THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 286/2022

In the matter between:

CLOSE-UP MINING (PTY) LTD	**FIRST APPELLANT**
WILLEM PIETER TENNER	**SECOND APPELLANT**
CLOSE-UP MACHINERY AND PLANT HIRE (PTY) LTD	**THIRD APPELLANT**

and

THE ARBITRATOR, JUDGE PHILLIP BORUCHOWITZ	**FIRST RESPONDENT**
LUTZKIE GROUP OF COMPANIES (PTY) LTD	**SECOND RESPONDENT**

Neutral citation: *Close-Up Mining (Pty) Ltd and Others v The Arbitrator, Judge Phillip Boruchowitz and Another* (286/2022) [2023] ZASCA 43 (31 March 2023)

Coram: VAN DER MERWE, MOCUMIE, MEYER and MATOJANE JJA and UNTERHALTER AJA

Heard: 7 March 2023

Delivered: 31 March 2023

Summary: Arbitration – grounds of review – arbitrator enjoyed no discretionary competence to decide a dispute not contained in the pleadings – Arbitration Foundation of Southern Africa (AFSA) rules applicable – gross irregularity not shown.

ORDER

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

1 The appeal is dismissed with costs, including the costs of two counsel, where so employed.

2 The second respondent is ordered to pay the costs of volumes 4-12 of the record.

JUDGMENT

Unterhalter AJA (Van der Merwe, Mocumie, Meyer and Matojane JJA concurring):

Introduction

[1] The second respondent, Lutzkie Group of Companies (Pty) Ltd (the Lutzkie Group), brought arbitral proceedings against the appellants, Close-Up Mining (Pty) Ltd, Willem Pieter Tenner and Close-Up Machinery and Plant Hire (Pty) Ltd, respectively (collectively, Close-Up Mining). The arbitrator, appointed by the parties, was the first respondent, retired Judge Phillip Boruchowitz (the Arbitrator). The dispute submitted to arbitration concerned two agreements, styled Binding Term Sheet 1 and 2. Having heard the matter, the Arbitrator made an award on 18 November 2020.

[2] In the award, the Arbitrator declined to consider a defence raised by Close-Up Mining to the effect that the Lutzkie Group had repudiated the agreements. The Arbitrator found that the defence had not been pleaded, and

hence fell outside his jurisdiction. Close-Up Mining considered the Arbitrator to have fallen into error. Consequently, Close-Up Mining brought review proceedings in the Gauteng Division of the High Court, Pretoria (the high court), seeking to set aside the Arbitrator's award in terms of s 33(1) of the Arbitration Act 42 of 1965 (Arbitration Act).

[3] Its challenge was initially widely cast. In a supplementary founding affidavit, filed before the hearing in the high court, the grounds upon which Close-Up Mining sought to set aside the award were considerably pruned. In essence, Close-Up Mining contended that the Arbitrator had excluded from consideration its defence of repudiation on the basis that the defence had not been pleaded. The Arbitrator, said Close-Up Mining, had failed to recognise that he enjoyed a discretion to entertain the defence, even though it was not pleaded. The Arbitrator thereby misconceived the nature of the enquiry before him, and his associated duties, and thus committed a gross irregularity in terms of s 33(1)*(b)* of the Arbitration Act. In addition, Close-Up Mining complained that the Arbitrator had 'made' Mr Tenner a party to Binding Term Sheet 1, when he was not a party to this agreement. By so doing, claimed Close-Up Mining, the Arbitrator had exceeded his powers and committed a gross irregularity.

[4] The review came before Raulinga J. The Arbitrator abided the decision of the court. The high court found that the disputes raised in the arbitration proceedings are those raised on the pleadings. And since the repudiation defence had not been raised on the pleadings, the Arbitrator had correctly decided that he lacked the jurisdiction to entertain the defence. The review was accordingly dismissed with costs, including the costs of two counsel. With the leave of the high court, Close-Up Mining appeals to this Court.

Pleading and jurisdiction ground of review

[5] I turn, first, to the principal issue raised in the appeal: is an arbitrator precluded from deciding a defence that was not pleaded?

[6] The Arbitrator considered this to be so, and consequently determined that his competence was thus limited. The dispute referred to arbitration is framed by the pleadings. If a defence is not pleaded, he reasoned, the Arbitrator does not enjoy the competence to decide that matter. This reasoning, Close-Up Mining contended, is mistaken.

[7] The matter before us proceeded on the basis that the question to be determined is whether a party to arbitration proceedings that has failed to plead an issue may nevertheless seek to have the arbitrator decide this issue. It was thus somewhat unexpected that counsel for Close-Up Mining commenced his oral submissions with the contention that the pleadings in the arbitration could be understood to have raised the defence of repudiation. We do not need to engage this interpretative exercise. Close-Up Mining confined their challenge to the grounds set out in their supplementary founding affidavit. There, Close-Up Mining relied upon the proposition that the Arbitrator had come to the erroneous conclusion that he lacked jurisdiction to decide a matter not pleaded. That proposition has as its starting premise that Close-Up Mining did not plead the defence of repudiation. The contention that the opposite is true is at odds with the grounds upon which Close-Up Mining formulated their case to set aside the award. We decline to entertain a new case on appeal addressed before us in oral argument.

[8] Proceeding then, on the basis that Close-Up Mining did not plead the Lutzkie Group’s repudiation of the agreements, Close-Up Mining did however raise the question of repudiation in its heads of argument before the Arbitrator.

This, Close-Up Mining argued, rendered the principle in *Shill v Milner*,[1] of application. There, the Appellate Division recognised that a court enjoys a discretion to give some latitude to a litigant to raise issues at the trial that were not explicitly pleaded, where to do so gives rise to no prejudice, and where all the facts have been placed before the trial court. Just as the *Shill v Milner* discretion is enjoyed by a trial court, so too, Close-Up Mining contended, an arbitrator is invested with the same competence. The Arbitrator however failed to recognise this competence, and hence committed a gross irregularity.

[9] What then of the Arbitrator's holding, affirmed by the high court, that he enjoyed no jurisdiction to decide matters that were not pleaded? As an invariable statement of the competence of an arbitrator, it is a proposition that cannot stand.

[10] It is well understood that parties may agree the matters to be referred to arbitration, and enjoy considerable autonomy in doing so.[2] It is the arbitration agreement of the parties, taken together with acceptance by the parties of the conditions on which the arbitrator accepts appointment, that determine the jurisdiction of the arbitrator as to the matters referred to arbitration.

[11] Under the principle of party autonomy, there is no reason why parties cannot agree to confer upon an arbitrator the competence to decide matters that have not been pleaded, under a discretionary competence, the content of which is akin to the discretion recognised in *Shill v Milner*. It is important, however, to recognise the source of such a competence in arbitration proceedings. It does not derive, as with the courts, from an inherent power to protect and regulate

[1] *Shill v Milner* 1937 AD 101 (A) at 105.
[2] *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* [2009] ZACC 6; 2009 (6) BCLR 527 (CC); 2009 (4) SA 529 (CC) para 219; *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266 (SCA); [2007] 2 All SA 243 (SCA); 2007 (5) BCLR 503 (SCA) para 4.

their own process.[3] It is to be found, rather, in the arbitration agreement of the parties. If the parties agree to confer upon the arbitrator a discretionary competence to decide a matter that has not been pleaded, but one that crystalises outside of the pleadings, there is no reason why the parties' agreement should not be honoured.

[12] It follows that there is no rule of law that an arbitrator cannot enjoy jurisdiction to decide matters not set out in the pleadings. What competence the arbitrator enjoys depends upon what is contained in the arbitration agreement. This holding is an application of the principle of party autonomy. It is also consistent with the Arbitration Act. An arbitration agreement is defined in the Arbitration Act to mean a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement. That is expansive language, and it would include a dispute that arises in the course of arbitration proceedings that the arbitrator is given a discretion to entertain. The only two matters that the Arbitration Act specifically excludes from a reference to arbitration are these: any matrimonial cause or any matter relating to status.[4] Plainly, like any other agreement, a provision contrary to public policy or the Constitution would also not be enforceable. But there is no suggestion that confining an arbitrator's competence to the matters pleaded is a requirement of the Constitution or of public policy. On the contrary, our courts have recognised the value that attaches to party autonomy in the use of arbitration to resolve disputes.[5]

[13] The holding in *Hos+Med*[6] is entirely consistent with the position that I have taken. In *Hos+Med*, this Court affirmed that the only source of an

[3] Section 173 of the Constitution.
[4] Section 2 of the Arbitration Act.
[5] See *Telcordia Technologies Inc* para 4 as well as authorities cited therein.
[6] *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing and Consulting (Pty) Ltd and Others* [2007] ZASCA 163; [2008] 2 All SA 132 (SCA); 2008 (2) SA 608 (SCA) paras 30-31.

arbitrator's power is the arbitration agreement. The assumption by the appeal tribunal, in that case, of a power to decide a matter outside of the pleadings, on the strength of *Shill v Milner*, was held by this Court to be incompetent because the submission to arbitration expressly limited the issues to the matters pleaded. Significantly, this holding says nothing as to whether parties can agree to submit issues to arbitration that are not pleaded. *Hos+Med* simply found that the parties did not do so.

[14] I am fortified in my opinion by the unreported decision of this Court in *Holford.*[7] There, the arbitration agreement accorded the arbitrator 'such powers as are allowed by law to a High Court of the Republic of South Africa to ensure the just, expeditious, economical and final determination of the dispute'. This Court found that since a court would have been entitled to apply the principles set out in *Shill v Milner*, the arbitrator was likewise entitled to do so.

[15] In sum, the competence of an arbitrator to decide matters is determined by the arbitration agreement. The arbitration agreement may confine the submission to the issues that have been pleaded. But there is no rule of law that requires the parties to confine their agreement in this way. The arbitration agreement can therefore confer a competence upon an arbitrator to decide matters upon an exercise of a discretion of the kind recognised in *Shill v Milner*. All depends upon what the parties have agreed, and the proper interpretation of their agreement.

[16] I turn next to this question: did the arbitration agreement concluded between the parties in fact confer a discretionary competence upon the Arbitrator to entertain the defence of repudiation, raised by Close-Up Mining in its heads of argument?

---

[7] *Holford v Carleo Enterprises (Pty) Ltd and Others* [2014] ZASCA 195 (SCA) para 9.

[17] Close-Up Mining contended that the arbitration agreement did so. The Lutzkie Group resisted this contention.

[18] I should clarify that we are here concerned to determine what competence the Arbitrator in fact enjoyed in terms of the arbitration agreement. We are not called upon to decide how the Arbitrator should have exercised such competence, if he had it to exercise.

[19] The arbitration agreement is terse. It reads as follows:

'Save to the extent to the contrary provided for in this Term Sheet, any dispute arising out of or in connection with this Term Sheet shall be decided by arbitration to be held in Sandton and shall be dealt with by AFSA (the Arbitration Foundation of South Africa).'

[20] The following interpretation of the arbitration agreement was common ground between the parties. We should understand the reference in the arbitration agreement to the Arbitration Foundation of South Africa (AFSA) to be a reference to the AFSA commercial rules for domestic arbitration applicable at the time (the AFSA rules).

[21] Close-Up Mining relied upon article 11.1 of the AFSA rules. That rule reads as follows:

'The arbitrator shall have the widest discretion and powers allowed by law to ensure the just, expeditious, economical, and final determination of all the disputes raised in the proceedings, including the matter of costs.'

[22] Counsel for Close-Up Mining emphasised three features of article 11.1. First, it conferred the widest discretion and powers allowed by law. That would include the kind of discretion recognised in *Shill v Miller*. Second, article 11.1 references the disputes raised in the proceedings. It does not refer to disputes

raised in the pleadings. And the proceedings must connote the arbitration proceedings. Disputes raised in evidence or argument are disputes raised in the proceedings. Third, the provisions of article 11.2 that set out specific powers do not detract from the amplitude of the general power conferred in article 11.1. This is precisely what article 11.2 says. It reads as follows: '[w]ithout detracting from the generality of the aforegoing [ie article 11.1], the arbitrator shall have the following powers: . . .'. Article 11.2's tabulation of specific powers, including powers concerning pleadings, does not diminish the scope of the power conferred in article 11.1.

[23] Close-Up Mining argued that the wide terms in which the power conferred by article 11.1 is cast must include a discretionary competence of the kind recognised in *Shill v Milner*. Whether this is so, requires us to interpret the arbitration agreement. The arbitration agreement, the parties have agreed, must be taken to include the AFSA rules. Like any agreement, we interpret the agreement, and hence the AFSA rules, according to the now well understood triad of text, context, and purpose.[8]

[24] True enough, article 11.1 is widely cast. It confers 'the widest discretion and powers allowed by law' for a particular purpose. That is, '*to ensure the just, expeditious, economical, and final determination of all the disputes raised in the proceedings, including the question of costs*'. However, if a dispute is not raised in the proceedings, then the powers conferred upon the arbitrator cannot be of application, no matter their breadth, because the power is conferred to determine a dispute raised in the proceedings.

[25] Thus, for the arbitrator to exercise the wide discretion and powers conferred by article 11.1, a dispute must have been raised in the proceedings.

[8] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) para 25.

The question is then this: when can it be said that a dispute has been raised in the proceedings? A dispute is raised in the proceedings, under the AFSA rules, by following these rules. A party must make a written request for arbitration. The request must, *inter alia*, set out a statement that an award, in accordance with the claims, would fall within the terms of the arbitration agreement (article 4.2.3); a statement setting out the *locus standi* of each party, the nature of the dispute, all the material facts, the contentions relied upon by the claimant and the relief claimed (article 4.2.4). Provision is then made for the response of the defendant. That response includes a statement as to whether the defendant disputes the arbitration agreement and that it is still operative (article 6.1.4); whether the defendant disputes that the claim falls within the terms of the arbitration agreement (article 6.1.4); and, if not, by delivering a statement of defence, setting out the material facts and contentions relied upon by the defendant, indicating which of the claimant's facts and contentions are disputed, and what relief is claimed (article 6.1.5.1). The defendant may deliver a counter-claim (article 6.1.5.2), and the claimant, a statement of defence to the counter-claim (article 6.4).

[26] Once a dispute has been raised on the pleadings, the arbitrator is invested with further powers granted under article 11 in respect of the pleadings. Those powers include the competence to permit of the amendment of any pleading (article 11.2.13); the competence to make any ruling or give any direction he considers necessary or advisable for the just, expeditious, economical and final determination of all the disputes raised in the pleadings (article 11.2.5); and an arbitrator may also require a party to amend its pleadings so that they are not evasive, and to strike out averments in pleadings that are embarrassingly vague, scandalous, vexatious or irrelevant (article 11.2.22).

[27] The AFSA rules define the term ‘pleading’ as follows. A pleading ‘includes documents comprising a Request for Arbitration, a statement of defence, a counter-claim and a statement of defence to a counterclaim’. The pleadings thus form steps in the proceedings by recourse to which disputes are raised. The pleadings, however, do not exhaust the ways in which disputes may be raised in the proceedings.

[28] Article 11.2 provides examples of other types of disputes that may be raised in the proceedings in respect of which the arbitrator enjoys powers. The arbitrator may decide disputes as to the admissibility of evidence, any matter of onus, the production or preservation of property, the joinder of parties in the arbitration proceedings, and the furnishing of security for costs.

[29] It follows that under the AFSA rules, disputes may be raised in the proceedings, outside of the pleadings, that the arbitrator is empowered to decide. The pleadings form part of the proceedings, but the proceedings are wider than the pleadings.

[30] If that is so, then should we not conclude that the arbitrator has a discretionary power to permit a dispute raised outside of the pleadings to be treated as a dispute raised in the proceedings? Three reasons incline against that conclusion.

[31] The first is conceptual. One cannot confuse the power of the arbitrator with the subject matter over which the arbitrator exercises this power. Article 11.1 is a general description of the arbitrator’s powers. Over what subject matter are those powers exercised? As I have said, the answer is the disputes raised in the proceedings in terms of the AFSA rules. Article 11.1 does not allow the arbitrator the *discretionary* power to decide that a dispute has been raised in the

proceedings. It is for the parties to raise the dispute in terms of the AFSA rules. If they do so, the power conferred upon the arbitrator is to decide this dispute.

[32] Second, the AFSA rules set out a detailed procedure by which the parties raise disputes by way of pleadings. As I have recognised, the pleadings are not the only way in which the parties may raise disputes in the proceedings. But a reading of the AFSA rules, taken as a whole, reflects that the exchange of pleadings is the procedure that is to be followed by the parties to define their primary substantive disputes. Why else specify in such detail what the request for arbitration and the statement of defence must contain, and the permission that must be sought of the arbitrator to amend the pleadings. There are then disputes that the AFSA rules permit the parties to raise as a consequence of the primary disputes that have been pleaded. Discovery, joinder, separation of issues: to identify a few examples. These disputes also require resolution. They may be raised by the parties in the course of the arbitration proceedings. But, these disputes arise from, and are parasitic upon, the primary pleaded disputes. I shall call these ‘dependent disputes’.

[33] Dependent disputes may be raised by the parties in the proceedings, but their hallmark is to facilitate the determination of the primary disputes. The dependent disputes do not constitute the decision by the arbitrator of the primary disputes that have been pleaded. The AFSA rules therefore do not contemplate that a party to the arbitration may raise a substantive dispute outside of the pleadings, and that such dispute may be adjudicated by the arbitrator if he decides, on a discretionary basis, to do so. That would subvert a central feature of the AFSA rules.

[34] The AFSA rules require the parties to raise their substantive disputes in the pleadings. If the pleadings fail to reflect the dispute adequately, then an

amendment of the pleadings must be sought, and it is for the arbitrator to decide whether to permit the amendment. These rules are antithetical to the discretionary *Shill v Milner* power that Close-Up Mining would attribute to the Arbitrator.

[35] Third, the discretionary power for which Close-Up Mining contends is an incident of the inherent power of the courts. While the principle of party autonomy permits parties to include such a discretionary power in their arbitration agreement (as I have found), it is an unusual provision to find in an arbitration agreement. Courts enjoy inherent power because they have a constitutional duty to secure justice. That extends beyond the interests of litigants. Arbitrators have no such power. It is the parties' agreement that determines what dispute must be decided and the powers conferred upon an arbitrator to do so. What makes the discretionary power of the type recognised in *Shill v Milner* unusual in an arbitration agreement is that it rests upon a paradox of party autonomy. The parties would confer the discretionary power contended for by Close-Up Mining to permit the arbitrator to extend the reach of his own jurisdiction, something that is ordinarily for the parties to determine. The parties may do so, but an arbitration agreement should ordinarily make it plain that that is what the parties intended. The AFSA rules do no such thing. Their cumulative provisions point to the opposite conclusion – that no such discretionary power was conferred upon the Arbitrator.

[36] For these reasons, I find that the AFSA rules do not confer a discretionary power upon the Arbitrator to decide whether to adjudicate the defence of repudiation. If the AFSA rules recognise no such power, then it is common ground that the arbitration agreement does not do so. Consequently, the Arbitrator made no error when he declined to entertain the defence of repudiation. And hence, Close-Up Mining has failed to establish that the

Arbitrator committed a gross irregularity. The appeal on this ground must consequently fail.

The parties to the transaction ground of review

[37] The second ground of appeal relied upon by Close-Up Mining is this. The Lutzkie Group averred in their statement of claim that Mr Tenner was a party to Transaction 1 of Term Sheet 1. Counsel for the Lutzkie Group had, in his opening address in the arbitration, made it plain that the purchase price in respect of Transaction 1 was payable by the Lutzkie Group to Close-Up Mining. This, it was contended, was a recognition by the Lutzkie Group that Mr Tenner was not a party to Transaction 1. Yet, the Arbitrator, in his award, having identified the *merx* of the sale to include Mr Tenner's shares in Close-Up Mining, made Mr Tenner a party to the transaction, when he was not, as counsel for the Lutzkie Group had acknowledged. By so doing, the Arbitrator, Close-Up Mining contended, exceeded his powers and committed a gross irregularity.

[38] The opening address of counsel for the Lutzkie Group amounted to no withdrawal of the claim, so as to alter the dispute the Arbitrator was required to decide. That dispute included a claim by the Lutzkie Group for the following relief: that Mr Tenner be directed to do all such things and sign all such documents as may be necessary to effect transfer of his shares in Close-Up Mining, and of his right, interest, benefits and claims of whatsoever nature. That relief was pursued by the Lutzkie Group in the arbitration proceedings by seeking the specific performance of Transaction 1. The Arbitrator was required to decide upon the relief sought. He did so, and granted the relief. That Close-Up Mining considers the Arbitrator to have been in error, because Mr Tenner was not a party to Transaction 1, is of no account. The Arbitrator decided a live dispute concerning the remedy of specific performance. By so doing, he committed no gross irregularity.

[39] Accordingly, this second ground of appeal must also fail.

Costs

[40] Close-Up Mining has not prevailed in the appeal. They must therefore bear the costs of that outcome, including the costs of two counsel, where so employed. That conclusion is subject to one rider. The Lutzkie Group insisted that the record must include the transcript of the arbitration proceedings. This was no small inclusion, amounting to nine volumes (some 1 500 pages). That insistence was entirely unwarranted. The first three volumes of the record were all that was required to ventilate and decide the appeal.

[41] Where records contain unnecessary documentation or have not been properly prepared in other respects, this Court has limited the costs of preparation, perusal and copying that those responsible for preparing the record would have otherwise been entitled to claim.[9] This is particularly so where the record is voluminous. There is no reason why this principle should not be extended to require that a party responsible for the unnecessary inclusion of documents in the record should be rendered liable for the costs occasioned thereby. Accordingly, the costs occasioned by the inclusion of the record of the arbitration proceedings must be borne by the Lutzkie Group.

[42] In the result, the appeal fails, and the following order is made:

1 The appeal is dismissed with costs, including the costs of two counsel, where so employed.

2 The second respondent is ordered to pay the costs of volumes 4-12 of the record.

---

[9] *Siyangena Technologies (Pty) Ltd v PRASA and Others* [2022] ZASCA 149; [2023] 1 All SA 74 (SCA); 2023 (2) SA 51 (SCA) para 50 and case cited therein.

D N UNTERHALTER
ACTING JUDGE OF APPEAL

[1]

Appearances

For the appellants:	B H Swart SC
Instructed by:	Alice Swanepoel Attorneys, Pretoria
	Symington De Kok Attorneys, Bloemfontein
For the respondents:	J J Brett SC
Instructed by:	Gothe Attorneys, Pretoria
	McIntyre Van der Post, Bloemfontein