Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: **379/2022**
Heard on: **17/10/2022**
Delivered on: **24/03/2023**

In the matter between:

DITIRO TSA KA TRADING 6 CC Applicant

and

JOE MOROLONG LOCAL MUNICIPALITY First Respondent
TEBOGO TLHOAELE Second Respondent

In the counter-application between:

JOE MOROLONG LOCAL MUNICIPALITY Applicant

and

DITIRO TSA KA TRADING 6 CC First Respondent
WYNAND FREDERIK BLOEM N.O. Second Respondent

Coram: Mamosebo J et Sieberhagen AJ

JUDGMENT ON REVIEW

MAMOSEBO J

[1] On 12 August 2022 Phatshoane DJP granted the following order by agreement:

> *"1. The applicant's main application be and is hereby postponed sine die.*
>
> *2. The respondent's counter-application (Review) be and is hereby postponed to the opposed roll of 17 October 2022.*
>
> *3. The Heads of Argument regarding the Review application are to be filed in terms of the Rules.*
>
> *4. The costs caused by the postponement will be costs in the application."*

[2] The applicant (in the counter-application) is Joe Morolong Local Municipality. The relief it seeks, in its Notice of Application dated 18 May 2022, is that the arbitral award by the second respondent, Mr Wynand Frederik Bloem N.O. (the arbitrator), be declared unlawful, reviewed and set aside in terms of the common law or in terms of s 33 of the Arbitration Act, 42 of 1965[1] (the Arbitration Act) or in terms of the Constitution as it is vitiated by material irregularities. That costs be awarded against any party opposing the application which should include costs consequent upon the employment of two counsel. Only

[1] Section 33 which deals with the setting aside of an award stipulates:

(1) Where-
  (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
  (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
  (c) an award has been improperly obtained,

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

(2) An application pursuant to this section shall be made within six weeks after the publication of the award to the parties: Provided that when the setting aside of the award is requested on the grounds of corruption, such application shall be made within six weeks after the discovery of the corruption and in any case not later than three years after the date on which the award was so published.

(3) The court may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

(4) If the award is set aside the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court.

the first respondent, Ditiro Tsa Ka Trading 6 CC (Ditiro), is opposing the review application. The arbitrator abides the decision of the Court.

[3] The arbitrator was notified together with the parties of his appointment by the South African Institute of Civil Engineering (SAICE) on 16 November 2020 as contemplated in Clause 10.9.1 of the General Conditions of Contract for Construction Works, Third Edition, 2015 (GCC 2015). During the arbitration process, the arbitrator conducted preliminary meetings with the legal representatives of the parties where pre-arbitration minutes were kept. It is during the course of these meetings that the scope and ambit of the dispute referred to arbitration, the rules of arbitration proceedings; the processes and time periods to be adopted in the arbitration proceedings were ventilated which resulted in a pre-arbitration agreement. There was also an agreement between counsel which was also included as an addendum. The powers of the arbitrator to depart from the rules of evidence were also confirmed. The arbitrator further confirmed with the parties that the Rules (GCC 2015 Clause 10.7.2) for the Conduct of Arbitrations 2018 Edition issued by the Association of Arbitrators (Southern Africa) would apply, more specifically, the Standard Procedure Rules. The contention by the Municipality in its founding/answering affidavit that the arbitrator issued his award late and out of time is without merit since the parties had agreed at para 10 of the minute of the first pre-arbitration meeting to waive the time periods determined by the Arbitration Act including those prescribed by s 23 of the Act and agreed to the time periods as set by the parties in the minutes.

[4] The agreement between the Municipality and Ditiro is based on the GCC 2015. The arbitrator was mindful and alerted the parties to Clause 10.3.2 of the GCC 2015 which provides for a dispute to be referred for

adjudication as the initial step for its resolution. The arbitrator established from the parties' attorneys whether they had resolved to pursue the process of arbitration. The response was in the affirmative. Evident from Clause 10.7 of the contract data is that the parties' preferred process of dispute resolution was arbitration. The parties agreed that the arbitrator, within the confines of the Rules and the laws, has the powers to use his own expert knowledge in determining and deciding his award. In short, the Municipality agreed to all the processes, time periods and methods of adducing evidence.

[5] These were the additional powers accorded to the arbitral tribunal agreed to by the parties. The arbitral tribunal shall have the power to:

5.1 depart from any statutory or common law rules of evidence to the extent that it deems reasonable provided that the rules of natural justice shall be observed;

5.2 question the parties on any matter relevant to the issues;

5.3 make any enquiries as the arbitral tribunal considers necessary or expedient;

5.4 grant the parties such opportunity, as the arbitral tribunal deems reasonable, of making amendments to the issues or to any statement or submission;

5.5 rely, in its Award, on its own expert knowledge or experience in any field;

5.6 The arbitral tribunal shall inform the parties of information gathered or obtained pursuant to rules 5.1.3 and 5.1.6 and give the parties an opportunity to respond before proceeding to rely thereon.

5.7 IBA Rules on Evidence 2020, Article 3(10) shall still apply.

[6] On 20 September 2021 the arbitrator published his award in terms of which he found the Municipality to be liable to Ditiro in an amount of R9,671,465.70 (Nine Million Six Hundred and Seventy-One Thousand Four Hundred and Sixty-Five Rand and Seventy Cents) plus interest and costs in respect of claims A – H at paras 345.2 and 345.3 of the award to be paid on that amount from the date of the arbitration award. The Municipality defaulted on payment in terms of the award, and, on 23 February 2022 Ditiro approached this court for the award to be made an order of court in terms of s 31 of the Arbitration Act[2]. The Municipality filed a Notice to have the award reviewed and set aside as contemplated in s 33(1)(b) of the Arbitration Act. It is against this background that the relief sought by the Municipality must be assessed.

[7] The Constitutional Court (ConCourt) remarks by O'Regan ADCJ, then, in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*[3] are instructive*:*

> *"[195] … Private arbitration is a process built on consent in that parties agree that their disputes will be settled by an arbitrator. It was aptly described*

[2] 31Award may be made an order of court
(1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.
(2) The court to which the application is made, may, before making the award an order of court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.
(3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect.

[3] [2009] ZACC 6; 2009 (4) SA 529 (CC) at para 195

by Smalberger ADP in Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA)(Pty) Ltd and Another as follows:

"The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement."

[8] The ConCourt continued at para 219[4]

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

[9] The Municipality raised two grounds in respect of which it alleges that the arbitrator has committed gross irregularities in the arbitration:

9.1 First, that the arbitrator exceeded the bounds of the terms of the contract and impermissibly extended the scope thereof; and

9.2 Secondly, the process adopted by the arbitrator in the determination of the disputes was wholly inappropriate having regard to the disputes delineated.

Essentially, the dispute between the parties is whether the arbitrator committed reviewable irregularities.

[10] I intend first to dispose of the reliance by the applicant on the common law as a ground for this review. The instructive remarks by Harms JA in *Telcordia Technologies Inc v Telkom SA Ltd*[5] are apposite:

[4] Ibid at para 219
[5] 2007 (3) SA 266 (SCA) at 294 para 59

> *"[59] ... As Telcordia mentioned, Telkom was unclear on whether it intended to rely on the common law relating to arbitration or that concerning administrative law. Dickenson & Brown,* ***I have said, held that that there was no common law review under arbitration law****. In addition, I have already expressed the view that* ***a party to a consensual arbitration under the Act is not entitled to rely on an administrative common-law review ground****."* (emphasis added)

This issue is therefore "cut and dried".

[11] It is common cause that the contract price in Contract No B162/2017 (Portion 2: Contract) for the upgrading, gravelling, rehabilitation & maintenance of access roads & internal roads in Joe Morolong Villages for a period of 36 months was to the total amount of R27,631,982.70 (Twenty-Seven Million Six Hundred and Thirty-One Thousand Nine Hundred and Eighty-Two Rand and Seventy Cents) inclusive of Value Added Tax (VAT). It is also common cause that the Municipality had advertised the tender and Ditiro was the successful bidder and accepted the appointment. When this contract was concluded the Municipality was represented by its Municipal Manager, Mr Tebogo Tlhoaele, while Ditiro was represented by Mr Thabo Ronald Phokoje. For the implementation of the project, the Municipality was represented by its agent, BMH Africa Engineers (Pty) Ltd, Mr E Van Vuuren.

[12] The contentious issue raised by the Municipality in this application, which it maintains invokes plain illegality, is how the contract price of R27,631,982.70 morphed into an exorbitant R78,846,541.21 (Seventy-Eight Million Eight Hundred and Forty-Six Thousand Five Hundred and Forty-One Rand and Twenty-One Cents). Noting that the arbitrator awarded damages to Ditiro in the amount of R9,671,465.70 (Nine Million Six Hundred and Seventy-One Thousand Four Hundred and Sixty-Five Rand and Seventy Cents) plus interest and costs.

[13] The Municipality terminated the GCC contract on 11 June 2020, more specifically the following agreements: the Bothitong Agreement; the Gadiboe Agreement; the Dikhing Access Road and Logobate Bridge Projects. Ditiro contends that the termination of the GCC contract was unlawful as it amounts to repudiation thereof because the subsequent agreements that were entered into were conducted by way of memoranda of understanding (MOU).

Points *in limine* raised by Ditiro

[14] Ditiro contends that the Municipality has failed to plead a sustainable and competent cause of action. It raised the following 4 points *in limine:*

14.1 The Municipality's review of the award is out of time;

14.2 The Municipality is in contempt of Court;

14.3 That the deponent to the counter-application, Mr Tebogo Tlhoaele, the Municipal Manager, lacked authority to oppose the main application and to bring the counter-application; and

14.4 That the Municipal Manager lacks personal knowledge of the allegations advanced in his affidavit.

The Municipality's award is out of time

[15] Ditiro takes issue with the delay and argues that the arbitrator published his award on 20 September 2021 and the application to review the award had to be brought within 6 weeks of the publication of the award to the

parties. However, the Municipality brought its review application eight months after the publication without seeking condonation for the late filing of the application, that the delay is unreasonable and that this Court ought therefore to non-suit the Municipality. Further, the Court lacks jurisdiction to entertain the application.

[16] In *Associated Institutions Pension Fund v Van Zyl*[6] where Brand JA remarked on the longstanding rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings. The rationale for such a rule is two-fold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions (see eg *Wolgroeiers Aflaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 41).*

[17] Counsel for the Municipality conceded, correctly so in my view, that it is important for review proceedings to be initiated without undue delay. Despite the fact that the Municipality only served its Notice of Application on Ditiro on 18 May 2022 the Municipality proffered no explanation why its application for the review of the arbitrator's award was launched eight months out of time. In the answering papers Ditiro pertinently raised the defence of unreasonable delay. In support whereof it pointed out that the Municipality has flouted its statutory obligations without seeking any condonation. The Municipality was represented by an attorney and counsel and there can be no excuse for such flagrant disregard of the prescribed time frame, so the argument went. Ditiro

[6] 2005 (2) SA 302 (SCA) at 321

asked for the review application to be dismissed with punitive costs on this basis only.

[18] To bolster its submission that this Court can overlook the delay in bringing the review application, the Municipality relied on *Minister of Safety and Security and Another v Tembop Recovery CC and Others,*[7], where the SCA had this to say:

> *"[9] Although the explanation of the appellants is far from satisfactory, there were indeed reasonable prospects of success in the case.* ***The High Court should have exercised its discretion and granted condonation instead of dismissing the application.*** *However, the opposition to the condonation application was not unreasonable and the appellants who sought the indulgence should bear the cost of obtaining it."*

Relying on this case does not assist the Municipality because of its total failure to seek condonation. There is no condonation application before me for consideration. The Municipality's prospects of success consequently do not arise.

[19] It was contended on behalf of the Municipality that the delay is not dispositive of the matter as the Court has the discretion to overlook the delay. Counsel advanced two reasons emanating from *State Information Technology v Gijima Holdings (Gijima)*[8] in an effort to persuade this Court to overlook the delay. Counsel contended that where lawfulness is probed the Court may overlook the delay. The point is advanced that the arbitration award is unlawful because it does not resort within the remit of the arbitration. The contract amount was R27 million and to increase it to R79 million is unlawful. According to counsel the Court has to consider the procurement process as set out in *Gijima* which process was ignored or overlooked in the instant matter. It is for these

[7] 52 ZASCA 2016 at para 9; also reported at [2016] JOL 35628 (SCA)
[8] 2018 (2) SA 23 (CC)

two reasons that the award cannot be made an order of court, the submission went.

[20] The Constitutional Court in *Gijima* [9] said the following*:*

> *"[47] Khumalo also says that* ***courts have a 'discretion to overlook a delay'****. Here is what we said:*
>
> *'(A) court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power. But that does not mean that the Constitution has dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay or with a court's discretion to overlook a delay.'*
>
> *[48] Tasima explained that* ***this discretion should not be exercised lightly****:*
>
> *'While a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power, it is equally a feature of the rule of law that* ***undue delay should not be tolerated. Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action.*** *A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise.'"* (Emphasis added)

[21] As already adverted to, it is inexplicable why the Municipality waited eight months before launching the counter-application for the reviewing and setting aside of the arbitral award. Condonation is not to be had merely for the asking. A period of eight months is inordinate, particularly against the backdrop of the parties having consented to private arbitration. It is on this point alone that the counter-application stands to be dismissed. In case I am wrong on this point, I proceed to consider the other points.

<u>Second point *in limine:* Contempt of Court</u>

[22] It was contended on behalf of Ditiro that although the Municipality was ordered to file its founding application in the counter-application and its

[9] Ibid at paras 47 and 48

answering affidavit in the main application on or before 29 April 2022 it failed to do so without tendering any explanation for its failure. The Municipality's correspondent attorney was present in court to note the directive. Ditiro pleads that the Municipality's failure was wilful and *mala fide* and should be disqualified from participating in these proceedings. The Court's direction as reflected in "DA0" is that the respondent file its opposing affidavit, if any, on or before 29 April 2022. The answering affidavit was only filed on 16 May 2022. The facts in *casu* are distinguishable from those relied on by Ditiro in *Meadow Glen Home Owners Association and Others v Tshwane City Metropolitan Municipality and Another*[10] where the parties had consented to the Court making an order despite the generality of its terms which led to disputes between the parties.

[23] The Municipality's failure to adhere to this Court's order to file its answering affidavit on or before 29 April 2022 (9 days out of time) cannot on its own prevent the court from hearing the dispute neither can it lead to the application being dismissed as prayed for by Ditiro. Besides, "*mala fide*" connotes bad faith or with dishonesty or by fraud. There was none. This is one of the aspects that can be cured by an appropriate costs order if justified.

Third point *in limine*: Lack of Authority

[24] Ditiro, invoking *Kouga Municipality v SA Local Government Bargaining Council*[11] and *Acting Municipal Manager and Another v Madibeng Black Business Chamber and Others*[12] filed a Rule 7 Notice contending that both the Municipal Manager and the attorney of record

[10] 2015 (2) SA 413 (SCA) at para 8
[11] (2010) 31 ILJ 1211 (LC)
[12] (11527/22) [2022] ZAGPPHC

lacked the requisite authority not only to oppose its application but also to bring a counter-application on behalf of the Municipality. The Municipality filed three documents in its reply to the Rule 7 Notice namely, a special power of attorney on behalf of the Municipality and a special power of attorney on behalf of the Municipal Manager and the filing sheet together with delegations whereat Kgomo Attorneys Inc/ Obakeng Kgomo were appointed. Counsel for Ditiro argued that in the absence of a resolution by the Municipal council authorising them to oppose the main application and to bring the counter-application, the delegation of authority of the Municipal Manager is meaningless and irrelevant.

[25] In countering the aforementioned submission, counsel for the Municipality relied on *Unlawful Occupiers School Site v City of Johannesburg*[13]. In his founding affidavit, the Municipal Manager said the following:

> *"I am authorised to depose to this affidavit on behalf of the first respondent [the Municipality]. The facts contained herein are within my personal knowledge and are, to the best of my belief, both true and correct."*

The Supreme Court of Appeal (the SCA) reiterated the words of Flemming DJP in *Eskom v Soweto City Council*[14] which was referred to with approval by the SCA in *Ganes and Another v Telecom Namibia Ltd*[15] and remarked[16]: "*is it conceivable that an application of this magnitude could have been launched on behalf of the municipality with the knowledge of but against the advice of its own director of legal*

[13] 2005 (4) SA 199 (SCA) at paras 14 -16
[14] 1992 (2) SA 703 (W)
[15] 2004 (3) SA 615 (SCA) at 624I – 625A
[16] Ibid 207 para16H

services? That question can, in my view, be answered only in the negative."

[26] In my view, the Municipal Manager, through the delegation of authority, was authorised to act on behalf of the Municipality as its accounting officer. Streicher JA remarked in *Ganes*[17] that the deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. I am accordingly not swayed by the submission of the lack of authority of both the Municipal Manager and the Attorney of record. The attack on both was not even raised before the arbitrator. In any event, this was agreed to at arbitration stage and minuted in the Minutes of Preliminary meeting and pre-arbitration agreement:

"Attendance Preliminary meeting 14:00, 17 December 2020.
Wynand F Bloem Arbitrator
Advocate Wayne Pocock (counsel for claimant)
Madam Evette Prinsloo (on behalf of Tiefenthaler Attorneys Inc. for the claimant)
Advocate Mike Louw (counsel for respondent)
Mr Obakeng Kgomo (on behalf of Kgomo Attorneys Inc. for the respondent)
Recordal
It is recorded that the South African Institution of Civil Engineering (hereinafter, SAICE) on 16 November 2020 appointed Wynand Frederick Bloem as arbitrator in the dispute/s between the claimant and the respondent to preside as single arbitrator and to conduct the arbitral proceedings in accordance with the 2018 Edition of the Standard Procedure for the Conduct of Arbitrations (hereinafter, the Rules); save as expressly provided herein.
Arbitrator's response: Agreed
Claimant's response: Agreed
Respondent's response: Agreed"

[27] This is what the aforementioned parties agreed to pertaining to representation:

[17] Ibid at 624H

> *"The representatives of the parties confirm by their signatures below and on behalf of their firms of attorneys they respectively belong to, that they hold the necessary mandate and authority to contractually bind the parties, and to do all things necessary to prosecute and defend the parties' claims and claims in reconvention to finality".*

If the issue of authority of the respective attorneys was agreed to at arbitral level it boggles the mind to be questioned at this stage.

[28] Further, lack of authority cannot be raised as a defence by a respondent in an answering affidavit or in heads of argument. A respondent who wishes to challenge authority has to invoke the provisions of Rule 7 to challenge the mandate of an attorney. Apart from the attorney, no other person, including the deponent to an affidavit, requires authority. This challenge of lack of authority stands to fall by the wayside.

The fourth point *in limine:lack of personal knowledge*

[29] The contention by Ditiro is that the Municipal Manager lacks personal knowledge of the allegations he advanced in his affidavit because he was neither involved in the tender process nor in the arbitration proceedings; that the Manager has failed to deal with the pre-arbitration meetings; that the Municipality's statement of defence and surrejoinder as well as the array of correspondence between the arbitrator, the Municipality and Ditiro are contradictory. I do not agree. The Manager was *au fait* with what was happening around this contract because among others, he was responsible for the correspondence of 05 March 2020 (SOC 6.1)[18] and 06 March 2020 (SOC 6.2)[19] addressed to Mr Thabo Ronald Phokoje, Ditiro Tsa Ka Trading 6 CC, addressing default by Ditiro and withdrawing the Gadiboye Access Bridge and Bothitong to Dithakong Access Road projects from which withholding the

[18] Page 641 of the paginated papers
[19] Page 644 of the paginated papers

allocation of further projects to Ditiro stem from and were signed by Mr Tlhoaele, the Municipal Manager. The responses by Ditiro (SOC 7.1 and 7.2)[20] to the same letters are also addressed to the Manager. The imputations by Ditiro therefore hold no water.

The grounds for review

[30] I now turn to the grounds raised by the Municipality to resist the arbitral award being made an order of court. It is trite that the grounds upon which the applicant wishes to rely in the review have to be set out in the founding affidavit. The deponent, Mr Tebogo Tlhoaele, filed the affidavit which served as both the founding and answering affidavit in the counter-application on behalf of the Municipality. He relied on s 33(1) of the Arbitration Act quoted in full in para 2 (above) but repeated for better comprehension. It stipulates:

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

The Municipality relied on (b) namely, gross irregularity and exceeding of power. The general principle applicable to 'gross irregularity' is that it concerns the conduct of the proceedings rather than the merits of the decision made by the arbitrator.

[20] Page 646 and 650 of the paginated papers

[31] To substantiate the contention that the arbitrator committed an irregularity and exceeded his powers the Municipality advanced the following reasons:

31.1 The GCC contract between the parties prescribes that amendments and/or variations to the provisions contained therein must be executed in writing and signed between the parties. Absent any clear indication that amend the contract price from R27,631,982.17 to R78,846,541.21, the arbitrator could not have lawfully found that the applicant (Ditiro) was entitled to such escalation.

31.2 Quite apart from the absence of a specific document in the GCC contract amending the contract price, the Municipality and Ditiro could not have been entitled to amend or vary the contract price in a manner inconsistent with s 116(3) of the Local Government: Municipal Finance Management Act read with National Treasury directives which prohibits an extension or variation of contracts by more than 20 % (twenty percent) from the initial scope without express approval.

[32] It is necessary, against the backdrop of the attack on the arbitrator, to determine the nature of the enquiry conducted by the arbitrator as well as his duties and powers. Regard must be had to the General Conditions of Contract for Construction Works, Third Edition (2015) (the GCC 2015) more particularly the Rules for the Conduct of Arbitrations (Clause 10.7.2), the Arbitration Act and the Constitution of the Republic of South Africa, 108 of 1996. The arbitrator had to interpret Contract No B162/2017 (the agreement) and the accompanying memoranda of

understanding (MOU's) applying the relevant laws and the applicable terms and conditions mindful of all the admissible evidence. He had to conduct the proceeding in accordance with the terms of reference, his powers, issues of law and facts he deemed appropriate, in a manner he deemed appropriate but at all times remain independent and impartial.

The arbitrator's award

[33] The arbitrator compiled a comprehensive award comprising both factual and legal findings. First and foremost, he found that the Municipality accepted Ditiro's tender and Ditiro accepted the appointment for the Works described as "*Rural Roads Programme for Upgrading, Gravelling, Rehabilitation & Maintenance of Access Roads & Internal Roads – in Joe Morolong Villages"* on 17 November 2017. Of significance are the following findings:

33.1 That the four notices (Bothithong-Dithakong Road; Gadiboye Bridge; Gamakgatlhe Road and Churchill/Kleinera Road Phase 2) called for submission to the Engineer's nominated office of a number of documents which the contractor had to comply with within 14 calendar days from date of the letter;

33.2 The two Memoranda of Understanding (MOU's) entered into between the parties and the Engineer on 27 June 2019 (the one for Bothithong-Dithakong Road and the other for Gadiboye Bridge referred to a party known as "South 32 HMM" who would be responsible for the funding of the projects despite not being a signatory to the MOU's.

33.3 There were 3 Annexures "A" containing the professional services agreement and responsibilities between the Municipality and BMH Africa Engineers (Pty) Ltd as Consultants; "B" containing the "total budget" combined for Ditiro and the Consultant; and "C" containing the "project cash flow combined" for Ditiro and the Consultant. The arbitrator agreed with the submission by Ditiro that the contractual regime for the respective portions of the Works was regulated by the GCC and the separate MOU's.

[34] The parties agreed to provide the statement of case (SOC) by Ditiro and a statement of defence (SOD) by the Municipality to the arbitrator as well as all relevant documentary evidence they relied upon in their respective cases to support or counter the dispute within specified timeframes. The arbitrator further called for Ditiro's reply to the Municipality's SOD and the Municipality's rejoinder as well as Ditiro's surrejoinder. Two preliminary meetings were held via zoom, on 05 July 2021 and on 17 December 2021. Pursuant to these meetings, the parties agreed on the minutes, the pre-arbitration agreement and the Addendum compiled by the respective parties' counsel.

[35] The ConCourt in *Mphaphuli*[21] stated that when parties choose private arbitration for the resolution of their dispute their choice does not translate into having rights under s 34 of the Constitution but rather their choice is not to exercise their rights under s 34. What is common cause is that the process of arbitration was consensual; the proceedings were not public; and the identity of the arbitrator and the manner of the proceedings was determined by agreement between the parties.

[21] Ibid para 216

[36] This is the broad overview of what Ditiro presented to the arbitrator in its Statement of Claim (SOC), replication, surrejoinder and in its response to the arbitrator's request for further information with supporting documentation: It was awarded the GCC contract and MOU's to cover other contracts as follows:

36.1 On 27 June 2019, at Kuruman, a MOU was concluded with the Municipality in respect of the Bothithong Project for the contract price of R20,000,000.00 (Twenty Million Rand) including 15 % VAT;

36.2 On 18 April 2019 a MOU was concluded with the Municipality in respect of the Gadiboye Project for the contract price of R6,666,969.75 (Six Million Six Hundred and Sixty Six Thousand Nine Hundred and Sixty Nine Rand and Seventy Five Cents) including 15 % VAT;

36.3 On 24 August 2018 a MOU was concluded with the Municipality in respect of the Gamakgatlhe Project in the amount of R5,352,525.00 (Five Million Three Hundred and Fifty-Two Rand Five Hundred and Twenty-Five Rand) including 15 % VAT;

36.4 On 13 June 2018 a MOU was concluded with the Municipality in respect of the Churchill/Kleinera Project for R7,049,500.00 (Seven Million Forty-Nine Thousand and Five Hundred Rand) including 15 % VAT;

36.5 Late 2019 early 2020 the Municipality allocated Dikhing/Logobate Bridge Project for the contract price of R5,623,001.00 (Five Million Six Hundred and Twenty Three Thousand and One Rand) and an amount of R6,489,965.99 (Six Million Four Hundred and Eighty-Nine Thousand Nine Hundred and Sixty-Five Rand and Ninety-Nine Cents) including 15 % VAT; and

36.6 Ditiro claims loss of future projects namely, Makubung Project, Buden Project and Churchill/Kleinera Project, for the total amount of R27,664,579.47 (Twenty-Seven Million Six Hundred and Sixty-Four Thousand Five Hundred and Seventy-Nine Rand and Forty-Seven Cents).

[37] Ditiro maintained that of the nine projects awarded it had completed four before the Municipality unilaterally terminated the main contract and withdrew the rest. The municipality awarded those remaining to third parties (other contractors). Ditiro avers that as a result of this termination or repudiation, it is entitled to damages which were broken down according to the said projects, claims A to G. Ditiro substantiated its case by submitting documentary evidence, including, a copy of the contract, copies of the MOU's except for the Churchill/Kleinera Road Phase 2 and the Gamakgatlhe MOU's for which it sought and was granted condonation from the arbitrator for its failure to file same. It further provided copies of the letters to the Department of Labour, proof of compliance with the South African Revenue Service (SARS) annexed to the papers REP 5.1 and the Construction Industry Development Board (CIDB) grading REP 5.2. Ditiro also submitted proof for the completion of the Padstow Road 4 project in terms of GCC2015 Clause 5.16.

[38] It is significant to note that none of the defences raised by the Municipality in its affidavit in the counter-application were pleaded in the arbitration proceedings. The following defences or allegations were neither pleaded nor referred to by the Municipality in the arbitration proceedings but were advanced for the first time eight months after the completion of the arbitration proceedings:

38.1 that the works performed by Ditiro or Ditiro's invoices exceeded the agreed contract price;

38.2 that Ditiro's entitlement in the Rural Roads Programme was limited to R27,632,982.17;

38.3 that the directive imposed by the National Treasury was contravened.

38.4 There was no mention that the award of the tender by the Municipality to Ditiro was unlawful, irregular or contravened any regulatory regime.

[39] This is broadly what the Municipality presented before the arbitrator. The Municipality filed a Statement of Defence (SOD) and a rejoinder but did not provide any response to the request for further information by the arbitrator nor did it respond to the arbitrator's invitation to make closing remarks and/or arguments on or before 06 August 2021. Before the arbitrator the Municipality mainly raised bare denials. It denied that Ditiro was appointed as the 'sole contractor' under the Rural Roads Programme; that Ditiro completed four of the nine projects; that the

withdrawal of the remainder of the projects from Ditiro awarding them to third parties amounted to a breach of the GCC; that the alleged damages suffered by Ditiro were contemplated; that its conduct amounted to repudiation; it maintained that it withheld payments from Ditiro because of Ditiro's non-compliance with SARS and CIDB. The Municipality further denied that its conduct was unlawful and amounted to repudiation; that it owed payment of interest to Ditiro. The Municipality pleaded that it validly cancelled the GCC contract and did not commit any breach or repudiation. It further denied that Ditiro suffered any damages and asked the arbitrator to dismiss Ditiro's application.

[40] Conspicuous and very glaring in both the submissions before the arbitrator and before the review court was the deafening silence pertaining to the projects funded by South 32 HMM despite not being a signatory to the MOU's. It remains unclear how these funded projects were linked to the tendered main project of R27,631,982.70 because it is the foundation upon which rested the evidence presented before the arbitrator, as substantiated by Ditiro, informed him that the total amount involved was R78,846,541.21. I cannot fathom how the municipality would elect to remain tight-lipped when it had the opportunity to explain to the arbitrator the connection between the GCC contract and the agreements covered by the MOU's. It is reasonable, in my view, to draw an adverse inference against the silence of the Municipality after submissions were made by Ditiro in its SOC. The arbitrator had to be led by the evidence before him.

[41] In this Court counsel for the Municipality argued that this contract required contractors with a grading designation of 6CE and above because the value of the contract was above R70 million. Contractors

with a grading designation of below 6CE-7CE would not have qualified as contemplated in the Construction Industry Development Board Act 38 of 2000 read with Regulation 25 of the Construction Industry Development Regulations promulgated under the Construction Industry Development Board Act. The applicant, it was contended, did not meet these criteria. The Municipality seems to miss the point that a case cannot be made in the heads of argument but must be made in the papers. What remains abundantly clear is that Ditiro had followed all the processes from the tendering process to the MOU's with the Municipality and the Municipality's "about turn" is inexplicable and untenable.

[42] It is not for this Court to interpret the agreement afresh but to determine whether the purported irregularities had been committed. The arbitrator invited further information from the parties. Under Claim A: loss of profit – Bothithong to Dithakong Road portion of the Works a child had drowned in a burrow pit resulting in the Department of Labour being involved. Although Ditiro wrote to the Consultant requesting some details on 03 March 2020 the Municipality responded on 05 March 2020 notifying it of its alleged failure to execute the work and classified it as a default. Of significance, as recorded by the arbitrator, is that *the Municipality failed to provide alternatively chose not to provide as part of any of its submissions to the arbitrator any evidence of these alleged formal correspondence and formal interactions or how the alleged non-compliance with these provisions in the contract amounted to default.*

[43] The Municipality followed up with Ditiro on 06 March 2020 referring to various previous correspondence notifying Ditiro of alleged default in terms of GCC 2015 Clause 4.1.1 and repeated that the Bothithong scope

of work was withdrawn. Again, the arbitrator mentions that *the Municipality failed alternatively chose not to provide any documentary evidence on which it relied to support its allegations.* Ditiro informed the arbitrator that it could only proceed with the Bothithong project after 10 November 2019 because of the environmental authorisation and related conditions thereto resultantly experiencing a six months delay. Ditiro pointed the arbitrator to the various factors, circumstances and events beyond its control entitling it to an extension of time thereby justifying that it was not in any breach or default which warranted withdrawal of the projects. The Municipality merely notified Ditiro of its decision on 11 June 2020 that the contract between them was terminated based on GCC 2015 Clause 9.2 yet again, as pointed out by the arbitrator, without any specific evidentiary backup or any specific clauses under clause 9.2.

[44] The arbitrator considered the aspect of termination/repudiation by seeking guidance from the Guidance Notes for the GCC 2015 and this is what it states:

> *"…A contract may only be terminated for a breach which is stipulated as a material term and if the contract provides for the right to terminate, or where such a right is obtained by serving a proper notice. A breach occurs when the obligations imposed by a contract are not performed, or are performed late, or are performed inadequately. If a party wants to terminate the Contract for breaches other than the material breaches listed in Clauses 9.1.1 to 9.1.3, 9.2.1 or 9.3.1, a notice must be served on the defaulting party requiring him to rectify the breach within a reasonable time or suffer termination.*
>
> *The termination of a construction contract is an extreme measure, only to be used as the very last resort. It is advisable for the party who wishes to terminate the Contract to consider whether termination would be in his best interest before embarking on this drastic step. GCC 2015 provides for other less drastic measures to rectify a party's default, for example extending the Employer's Agent's instruction to commence with the carrying out of the Works instead of terminating the Contract when the Contractor delivers late or unacceptable documentation required in terms of Clause 5.3.1 or, instead of terminating the Contract, the Contractor may claim extension of time and additional costs when the Employer fails to comply in good*

time with the information required to proceed with the Works in terms of Clause 5.10.1. Before embarking on termination matters, it would be advisable for the party who wishes to terminate to seek legal advice. The slightest deviation from the terms of the Contract may lead to repudiation of the Contract, with all the undesirable consequences of such a breach…."

[45] This is the arbitrator's sound reasoning. For the Municipality to legitimately terminate the contract under Clause 9.2 of GCC2015 for default actions by the Contractor, it requires under Clause 9.2.1.3:

"… After giving effect to Clause 3.2.2, the Employer's Agent certifies, in writing, to the Employer and to the Contractor, with specific reference to this Clause, that the Contractor……and then it lists under sub-clause 9.2.1.3.1 to 9.2.1.3.8 various actions of default… and concludes with: "……then the Employer may, after giving fourteen (14) days written notice to the Contractor, (with specific reference to this Clause) to remedy the default, terminate the Contract…."

[46] The Municipality failed or chose not to provide the arbitrator with evidence on which it relied despite the request by the arbitrator for it to do so in their second preliminary meeting where the arbitrator specified to it the information he sought. The arbitrator concluded that the Bothithong to Dithakong portion of Works was repudiated and Ditiro accepted the repudiation and is entitled to damages flowing from such repudiation. Pertaining to the quantum of damages Ditiro asked for R2,222,774.52 (Two Million Two Hundred and Twenty-Two Thousand Seven Hundred and Seventy-Four Rand and Fifty-Two Cents) including VAT. However, the arbitrator rejected the 20% profit and allowed 15% on the value of the work Ditiro was prevented from doing thereby concluding that Ditiro was entitled to a payment of R1,667,080.89 including VAT. He further concluded that interest *tempore morae*, compounded monthly at prime overdraft interest rate charged by the Contractor's bank shall be payable to Ditiro from the date of the award until date of payment.

[47] Claim B relates to interest on late payments: Bothithong/Dithakong. Ditiro alleged that the 28 days were allowed for as per GCC 2015 Clause 6.10.4 and that the Municipality must be held liable therefor. In denying liability the Municipality yet again contended that the reason for the late payments is ascribed to the fact that Ditiro was not compliant with SARS regarding its tax affairs but has not tendered any proof to substantiate those accusations to the arbitrator. However, Ditiro provided the countering proof of being tax compliant to the arbitrator. Having found that the Municipality was obliged to pay within the 28 days stipulated in GCC 2015 Clause 6.10.4, and that its failure attracted interest compounded monthly the arbitrator found the conditions of the GCC 2015 took precedence over those of the MOU and ordered that an amount of R54,969.09 (Fifty-Four Thousand Nine Hundred and Sixty-Nine Rand and Nine Cents) was payable.

[48] Claim C pertains to loss of profit: the Gadiboye Access Bridge portion of the Works. The arbitrator found that although the anticipated commencement date of the portion of the Works is stated as 02 May 2019 for a period of 5 months, the MOU was only signed on 27 June 2019 to be retrospectively effective from 16 April 2019 and that the Consultant would certify the Services/Products described in the scope of Works as rendered/constructed by 31 October 2019. On 05 March 2020 the Municipality notified Ditiro of its alleged failure to execute the said project not only classifying such failure as default but also extending that time to 26 February 2020. The Municipality, however, did not furnish any evidence to support its allegations of the formal correspondence and interactions that preceded the notice issued in March. Despite this the Municipality issued correspondence on 06 March 2020 withdrawing the Gadiboye Access Bridge contract. Despite

the arbitrator asking the Municipality for specific information in respect of the Gadiboye portion of the Works, the Municipality failed or chose not to provide same. That failure led the arbitrator to conclude that there was repudiation of the contract by the Municipality and found that Ditiro was entitled to damages for loss of profit of 15% of the value of the work it was prevented from executing and ordered payment in the amount of R859,178.02 (Eight Hundred and Fifty-Nine Thousand One Hundred and Seventy-Eight Rand and Two Cents) including VAT instead of the claimed R1,145,570.69.

[49] Claim D relates to interest on late payments: Gadiboye Bridge. The assessment is the same as Claim B above. The arbitrator forwarded some questions to both parties. Following their responses he was satisfied that the claim was in terms of GCC 2015 and not the MOU. He found that the interest on overdue amounts was equal to the amounts claimed under Ditiro's revised annexure REVISEDSOC 15.1 to a total amount of R8,858.19 (Eight Thousand Eight Hundred and Fifty-Eight Rand and Nineteen Cents) and dismissed the interest claimed under SOC 15.2. When Ditiro was unable to produce a copy of the MOU for this project the arbitrator asked the Municipality for a copy. The information received persuaded him to grant Ditiro the condonation sought.

[50] Claim E: loss of profit for Gamakgatlhe Road & Bridge. The arbitrator noted that the letter to commence was dated 24 August 2018 for a 600m long road with a double culvert bridge. The scheduled commencement date is stated as 29 March 2019 for a period of five months. However, Ditiro averred that 29 March 2019 was not the commencement date but the anticipated completion date. Ditiro could not produce the MOU for

this project but alleged that it received drawings in respect of the project on 3 September 2019. It required installation of culvert sections for which it provided the Municipality with certain proposals on 18 February 2019 and 11 December 2019 but did not hear from the Municipality until 30 January 2020. It claims to have asked for a response from the Municipality on 27 February 2020 and on 03 and 05 March 2020. The arbitrator says that despite finding the dates to be confusing they were confirmed as correct. This implies an inordinate delay on this portion of the Works with the parties attributing blame at each other. On 06 March 2020 the Municipality wrote to Ditiro: *"… Your urgent Remedial Action is required detailing how you will attend to outstanding works."* This was followed by inaction and on 11 June 2020 the notice to terminate the contract based on GCC 2015 Clause 9.2 was issued. The arbitrator found that the Municipality has repudiated the contract and, similarly to Claim A above, concluded loss of profit at 15% and ordered payment of R494,540.21 (Four Hundred and Ninety-Four Thousand Five Hundred and Forty Rand and Twenty-One Cents) including VAT.

[51] Claim F: Half the retention of Churchill/Kleineira Road Phase 2. The letter to commence the project is dated 13 June 2018 under the Scope of Works to upgrade a 1100m long road to surface standard. The stated commencement date was set for 20 July 2018 to run for a period of five months. Ditiro did not furnish a copy of the MOU to the arbitrator but asserted that it had completed the construction on either 7 or 19 February 2019. It, however, attached an issued Completion Certificate with certain snag items. It was paid half of its retention monies. It maintains that the snagging was completed on 02 July 2020. Despite this the Municipality issued a notice of its decision to terminate the

contract on 11 June 2020. The arbitrator sought further information from the Municipality as substantiating evidence that the "Hand-over-Certificate" issued was not intended to be a "Final Approval Certificate" as intended by the GCC 2015 Clauses 1.1.1.18 read with Clause 5.16.1. The Municipality failed or chose not to furnish same to the arbitrator. The arbitrator concluded that the Churchill/Kleineira Road Phase 2 was repudiated and dismissed the allegation by the Municipality that the termination was legitimate. The arbitrator limited the damages to half of the retention monies in the amount of R313,444.84 (Three Hundred and Thirteen Thousand Four Hundred and Forty-Four Rand and Eighty-Four Cents) including VAT. Since Ditiro did not claim interest on this portion of the damages, despite being entitled thereto, none was ordered by the arbitrator.

[52] Claim G: Loss of profit for Dikhing Access Road & Logobate Bridge. The arbitrator found that the Municipality neither issued a notice to commence nor a MOU for these two portions of the Works. In its default notification to Ditiro the Municipality added this phrase *"the Dikhing Access Road and Logobate Bridge portions of the Works were not allocated due to non-performance."* .The Municipality failed or chose not to provide any documentary evidence on which it relied to support this statement. Ditiro's attorneys wrote to the Municipality on 07 April 2020 mentioning that the contract concluded with the Municipality included all work associated with the Rural Roads Programme. Ditiro denied non-performance and emphasised that it was Ditiro's intention to comply with all its contractual obligations. Despite the letter concluding with the request to the Municipality to withdraw the notice that it was not allocated the Works, it was followed by the termination notice dated 11 June 2020. This too was not supported by

any evidentiary material by the Municipality resulting in the finding by the arbitrator that the Dikhing Access Road and Logobate Bridge portions of the Works were repudiated by the Municipality and that Ditiro had accepted the repudiation. He awarded a 15% loss of profit damages claim of the value of the work it was prevented from executing. Notwithstanding the arbitrator requesting verification of the contract sums from both parties, only Ditiro responded in this manner, which response was accepted by the arbitrator in the absence of any countervailing response:

"…the contract amounts in SOC20 and SOC21, which amounts were communicated directly and confidentially to me, during a telephonic conversation I had with an employee of the Municipality and with an employee from BMH…"

The arbitrator found that Ditiro is entitled to damages to the value of 15% of the work it was prevented from performing, which computed to R1,816,945.05 (One Million Eight Hundred and Sixteen Thousand Nine Hundred and Forty-Five Rand and Five Cents) including VAT.

[53] Claim H: Loss of profit for Makubung Access Road Phases 3, 4, 5; Buden Access Road; Makubung Access Road Phase 6; Churchill/Kleineira Access Road Phase 4. These portions of the Works were allocated to third parties and not to Ditiro. In assessing whether they formed part of the original contract or not the arbitrator considered the wording from the GCC which he found persuasive:

53.1 The GCC was clearly concluded for the: "Rural Roads Programme for upgrading, gravelling, rehabilitation & maintenance of Access Roads & Internal Roads – In the Joe Morolong Villages – Contract;

53.2 In addition, under Ditiro's REP1 the following:

> *"…The Upgrading, Re-gravelling, Rehabilitation and Maintenance of Access Roads and Internal Roads in the villages of the Joe Morolong Municipality.*
> *Tenderers are to note that this is a rate only contract applicable to **all** villages of the Joe Morolong Local Municipality therefore a schedule of quantities for each village will be issued on a project by project basis…"*

[54] The Municipality failed to provide any countervailing evidence that the contract did not apply to all the villages in the Joe Morolong Local Municipal Area. This led to the arbitrator concluding, correctly so in my view, that the scope of work included in the contract between the Municipality and Ditiro was not limited to portions in respect of which he was notified to proceed incorporating the MOU's and other portions covered by the upgrading, re-gravelling, rehabilitation and maintenance of access roads and internal roads of all the villages under the Joe Morolong Municipality.

[55] Consequently, the arbitrator found that there was repudiation and granted damages in the form of loss of profit of 15% of the value of the work which Ditiro was prevented from executing. He found that Ditiro was entitled to R4,149,686.92 (Four Million One Hundred and Forty-Nine Thousand Six Hundred and Eighty-Six Rand and Ninety-Two Cents) including VAT.

[56] The following remarks in *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd*[22]are instructive:

> *"[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*

[22] 2008 (2) SA 608 (SCA) at paras 30 and 32

> *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."*

The Court went on to say:

> *"[32] I have already said 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."*

In the case before us the Municipality neither raised a defence in the pleadings[23] nor agreed with Ditiro to extend the scope and terms of reference of the arbitration.[24] The parties had agreed, for purposes of the arbitration proceedings, that their dispute was contractual in nature pertaining to monies due and owing by the Municipality to Ditiro and did not raise any issues regarding the validity of the contract and/or the award.

[57] Regard being had to the conspectus of all these claims and how the arbitrator dealt with each one of them against the backdrop of the applicable prescripts and admissible evidence, more importantly, the Municipality's failure to submit the relevant documentation or furnish the required explanation, I am of the view that it was proper for the arbitrator to have had regard to the additional projects funded by South 32 HMM and the MOU's. It was accordingly also proper for the arbitrator to have considered and interpreted the agreement. I have further noted and referred to areas where he reduced the claimed amounts, percentages and did not entertain interest that was not claimed or due. All this is demonstrative of his independence and impartiality.

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[23] Yannakou v Apollo Club 1974 (1) SA 614 (A) at 623G - H

[24] Gutsche Family Investments (Pty) Ltd and Others v Mettle Equity Group (Pty) Ltd and Others 2007 (5) SA 491 (SCA).

[58] Of significance, in the reading of the award, is the repeated inaction by the Municipality to furnish required information or to submit evidentiary documentation and or clarity on the relevant clauses. The Municipality's attack on the arbitration is based on the contention that he committed an irregularity or exceeded the bounds of the contract between the parties. These are the alleged irregularities as deposed to in the founding/answering affidavit by Mr Tebogo Tlhoaele:

> *"16. Non-compliance with the regulatory regime, in the execution of the contract awarded to the applicant, renders the purported extension of the applicant unlawful and invalid and ultimately unenforceable.*
>
> *17. I accordingly submit that the administrative action associated with the awarding of the contracts and the awarded contracts are liable for review and setting aside in terms of s 1(c) of the Constitution, on account of illegality. The resultant consequence is that the Arbitration Award developed from the premise that the applicant was destined for contracts to the total amount of R78 846 541.21 cannot stand.*
>
> *18. Had the arbitrator properly confined himself to the stipulations of the contract between the parties, there could not have arisen a computation of damages on the astronomical amount of R78,846,541.21."*

[59] The arbitrator repeatedly called for substantiating evidence from the Municipality but did not receive any. The arbitrator expressed a view that the Municipality's case was not supported by evidence. There can be no basis that the arbitrator failed to afford the Municipality a hearing on these matters. The parties had beforehand agreed on the process and the regulatory framework to arbitrate their dispute. It was therefore unhelpful for the Municipality to cast aspersions on the role and the powers of the arbitrator. I can find nothing wrong with the manner in which the arbitrator conducted the proceedings and in the exercise of his discretion as well as his findings on the law and the facts.

[60] I find that the arbitrator's award was well articulated and covered all aspects of the contract. The parties were afforded a fair hearing. The new defences the Municipality seeks to introduce in this counter-application were neither pleaded in the statement of defence nor the rejoinder. Crucial in this entire application from the arbitration stage is the lack of evidence from the Municipality. The Constitutional Court pointedly said the following in *Member of the Executive Council for Health, Eastern Cape Province v Kirland Investments.*[25]

> *"Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly."*

[61] In *Administrator, South West Africa v Jooste Lithium Myne (Eiendoms) Bpk*[26] Hoexter JA said the following:

> *"It cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by a court."*

[62] The caution by the SCA in *Telcordia*[27] is apposite:

> *"[4] The High Court in setting aside the award disregarded the principle of party autonomy in arbitration proceedings and failed to give due deference to an arbitral award, something our courts have consistently done since the early part of the 19th Century. This approach is not peculiar to us; it is indeed part of a worldwide tradition. Canadian law, for instance, 'dictates a high degree of deference for decisions . . . for awards of consensual arbitration tribunals in particular.' And the 'concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes' have given rise in other jurisdictions to the adoption of 'a standard which seeks to preserve the*

[25] 2014 (3) SA 481 (CC) at para 82
[26] 1955 (1) SA 557 (A)
[27] Ibid at 278 para 4

> *autonomy of the forum selected by the parties and to minimise judicial intervention when reviewing international commercial arbitral awards'"*

[63] I therefore conclude that the Municipality's attack that the arbitrator exceeded the bounds of the contract between the parties and impermissibly extended the scope of the contract and further that the process adopted by the arbitrator in the determination of the dispute was wholly inappropriate having regard to the disputes presented for determination, is devoid of any merit. The arbitrator correctly understood his mandate. It was, accordingly, proper for the arbitrator to have regard to all the surrounding circumstances and events, including the MOU's when interpreting the contract between the parties. It follows that the Municipality's counterclaim stands to be dismissed.

<u>On the issue of costs</u>

[64] The Municipality contends that the arbitration award should not be made an order of court and that the counter-application should succeed. Ditiro on the other hand seeks an order dismissing the review application with costs against the Municipality and as far as the the Municipal Manager is concerned costs *de bonis propriis,* including the cost of two counsel, where employed, on the scale as between attorney and own client.

[65] It is trite that costs are in the discretion of a presiding officer which must be exercised judicially upon a consideration of the facts in each case. Regard being had to the facts before us I am not persuaded that the facts justify an order *de bonis propriis* against the Municipal Manager. The litigation by the Municipality was unnecessarily drawn out. Ditiro cannot be mulcted in costs. I am inclined to grant a punitive cost order against the Municipality for the following reasons:

65.1 It had consented to the arbitration process but did not participate meaningfully in it;

65.2 It failed to apply for condonation for its late filing of the review application; and

65.3 The Municipality is unsuccessful in this application and should pay the costs, including those consequent upon the employment of two counsel.

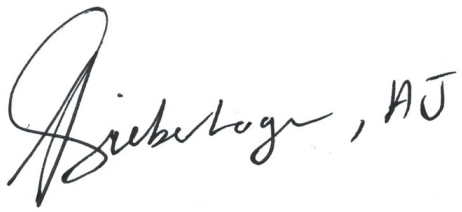
[66] In the result, the following order is made:

1. The counter-application by the Municipality is dismissed with costs on a scale between attorney and client, such costs to include the costs of two counsel.

_____

MAMOSEBO J
NORTHERN CAPE DIVISION

I concur



SIEBERHAGEN AJ
NORTHERN CAPE DIVISION

For the applicant:	Adv Matlhaba E. Manala (with him Adv Moloko Rasekgala)
Instructed by:	Kgomo Attorneys Inc. c/o Haarhoffs Attorneys
For the first respondent:	Adv WH Pocock (with him Adv C Opperman)
Instructed by:	Tiefenthaler Attorneys Inc c/o Duncan & Rothman Inc