IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1)	REPORTABLE: Electronic reporting only
(2)	OF INTEREST TO OTHER JUDGES: No.
(3)	REVISED.

....

DATE SIGNATURE

Case no: 52056/16

In the matter between:

RAND WATER Applicant

and

ZUIKERBOSCH BIOCAL PRODUCTS CC AND TAROLINE (PTY) LTD JOINT VENTURE 1ST Respondent
EZRA GOLDSTEIN N.O. 2ND Respondent

Case Summary: **Arbitration – Arbitration Act 42 of 1965 – s 33(1)(a) and (b) – Setting Aside of Arbitral Award – whether arbitrator has exceeded his powers, has misconducted himself in relation to his duties as arbitrator or has committed any gross irregularity in the conduct of the arbitration proceedings.**

JUDGMENT

MEYER J

[1] The applicant, Rand Water, seeks the review and setting aside of the arbitral award made by the second respondent, Ezra Goldstein N.O. (the arbitrator), on 24 May 2016, in arbitration proceedings between it and the Zuikerbosch Biocal Products CC

(Zuikerbosch) and Taroline (Pty) Ltd (Taroline) joint venture (the joint venture). The application is brought in terms of s 33(1)(a) and (b) of the Arbitration Act 42 of 1965 (the Act), which provides for the setting aside by the court of an award 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'.

[2] Rand Water is a public entity and bulk water supplier. Its water processing and purification processes produce significant quantities of sludge (containing agricultural lime). The sludge is deposited from its water purification plant into drying beds situated at its Panfontein sludge disposal site (Panfontein). The dried sludge is regularly removed from the drying beds for use in, *inter alia*, the agricultural sector by farmers to treat or improve the soil for agricultural purposes. The dried sludge is collected, crushed, screened/sieved and loaded onto trucks for sale to farmers as a ground improvement agent. Rand Water has over the years concluded short term contracts with various service providers to remove the sludge from the drying beds at their own cost in return for a nominal fee of less than R2 per ton of sludge. Traditionally, the sludge removed was delivered to farmers within a 150 km radius of Panfontein.

[3] Since about 2009, Zuikerbosch was one of Rand Water's service providers that removed the sludge from the settling ponds at Panfontein. During February 2013, Mr Hennie Pistorius, representing Zuikerbosch, submitted a written proposal to Rand Water to increase the quantities of sludge to be removed from Panfontein (the Zuikerbosch proposal). The executive summary of the Zuikerbosch proposal reads as follows:

'At present Rand Water is increasing the capacity of 20 settling ponds at a cost of approximately R350m. The upgrade results in sufficient capacity for another 4-5 years after which a similar upgrade will be required to ensure effective operation of the facility.

Zuikerbosch Biocal can increase the sludge removal to an estimated R35000t-40000t per annum by increasing the geographical size of the market. The increased market will be ensured through strategically positioned depots in the major grain producing area of South Africa. This increase in sludge removal will eliminate the need for future capital expenditure to increase pond capacity. Sludge can be removed and processed into the market at ±30% of the R/t upgrade cost per annum of the ponds that have a limited operating life without sludge removal.

Increasing the market share will have the following benefits for Rand Water:

- Significant reduction in capital cost required to upgrade facilities
- Instantaneous increase in the existing capacity to handle sludge
- Noticeable contribution to food security through reducing input costs
- Sustainable development in a number of communities where depots will be established

Rand Water can ensure the operation capacity of the facility by subsidizing the transport of sludge to strategic depots within a 200km distance from Zuikerbosch.'

[4] The Zuikerbosch proposal accordingly called on Rand Water to subsidize the transport costs of the sludge removed from Panfontein and transported to centralized distribution depots, from where it could be redistributed to the local market in that area. It was to the effect that the removal of increased quantities was possible provided the sludge is removed to farmers beyond the 150 km radius from Panfontein, but that would translate into increased transportation costs, which Rand Water should subsidize by way of a transport subsidy payable on each ton of sludge removed. The benefit to Rand Water would be the increased capacity of the available empty drying beds and the elimination of the need for future capital expenditure to increase pond capacity.

[5] On 7 March 2014, Rand Water issued a tender invitation for bidders to bid for the removal of sludge from Panfontein to a distance greater than 150 kilometres in return for a transport subsidy to mitigate the related increased transportation costs. The Zuikerbosch proposal, it is common cause, formed the basis of the tender invitation. The joint venture was one of the parties which submitted a written tender in response to Rand Water's tender invitation (the joint venture's tender submission). Rand Water selected two entities as the successful bidders, the joint venture being one. On 2 May 2014, Rand Water furnished the joint venture with a letter of award entitled 'REMOVAL OF SLUDGE TRANSPORT SUBSIDY AT PANFONTEIN SITE – AWARD OF WORK' (the letter of award), stating that-

'Rand Water hereby accepts your offer to remove a minimum of 15000 tons per month against a payment of R349.20 per ton (Excluding value- added tax). All work shall be undertaken in accordance with the terms and conditions of the RFP.

The tender is awarded based on the information contained in the tender document and in line with Rand Water Supply Chain Management Policy. Copies of all relevant & applicable licenses are to be submitted to Rand Water within 30 days of date of award.
Rand Water considers the information contained in the tender document as a material aspect of the contract and should there be any significant change in the equity situation of your company or close corporation during the duration of the contract, Rand Water reserves its rights in law to take any appropriation action in order to deal with the changed status.
Parties are to successfully conclude & sign off SLA agreement within 14 days of the date of this letter. Should the SLA agreement not be concluded, Rand Water would not be bound to enter into agreement with yourself. . . . '

[6] On 3 June 2014, Rand Water, represented by Mr Graham Duncan, and the joint venture, represented by Mr Pistorius, concluded a written 'Transport Subsidy Agreement' (the contract) for the removal of sludge from Panfontein to distances greater than 150 kilometres. The presently relevant terms of the contract were the following:

'2.1 This Agreement shall commence on 1/4/2014, irrespective of date of signature hereof, and shall continue for a period of 12 (twelve) months, expiring on 31/3/2015 ("the Term") with an option to The Contractor to renew the Agreement for a further 12 (twelve) months on substantially the same terms and conditions contained here-in, subject to performance review on this current Agreement and Rand Water's finances available.

. . .

2.3 This Agreement may be terminated by either of the two parties, with one month's written notice given by the party wishing to terminate the Agreement.

. . .

3.2 The Contractor shall perform all aspects of its obligations as stipulated in Annexure "A" hereto.

. . .

4.1 It is agreed between the Parties that Rand Water will pay The Contractor R349.20 per metric ton of sludge removed, as a transport subsidy, for each ton of sludge transported further than 150Km from Panfontein site.

. . .

5.1 As consideration for The Contractor's obligations, The Contractor shall invoice Rand Water once per month at the end of each month, during the Term, and Rand Water shall pay The Contractor within 30 days of date of the relevant invoice.

. . .

8.1 Should any Party commit a breach of any terms or conditions of this Agreement and fail to remedy such breach within 7 (SEVEN) days after delivery by the other Party of the written notice to do so, the Party issuing the written notice shall be entitled, without prejudice to whatever other rights and remedies it may have in terms of this Agreement or in law, to terminate the Agreement.

. . .

12.1 This Agreement represents the entire understanding between the Parties and supersedes all prior understandings and agreements, whether oral or written, between the Parties with respect to the promotion.

12.2 Neither this Agreement nor any attachment and/or annexure may be changed or modified unless such change or modification is in writing and executed by the Parties through signature.

. . .

13.1 In the event of either party requiring to terminate this contract, then such party shall have the right to cancel this contract by giving the other 1 (ONE) month written notice.

. . .

18.2 The Contractor will pay to Rand Water R175.00 per metric ton for each ton of sludge below the expected performance (target), as set out in Annexure "A", clause 1. Penalties shall only be applied at the end of the initial duration to the contract. This clause relating to Penalties shall survive termination of the contract.'

[7] Annexure 'A' to the contract is entitled 'RIGHTS AND OBLIGATIONS OF THE PARTIES' and the presently relevant provisions thereof are the following:

'1. The Contractor shall remove 180 000 tons of sludge from Panfontein site over a period of 12 (twelve) months.

2. Sludge may only be taken to a distance greater than 150Km from Panfontein site.

3. Under this Agreement, sludge may not be supplied to any customer, consumer, depo or end user within a 150Km radius of Panfontein site.

. . .

5. The Contractor shall be responsible for all costs incurred for the collection, processing and removal of sludge.

. . .

14. The Contractor shall ensure that the removal of the sludge, transport, utilisation, storage or disposal of this material by themselves or a third party to whom sludge was supplied is done in accordance with all Acts, legislation, local by-laws and regulations governing the environment, and in accordance with all permits issued by Government Departments to Rand Water. A copy of the permit/s shall be furnished by Rand Water.

. . .

16. The Contractor shall supply Rand Water Panfontein with weekly figures of the tonnage of sludge removed for the previous week, on the Monday of the following week (figures supplied weekly). This will include tonnages removed, client details, distance travelled to client/disposal point and dates.

. . .

20. The Contractor will provide Rand Water with a list of customers/clients on a weekly basis.

. . .

21. The Contractor will not remove the sludge for any other purpose, other than for use in the Agricultural market and not closer than 150Km from Panfontein site. Any other intended use of the sludge must be disclosed to Rand Water and written permission obtained from Rand Water, prior to removing the sludge from Panfontein site for this intended use.'

[8] Prior to the letter of award, during the period 1 April 2014 to 2 May 2014, the joint venture removed 3,795.66 tons of sludge to farmers in the Standerton district. According to the joint venture, it had removed the sludge before the contract was awarded to it in accordance with an arrangement between Rand Water and itself in terms of which it was agreed that the joint venture could proceed with the removal of sludge as from 1 April 2014 at its own risk, in other words, if the joint venture was not awarded the contract it would not have been entitled to payment of the transport subsidy. According to the joint venture it removed 55 893.86 tons of sludge to six destinations - the Vrede depot and Vrede farmers, Orkney depot, Middelburg depot, Senekal and farmers in the Standerton district - during the period 2 May 2014 until 10 July 2014, in respect of which removals Rand Water failed to pay to it the transport subsidy.

[9] By letter dated 10 July 2014, addressed to the joint venture, Rand Water suspended the joint venture's removal of sludge from Panfontein in terms of the contract, with immediate effect. The letter reads thus:

‘1. Please be advised that Rand Water has picked up certain irregularities in respect to the above contract. In light of these irregularities we require that you immediately stop with the removal of the sludge, until the parties can meet.

2. Kindly provide us with two dates and times for next week in order that a meeting can be arranged.

3. Further, please note that the halting of the removal of sludge commences with immediate effect and as such Rand Water will, from tomorrow, refuse access to your vehicles.

4. We await your response hereto as a matter of urgency.’

[10] By letter dated 16 September 2014, Rand Water, represented by its attorneys Cliff Dekker Hofmeyr Inc., gave the joint venture one month’s written notice of the termination of the contract, in terms of clauses 2.3 and 13.1 thereof. The contract was thus terminated with effect from 31 October 2014. The joint venture was further advised:

‘8. In regard to invoices submitted by you Rand Water hereby declares a dispute in terms of the dispute resolution clause of the Agreement as a result of the weigh bridge discrepancies.

9. Accordingly Rand Water is unable to accept liability for any of the invoices submitted.’

[11] Arbitration proceedings followed; the joint venture being the claimant and Rand Water the defendant. The relevant parts of the arbitration clause included in the contract, were the following:

’17.6.3. The proceedings shall be in terms of the Arbitration Act, Act 42 of 1965 (as amended) subject to the provisions of clause 17.6.5.

17.6.5 The arbitrator appointed shall not be obliged to follow the strict principles of law in determining the dispute, but shall be entitled, in his sole discretion to determine the dispute with due reference to the equities prevailing in respect of the dispute. . . .

17.6.6 The parties irrevocably agree and undertake that any award or order whatsoever made by the arbitrator shall be final and binding upon them and may at the option of either party be made an order of court, having competent jurisdiction and to which jurisdiction the parties are subject. The parties hereby specifically exclude all rights of appeal, which might otherwise be conferred upon them by law.’

[12] The Joint Venture issued its statement of claim on 10 April 2015. Therein two separate claims were raised: an accrued rights claim for payment of R23 761 673.68

transport subsidy for sludge removed by the joint venture beyond the 150 km radius of Panfontein plus interest, and a damages claim in the sum of R35 704 828.89 plus interest as a result of Rand Water's alleged repudiation of the agreement and the subsequent cancellation thereof. By agreement between the parties the accrued rights claim was to be determined first and the damages claim postponed for later determination. The arbitration hearing in respect of the accrued rights claim commenced on 31 August 2015 and proceeded until 8 September 2015, from 11 December 2015 until 17 December 2015, from 29 February 2016 until 3 March 2016, and the closing arguments were heard on 4 and 5 May 2016. The following witnesses testified on behalf of the joint venture: Mr Andries Grobler, the operational manager for Zuikerbosch; Mr Renso Louis Nel, a businessman and the owner of LimeCrop (Pty) Ltd; Mr Jacobus Johannes de Wet, a businessman and the owner of FetilCrop; Mr Barry Mills, the joint venture's attorney; Mr Siegfried Dieter Schubert, the general manager, lime operations, at PBD Boeredienste; Mr George Price Wessels, a farmer in the Vrede district in the Free State; and Mr Andre Johan Smit, employed by PBD Boeredienste as a weighbridge operator at the Vaalbrug Depot, Orkney. Ms Heidi Vorster testified on behalf of Rand Water. She is a fraud examiner and assistant manager in Rand Water's Group Forensic Services Department, who conducted a forensic investigation into the conclusion and execution of the contract.

[13] The joint venture's case was that it removed 59 689.50 tons of sludge to destinations in excess of 150 km from Panfontein for use in the agricultural market, it invoiced Rand Water for the removal of the sludge and that it was thus in terms of the contract entitled to payment of the transport subsidy in the sum of R349.20 per ton plus 14% VAT (59,689.50 x 349.20 = R20 843 573.40 + R2 918 100.28 VAT = R23 761 673.68). In its statement of claim the joint venture averred:

'9. The Claimant duly performed in terms of the Agreement and more specifically the Claimant:

9.1. over the period 2 May 2014 to 26 June 2014 removed at least the agreed 15 000 tons of sludge per month from the Panfontein site;

9.2. removed the said sludge to a location further than 150 km from the Panfontein site;

9.3 delivered invoices, supported by weighbridge tickets and delivery notes pertaining to each load collected and removed from the Panfontein site to the Defendant, copies of the invoices dated 17 June 2014, 30 June 2014 and 1 July 2014 are attached and marked "POC 4", "POC 5" and "POC 6" respectively.

10. On or about 1 July 2014, the Defendant, represented by Khulekani Nxumalo orally requested the Claimant represented by Hennie Pistorius to issue credit notes for and cancel the invoices "POC 4", "POC 5" and "POC 6" hereto and to issue fresh invoices in respect of the sludge removed, such invoices to be dated post 30 June 2014, being the date of the Defendant's financial year end.

11. On or about 2 July, 3 July, 11 July 2014 and 10 April 2015, the Claimant in substitution of the invoices pleaded in paragraph 9.3 and in respect of further removals of sludge, issued the Defendant with fresh invoices, copies of which are attached and marked "POC 7", "POC 8", "POC 9" and "POC 10" respectively.

. . .

14. Despite the rendering of invoices, the lapse of 30 days from date of invoicing and demand, the Defendant failed and/or refused to make payment to the Claimant in the amount of R23,761,673.68 representing the aggregate amount of the invoices, "POC 7", "POC 8", "POC 9" and "POC 10", or any portion thereof.'

[14] Rand Water denied the averments in par 9 (inclusive of sub-paragraphs 9.1 and 9.2) and, in amplification of the denial, pleaded as follows:

'7.2.1. The claimant failed to deliver the sludge it removed from Panfontein to a destination or point of disposal which was more than 150km from Panfontein, as was required in terms of clauses 1 and 4, as well as Annexure "A.2" of Annexure "POC 1" [the contract] of the statement of claim.

7.2.2. The claimant failed to deliver to the respondent, in terms of Annexure "A.16" of Annexure "POC 1" of the statement of claim, weekly figures of the:

7.2.2.1. tonnage of sludge removed from Panfontein;

7.2.2.2. details of clients to whom the sludge removed from Panfontein was delivered by the claimant;

7.2.2.3. disposal sites and dates where the sludge so removed was delivered;

7.2.2.4. distances travelled by the respondent's vehicles which collected sludge from Panfontein for delivery to the prescribed destination or points of disposal;

7.3 In addition, the claimant breached the representations and undertaking made by it in its proposal when he carried out the business of removing sludge from Panfontein for delivery to the required destination in that:

7.3.1. ZB Biocal failed to provide for and ensure the meaningful involvement of Taroline in the business;

7.3.2. The claimant failed to ensure that transport services for the removal of sludge were provided by a Black Economic Empowerment entity it identified and undertook to use for that purpose, Senosi Trading (Pty) Limited.

7.3.3. Instead, the claimant made use of transport services provided by a third party, PBD Logistics (Pty) Limited, which was neither a Black Economic Empowerment Entity nor nominated and identified by it for that purpose.'

[15] By agreement between the parties the arbitrator made an interim award on 11 December 2015, in terms of which Rand Water was ordered to pay the sum of R1 836 158.80 (exclusive of VAT) to the joint venture. Pursuant to the interim award, Rand Water paid the sum of R2 093 221.03 (R1 836 158.80 plus 14% VAT = R2 093 221.03) to the joint venture on 9 October 2015. On 13 May 2016, the arbitrator made an award in terms of which Rand Water was ordered to pay the further sum of R21 668 452.60 plus interest to the joint venture. The arbitrator arrived at the sum of R21 668 452.60, thus:

'[275] In the result, the claimant is entitled to payment of R59 689.5 X R349.20, which is R20 843 573.40, plus VAT of 14%, which amounts to R2 918 100.28, giving a total of R23 761 673.70 less R2 093 221.03 which the defendant paid the claimant on 9 October 2015. The resultant figure is R21 668 452.60.'

[16] The arbitrator made the following findings:

'[264] I turn now to the question whether the claimant has proved its case. In this regard the first question which arises is whether the removals of lime which occurred before 2 May 2014 fall within the ambit of the contract. I see no reason why not. Clause 2 is headed "Duration". It expressly states that "(t)his Agreement shall commence on 1/4/2014 irrespective of date of signature hereof".

[265] Has the claimant proved the tonnage it alleges in A196 of 59 689.5? I have been presented with very detailed and full evidence of the procedure adopted. First, the empty truck is weighed and the date and time is recorded; then, the loaded truck is weighed and the date

and time is again recorded. The difference between the two weights provides the weight of lime for which payment is sought. All of the aforegoing and more is meticulously recorded and has been made fully available to the defendant. I have recounted the evidence led by the defendant's witnesses at some considerable length. What is absent from such evidence is any attack at all on the net weight of lime the claimant contends for in any of its deliveries.

[266] Moreover, the weights the claimant contends for are in the cases of Vrede Depot, Orkney Depot, Middelburg, Vrede Farmers, and Standerton supported by the evidence of disinterested witnesses who appeared to have no reason to mislead me. Wessels gave cogent and credible evidence on deliveries to the Vrede Depot and Vrede Farmers. Smit gave equally convincing evidence on deliveries to Orkney Depot. And PD Olivier of Vaalbrug Dolomiet (Edms) Bpk provided a letter in support of Smit's evidence as well as the lengthy document at B2171-2184 setting out details of each delivery to Orkney Depot and giving the total of 22 892.26 being only 73.16 short of the total contended for in A196. De Wet gave convincing evidence on the total weight supplied to Limecrop.

[267] Schubert's evidence on the Middelburg deliveries was less impressive mainly because, in my view, he lacked the direct knowledge of Wessels and Smit. He satisfied me nevertheless principally because he testified that his company had paid for the weight of the lime it received and had been paid for such weight by its customers. There had been no complaints of short delivery. Incidentally, dividing the total of 59,689.5 tons by 40 gives about 1 492.

[268] The Senekal tonnage of 84.9 amounted to only two loads. The claimant proved those by its uncontested documentary evidence and by Vorster herself having stated she was satisfied with Senekal.

[269] There is a further factor. As I have already stated the memory stick in Exhibit G contains, I believe, about 1 090 loads in respect of all deliveries other than the Standerton deliveries and the deliveries which occurred before 18 June 2014. The number of Standerton loads representing 19,391 tons at 40 tons per load, and in respect of which there is nothing on the memory stick, must have been about 484 loads. In A30.1-A230.24 the defendant queries only 226 of all these. Furthermore A230.1-A230.24 appears to have been preceded by A197-A230 on which only 338 loads are queried, and in most cases in both lists the weights are not queried. It is interesting to note too, as counsel for the claimant pointed out, that A197-206 contains references to weighbridge tickets and other information regarding the period 1-30 April 2014 in which there were no weekly reports indicating that, despite this, the defendant had the relevant documentation in its possession.

[270] Has the claimant proved removal more than 150 kilometers form the Panfontein site? A196 contains the coordinates of the loads of each order. Each of these is stated to be more than 150 kilometres from the Panfontein site save for one, in respect of LC00117, which is stated to be 148 kilometers from such site. None of the coordinates on A196 was challenged as false or as denoting a point at a distance less than 150 kilometers, save for Vorster's allegations about VS24 and Crop 10 referred to in paragraph [256] above; her evidence in this regard of reliance on her GPS is not sufficient in all circumstances to disturb my view that, in all the circumstances, the claimant has discharged its onus in respect of these two as well. In respect of all the deliveries except those to Standerton, and those effected before 18 June 2014, Exhibit G provided detailed evidence in support of the claimant's case. None of this was challenged before me. Grobler who gave evidence on Exhibit G concluded his evidence on 17 December 2015 after which the matter was postponed and he was cross-examined on Exhibit G on 2 March 2016. De Wet gave very convincing evidence on all the Standerton distances and none of this was seriously challenged. He also persuaded me that the point of delivery of LC00117 was more than 150 kilometers from Panfontein.

[271] Counsel for the defendant argues that the joint venture between Zuikerbosch and Taroline amounted to fronting which constitutes an offence in terms of Section 130(1)(c) and (d) of the Broad-Based Black Economic Empowerment Act 53 of 2003. Counsel citing Allpay Consolidated Investments Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others 2014 (1) SA 604 (CC) and 2014 (4) SA 179 (CC) at para [67], contends that the claimant ought to be confined to a claim for its expenses and ought not to benefit from the wrong it has allegedly perpetrated. Allpay is distinguishable. There the court declared the contract concerned invalid at the behest of a competitor. Here the defendant alleges in paragraph 7.3 of its plea a breach of "representations and (an) undertaking made by (claimant) in its proposal…" The contract, however, excludes reliance on such an antecedent agreement; clause 12.1 reads: "This Agreement represents the entire undertaking between the Parties and supersedes all prior undertakings and agreements whether oral or written between the Parties with respect to the promotion".

[272] Counsel for the defendant submits that the claimant has failed to comply with clause 16 of Annexure "A" to the contract and should be non-suited on that ground. Clause 16 reads: "The Contractor shall supply Rand Water Panfontein with weekly figures of the tonnage removed for the previous week, on the Monday of the following week (figures supplied weekly). This will include tonnages removed, client details, distance travelled to client/disposal point and dates". No weekly reports were supplied for the period 1 April to 1 May 2014. The weekly

reports provided thereafter arguably do comply with the clause. The words "client details" are very vague and words like Vrede Depot may well amount to compliance with the phrase: moreover, the parties themselves appear to have accepted the weekly reports as compliant. The tonnages and distances stipulated for are provided as are the dates. Whatever the position of compliance may be, however, I am of the view that the purpose of the clause is to provide for a mechanism to facilitate proof of the performance of the claimant's obligations of removal of tonnages and its being taken more than 150 kilometers from Panfontein; if that proof can be provided in another way the intention of the contract cannot be to deny the claimant its right to payment by the defendant. And so this defence fails too.

[273] Counsel for the defendant invokes clause 21 of Annexure "A" to the contract which reads: "The Contractor will not remove the sludge for any other purpose, other than for as in the Agricultural market…." The submission is that because the Orkney Depot had at the time of the hearing only sold about 1 000 tons of lime of the total of 22 965.42 acquired the lime had been removed for other than agricultural purposes. This defence was not put to any of the claimant's witnesses and the factual basis necessary to ground it was according not laid. Furthermore, most of the deliveries in respect of which counsel for the defendant made its with prejudice offer were to Orkney Depot. On the limited facts before me the defence fails.

[274] Counsel for the defendant submitted that the claim in respect of the Standerton removals had to be dismissed because the claimant did not effect the removal itself but such was carried out by the end-users. I agree with the submission by counsel for the claimant that the contract does not require the claimant itself to effect the removals and that clause 14 of Annexure "A" actually provides otherwise. It reads: "The Contractor shall ensure that the removal of the sludge, transport, utilization, storage or disposal of this material by themselves or a third party to whom the sludge was supplied is done in accordance with all Acts…..".

[17] The arbitrator, Rand Water argues, 'has exceeded [his] powers', 'has misconducted himself in relation to his duties as arbitrator' and has committed a 'gross irregularity in the conduct of the arbitration proceedings' as contemplated by the provisions of s 33(1)(a) and (b) of the Act in that: (a) the award made in respect of sludge removed from 1 April 2014 to 1 May 2014 fell outside the scope of the arbitration and he thus exceeded his powers; (b) farmers in the Standerton district had collected the sludge from Panfontein themselves at their own cost, which was not the basis upon which the joint venture's claim in terms of its statement of claim was predicated; (c) only about 1 000 of the total of 22 965.24 tons of sludge removed to the Orkney depot were

on-sold to farmers and that depot was therefore used for the dumping of sludge, which did not constitute agricultural use; and (d) in holding that the representations contained in the proposal constituted an antecedent agreement and that clause 12.1 of the transport subsidy agreement excluded reliance on such antecedent agreement, the arbitrator failed to consider the material representations and undertakings made by the joint venture in its tender regarding the participation of a black economic empowerment partner in the joint venture and the breach thereof by Zuikerbosch to provide for and ensure the meaningful involvement of Taroline in the business of sludge removal from Panfontein, that such conduct amounted to 'fronting', an offence, and the arbitrator thus committed a fundamental error of fact and law, misconducted himself in relation to his duties as an arbitrator and condoned a direct contravention of the law.

[18] In *LAWSA* Vol 2 3rd Ed para 140, it is stated:

'The rights of a party to an arbitration to have the tribunal's award set aside are and always have been severely limited and the statutory grounds for setting aside are exhaustive. The court will always be most reluctant to interfere with the award of an arbitrator, as the parties have chosen to go to arbitration instead of resorting to the court; they selected their tribunal and they agreed that the award of that tribunal would be final and binding. They cannot then be heard to object to the award except on very limited grounds. Moreover, in order to achieve the goals of private arbitration, the Constitution requires a court to construe the statutory grounds for setting aside an award reasonably strictly in the context of private arbitration.'

(Footnotes omitted.)

[19] It is to the question whether the arbitrator exceeded his jurisdiction in also awarding to the joint venture the transport subsidy for sludge removed during the period 1 April to 1 May 2014 that I now turn. An arbitral tribunal exceeds its jurisdiction if it decides the matter on a basis not covered by the pleadings. In *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing and Consulting (Pty) Ltd* 2008 (2) SA 608 (SCA), Lewis JA said the following:

'[30] In my view it is clear that the only source of an arbitrator's power is the arbitration agreement between the parties and an arbitrator cannot stray beyond their submission where the parties have expressly defined and limited the issues, as the parties have done in this case to the matters pleaded. Thus the arbitrator, and therefore also the appeal tribunal, had no

jurisdiction to decide a matter not pleaded. Hosmed's rejoinder put in issue Thebe's allegation that there had been compliance with s 228. Had Hosmed intended to rely on the principle of unanimous assent it would have had to plead it specifically because it amounts to a classic confession and avoidance. There is a fundamental difference between a denial (where allegations of the other party are put in issue) and a confession and avoidance where an allegation is accepted, but the other party makes an allegation which neutralises its effect – which is what the raising of unanimous assent would seek to achieve. It is of course possible for parties in an arbitration to amend the terms of reference by agreement, even possibly by one concluded tacitly, or by conduct, but no such agreement that the pleadings were not the only basis of the submission can be found in the record in this case and Thebe strenuously denied any agreement to depart from the pleadings.

[31] The appeal tribunal held, however, that it was entitled to go beyond the pleadings where the issue had been traversed in evidence. It relied, as I have said, on *Shill v Milner* [1937 AD 101 at 105] where de Villiers JA said:

"The importance of pleadings should not be unduly magnified. 'The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full inquiry. But within those limits the Court has wide discretion. For pleadings are made for the Court, not the Court for pleadings. Where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal merely because the pleading of the opponent has not been as explicit as it might have been.' *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173.

Relying on these dicta in *Shill v Milner* and in *Robinson v Randfontein Estates* the appeal tribunal held, as mentioned in para 22, that the issues were 'substantially broadened during the hearing before the arbitrator . . . to include a defence of unanimous assent'.

[32] I have already said that the appeal tribunal was not entitled to take this approach: its powers were conferred by the arbitration agreement and it did not have the power to go beyond that. . . . '

(Footnotes omitted.)

[20] The arbitrator in this instance also had no jurisdiction to decide a matter not pleaded, even though the issue relating to the removal of sludge during the period 1 April to 1 May 2014 was canvased in the evidence presented at the arbitration. The statement of claim limited the joint ventures accrued rights claim to the period 2 May

2014 to 26 June 2014. On the first day of the arbitration hearing the parties agreed that the issues for determination by the arbitrator and the defences raised by Rand Water, as defined by the pleadings, were whether the joint venture duly performed in terms of the agreement, the quantity of sludge removed by the joint venture in the period May to 26 June 2014, whether the sludge was removed to a distance greater than 150 km from Panfontein and whether Rand Water established its defences to the joint venture's claim. Neither the joint venture nor Rand Water amended its pleadings during the course of the arbitration. The issues for determination where thus not broadened. If anything, the joint venture contends in its answering affidavit, the issues were further narrowed down during the course of the arbitration proceedings, a contention Rand Water denies. The view I take of this matter, however, renders it unnecessary to consider the dispute relating to the further narrowing down of the issues during the arbitration hearing.

[21] The arbitrator mischaracterised the dispute between the parties. In his award he held that 'the first question which arises is whether the removals of lime which occurred between 1 April and 2 May 2014 falls within the ambit of the contract. That question, in terms of the pleadings, did not arise. The dispute between the parties was whether the joint venture, during the period 2 May to 26 June 2014, had removed the claimed tonnages in accordance with the terms of the contract to distances greater than 150 kilometres from Panfontein, for use in the agricultural market, and was thus entitled to payment of the transport subsidy. The award for the payment of the transport subsidy during the period 1 April to 1 May 2014, is severable from the whole award (it is for 3 795.66 tons of sludge amounting to a total transport subsidy of R151 006.70 inclusive of VAT (3 795.66 X 349.20 + R185 562.22 VAT = R151 006.70)), and such severable portion, therefore, falls to be set aside. (See *Grant Brothers v Harsant* 1931 NPD 477; *Harris v SA Aluminium Solder Co. (Pty) Ltd* 1954 (3) SA 388 (D) at 391E-G.)

[22] The joint venture's case was that during the period 2 May 2014 to 26 June 2014 it had removed sludge to various destinations beyond 150 kilometres from Panfontein, including 19,391.77 for use by farmers in the Standerton area; 3,795.66 tons during the period 1 April to 1 May 2014, and 15,569.11 tons during the period 2 May 2014 to 26

June 2014. In substantiation of its claim in respect of the sludge removed for use by farmers in the Standerton district, it also called the witnesses Messrs Nel and De Wet, who, *inter alia*, testified that the sludge removed to the Standerton farmers was collected by the farmers themselves, and they were responsible for the transport costs. Rand Water submitted to the arbitrator that the claim in respect of the sludge removed to farmers in the Standerton district should be dismissed, because it was not the joint venture that effected those removals, but the end-users themselves. The arbitrator rejected that argument and found that the contract does not require the claimant itself to effect the removals and, on the contrary, that clause 14 of Annexure 'A' to the contract actually provides that the joint venture 'shall ensure that the removal of the sludge, transport, utilization, storage or disposal of this material by themselves or a third party to whom the sludge was supplied is done in accordance with all Acts . . . '.

[23] Rand Water argues that, in light of the testimony of Messrs Nel and De Wet, there was 'no longer a dispute between the parties as regards sludge provided to farmers in Standerton' but that the arbitrator 'nonetheless relied on another basis to award the first respondent [the joint venture] the right to receive a subsidy for transport costs the first respondent had not incurred'. It argues that the arbitrator's finding, with particular reference to clause 14 of the agreement, that the contract does not require the joint venture itself to effect the removals, 'was not a cause of action or a ground of claim pleaded by the first respondent' or 'a basis on which it asserted its compliance with the agreement'. It was, so argues Rand Water, 'a ground of liability unilaterally assumed by the second respondent [the arbitrator] when it was not pleaded at all by the first respondent'. Rand Water argues that the approach of the arbitrator, therefore, 'manifests a gross misconduct in that he made an assumption of liability inconsistent with the requirement and rules of a fair hearing' and that his approach 'shows that he exceeded his mandate by deciding a basis of liability which was not pleaded by the first respondent'.

[24] Here the arbitrator did not exceed his powers, as Rand Water would have it. The joint venture pleaded that it complied with all its obligations in terms of the contract - to remove the sludge, to transport it to distances greater than 150 km from Panfontein for

use in the agricultural market and to supply Rand Water with weekly figures of the sludge removed. It was not necessary for the joint venture to plead whether the removal and transport of the sludge was effected by itself or by a third party. The joint venture's statement of claim contains a clear and concise statement of the material facts (*facta probanda*) upon which it relied for its accrued rights claim, and it was not enjoined to set out the evidence (*facta probantia*) upon which it relied. Rand Water also contends that, in interpreting the agreement as he did, the arbitrator 'misconducted' himself in relation to his duties as arbitrator or that he has committed a 'gross irregularity' in the conduct of the arbitration proceedings within the meaning of those words in s 33(1)(a) and (b) of the Act.

[25] In *Total Support Management v Diversified Health Systems* (SA) 2002 (4) SA 661 (SCA), paras 15 and 21, Smallberger ADP said the following:

'[15] *In Dickenson & Brown v Fisher's Executors* 1915 AD 166 this Court considered the provisions of s 18 of Natal Act 24 of 1898 which provided for the setting aside of an arbitral award where*, inter alia,* 'an arbitrator or umpire has misconducted himself'. In the course of this judgment (concurred in by all the other members of the Court) Solomon JA stated (at 176) that there could not be misconduct, if the word was used in its ordinary sense, 'unless there has been some wrongful or improper conduct on the part of the person whose behaviour is in question' and rejected the notion 'that a *bona fide* mistake either of law or of fact made by an arbitrator can be characterised as misconduct . . .'. He went on to hold (also at 176) that

"in ordinary circumstances where an arbitrator has given fair consideration to the matter which has been submitted to him for decision, I think it would be impossible to hold that he had been guilty of misconduct merely because he had made a *bona fide* mistake either of law or of fact'.

. . .

[21] Because the submission to arbitration did not provide otherwise, the parties were precluded by the provision of clause 30.12.3 of the agreement form appealing against the decision of the second respondent. The appellants can challenge the second respondent's award only by invoking the statutory review provisions of s 33(1)(*a*) and (*b*) of the Act. Proof that the second respondent misconducted himself in relation to his duties or committed a gross irregularity in the conduct of the arbitration is a prerequisite for setting aside the award. The *onus* rests upon the appellants in this regard. As appears form the authorities to which I have referred, the basis on which an award will be set aside on the grounds of misconduct is a very

narrow one. A gross or manifest mistake is not *per se* misconduct. At best it provides evidence of misconduct (*Dickenson & Brown v Fisher's Executors* (*supra* at 176)) which, taken alone or in conjunction with other considerations, will ultimately have to be sufficiently compelling to justify an inference (as the most likely inference) of what has variously been described as 'wrongful and improper conduct' (*Dickenson & Brown v Fisher's Executors (supra* at 176)),'dishonesty' and '*mala fides* or partiality' (*Donner v Ehrlich (supra* at 160-1)) and 'moral turpitude' (*Kolber and Another v Sourcecom Solutions (Pty) Ltd and Others (supra* at 1108A)).'

[26] In *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA), Harms JA said the following:

'[69] Errors of law can, no doubt, lead to gross irregularities in the conduct of the proceedings. Telcordia posed the example where an arbitrator, because of a misunderstanding of the *audi* principle, refuses to hear the one party. Although in such a case the error of law gives rise to the irregularity, the reviewable irregularity would be the refusal to hear that party, and not the error of law. Likewise, an error of law may lead an arbitrator to exceed his powers or to misconceive the nature of the inquiry and his duties in connection therewith.

. . .

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

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

[73] The *Goldfields Investment* qualification to this general principle dealt with two situations. The one is where the decision-making body misconceives its mandate, whether statutory or consensual. By misconceiving the nature of the inquiry a hearing cannot in principle be fair because the body fails to perform its mandate. *Goldfields Investment* provides a good example. According to the applicable Rating Ordinance any aggrieved person was entitled to appeal to the magistrates' court against the value put on property for rating purposes by the local authority. The appeal was not an ordinary appeal but involved, in terms of the Ordinance, a rehearing with evidence. The magistrate refused to conduct a rehearing and limited the inquiry to a determination of the question whether the valuation had been 'manifestly untenable'. This meant that the appellant did not have an appeal hearing (to which it was entitled) at all because the magistrate had failed to consider the issue prescribed by statute. The magistrate had asked himself the wrong question, that is, a question other than that which the Act directed him to ask.

In this sense the hearing was unfair. Against that setting the words of Schreiner J should be understood:

"The law, as stated in *Ellis v Morgan (supra)* has been accepted in subsequent cases, and the passage which has been quoted from the case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and *bona fide*, though mistaken, may come under the description. *The crucial question is whether it prevented a fair trial of the issues.* If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect. And if from the magistrate's reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. *Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial.* One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the Court's not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the inquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say the losing party has not had a fair trial. *I agree that in the present case the facts fall within this latter class of case, and that the magistrate, owing to the erroneous view which he held as to his functions, really never dealt with the matte before him in the manner which was contemplated by the section.* That being so, there was a gross irregularity, and the proceedings should be set aside.'

[74] The other line of cases, which dealt with reviews of inferior courts, was concerned with orders made where a jurisdictional fact was missing or, put differently, 'a condition for the exercise of a jurisdiction had not been satisfied'. A typical example is *Primich.* The magistrate could order, in terms of the relevant court rule, the provision of security if the plaintiff was not resident in the country. The magistrate, in spite of the limitation on his jurisdiction, made such an order against a plaintiff who was resident in the country. Objectively, this was not a case of an error of law; it was an error of fact dressed up as an error of law. Decisions of a factual nature can all too easily be dressed up as issues of law. There was no indication that the magistrate had misinterpreted the rule; he misunderstood the facts, holding that a jurisdictional fact was

present while it was not. A similar instance was *Visser v Estate Collins.* In terms of the statute concerned, the magistrates' court could set aside a void judgment granted by default provided the application for recession was made within one year of the date on which the applicant first had knowledge of the invalidity. The magistrate set aside a void judgment by default without any evidence as to when the applicant had become aware of the invalidity. Once again, the magistrate had failed to determine whether a jurisdictional fact for the setting aside of the judgment was present. Whether this was due to an error of law is really beside the point.

[75] In all these cases the complaint was directed at the method or conduct and not the result of the proceedings. Where the legal issue is left for the decision of the functionary any complaint about how he reached the decision must be directed at the method and not the result. This is known as the *Doyle v Shenker* principle.'

[27] The joint venture sold the sludge to its clients, which, amongst others, were dealers in limestone (distribution depots). They, in turn, on-sold the sludge to the end-users (farmers). As far as the removal of sludge to farmers in the Standerton district was concerned, Mr De Wet testified that LimeCrop had in all instances been the purchaser of the sludge from the joint venture and that LimeCrop, in turn, on-sold the sludge to the end-user farmers, who were responsible to collect the sludge at Panfontein at their own cost. They were invoiced by LimeCrop duly paid LimeCrop for the total of 19,391.77 tons of sludge. The joint venture, in terms of the contract (clause 5 of Annexure 'A'), nevertheless *vis-à-vis* Rand Water remained 'responsible for all costs incurred for the collection, processing and removal of the sludge' and it was agreed that Rand Water would pay to it R349.20 per metric ton of sludge removed 'as a transport subsidy' (clause 4.1). Even if the arbitrator might have been wrong in his interpretation of the contract that the joint venture was not obliged to remove the sludge itself, that the end-users could remove it at their own cost and that the joint venture was nevertheless entitled to the transport subsidy for the sludge so removed at the cost of the end-users (and I am not suggesting that he was wrong), that does not justify an inference of wrongful or improper conduct on his part nor can it be found that he acted high-handedly or arbitrarily or that he misconceived the nature of the enquiry or his duties or that he acted irrationally. It is apparent from his involvement in the arbitration proceedings and his comprehensive judgment, that he has given fair consideration to the matters which were submitted to him for decision, and in particular to the issue of

the removal of sludge from Panfontein by the end-user farmers in the Standerton area. Furthermore, no instance of gross procedural irregularity in the proceedings has been established. (See *LAWSA* Vol 2 3rd Ed para 142.)

[28] Rand Water also attacks that part of the award relating to 22,892.26 tons of sludge that was removed to the Orkney Depot. At the time of the arbitration hearing only ± 1 000 tons of sludge delivered to the Orkney Depot had been on-sold for use in the agricultural market. Rand Water argues that the deliveries of the sludge to the Orkney Depot were in direct contravention of clause 21 of Annexure 'A' to the contract, which provides that 'the contractor will not remove the sludge for any other purpose, other than for use in the Agricultural market . . .'. It contended, and still contends, that the 'dumping' of the sludge at the Orkney Depot did not constitute agricultural use. The arbitrator held that that defence had not been put to any of the joint venture's witnesses, and that the factual basis necessary to ground that defence had not been laid. Again, I am unable to find that the arbitrator misconducted himself in relation to his duties as arbitrator or that he committed any gross irregularity in the conduct of the arbitration proceedings in awarding the transport subsidy for the sludge removed to the Orkney Depot to the joint venture. No evidence was presented that the sludge that had been removed to the Orkney Depot had been removed for a purpose other than for use in the agricultural market. The sludge had been deposited at the Orkney Depot in order to be on-sold for use in the agricultural market. The fact that only a small portion thereof had indeed been sold for use in the agricultural market by the time of the arbitration hearing simply does not mean that the sludge had been removed there for a purpose other than for use in the agricultural market.

[29] I now turn to Rand Water's defence that the joint venture breached the representations and undertaking made by it in its proposal when it conducted the business of sludge removal from Panfontein by Zuikerbosch, failing to provide for and ensure the meaningful involvement of Taroline in the business. That breach, Rand Water contended to the arbitrator, amounted to fronting, and, relying on *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency, and others* 2014 (1) SA 604 (CC), it further contended

that the joint venture ought to be confined to a claim for its expenses only. The arbitrator rejected Rand Water's contentions in this regard and found that *Allpay* was distinguishable; there the court declared the contract concerned invalid at the behest of a competitor whereas in this instance Rand Water, in para 7.3 of its plea, alleged 'a breach of "representations and (an) undertaking made by (claimant) in its proposal . . . "'. The arbitrator further found that '[t]he contract, however, excludes reliance on such an antecedent agreement; clause 12.1 reads: "This Agreement represents the entire undertaking between the Parties and supersedes all prior undertakings and agreements whether oral or written between the Parties with respect to the promotion"'. Rand Water now seeks the setting aside of the entire award on the basis of the arbitrator's alleged failures to properly appreciate the true nature of the question of law that was raised before him, namely that of fronting, which, according to Rand Water, underpinned the joint venture's bid for the transport subsidy agreement, and its failure to implement the contract in line with the undertaking furnished to Rand Water.

[30] Broad-Based Black Economic Empowerment (B-BBEE) is defined in s 1 of the Broad-Based Black Economic Empowerment Act 53 of 2003 (the B-BBEE Act), to mean 'the viable economic empowerment of all black people, in particular women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socio-economic strategies that include, but are not limited to- (a) increasing the number of black people that manage, own and control enterprises and productive assets; (b) facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises; (c) human resource and skills development; (d) achieving equitable representation in all occupational categories and levels in the work force; (e) preferential procurement from enterprises that are owned or managed by black people; and (f) investment in enterprises that are owned or managed by black people'.

[31] As was said by Froneman J in *Allpay*, para 55:

'Substantive empowerment, not mere formal compliance, is what matters. It makes a mockery of true empowerment if two opposite ends of the spectrum are allowed to be passed off as compliance with the substantive demands of empowerment. The one is a misrepresentation that historically disadvantaged people are in control and exercising managerial power, even

when that is not the case. That amounts to exploitation. The other is to misrepresent that people who hold political power necessarily also possess managerial and business skills. Neither situation advances the kind of economic empowerment that the Procurement and Empowerment Acts envisage. Both employ charades.'

[32] Section 1 of the B-BBEE Act defines 'fronting practice' as 'a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of this Act or the implementation of any of the provisions of this Act, including but not limited to practices in connection with a B-BBEE initiative– (a) in terms of which black persons who are appointed to an enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise; (b) in terms of which the economic benefits received as a result of the broad-based black economic empowerment status of an enterprise do not flow to black people in the ratio specified in the relevant legal documentation; (c) involving the conclusion of a legal relationship with a black person for the purpose of that enterprise achieving a certain level of broad-based black economic empowerment compliance without granting that black person the economic benefits that would reasonably be expected to be associated with the status or position held by that black person; or (d) involving the conclusion of an agreement with another enterprise in order to achieve or enhance broad-based black economic empowerment status in circumstances which– (i) there are significant limitations, whether implicit or explicit, on the identity of suppliers, service providers, clients or customers; (ii) the maintenance of business operations is reasonably considered to be improbable, having regard to the resources available; (iii) the terms and conditions were not negotiated at arm's length and on a fair and reasonable basis'. In terms of s13 O(1)(d) a person commits an offence if that person knowingly 'engages in a fronting practice'.

[33] In its bid or proposal to be awarded the Rand Water sludge removal and transport subsidy contract, the joint venture represented that Zuikerbosch and Taroline each had a 50% interest in the joint venture; Messrs HPH Pistorius (snr) and HPH Pistorius (jnr) each held a 50% membership interest in Zuikerbosch and Mr L Phungo was the 100% shareholder of Taroline; Zuikerbosch would be responsible for project funding, project implementation, project management, operational implementation, sales

and all on-site operations and Taroline for contract procurement, business development, client liaison and debtors book management/collections; Mr HPH Pistorius would be responsible for management, Messrs HPH Pistorius and L Phungo would be the responsible partners, Messrs A Grobler and J Mgaoile would be the site supervisors and Mr C Lombard the administrative manager; the percentage of work to be performed by Zuikerbosch would be 85% and by Taroline 15%; and that R53 427 600 of the total contract value would be allocated to Zuikerbosch and R9 428 400 to Taroline.

[34] It is stated in the report of Ms Heidi Vorster, who in her capacity as assistant manager group forensic services of Rand Water conducted a forensic investigation into the conclusion and implementation of the contract, that:

- GFS [Group Forensic Services] could not find any evidence that Mr Phungo and/or his company Taroline (PTY) LTD played an active role in the removal of sludge at Panfontein.
- Mr. Phungo and/or Taroline (PTY) LTD did not play any part in the dispute declared against Rand Water by ZB Biocal.'

[35] The sum total of evidence presented at the arbitration hearing by Rand Water in support of this defence of representations and an undertaking relating to the joint venture's black economic empowerment and involvement, and the breach thereof, was that of Ms Vorster, who testified that Messrs Pistorius and Grobler refused to discuss the matter with her, that she had never met the owner of Taroline, Mr Phungo, and that-

'[a]ccording to the request for proposal . . . Mr Phungo was going to be actively involved as a supervisor for ZB Biocal. We never found any evidence that he was actively involved. When I had the meeting with ZB Biocal Mr Phungo wasn't present. As we couldn't find that he ever visited Rand Water and then of course for us this is fronting because he's never played an active role in any of it and he's being presented as a BEE partner according to their documents. We've never met with Mr Phungo and never found any evidence that he played an active role.'

It is on that scant evidence – essentially Ms Vorster's conclusion – that Rand Water wished the arbitrator to infer that Zuikerbosch knowingly engaged in a fronting practice.

[36] The arbitrator, in my respectful view quite correctly, held that *Allpay* is distinguishable from this instance. *Allpay* is an application to review and set aside an award under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) on the basis

of material irregularities that invalidated the award, at the behest of a competitor. This case, on the other hand, is a pure contractual matter that was referred to private arbitration and, as I have mentioned earlier in this judgment, in which the parties expressly agreed that the arbitrator need not follow the strict principles of law in determining the dispute, but shall be entitled to determine the dispute with due reference to the equities prevailing in respect of the dispute, and that any award made by him shall be final and binding upon them without the right of appeal. As was said by Brandt JA in *Government of the RSA v Thabiso Chemicals* (148/2007) [2008] ZASCA 112 (25 September 2008) para 18:

'. . . I do not believe that the principles of administrative law have any role to play in the outcome of the dispute. After the tender had been awarded, the relationship between the parties in this case was governed by the principles of contract law (see eg *Cape Metropolitan Council v Metro Inspection Services CC* 2001 (3) SA 1013 SCA para 18; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) paras 11 and 12). The fact that the Tender Board relied on authority derived from a statutory provision (i.e. s 4(1) (eA) of the State Tender Board Act) to cancel the contract on behalf of the Government, does not detract from this principle. Nor does the fact that the grounds of cancellation on which the Tender Board relied were, inter alia, reflected in a regulation. All that happened, in my view, is that the provisions of the Regulations – like the provisions of ST36 - became part of the contract through incorporation by reference.'

[37] If there was a contractual obligation that Taroline would be actively involved in the execution of the joint venture's obligations in terms of the contract, and a breach thereof, then Rand Water had to first (in terms of clause 8.1) by written notice afford the joint venture an opportunity to remedy such breach within seven days after delivery of the written notice before it could avail itself of the rights and remedies it may have in terms of the contract or in terms of the law, including the right to then terminate the contract, unless, of course, the conduct of the joint venture evinced an unequivocal intention not to be bound, or not to be fully bound, by the contract and Rand Water accepted such repudiation. No such notice, however, was given and it was not Rand Water's case that the joint venture had repudiated the contract. On the contrary, Rand Water, as it was entitled to do, expressly terminated the contract in terms of clauses 2.3 and 13.1 thereof by giving the joint venture one month's written notice of its termination

of the contract. Rand Water did not seek to avoid the contract nor did it claim damages as a result of the alleged breach thereof.

[38] I am unable to find, therefore, that in rejecting Rand Water's reliance on the alleged contractual obligation under consideration, and the breach thereof, the arbitrator misconducted himself in relation to his duties as arbitrator within the meaning ascribed to that word in cases such as *Dickenson & Brown v Fisher's Executors* and *Total Support Management v Diversified Health Systems* or that he has committed a gross irregularity in the conduct of the arbitration proceedings within the meaning ascribed to that term in, for example, *Telcordia Technologies Inc v Telkom*.

[39] Finally the matter of costs. The joint venture argues that this application for the review of the arbitrator's award in terms of s 33(1)(a) and (b) of the Act is nothing else than an appeal in disguise; it has the effect of being vexatious, constitutes an abuse of the process of this court and is aimed at delaying payment of what is due. A punitive costs order, so it argues, should thus be granted against Rand Water. (See *In Re Alluvial Creek Ltd* 1929 CPD 532 at 535; *Boost Sports v SA Breweries* 2015 (5) SA 38 (SCA) at 56D-G.) Although there is much force in the argument that - apart from the attack against that portion of the award allowing the transport subsidy for sludge removed during the period 1 April to 1 May 2014 - this application is essentially an attempt at appealing the arbitrator's award under the disguise of an application to set it aside in terms of s 33(1)(a) and (b) of the Act, I am not persuaded that this is one of those exceptional cases where a deviation from the general principle that costs follow the event on the scale as between party and party would be justified. Taking into account the respective measures of success of the parties, I am of the view that an appropriate costs order would be for the joint venture to pay 10% of Rand Water's costs of the application, including the costs of two counsel, and for Rand Water to pay 90% of the joint venture's costs, including those of senior counsel.

[40] In the result the following order is made:

(a) The award of R1 511 006.70 forming part of the award of R21 668 452.60 is set aside as well as the award for the payment of interest on the amount of R1 511

006.70 at 9% per annum from 11 May 2015, as set out in paragraph [277] A.2.2.3 of the award.

(b) The first respondent is ordered to pay 10% of the applicant's costs of this application, including the costs of two counsel, one of whom a senior counsel.

(c) The applicant is ordered to pay 90% of the first respondent's costs of the application, including those of senior counsel.

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P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	1 & 2 March 2018
Date of judgment:	21 September 2018
Counsel for the Applicant:	Adv V Maleka SC (assisted by Adv M Sello)
Instructed by:	Cliffe Dekker Hofmeyr Inc., Sandton C/o Friedland Hart Solomon & Nicholson Attorneys, Monument Park, Pretoria
Counsel for 1st Respondent:	Adv LW de Koning SC
Instructed by:	Mills & Groenewald Attorneys, Vereeniging