2015 variation agreement. IUM and MBFS 's case is that no enforceable arbitration agreements were in place to justify why the merits awards should be made orders of court. This is because on 29 September 2014, and prior to Blue Crest even entering the scene, IUM and MBFS, on their versions, varied these lease agreements with Meadow Star by *inter alia*, deleting the arbitration clauses contained in the original lease agreements (clause 48).

[35] It is to the interpretation of the contract that I now turn, which is central to the resolution of the dispute. The law in this regard is trite. When interpreting written agreements, the meaning of words is determined by the nature and

[3] 2013 (6) SA 345 (SCA).
[4] 2013 (5) SA 1 (SCA).

purpose of the contract having regard to the context of the words used in relation to the contract as a whole.[5] In addition, a contract must be interpreted so as to give it a commercially sensible meaning.[6]

[36] For the purposes of the present proceedings, in the preamble, each of the 2015 variation agreements provides, *inter alia*, that the parties "entered into an Agreement of Lease on 20 August 2014", and that the parties in the body of the agreement, agreed under the heading "Extension of Lease and Rental and Escalation" that "the terms and conditions for the extended period of lease will be the same of those contained in the existing lease between Meadow Star Investments 85 (Pty) Ltd and Insurance Underwriting Managers (Pty) Ltd, and also in the case of Mont Blanc Financial Services Ltd, save that ...". The parties further agreed that "all other terms and conditions of the original Agreement of Lease apply to this Variation Agreement".

[37] Significantly, the October variation agreements identify in the preamble only one lease, being the "Agreement of Lease on 20 August 2014". The variation agreements stipulated that the terms and conditions of "the original" leases would apply to the variation agreements. By including the phrase "the original" agreement of lease, the parties, in my view, excluded the prospect of either of them contending for a subsequent amendment to or variation of that original agreement of lease as the arbitrator also concluded.

[38] From the above, it is distinctly apparent that the parties agreed that all the terms of the original agreement of lease would apply to the varied agreement of lease. It is, accordingly, clear from the evidence that the purported variations that allegedly removed clauses 48 from the agreements between the parties were not part of the agreement between Blue Crest, IUM and MBFS.

The original lease agreements of on 20 August 2014

[5] *List v Jungers* 1979 (3) SA 106 (A) at118G–H; *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 767I; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18] as well as *Bothma-Batho Transport* (*Edms*) *Bpk v S Bothma & Seun Transport* (*Edms*) *Bpk* 2014 (2) SA 494 (SCA) at para 12.
[6] *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd*, n3 above at para 25.

[39] Each original lease, which forms part of the whole agreement, is relevant to its interpretation. The agreements are worded in similar terms. Both contain some provisions that point towards the parties intending their whole agreement to include only the original lease and the October 2015 variations: The original lease agreements provide that any party to the original lease agreements may demand that a dispute be determined in terms of clause 48 of the General Conditions of Lease by written notice given to the other party, which entails that such arbitration shall be held at the premises of AFSA in Sandton, that the arbitration shall be final and binding on the parties to the dispute and may be made an order of court as provided in clause 48.7. of the original lease agreements.

[40] Clause 49.3 of the General Conditions of Lease thereof provides that this agreement constitutes the whole agreement between the parties, relating to the subject matter hereof. Clause 49.2 of the General Conditions of Lease provide that "no amendment or consensual cancellation of this agreement or any provision or term hereof ... shall be binding unless recorded in a written document signed by the parties". Clause 49.6 of the General Conditions of Lease provides that "to the extent permissible by law no party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded herein, whether it induced the contract and/or whether it was negligent or not".

[41] Seen in this light, and in my view, had the parties had intended to incorporate any further variations to the original lease, then they would have specifically referenced such variations in the October variations, or at a basic minimum referred to the original lease "as amended", which is not the case in both instances.

[42] From the above, it is patently apparent to me that the parties agreed that all the terms of the original agreement of lease would apply to the varied agreement of lease. Accordingly, I conclude that the reference to the "only original Agreement of Lease" can only be the original lease without any amendments. But there is more. Not only were the alleged variation agreements never disclosed and not referred to in the October 2015 lease agreements, which

would bind these parties, inexplicably the conduct by IUM and MBFS between October 2015 to March 2020, when they defaulted, was consistent with the 2014 original lease agreements.

[43] In this case, the invoices which were rendered to IUM and MBFS and considered by Blue Crest before the October 2015 variation agreements were signed reflected rates recoveries that were consistent only with escalations of rates consistent with the original leases. This would not have been permitted under the purported variations. With due regard to the Plascon-Evans approach: as the applicants in these proceedings, IUM and MBFS's version stands only if it is not contradicted by the respondent, which the latter succeeded to do.

[44] On its version, which was not seriously challenged, Blue Crest was never sent the purported amendment agreements prior to signature of the Offer to Purchase ("OTP") or as part of the due diligence process required by the OTP. Blue Crest was therefore completely justified in relying on the provisions relating to arbitration as they remained of full force and effect, and are part of the agreement between the parties. I find, accordingly, that there are binding arbitration agreements between, on the one hand, IUM and MBFS, and on the other hand, Blue Crest.

[45] It follows, accordingly, that the arbitrator was vested with general jurisdiction to try the dispute between the parties by reason of his appointment as he did, which is consistent with article 11.2.2 of the AFSA Rules. The article also provides, *inter alia*, that "the arbitrator shall have the following powers: to rule on his own jurisdiction, including rulings on any dispute in regard to the existence or validity of the arbitration agreement or the scope thereof".

[46] In terms of s 31(1) of the Arbitration Act, an award may, on application to a court by any party (in this case Blue Crest), be made an order of court. Section 33(1) thereof empowers a court, on limited grounds, to set aside an award on application by any party, e.g. in terms of s 33(1)(b) where an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration

proceedings or has exceeded its powers. An arbitration is, in its nature, a quasi-judicial proceeding.

[47] However, when an arbitrator having exercised a discretion that is within his or her powers, a court will not review the decision unless the party seeking review, can show a gross irregularity by the arbitrator. In *Telcordia Technologies Inc v Telkom SA Ltd*[7] the SCA held that, by agreeing to arbitration, the parties had limited the grounds of interference in their contract by the courts to the procedural irregularities set out in s 33(1) of the Act. By necessary implication, they had waived the right to rely on any further grounds of review, whether at common law or otherwise. The SCA reaffirmed the principle of party autonomy, that is, a realisation of freedom enjoyed by parties to execute arbitration agreements.[8]

[48] Section 15(2) of the Arbitration Act provides that:

"If any party to the reference at any time fails, after having received reasonable notice of the time when and place where the arbitration proceedings will be held, to attend such proceedings without having shown previously to the arbitration tribunal good and sufficient cause for such failure, the arbitration tribunal may proceed in the absence of such party."

It is a jurisdictional requirement, as Blue Crest pointed out, for the application of section 15(2) that the party who fails to attend the arbitration "receives" reasonable notice of the time and place where the arbitration proceedings will be held.[9] This requirement is peremptory. There is no suggestion made in this matter that IUM and MBFS did not receive received reasonable notice of the time when and place where the arbitration proceedings would be held.

[49] It is common cause that the application for a postponement on 22 September 2021 was brought from the bar and without a supporting substantive application and affidavit. The postponement was sought based on IUM and MBFS's claim that their attacks on the validity of the arbitration referral should be decided by

[7] 2007 (3) SA 266 (SCA) at para [51].
[8] See too Lufuno Mphaphuli and Associates (Pty) Limited v Andrews and Another 2009 (4) SA 529 (CC)
[9] See *Vidavsky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA) at para 12.

a court, and not by the arbitrator. The first ground of review in respect of the refusal for postponement is that the arbitrator “did not take into consideration the section 3 application”, and did not consider that a court could always reopen the question of jurisdiction.

[50] However, by agreeing to submit any dispute "in connection with ... the formation or existence of ... (or) the validity, enforceability, rectification, termination or cancellation of whether in whole or in part of, this agreement", as I have already concluded above, that wording of clause 48 is such that the arbitrator has jurisdiction to determine the issue before him. The parties accepted that the arbitrator could determine disputes extending to whether: (a) the defendant and Meadow Star adopted the purported variations and, in so doing, removed the arbitration clause under the original lease; (b) when the parties concluded the October 2015 variations, the defendant and Meadow Star contracted on the basis of the original lease only, or intended to give effect to the alleged amending agreements as well.

[51] As Blue Crest contends, had IUM and MBFS remained in attendance, they would have been able to: (i) lead their own witnesses and allow those witnesses to be cross examined; (ii) cross-examine Blue Crest's witnesses; and (iii) make submissions to the arbitrator. Had they remained, then this court would have before it today a full transcript of the IUM and MBFS’ witnesses' performances under cross-examination, when they would have had to answer to the insurmountable problems with the probabilities of the versions that they had offered in the section 3 application as I have already concluded.

[52] It was also contended on behalf of IUM and MBFS that they are facing allegations of fraud against it, and that it is entitled to defend its good name in court and in public with the right to take an adverse decision on appeal. But, the argument in this regards holds no water because the dispute between the parties as to jurisdiction could still have been resolved if the arbitrator accepted that the variation agreement of 29 September 2014 was concluded.

[53] If I understand the stance of IUM and MBFS correctly, it is their contention that the Arbitrator misdirected himself in entertaining any application for an award.

The conduct of the respondent in failing to remain in attendance at the proceedings fell squarely within the ambit of the provisions of section 15(2) of the Arbitration Act referred to above. IUM and MBFS raised no other grounds valid for postponing the arbitration other than that the issue of jurisdiction should be ventilated in the High Court. The Arbitrator was consequently entitled to proceed with the arbitration in the absence of IUM and MBFS.

[54] IUM and MBFS, accordingly, have made out no case that the arbitrator committed any gross irregularity or exceeded his authority when he dismissed the postponement application. The postponement application was in my view, correctly dismissed by the arbitrator on the basis of binding authorities from the SCA referred to above and clause 48 of the original leases, which as I concluded, give the arbitrator the jurisdiction to enquire into the validity of the arbitration clause itself. In amplification, Article 11 of the AFSA Rules is of relevance. It provides in relevant part at 11.1 that "[t]he arbitrator shall have the widest discretion and powers allowed by law to ensure the just, expeditious, economical, and final determination of all the disputes raised in the proceedings**,** including the matter of costs", consistent with the approach taken by the arbitrator.

Conclusion

[55] The applicants, IUM and MBFS have made out no case for reviewing the arbitrator's finding that he has jurisdiction nor that there was no just cause to postpone the arbitration hearings. On the contrary the evidence clearly establishes that the arbitrator was correct when he held that IUM and MBFS had not shown good and sufficient cause to be absent from the arbitration and then proceeded to continue with the hearing into the merits.

[56] The evidence also overwhelmingly shows that the purported variations that allegedly removed clauses 48 from the agreements between the parties were not part of the agreement between Blue Crest and the applicants. This is the case even if the purported agreements were concluded. Similarly, IUM and MBFS made out no case that the arbitrator committed any gross irregularities in respect of the merit awards that justifies review after considering the relevant

evidence. It stands to reason that both applications and related counter application by IUM and MBFS fall to be dismissed with attendant costs following the result. Conversely, I conclude that the applicant, Blue Crest is entitled to the relief it seeks.

Order

1 The application of Insurance Underwriting Managers (Pty) Ltd and Mont Blanc Financial Services (Pty) Ltd under case number 38025/2021 is dismissed.

2 Insurance Underwriting Managers (Pty) Ltd and Mont Blanc Financial Services (Pty) Ltd are to pay the costs of the aforesaid application and counter-application, jointly and severally, the one paying the other to be absolved, on the attorney and client scale, including the costs of two counsel.

3 The application of Insurance Underwriting Managers (Pty) Ltd and Mont Blanc Financial Services (Pty) Ltd under case number 54327/2021 is dismissed.

4 The counter-application of Blue Crest Holdings (Pty) Ltd under case number 54327/2021 is granted and it is ordered that:

4.1 The award made by the second respondent, Retired Judge Meyer Joffe, on 19 and 20 October in the arbitration between Insurance Underwriting Managers (Pty) Ltd and Blue Crest Holdings (Pty) Ltd is made an order of court under section 31 of the Arbitration Act, 42 of 1965;

4.2 The award made by the second respondent, Retired Judge Meyer Joffe, on 19 and 20 October in the arbitration between Mont Blanc Financial Services (Pty) Ltd and Blue Crest Holdings (Pty) Ltd is made an order of court under section 31 of the Arbitration Act, 42 of 1965;

5 Insurance Underwriting Managers (Pty) Ltd and Mont Blanc Financial Services (Pty) Ltd are to pay the costs of the aforesaid application and counter-application, jointly and severally, the one paying the other to be absolved, on the attorney and client scale, including the costs of two counsel.

6 The application of Blue Crest Holdings (Pty) Ltd under case no. 2022/004842 is granted, and it is ordered that the Awards, set out below in parts A and B, of Retired Judge Meyer Joffe, dated 27 April 2022 in the arbitration between Blue Crest Holdings (Pty) Ltd and Insurance Underwriting Managers (Pty) Ltd and Mont Blanc Financial Services (Pty) Ltd be made an Order of Court in terms of Section 31(1) of the Arbitration Act, 42 of 1965, as amended:

PART A: Award against First Respondent

(i) Insurance Underwriting Managers (Pty) Ltd is to pay Blue Crest Holdings (Pty) Ltd the sum of R8 401 807.37 in respect of arrear rental and additional charges;

(ii) Insurance Underwriting Managers (Pty) Ltd is to pay Blue Crest Holdings (Pty) Ltd R706 247.20 in respect of the costs of repairing and restoring the premises;

(iii) Insurance Underwriting Managers (Pty) Ltd is to pay Blue Crest Holdings (Pty) Ltd interest on the aforesaid amounts at the commercial overdraft rate charged by Nedbank from time to time, plus 2% per annum calculated from 1 February 2022 and compounded monthly until the date on which payment is made;

(iv) Insurance Underwriting Managers (Pty) Ltd is to pay the costs of the arbitration on an attorney and own client scale; such costs to include the fees of the Arbitrator, The Arbitration Foundation of Southern Africa and the Transcribers; and

(v) Insurance Underwriting Managers (Pty) Ltd is to pay Blue Crest Holdings (Pty) Ltd's costs of suit, including the costs of two counsel when and where applicable.

PART B: Award against Second Respondent

(i) Mont Blanc Financial Services (Pty) Ltd is to pay Blue Crest Holdings (Pty) Ltd the sum of R4 645 350.87 in respect of arrear rental and additional charges;

(ii) Mont Blanc Financial Services (Pty) Ltd is to pay Blue Crest Holdings (Pty) Ltd R248 748.75 in respect of the costs of repairing and restoring the premises;

(iii) Mont Blanc Financial Services (Pty) Ltd is to pay Blue Crest Holdings (Pty) Ltd interest on the aforesaid amounts at the commercial overdraft rate charged by Nedbank from time to time, plus 2% per annum calculated from 1 February 2022 and compounded monthly until the date on which payment is made;

(iv) Mont Blanc Financial Services (Pty) Ltd is to pay the costs of the arbitration on an attorney and own client scale; such costs to include the fees of the Arbitrator, The Arbitration Foundation of Southern Africa and the Transcribers; and

(v) Mont Blanc Financial Services (Pty) Ltd is to pay Blue Crest Holdings (Pty) Ltd's costs of suit, including the costs of two counsel when and where applicable.

7 The counter-application of Insurance Underwriting Managers (Pty) Ltd and Mont Blanc Financial Services (Pty) Ltd under case number 2022/004842 is dismissed.

8 Insurance Underwriting Managers (Pty) Ltd and Mont Blanc Financial Services (Pty) Ltd are to pay the costs of the aforesaid application and counter-application, jointly and severally, the one paying the other to be absolved, on the attorney and client scale, including the costs of two counsel.

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MUDAU J

[Judge of the High Court]

APPEARANCES

Counsel for Insurance Underwriting Managers (Pty) Ltd (IUM) and MBFS Financial Services (Pty) Ltd (MBFS):

EJ Ferreira SC & Adv JM Killian

Instructed by:

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Counsel for Blue Crest Holdings (Pty) Ltd (Blue Crest):

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Instructed by:

Tatham Wilkes Inc

Date of Hearing:	10 October 2022
Date of Judgment:	26 January 2023