# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
# JUDGMENT

**Not Reportable**
Case No: 995/16

In the matter between:

**STATE INFORMATION TECHNOLOGY AGENCY SOC LIMITED** **APPELLANT**

and

**ELCB INFORMATION SERVICES (PTY) LTD** **FIRST RESPONDENT**

**LEON DICKER NO** **SECOND RESPONDENT**

**Neutral citation:** *State Information Technology Agency SOC Limited v ELCB Information Services (Pty) Ltd & another* (995/16) [2017] ZASCA 120 (22 September 2017)

**Coram:** Shongwe AP, Majiedt JA and Plasket, Tsoka and Rogers AJJA

**Heard:** 18 August 2017

**Delivered:** 22 September 2017

**Summary:** Arbitration Award – review – arbitrator alleged to have committed gross irregularities – s 33(1)*(b)* of the Arbitration Act 42 of 1965 – gross irregularities not proved – appeal dismissed.

## ORDER

**On appeal from:** Gauteng Division of the High Court, Pretoria (Mabuse J, sitting as court of first instance):

The appeal is dismissed with costs.

## JUDGMENT

**Shongwe AP (Majiedt JA and Plasket, Tsoka and Rogers AJJA concurring)**

[1] This appeal arises from a judgment and order of the Gauteng Division of the High Court, Pretoria (Mabuse J) in which it dismissed a review application brought by the appellant, State Information Technology Agency SOC Ltd (SITA), against the respondents, ELCB Information Services (Pty) Ltd, and Leon Dicker NO. The court below also granted a counter-application by the first respondent which sought an order that the arbitrator's award granted on 31 March 2014 be made an order of court in terms of s 31(1) of the Arbitration Act 45 of 1965 (the Act). (I shall refer to the parties in this judgment as appellant and respondent for ease of reference, as the second respondent – the arbitrator - did not participate in the hearing or in this appeal).

[2] Aggrieved by this decision, the appellant applied for leave to appeal on the grounds that the court a quo had erred in the following respects. (It is neccesary to mention the grounds in full for reasons that will emerge later in the judgment).

'1. In not reviewing and setting aside the second respondent's arbitration award against the applicant.

2. In not finding that the second respondent committed gross irregularities in the conduct of the arbitration proceedings between the applicant and the first respondent.
3. In not deciding at all the question whether the second respondent committed gross irregularities in the conduct of the arbitration proceedings between the applicant and the first respondent.
4. In not finding that the Promotion of Administrative Justice Act 3 of 2000 did not apply where an organ of the state seeks to set aside its own conduct and that the 180 days period provided for therein did not apply thereto.
5. In not following the decision of this Court per Southwood J in Telkom v Merid Trading'.

The appellant did not end there – it added the following in its application for leave to appeal:

'TAKE FURTHER NOTICE THAT the learned judge's judgement did not resolve all the issues in dispute between the parties insofar as the learned judge did not decide the question whether the second respondent committed gross irregularities in the conduct of the arbitration proceedings between the applicant and the first respondent and that this issue on its own justifies the hearing of an appeal'.

The court below dismissed the application for leave to appeal in respect of grounds (1), (2), (4) and (5), but granted leave 'in respect of the ground that the court did not deal with the arbitration issue in its written judgment'.

[3] The background facts are that the appellant and the respondent concluded two agreements. In terms of the first agreement, concluded on 12 March 2006, the respondent was appointed and required to develop and implement an information management system for the South African Social Security Agency (SASSA). In short it was for the procurement of information technology goods and services on behalf of the appellant and some other government departments. The second agreement was purportedly concluded pursuant to a letter dated 11 January 2007 from the Superintendent-General of the Eastern Cape Department of Health, requesting the appellant to appoint the respondent to develop a records management system for that department. The appellant has not been able to locate the signed copy of the second agreement.

[4] Clause 25 of the first agreement provided that if a dispute between the parties was not resolved, such a dispute shall be referred to arbitration which would be conducted in accordance with the rules of the Arbitration Foundation of South Africa (AFSA). The respondent relied on an unsigned copy of the second agreement, which it alleged was concluded by the parties. However, the appellant denied the conclusion of the second agreement in the absence of evidence showing that such an agreement was indeed concluded between the parties. For this reason, the appellant contended that there was no arbitration agreement to arbitrate the respondent's second claim. Therefore, the appellant argued, that it was legally incompetent to conduct arbitration proceedings in relation to a claim founded on the second agreement.

[5] As a result of the first agreement, the appellant and the respondent concluded and signed an arbitration agreement on 13 March 2006. It is important to record that the appellant fulfilled its obligations in respect of both agreements and duly paid a substantial portion of what was due to the respondent. In terms of the first agreement R220 million was payable in aggregate by the appellant for the services to be rendered by the respondent and, in terms of the second agreement the sum of R20.1 million in aggregate for the services. The respondent, likewise performed all its contractual obligations in terms of both agreements, having rendered the professional services to the appellant. During the duration of the agreements, the respondent submitted various invoices to the appellant for payment, for which the appellant effected substantial payments. Eventually, on 11 March 2013 the respondent sent a letter demanding payment, failing which summons would be issued. On 21 June 2013, the respondent sent another letter to the appellant requesting that the matter be referred to mediation as agreed.

[6] The respondent lodged a statement of claim as per the arbitration agreement and a pre-arbitration meeting was held on 1 October 2013. Both parties were represented by counsel and agreed on various topics including that there was an arbitrable dispute, that the issues in dispute would be those as defined in the pleadings, the delivery of processes, pleadings and documents, expert witnesses, rules of evidence, onus and duty to begin and all other relevant topics. It was agreed that the arbitration would be held on 21 January 2014 to 24 January 2014. The appellant reserved its right to raise an objection to the jurisdiction of the arbitrator in respect of both claims by no later than 16:00 on 11 October 2013. The objection was never raised. It was also agreed that the appellant would deliver its statement of defence and any counterclaim by no later than 16:00 on 8 November 2013. These documents were never delivered.

[7] On 21 January 2014, the hearing was postponed to 3 March 2013 because of the appellant's failure to file its statement of defence. On this date the appellant brought an application for an order declaring both agreements constitutionally invalid, unlawful and unenforceable and for an order that the arbitration proceedings be stayed or postponed pending the final determination of the validity of the agreements. The essence of this late application was that both agreements were in contravention of s 217 of the Constitution in that the appellant did not comply with the procurement procedures applicable to state procurement of goods and services in entering into agreements. This constitutional point had never previously been raised. On 4 March 2014 the arbitrator ruled against the appellant, thus dismissing the application of invalidity with costs on the attorney and client scale. At this juncture the appellant and its legal representatives left the proceedings.

[8] On 31 March 2014 the arbitrator made an award, without giving reasons after having considered the evidence of the respondent, and having heard

counsel for the respondent. As stated, the appellant and its legal representatives had left the hearing and consequently no evidence was led on behalf of the appellant. The appellant was ordered to pay certain amounts plus interest to the respondent and the costs of arbitration. On 9 May 2014 the appellant filed an application wherein it sought an order reviewing and setting aside the arbitration award and also declaring both agreements concluded between the appellant and the respondent constitutionally invalid and unenforceable. As indicated above in paragraph 1 of this judgment, this application was dismissed and the counter-application by the respondent seeking that the award be made an order of court was granted.

[9] Leave to appeal in respect of grounds (1), (2), (4) and (5), as indicated in paragraph 2 above, was dismissed. The court below reasoned that there were no reasonable prospects of success. However, it granted leave on the ground that it did not deal at all with the arbitration issue in its written judgment. The notice of appeal was couched in a manner suggesting that the appeal is against the reasons for the judgment and not against the order or orders granted by the court below. The ambiguity created by the notice of appeal resulted in the registrar of this court sending a letter to the parties to prepare and file supplementary heads of argument dealing with what appeared to be a defective notice of appeal. In the respondent's supplementary heads, the respondent contended that the appeal should be struck from the roll. It argued that to allow the appeal to be heard in circumstances where the court below did not deal at all with the arbitration dispute, would mean that this court would be required, as a court of appeal, to determine the dispute without the benefit of the reasoning of the court below. It contended further that it would be inappropriate, even if there was a valid notice of appeal, for this court to determine the arbitration dispute as a court of first and last instance.

[10] The appellant on the other hand contended that, in terms of the Supreme Court of Appeal rule 7(3), the notice of appeal must state what part of the judgment or order is appealed against and state the particular respect in which the variation of the judgment or order is sought. The appellant referred this court to *Makings v Makings* 1958 (1) SA 338 (A) at 341F and *De Jager v Diner & another* 1957 (3) SA 567 (A) at 573, which cases concluded that the object of the rule[s] is to avoid embarrassment and ambiguity especially 'where the only issue involved is apparent on the record and there can be no embarrassment or ambiguity, a strict compliance with the Rule may be waived'. The appellant contended further that the only issue was whether the arbitration award fell to be reviewed and set aside on the grounds that the arbitrator committed gross irregularities.

[11] After this preliminary question was argued by both counsel, this court heard the parties on the merits, ie whether the arbitrator made himself guilty of gross irregularities which justified the reviewing and setting aside of the award. We decided to hear the merits for convenience and having considered that it would be in the interest of justice to do so. We were also mindful of the fact that the respondent conceded that it was not embarrassed by the alleged defect in the notice of appeal. In its amended notice of appeal the appellant specifically abandoned the ground regarding the constitutional invalidity of both agreements.

[12] I now turn to discuss whether or not the arbitrator committed gross irregularities. The appellant raised five grounds before us on which it contended that the arbitrator committed gross irregularities. These are: (a) that the appellant was excluded from participating in the arbitration proceedings – thus the appellant was not given a hearing; (b) that the second agreement was not signed by the appellant and thus never came into existence; (c) that the

arbitrator exceeded his powers when he awarded interest on the sum of R2 911 676,64 with effect from 11 March 2013 because there was no demand made for payment of the said sum on that date; (d) that the arbitrator failed to properly apply his mind to the evidence placed before him; (e) that the arbitrator contravened clause 23.6 of the second agreement ie by failing to give written reasons.

[13] Having considered all the grounds relied on for the setting aside of the award, and having heard both counsel, I conclude that none of the grounds raised are valid and meritorious. My reasons follow.

**That the appellant was excluded from the arbitration proceedings**.

[14] The appellant was not excluded from the arbitration proceedings. Its representatives chose to leave the hearing after the arbitrator dismissed its invalidity application. The appellant was required to submit a statement of defence after the respondent had submitted its statement of claim as agreed during the pre-arbitration meeting. But the appellant failed to do so. The arbitrator ruled that the appellant was in default after several opportunities and extensions had been granted to it. The appellant was in fact given an opportunity to cure its default by making an application to that effect before the arbitration hearing started. The appellant failed to do so. On 3 March 2014, when the arbitration proceedings were scheduled to resume, the appellant was present and represented by counsel. The appellant was still in default and still entitled to apply to cure its default, but again failed to do so. Instead the appellant launched an ill-conceived application seeking the declaration of the invalidity of the two agreements and alleged that a proper procurement process had not preceded the conclusion of the two agreements. As stated (in para 7 above) this was the very first time since the agreements were concluded seven to eight years previously that the appellant alleged the constitutional invalidity

and unlawfulness of the agreements. The ancillary relief sought was the staying of the arbitration proceedings pending the final determination of the invalidity by a court. This was in my view, a poorly disguised and unsubstantiated application for a postponement. The arbitrator, correctly so, in my view, refused both the primary and secondary relief sought. The arbitrator cited article 10.6.2.1 read with 10.2.6.2 of the Commercial Arbitration Rules, which empowered him to 'proceed with the arbitration in the absence of, or without further hearing, the defaulting party, to its final conclusion …'. The appellant left the arbitration proceedings, on its own volition, therefore it was not excluded as alleged. The appellant's counsel was unable to direct our attention to any part of the transcript of the arbitration hearing in which the arbitrator supposedly made a ruling excluding the appellant from the hearing.

**That the second agreement was unsigned by the appellant**

[15] The respondent contended that there was a written and signed second agreement between the parties. The respondent produced the copy which it had signed and which, so it alleged, was probably thereafter signed by the appellant. The respondent set out various circumstances pointing to the likelihood that the appellant had indeed signed the agreement: the respondent had delivered its signed version to the appellant; the agreement was thereafter implemented over a period of more than five years; substantial sums were paid to the respondent; the appellant would have undergone annual audits. The appellant on the other hand contended that it was unable to locate a signed copy. The appellant did not say that a signed version never existed, only that it could not be located. The principle espoused in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), becomes relevant and applicable. The appellant's version is a bare denial of the existence of the second agreement. The appellant did not file an affidavit by the officials who would have been responsible for signing the agreement in 2007 and would have direct knowledge of whether the

agreement was signed. The appellant contended that even if there was a signed agreement, it would still be invalid due to the fact that it was concluded in contravention of s 217 of the Constitution. It is not necessary to decide this aspect as the appellant has abandoned the constitutional validity point. Applying the *Plascon Evans* principle, it cannot be said that the arbitrator acted grossly irregular by relying on an unsigned agreement. The respondent's version to the effect that the second agreement was probably signed was not one which could be dismissed out of hand on the papers. What is more convincing is that the appellant complied with all the obligations in terms of the second agreement and at no stage did the appellant accuse the respondent of not complying with its obligations until the respondent demanded payment of the balance of the contract price. There is no merit on this point.

**The arbitrator exceeded his powers by awarding interest**

[16] The respondent claimed the sum of R2 911 676,64 plus interest with effect from 11 March 2013. The appellant contended that interest cannot be calculated with effect from 11 March 2013 as there was no letter of demand from the respondent. It is not correct that there was no letter of demand. On 16 August 2012 the respondent addressed a letter of demand to the appellant. On 11 March 2013 a further letter of demand was sent to the appellant. In my view, these are proper letters demanding payment, failing which legal proceedings were to follow. The fact that the appellant does not recognise these letters as demanding payment is irrelevant. The facts speak for themselves. The respondent even provided its banking details in the letter of demand dated 11 March 2013, and mentioned words to the effect that if the money is not deposited, summons will be issued against the appellant.

**The arbitrator failed to apply his mind**

[17] It is significant to note that the appellant was given more than ample opportunity to cure its default. It failed to make use of the opportunities. The appellant was in default and left the arbitration proceedings on its own volition. The appellant's statement of defence would have clarified its position and highlighted any specific aspects which required the arbitrator's particular attention. The arbitrator specifically mentioned in his award that '[h]aving considered the evidence [which was undisputed] and having heard counsel … I make the following award'. Whether the arbitrator came to an incorrect conclusion is irrelevant in review applications. It would appear that the appellant conflates appeals and reviews thus blurring the difference. A review of an arbitrator's award does not deal with the merits, but the manner in which a decision was reached. It does not concern whether the decision was right or wrong. An appeal, on the other hand, amounts to a re-hearing of the matter and the appeal tribunal is restricted to the record of the proceedings before it, unless the statute provide otherwise. (See *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) para 85 where this court held that an arbitrator 'has the right to be wrong'.) Therefore this ground is misconceived as a ground to have the impugned award reviewed and set aside.

**Contravention of Clause 23.6 of the Second agreement – failure to supply written reasons**

[18] It is incorrect to characterise the arbitrator's conduct as a failure to give written reasons upon which the award was based and also to conclude that the failure constituted misconduct and a gross irregularity. The fact of the matter is that the arbitrator did provide written reason upon which the award was based; although the written reasons were provided outside the time period agreed to by the parties during the pre-arbitration meeting. Clause 13.1 of the pre-arbitration meeting reads as follows:

’13.1 After the conclusion of the arbitration proceedings, the arbitrator will finalise his award, with reasons, within two months after having heard closing arguments’.

The award itself, without written reasons was handed down on 31 March 2014. There is no evidence as to the date on which the written reasons were issued, save for uncontested correspondence sent to the parties on 10 June 2014 advising them that the arbitrator has fallen ill and on 13 June 2014 wherein the parties were assured that the arbitrator was recovering well and that the parties ‘will definitely receive a copy of the reasoned award by Thursday 19 June 2014, close of business ….’ It is undisputed that the written reasons were given after the agreed date. The arbitrator apologised for the delay but ascribed the delay as having been occasioned by persistent ill health. This is not a case where the arbitrator failed completely to furnish written reasons, it is a case where reasons for the delay were communicated to the parties. The delay spanned over a period of about three months which cannot be described as inordinate to constitute misconduct, let alone a gross irregularity.

[19] Section 33 of the Act provides as follows:

‘(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’.

The provisions of s 33(1)*(c)* give this court a discretion to exercise, judicially, to set the award aside if there has been a gross irregularity. It must be noted that there is no legal prohibition that a written award furnished after the agreed date per se amounts to misconduct and therefore constitutes a gross irregularity. It is trite that each case must be considered on its own merits. In the present case the

appellant did not even, after the award was handed down on 31 March 2014, request a written award from the arbitrator nor did the appellant raise this point as being prejudicial to its case. The appellant was at pains to try and persuade this court that such failure or delay to provide written reasons amounted to a gross irregularity. However not a single authority was proffered by counsel.

[20] The learned authors, D Butler and E Finsen stated the following in *Arbitration in South Africa Law and Practice* (1993) at 269 para 7.8: 'Contrary to the position in several jurisdictions, neither the Arbitration Act nor the common law requires an arbitrator to give reasons for his decision. He is quite entitled to make an award whereby the one party shall pay the other party a certain sum of money, without furnishing any reasons or justification whatsoever.' (Footnotes omitted). (See *Schoch, NO & others v Bhettay & others 1974* (4) SA 860 (A) at 865 D-E). In *Mutual Shipping Corporation v Bayshore Shipping Co (The "Montan")* [1985] 1 Lloyd's Rep 189 (CA) at 191 it was held (at 192, 198) 'that a court could still look at the reasons if circumstances so required.' It is so that there is a strong case to be made for furnishing written reasons, but the Act is silent on the consequences of not furnishing or delaying furnishing written reasons. A court may, upon application order an arbitrator to furnish a reasoned award. The Act defines an award as including an interim award and not a written reasoned award. There is no unanimity in many foreign jurisdictions on this question. This ground is also unmeritorious.

[21] It is necessary to comment on the lackadaisical manner in which the appellant went about litigating in this case. The appellant is an organ of state and uses taxpayers' money to do its job. It entered into two agreements worth millions of rands. Then eight years later it decided to challenge the constitutional validity thereof. At the arbitration stage it neglected to file its statement of defence and defaulted in remedying or curing the default.

Thereafter it simply walked out of the arbitration proceedings and then filed an application to review the award. It appealed the decision of the court below dismissing its application, amended its notice of appeal and abandoned the constitutional invalidity point. This court will be failing in its duty not to express its disquiet in the manner the appellant handled the whole litigation process. It is high time that officials of state organs be held personally liable for unnecessarily and or negligently incurring costs. Had this issue been pertinently raised, this court would not have hesitated to order the functionaries personally to bear the costs of both the arbitration and the litigation.

[22] In my view the appellant failed to persuade this court that the arbitrator committed gross irregularities. The appeal is therefore misplaced and must fail.

[23] The appeal is dismissed with costs.

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J B Z Shongwe
Acting President of the
Supreme Court of Appeal

Appearances

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|---|---|
| For the Appellant: | K Tsatsawane (with him T Mofokeng) |
| | Instructed by: |
| | Kunene Rampala Inc, Pretoria |
| | Phatsoane Henney Attorneys, Bloemfontein |
| For the Respondent: | S Rorke SC |
| | Instructed by: |
| | Smith Tabata Inc, Pretoria |
| | Webbers Attorneys, Bloemfontein |