ABONGILE ASANDA JWAAI

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SUPERVISOR: PROFESSOR ALAN RYCROFT

RECENT COURT JUDGEMENTS ON THE MEANING OF "GROSS IRREGULARITY" IN TERMS OF SECTION 33 OF THE SOUTH AFRICAN ARBITRATION ACT.

RESEARCH DISSERTATION PRESENTED FOR THE APPROVAL OF SENATE IN PART FULFILMENT OF REQUIREMENT FOR THE POST GRADUATE DIPLOMA OF LAW IN APPROVED COURSES AND MINOR DISSERTATION. THE OTHER PART OF THE REQUIREMENT FOR THIS DIPLOMA WAS THE COMPLETION OF A PROGRAMME OF COURSES.

CAPE TOWN, 2014

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DECLARATION

I declare that this dissertation is my own unaided work. It is being submitted for the Post graduate Diploma of law at the University of Cape Town.

It has not been submitted before, for any diploma, degree or examination to any other university, nor has it been prepared under the aegis or with the assistance of any other body or person outside the University of Cape Town

Cape Town, 15th September, 2014

Abongile Asanda Jwaai

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DEDICATION

I wish to dedicate this work to my parents, brothers, and sisters

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CHAPTER 1: INTRODUCTION

Arbitration has become central as an alternative dispute resolution mechanism for differences that may occur in the course of trade. One of the attractive features of arbitration is that the award is final and binding. This avoids a costly appeal process in successive courts. There are however certain circumstances which allow a dissatisfied party to approach a court to review and set aside the award.[1]

Other advantages of arbitration include but are not limited to;[2]

i. The process is flexible, and parties may agree on practical issues which suit their particular dispute, including where the process will be undertaken, under what law and rules.
ii. The parties are also involved in the selection of arbitrators, the adjudicators who decide their case (this is unlike litigation where the judges or magistrates are public officials appointed for the general public)
iii. It is generally a private process, as parties shoulder the bills of the process, unlike court processes where the premises and the judicial officers are paid from the public kit.
iv. The proceedings of the process are confidential to the parties.
v. Parties may choose a neutral place of arbitration where none enjoys any particular advantages over the other.
vi. The process is less antagonistic than public litigation and parties who have been involved may maintain their relationship, even after the process has ended.
vii. If it is international arbitration, arbitral decisions find more acceptances and are enforceable in many countries. This is not the same for court decisions which may be binding within limited jurisdiction.

This dissertation investigates the way courts have interpreted the limited grounds of review, in particular 'gross irregularity', evaluating the test for review, and assessing the extent to which they have been consistent in their approach to review.

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[1] See the definition of Arbitration in Gary B Born, in *International Arbitration: Law and Practice* (2012) at 4
[2] Redfern and Hunter ,International Arbitration (2006) 4th edition at 27

Parties may reach a settlement of the matters in dispute before the tribunal pronounces its decision. This is recognised in arbitration, and different rules accept it. For instance, the UNCITRAL Rules state that;

> "If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award."[3]

If no such settlement is however reached, it is upon the arbitral tribunal to make a final decision in the form of written arbitral award. The tribunal is obliged to make a final award,[4] it is not a choice.

1.1 Arbitration in South Africa

Arbitration has been practiced in South Africa for a long time. It is currently regulated by the Arbitration Act No. 42 of 1965.[5] This is the national statute which regulates domestic arbitration in South Africa. Two features of the Act deserve comments for purposes of this dissertation, namely;

i. The Arbitration Agreement

Section 3 of the Act provides that

> "(1) Unless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto.
>
> (2) The court may at any time, on the application of any party to an arbitration agreement, on good cause shown-
>
> (a) set aside the arbitration agreement; or

[3] See Article 34.1 of the UNCITRAL Rules
[4] Ibid 2 at 13
[5] See the Arbitration Act No. 42 of 1965 (hereinafter referred to as the Act)

(b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or

(c) order that the arbitration agreement shall cease to have effect with reference to any dispute referred."

This is a vague support for the arbitration agreement, and enforcement of the agreement has been subject to serious litigation in the past. The courts have however generally upheld the arbitration agreement, unless in instances where the agreement was drawn with fraudulent motivations, or attempts to evade justice, as was the case in the matter of *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd*.[6]

ii. The award

An arbitral award once pronounced is final and binding and not subject to appeal as provided by section 28 of the Act which states:

"Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms."

Although this is what the Act provides, the court may actually review an award when setting it aside as will be shown in the process of this dissertation.

The Act further provides that a party to the proceedings may make an application to make the award an order of the court. It states that;

"(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)…..

(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."

[6] 2013 (5) SA 1 (SCA); [2013] 3 All SA 291 (SCA).

This means that, once the award has been made an order of court, the successful party may enforce the same as he would do with any court judgment.

The Act however provides for setting aside of an award,

Section 33(1)[7] states that, 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.

These grounds are few and brief, compared to the grounds upon which a party may rely to set aside an award, as suggested by the UNCITRAL Model law, 2006. They are however not clear, and are open to different interpretations. A party may raise issues which may be difficult to substantiate, but which may delay the enforcement of the award and therefore frustrate a successful party.

1.2 Appeal and Review

An appeal is a resort by an unsuccessful party in legal proceedings to a higher authority that may by law be empowered to rescind a final decision of a lower court or lower authority on the grounds that the decision was based on a wrong application of law or procedure.[8] In arbitration, an appeal, when and if allowed by law would mean an application to set aside a decision of the arbitral award as pronounced by the tribunal.

[7] Ob cit 5.
[8] The Law Dictionary Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.

Review on the other hand means a process of re-examination of a process or its decision making for purposes of correction. [9]In the case of arbitration, the Court may be called upon to re-examine the process as well as the decision making of an arbitration process.

In South Africa, a dissatisfied party, may however seek remittal of the award within a particular period of time or alternatively, they may seek to set aside the award on any of the grounds set out under section 33 of the Act.

A party may apply to the court, for the award to be adopted by the court, as an order of the court, and enforced as any other judgment of the court. Section 31 of the Act states that;

> "(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 application is so made, may, before making the award an order of court, correct any clerical mistake in the award or any patent error arising from any accidental slip up 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."

The wording of the section does not give the option to lodge an appeal on the arbitral award. The issues determined by the arbitral tribunal therefore become res judicata and neither party may re-open those issues for fresh arbitration or court action.[10] The powers of the arbitrators in the matter also come to an end once they have published the award.

A party who is dissatisfied with the award however has two remedies which he may consider to attack it with, i.e. remittal of the award, and setting the award aside.[11]

[9] Ibid
[10] Butler and Fishen Arbitration *in South Africa* (1993) at 271.
[11] Ibid at 285.

1.3 Remittal of the award

Once the award has been published, the arbitral tribunal functions become *fuctus officio* and the tribunal has no further powers, except their limited statutory powers to correct slip-ups. The Act allows a party within six weeks of the publication of the award, to remit the matter which was on arbitration to the arbitrator for his re-consideration,[12] to correct any mistake on the face of the award, to make any further or fresh award, or for any other purposes as the party may specify. In the event that the other party opposes the remittal, the applicant may approach the court by way of application, for the court to order remittal of the award to the arbitrator. And the court may (section 32(2))

> "...on the application of any party to the reference after due notice to the other party or parties, made within six weeks after the publication of the award to the parties, and on good cause shown, remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award, or a fresh award, or for such other purpose as the court may direct."

1.4 Setting aside the award

The other possible remedy a party may have on an award which they are not satisfied with is to set the award aside. The dissatisfied party may make an application to the court on any of the three statutory grounds in section 33.

Section 33(2) states that;

> "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.

[12] Section 32 of the Act.

(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."

This then is a contested application and the other party has the option to contest any of the grounds that the applicant sites for the reason to set the awards aside.

For purposes of this dissertation, the writer shall concentrate on the grounds in section 33(1)(b), which deal with "gross irregularity". The Black's Law Dictionary describes irregularity as "A violation of established rules and practices. The want of adherence to some prescribed rule or mode of proceeding; consisting either in omitting to do something that is necessary for the due or orderly conducting of a suit or doing it in an improper manner."

This dissertation investigates instances when an arbitral award may be set aside for reasons of irregularity, either in the award or in the process of arbitration.

In the case of *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet*[13], among the grounds the applicant relied on to have an award set aside was that, "in as much as the agreement was invalid, the arbitration clause contained therein fell away and the arbitrator had no jurisdiction to arbitrate the matter. This ground of no jurisdiction was considered by the court to fall under section 33 (1) (b), as being a case where the arbitral tribunal has exceeded its powers. The court held that if the arbitration were to be based upon an invalid agreement, then that would be a contravention of section 33(1) (b) and arbitrating such a dispute would be exceeding his jurisdiction."[14] See also the case of *Cape Town Municipality v Yield & Others.*[15]

In the case of *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and another*[16], the applicant relied on section 33 (1) to apply for review and setting aside of the arbitral award. The allegations were that;

i. The arbitrator failed to perform his mandate
ii. The arbitrator committed manifest errors

[13] 1968(1) SA 7 (c) at 11-12
[14] Ibid 14
[15] (1978) 4 at 802.
[16] (CCT 97/07) [2009] ZACC 6; 2009 (4) SA 529 (CC)

iii. The arbitrator was biased in favour of the contractor or that there was at least reasonable perception that the arbitrator was biased.

Some of the grounds for these allegations were that the arbitrator took part in secret meetings with the contractor/respondent. The court held the view that those so-called secret meetings were open discussions, of which the employer/applicant were aware of and which were meant to make clarity points under arbitration. The court further considered the applicants application as misconceived in that the applicant had made it as if it were an appeal, and as if the court was to re-hear the arbitration. The application for setting aside the arbitral award was dismissed. The applicant sought to appeal to the Supreme Court of Appeal and leave to appeal was granted.

The Supreme Court of Appeal observed of the applicant that,

> "Lufuno's founding papers assumed, erroneously so - as was subsequently conceded by it - that the private arbitration process as an administrative one, which had to be lawful, reasonable and procedurally fair. The parties clearly intended Andrews (the arbitrator) to have exclusive authority to decide whatever questions were submitted to him and that each was precluded by virtue of the provisions of Clause 2 of the arbitration agreement from appealing against his decision. The parties had accordingly waived the right to have the merits of their dispute re-litigated or reconsidered. Interference by a court was therefore limited to the ground of procedural irregularities as set out in s 33(1) of the Act."

On the allegations that the arbitrator held secret meetings with the respondent, the court observed that

> "Were an arbitrator has to discuss the merits of the matter with one of the parties to the exclusion of the other that, ordinarily at any rate, would constitute a serious irregularity, which may without more warrant the award being set aside. But, against the backdrop of the arbitration agreement and the context of the arbitrator's mandate, those meetings were quite innocuous and had no effect whatsoever on Andrews. To describe them as 'secret meetings', as Lufuno does, is giving them a sinister connotation that is wholly unwarranted. The purpose of those meetings was simply to verify certain figures and to

clarify the use of certain items. That fell within the parameters of Andrews' (the arbitrator) mandate. That being so, even if he had been wrong those would have been errors of the kind committed within the scope of his mandate.

Proof that Andrews misconducted himself in relation to his duties or committed a gross irregularity in the conduct of the arbitration is a prerequisite for the setting aside of the award. An error of fact or law, or both, even a gross error, would not *per se* justify the setting aside the award. It followed that Lufuno had to go further than that."

The Supreme Court of Appeal therefore agreed with the High Court that grounds for "grounds for gross irregularity had not been proved and dismissed the appeal. The appellant proceeded to the constitutional court,[17] but the application was also unsuccessful, with the constitutional court terming it as an attempt at a further appeal against the award.

In the matter of *Telcordia Technologies Inc v Telkom SA*[18], Telkom, the respondent approached the High court seeking review and setting aside of the arbitral award, on its dispute with the appellant. It alleged that the arbitrator had committed gross irregularities in the conduct of the proceedings by;

(i) Breaching an undertaking or promise to receive further evidence relevant to the London agreement;

(ii) Failing to refer legal questions for the opinion of the court under s 20; and

(iii) Proceeding to hand down his award in the face of a pending s 20 application.

The statement that the arbitrator had exceeded his powers was based on the allegations that;

(i) He proceeded to hand down his award in the face of a pending S.20 application;

(ii) He had made key findings which were grossly incorrect, unfair and unreasonable and

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[17] Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and another (CCT 97/07) [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) (20 March 2009)

[18] [2006] 139 SCA (RSA)

(iii) He had ignored important provisions of the Integrated Agreement.

The High Court found for Telkom and held that;

> "the arbitrator had committed gross irregularities in the proceedings in the course of interpreting a contract between the parties. The alleged irregularities related in summary to the nature of the evidence that the arbitrator took into account; and whether he had failed to appreciate the import of South African law in relation to both contractual interpretation and to the amendment of written contracts."

The High Court not only set aside the award; in addition, it removed the arbitrator and appointed three new arbitrators, retired South African judges, in his stead.

Dissatisfied, Telcordia sought leave to appeal, which was declined. On petition, the Supreme Court of Appeal (SCA) granted the leave to appeal.

The Supreme Court of Appeal in explaining what would constitute a "gross irregularity" and "exceeding powers" adopted the words of Lord Steyn;

> "But the issue was whether the tribunal exceeded its powers within the meaning of section 68(2)(b) [of the English Act]. This required the courts below to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have. If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under section 68(2)(b) is involved. Once the matter is approached correctly, it is clear that at the highest in the present case, on the currency point, there was no more than an erroneous exercise of the power available under section 48(4). The jurisdictional challenge must therefore fail." It also referred to often quoted statement from *Ellis v Morgan* where Mason J laid down the basic principle in these terms:
>
> > "But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined"

In faulting the position taken by the High Court, the SCA observed that;

> "its function was to determine whether the gross irregularities alleged had been committed. By its reinterpretation the court dealt with the matter as an appeal, reasoning in effect that because the arbitrator was wrong it had to follow that he had committed an irregularity. The failure to apply the applicable principles of interpretation or to come to a wrong conclusion does not amount to a gross irregularity."

In the following two chapters, the writer will discuss several issues which constitute gross irregularity as a ground of setting aside an award, namely;

1. Misconceiving the nature of inquiry or arriving at unreasonable result
2. Delay in issuing award
3. Bias
4. Failure to deal with arbitrable issue
5. Failure to expressly dismiss the opposing parties' counter-claims
6. Deciding his/her own jurisdiction
7. Failure to follow the rules of evidence.

CHAPTER 2: GROSS IRREGULARITY AS A GROUND FOR SETTING ASIDE AN AWARD IN SOUTH AFRICA.

2.1 Misconceiving the nature of inquiry or arriving at unreasonable result

The court will be prepared to set aside an award if on enquiry it is of the view that the arbitral tribunal was mistaken, or misconceived on the nature of duty it was supposed to be engaged in. Arbitration is a process which is alternative to litigation. The result of the process must be a binding award. It cannot be equated to a review of administration action.[19] It can neither be viewed as process leading to suggestions on what the parties may do after the process. The arbitral tribunal must therefore apply its mind to the process as if it were arbitration, a quasi-judicial process and not an administrative function, or a reconciliation exercise. The dictum from the *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*.[20] *(SARFU)* was that, "what matters is not so much the functionary as the function",[21] That dictum was used in *SARFU* to assist in drawing the line between "executive" acts and "administrative" acts.

In Goldfields,[22] the court qualified this general principle. This case concerned a situation where the decision-maker misconceived his or her mandate. The court held that where a decision-maker misconceives the nature of the inquiry, the ensuing hearing cannot in principle be said to be fair because the decision-maker has failed to perform his or her mandate. Schreiner J expressed the principle as follows:

> "The law, as stated in *Ellis v. Morgan* has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as gross irregularity; behaviour which is perfectly well-intentioned and *bona fide*, though mistaken, may come under that description. The

[19] See op cit note 15 on chapter 1
[20] 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC).
[21] *SARFU* at para 141.
[22] *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another* 1938 TPD 551.

crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity.

In *Goldfields*, Schreiner J distinguished between "patent irregularities", that is, those irregularities that take place openly as part of the conduct of the proceedings, on the one hand, and "latent irregularities", that is, irregularities "that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given" by the decision-maker.[23] In the case of latent irregularities one looks at the reasons not to determine whether the result is correct but to determine whether a gross irregularity occurred in the proceedings. In both cases, it is not necessary to show "intentional arbitrariness of conduct or any conscious denial of justice.

Further, in the matter of *Herholdt v Nedbank Ltd (Cosatu as Amicus Curiae)* [24] the court held,

> "A latent irregularity, sometimes referred to as process related unreasonableness , is one arising from the failure by the arbitrator to take into account a material fact in determining the arbitration. It includes the converse situation of taking into account a materially irrelevant fact. If that occurs, it is said to be a latent irregularity justifying the setting aside of the award. The LAC expressed it thus: "Where a commissioner fails to have regard to material facts, this will constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner would have unreasonably failed to perform his or her mandate and thereby have prevented the aggrieved party from having its case fully and fairly determined."[25]
>
> For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)*(a)*(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator."

[23] Id.
[24] 2013 (6) SA 224 (SCA):
[25] Para 36.

Cachalia JA's explication of the Sidumo[26] test in *Herholdt v Nedbank* Ltd was as follows;

> "That test involves the reviewing court examining the merits of the case, in the round" by determining whether, in the light of the issues raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can be reasonably reached by that route. If not, however, the court must still consider whether apart from those reasons, the result is one that a reasonable decision-maker could reach in the light of the issues and the evidence."

And,

> "In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before him/her. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."

The same was again considered by the court in the matter of The Labour Appeal Court in Goldfields Mining South Africa (Pty) Limited (*Kloof Gold Mine v CCMA & Others*) in a decision that was handed down immediately after that of the Supreme Court of Appeal in Herholdt, stated the following in regard to the Sidumo test;

> "Sidumo does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the

[26] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (CCT 85/06) [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC); 2008 () BCLR 1558 (CC) (5 October 2007)

reasonableness of the decision arrived at by the arbitrator. The court in Sidumo was at pains to state that arbitration awards made under the Labour Relations Act (LRA) continue to be determined in terms of s145 of the LRA but that the constitutional standard of reasonableness is "suffused" in the application of s145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come on the available material."

And;

"In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable."

The principles coming from this two cases were deduced in the matter of *Airports Company of South Africa Limited v Linda Mthembu & Others*[27]

"Firstly, although a reviewing court must scrutinise the evidence in order to establish whether the result was reasonable, that fine line between an appeal and a review should be preserved.

Secondly, awards should not be set aside simply because the reviewing court would have arrived at a different result.

Thirdly, the reviewing court should not adopt a piecemeal approach where each factor that a commissioner failed to take into account is analysed independently and individually because that assumes the form of an appeal.

Fourthly, the Sidumo test remains stringent, and that awards should not easily be interfered with unless "the decision was entirely disconnected with the evidence or is unsupported by any evidence and involves speculation by the commissioner."

Fifthly, Commissioners will commit a gross irregularity in framing their awards if they misconceive the nature of the enquiry or arrive at an unreasonable outcome.

[27] [2014] ZALCD 8

Sixthly, in order to succeed with a review based on the commissioner's failure to consider material facts, the reviewing party must establish that this had culminated in the result of the award being substantively unreasonable."

The court will therefore not hesitate to set aside an award that has been given on misconception, or where the tribunal has misdirected itself to enquiry that it is not qualified to, or where the nature of the award is such that it has no relation to the powers given to arbitrator either by the parties, or the Act.

Arbitrators must observe precision and establish clearly the nature of the exercise for which they are called upon to perform. Deviation from the forms of procedure, without the consent of the parties may lead to a conclusion that the process has either been compromised or has lost its original meaning and purpose. That may lead to the conclusion of gross misconduct on the part of the arbitral tribunal, as contemplated in section 33 (1)(b).

2.2 Delay in making the arbitral award.

The act lays down provisions on when an award may be issued. Section 23 thereof provides that;

> "The arbitration tribunal shall, unless the arbitration agreement otherwise provides, make its award-

(a) in the case of an award by an arbitrator or arbitrators, within four months after the date on which such arbitrator or arbitrators entered on the reference or the date on which such arbitrator was or such arbitrators were called on to act by notice in writing from any party to the reference, whichever date be the earlier date; and

(b) in the case of an award by an umpire, within three months after the date on which such umpire entered on the reference or the date on which such umpire was called on to act by notice in writing from any party to the reference, whichever date be the earlier date, or in either case on or before any later date to which the parties by any writing signed by them may from time to time extend the time for making the award:

Provided that the court may, on good cause shown, from time to time extend the time for making any award, whether that time has expired or not.

One of the advantages of arbitration as a mechanism of settling disputes is the speed with which the process may come to an end. The process can only be complete from the arbitrator's position once an award has been issued. No other duty is outstanding from the arbitrator once he has issued the arbitral award. It is therefore the expectation of all the parties involved that the award will be issued as soon as practically possible after the hearings have been closed.

Prompt issuing of an award also goes hand in hand with the provision for fair trial conferred by the constitution. Delay in issuing the arbitral award may be construed to indicate a measure of misconduct, on the part of the arbitrator, and may form a ground for setting aside the award so issued.

2.3 Bias

Bias means a predisposition to decide a cause or an issue in a certain way which does not leave the mind perfectly open to conviction.[28] It could be that the arbitrator is accused of having foregone conclusions on the matter at hand. It could be that he is accused of having been influenced to make his decisions in favour of one party and not the other. It then means an arbitrator is free to make his interim or final orders based on the facts presented to him by the parties. It would be unfair to expect orders only to be in favour of the applicant/disgruntled party. It has been seen that an arbitrator maybe disqualified and therefore an award may be set aside, on the grounds of secret interest. Thus in a building arbitration before the architect of the building, where the amount due to the contractor was in dispute the award was set aside, upon it being shown that the architect had contracted with a building owner that the expenses should not exceed a certain amount. It should be remembered that the bias or interest must be sufficient to create a reasonable probability of a corrupt decision.[29]But the court will be reluctant to disqualify an arbitrator or set aside an arbitral award on account of accusations that the arbitrator was biased. In matter of *Syphus & others vs Schoeman* 1923 C.P.D 113,[30] it was held that a mere suspicion of bias was not sufficient to disqualify an arbitrator named by the parties in a deed of

[28] Black's Law dictionary
[29] Gordon Davis on Law and Practise of arbitration in South Africa (1966) at pg 56
[30] 1923 C.P.D 113

submission. In order to disqualify him, it must be shown if not that he would be biased, at least there was a probability that he would be biased. An arbitrator should be impartial, and exhibit fairness when dealing with parties to arbitration. The essence of fairness in arbitration is that the arbitrator must hold a balance evenly between the two parties, and should not favour either.

Also, In the matter of *Umgeni Water v Nigel Hollis N.O. & Siza Water (Pty) Limited*[31] the court held that;

> "There needs to be a certain tolerance for the hurly burly to be found in the course of litigation and trial hearings. Where there are arbitration proceedings and the foundational agreement, as here, by prior agreement between the parties requires expedition at the expense of procedural precision, then the ultimate question is not whether one agrees with every unguarded utterance by the arbitrator, or every ruling he made in the course of the proceedings. It is rather whether the proceedings, viewed holistically, may be considered substantially fair. In the context of the present matter the further question arising is whether, again viewed holistically, the applicant upon whom the burden of proof rests, has objectively demonstrated on a preponderance of probabilities that the proceedings gave rise to the perception of bias. In other words, whether a reasonable, objectively informed person would on the facts demonstrated and relied upon by the applicant, reasonably apprehend that the first respondent has not brought, or will not bring, an unbiased mind to bear upon the adjudication of the arbitration. Put differently, that he is not likely to approach such proceedings with a mind open to persuasion by the facts and submissions to be placed before him in due course."

2.4 Failure to deal with arbitrable issues

An arbitrator must confine arbitral process to matters that are arbitrable. Several matters may not be arbitrable. Example of matters which may not be subject to arbitration are matters to do with status of a person, matters to do with succession and inheritance, criminal matters, matters

[31] 2012 (3) SA 475 (KZD)

involving minors and arbitrations involving people who have no legal capacity to act as was held in the matter of *Leadtrain Assessments (Pty) Ltd And Others v Leadtrain (Pty) Ltd and Others*;[32]

> "An arbitrator, like a court, exercises discretion when he or she makes an award of costs. In support of the counter-application it is alleged by Mr Lilford that the arbitrator in this case misdirected himself in exercising that discretion. We need not elaborate upon the manner in which he is said to have done so. The central question is whether misdirection in the exercise of his discretion –it occurred."

The tribunal must also not indulge itself in matters that have not been referred to it by the parties to the arbitration agreement. The court in the matter referred above further held that;

> "Section 33(1) of the Act permits a court to interfere with an award where an arbitration tribunal has misconducted itself, or committed a gross irregularity, or exceeded its powers, or the award has been improperly obtained,
>
> In support of his submission that misdirection on the part of an arbitrator in exercising his discretion in relation to costs allows a court to set aside his award and remit the matter for reconsideration counsel for Mr Lilford relied upon various decisions in which that has been done.
>
> It is not desirable to attempt to circumscribe when 'good cause' for remitting a matter will exist. It will exist pre-eminently where the arbitrator has failed to deal with an issue that was before him or her – which was what, occurred in *York Timbers*[33] – but once an issue has been pertinently addressed and decided there seems to us to be little room for remitting the matter for reconsideration. The guiding principle of consensual arbitration is finality – right or wrong – and we see no reason why an award of costs is to be treated differently to any other aspect of an award.[34] It would be extraordinary if the conduct of an arbitrator that falls short of the strict constraints of s 33(1) were nonetheless to be capable of being set aside and remitted for reconsideration under s 32(2)."

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[32] 2013 (5) SA 84 (SCA)

[33] Para 15.

[34] In *John Sisk & Son (SA) (Pty) Ltd v Urban Foundation* 1985 (4) SA 349 (N) it seems to have been accepted by both parties that the conduct of the arbitrator in that case provided 'good cause' for remittal.

2.5 Failure to expressly dismiss the opposing parties' counter-claims

The Act clearly provides that an arbitral award is final and binding on the parties, and not subject to appeal.[35]Grounds for setting aside an award are therefore limited. Once an arbitrator has given his award, the matter becomes res judicata. All matters which have been considered during the arbitration are considered closed. An appeal cannot then be brought before him to adjudicate again. In the matter of *Reward Ventures 01 CC v Walker,*[36] the Supreme Court of Appeal held that;

> "It should be pointed out though that the soundness of the arbitrator's assessment of the evidence, in particular regarding questions such as whether the accountant's evidence provided a "reconciliation contemplated in terms of the agreement," seem to me to be issues to be properly decided in an appeal. They bear no relevance in these proceedings which are concerned purely with the conduct of the arbitration and not its merits."

While the allegation of failure to dismiss the opposing parties' counter-claim may be used as a ground to apply for setting aside an award, the court will be hesitant to accept it as a ground to set aside an award.

In the next chapter, the writer will canvas the grounds of Jurisdiction, of the arbitrator, and of the process, and the taking of evidence as part of "gross irregularity" as a ground of setting aside an arbitral award.

[35] See section 28 of the Act
[36] (946/12) [2013] ZASCA 207

CHAPTER 3: JURISDICTION AND EVIDENCE

3.1 Jurisdiction

Jurisdiction may be described as "the power of a body, court or tribunal to effectively decide on a matter." This power may be viewed in regard to;

i. The nature of the matter or dispute

The basic question in this regard would be whether the subject of the dispute is one that can be decided by the forum which has been called upon to decide it. This may be referred to as the subject-matter jurisdiction.[37] In this case the question would be whether an arbitral tribunal has the power allocated by law, or the parties to arbitration to decide on the matter. Some of the matters that cannot be decided by arbitration are disputes on status of a person, matters of divorce, succession and criminal cases.

ii. The geographical area

A forum may not have jurisdiction to decide on a matter which arose outside its geographical area of its jurisdiction. In the case of arbitration however, parties may decide on the place of arbitration which is outside the geographical area where the dispute arose. However, the fact that an arbitral tribunal may sit outside the area where the dispute arose is one of the advantages of commercial arbitration. A concern in this regard would be whether the courts of the enforcing country will be able to appreciate the source of the arbitral award, when called upon to enforce it.

[37] The legal information institute

iii. The extent of the powers of the arbitral tribunal

Another question about jurisdiction may arise where a dispute brought before an arbitral tribunal contains disputes on matters that the tribunal may have jurisdiction and others where its jurisdiction may be challenged. A partial challenge to the jurisdiction of a tribunal may be brought where it is asserted that some of the claims that have been brought before the tribunal do not properly come within its jurisdiction.[38]This kind of dispute has been tested in ICSID arbitrations where there is usually a requirement to notify disputes for the purpose of seeking an amicable settlement before the right to submit crystallises. Respondent states have often argued that certain claims fall outside of the originally notified dispute.[39]

An arbitral tribunal may only validly resolve those disputes that the parties have agreed that it should resolve.[40]This is an inevitable consequence of the nature of arbitration. Arbitral tribunals only get powers to decide on disputes, from the agreement of the parties to the dispute.

Parties to an arbitration agreement are for the most part, free to contract on whatever terms they wish. Within certain limits they are therefore at liberty, in the arbitration agreement, to confer on the arbitrator whatever powers they would like him to have.[41] These powers must conform to the statutory requirements. Parties are free to contract out of the common law rules that might govern the conduct of the arbitration, provided they are not illegal or contrary to public policy.[42]

It is accepted that an arbitral tribunal has power to investigate its own jurisdiction. This power is necessary if the tribunal is to carry its functions properly. Of course, the tribunal's decision on the issue of its jurisdiction may be over ruled subsequently by a competent court, but that does not prevent the tribunal from making a decision in the first

[38] Redfern and Hunter on International arbitration (2009) page 342
[39] CMS Gas Transmission Company vs The Republic of Argentina (decision on objections to jurisdiction ICSID Case No ARB/01/8, ICC 64 (2003) 42 ILM 788
[40] Ob cite note 1 at 341
[41] Butler and Finsen on arbitration in South Africa (1993) page 172
[42] Ibid at 173

place. In the matter of *Christopher Brown Ltd Genossenschaft Oesterreichscher Waldbesitzer Holzwirdschaftsbetriebe Registrierte GmbH*[43], the court held

> "It is not the law that arbitrators, if the jurisdiction is challenged or questioned, are bound immediately to refuse to act until the jurisdiction had been determined by some court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and to determine the matter in dispute, leaving the question of the jurisdiction to be held over until it is determined by some court which has power to determine it. They might then be merely wasting their time and everybody else's. They are not obliged to take either of those courses. They are entitled to enquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching a conclusion which might be binding on the parties because they cannot do but for the purpose of satisfying themselves as a preliminary matter about whether they ought to go on with the arbitration or not. If it became abundantly clear to them, on looking into the matter, that they obviously had no jurisdiction, as for example, it would be if the submission which was produced was not signed, or not properly executed, they might well take the view that they were not going to go on with the hearing at all. They are entitled to make their own enquiries in order to determine their own cause of action and the result of that enquiry has no effect whatsoever upon the rights of the parties. In short, what is called for when confronted with a jurisdictional objection is sound judgement by the arbitrator on the cause that should be followed, based on his view of the strength of the objection and the circumstances that present themselves in the particular case."

This was the position adapted by the court in the matter of *Radon Projects (Pty) Ltd vs N V Properties (Pty) Ltd and another*[44]

[43] *(1954) 1 QB 8 at 12 and 13*
[44] 528/12 (2013) ZASCA 83

iv. Competence-competence

The power of an arbitral tribunal to decide upon its own jurisdiction is referred to as an inherent power. However, the practise in modern arbitration is to spell out in expressed terms the power of an arbitral tribunal to decide upon its own jurisdiction all as is often put, its competence to decide upon its own competence.[45]For example, article 21 of the UNCITRAL Rules provides;

1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdictions, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.
2. ...

The South African statutory law does not expressly provide for the competence of an arbitral tribunal to decide on its jurisdiction. However, the court has severally held that an arbitral tribunal has jurisdiction to decide on its competence. In the matter of *Makhanya vs The University of Zululand,* although the case concerned the jurisdiction of a court the principle may apply as much to the jurisdiction of an arbitrator. The court said the following;

> "The submissions that were made before us by counsel for the university when examined, came down to a asserting that the court had no jurisdiction because the claim is a bad claim. A submission was that the court had no power in the matter because the university had a good defence to the claim.
>
> The term jurisdiction describes the power of a court to consider and to either uphold or dismiss a claim."

[45] Ob cite note 2 at 347

In the matter of *Chirwa and Transnet Ltd and others* (2008) 4 SA 367 (CC) [46], the court held that;

> "When confronted with a jurisdictional objection an arbitrator is not obliged to forthwith to throw up his hands and withdraw from the matter until a court has clarified his jurisdiction. While an arbitrator is not competent to determine his own jurisdiction that means only that he has no power to fix the scope of his jurisdiction. The scope of his jurisdiction is fixed by his terms of reference, and he has no power to alter its scope by his own decision (in the absence of agreement to the contrary). But that does not preclude him from enquiring into the scope of his jurisdiction, and even ruling on it, when a jurisdictional objection is raised."

Lack of jurisdiction on the part of the arbitral tribunal has been cited to challenge arbitral awards as a ground forming part of gross irregularity. In the matter of *Gutsche Family Investments vs Mettle Equity Group*[47], the appellants sought to appeal against the arbitrators ruling dismissing the exception in part to the second respondent, the appeal arbitrator. The first respondent, however, objected to his jurisdiction on the basis that the parties had agreed on an appeal procedure against the arbitrator's final award only, and not against interlocutory rulings. The arbitration agreement made no provision for an appeal against any award of the arbitrator, but it did provide for disputes to be submitted to and decided by arbitration in accordance with the rules of and by an arbitrator or arbitrators appointed by, the Arbitration Foundation of South Africa (AFSA). The court held that where the parties themselves disagree as to the powers conferred on an appeal arbitrator, the appeal arbitrator cannot extend the area of jurisdiction over the very matter which is required to resolve. And if he does, he will act beyond his mandate.

"Thus, by deciding the jurisdictional question wrongly, and hearing and deciding the merits of the appeal (and the cross-appeal) the appeal arbitrator exceeded his powers and his award fell to be set aside in terms of s, 33 (1) of the Arbitration Act 42 of 1965 and the arbitration appeal fell to be declared of no force and effect."

[46] (2008) 4 SA 367 (CC)
[47] (2007) SCA 45 (RSA)

This clearly shows that the court will not hesitate to intervene when the arbitral tribunal has obviously acted beyond its mandate. The system under which a national court is involved in the question of jurisdiction before the arbitral tribunal has issued a final award on the merits is known as "concurrent control". The advantage of this system is that it enables the parties to know relatively quickly where they stand, and they will save time and money if the arbitration proceedings prove to be groundless.[48]

In the matter of *Dexgroup (Pty) Ltd vs. Trustco Group International (Pty) Ltd*[49], the appellants brought an application to set aside an arbitral award, relying on the ground that the arbitrator had committed a gross irregularity in terms of s,33 (1)(b) of the Act or exceeded his powers. It complained that it had suffered a substantial injustice in the conduct of the proceedings.

3.2 Evidence

The purpose of presenting evidence is to assist the arbitral tribunal in determining disputed issues of fact and disputed issues of opinion (as presented by experts).[50]

The Act gives wide directions of taking evidence in arbitration. Furthermore, it provides that an arbitral tribunal may seek the assistance of a Court in taking evidence in an arbitral process. The rules of taking evidence in arbitration are however more liberal than they maybe in taking evidence in Court.

Le Monde Luggage CC t/a Pakwells Petje v Dunn & others (2007) 10 BLLLR[51]*; The Foschini Group v Maidi & Others*[52] the court in both instances held that arbitrators are not bound by strict rules of evidence.

[48] Ob cit note 2 at 352
[49] (687/12) (2013) ZASCA at 120
[50] Redfern (2006) at 349
[51] (2007) 10 BLLLR 909 (LAC); 16 LAC 1.11.31
[52] (2009) 18 LAC 1.25.2

Generally, arbitrators should admit all evidence that is relevant to the subject in issue, Evidence is relevant if it;

i. is material to the issues and to facts in dispute
ii. appears reliable (credible)
iii. will assist in deciding the case: it has the ability to shine light on what actually happened when there is a dispute of fact
iv. does not involve lengthy investigations into collateral issues that begs the very issue that the arbitrator has to decide
v. does not prejudice a fair and speedy resolution of the dispute
vi. relates to the credibility of a witness: whether he has a reason to lie, his powers of perception and memory, the consistency, inherent probabilities and accuracy of his version.[53]

Arbitral tribunals are not bound to follow the common law or civil law mode of taking evidence. They may thus adopt methods which are relevant and convenient on a case-to case basis. This will ensure that the rules applied to a particular arbitral process only go along the rules agreed by the parties to the process. It also ensures that the process is kept as a private process, flexible to the needs of the parties, more so because parties to the process may be coming from different jurisdictions.

In the matter of *Dexgroup (Pty) Ltd*,[54] one of the grounds for seeking to set aside arbitral award was an objection related to the alleged inadmissibility of the evidence to which the arbitrator had regard in construing the agreement. Fundamental to this objection was the contention that an arbitrator is obliged to apply the rules of evidence in the same way as a court of law. It was considered at *Lawsa*[55] that the rule would more accurately reflect modern arbitral practice if it was restated as saying that, unless the arbitration agreement otherwise provides, the arbitrator is not obliged to follow strict rules of evidence provided the procedure adopted is fair to both parties and conforms to the requirements of natural justice.

[53] 24th annual labor law conference(29th June-1st July, 2011) Shandon - Johannesburg
[54] supra
[55] Lawsa Vol 1 (2nded) Para 586 fn 5

The Court correctly held that;

> "The advantages of arbitration over litigation, particularly in regard to the expeditious and inexpensive resolution of disputes, are reflected in its growing popularity worldwide. Those advantages are diminished or destroyed entirely if arbitrators are confined in a straitjacket of legal formalism that the parties to the arbitration have sought to escape. Arbitrators should be free to adopt such procedures as they regard as appropriate for the resolution of the dispute before them, unless the arbitral agreement precludes them from doing so. They may therefore receive evidence in such form and subject to such restrictions as they may think appropriate to ensure, as the arbitrator in this case was required to do, the 'just, expeditious, economical and final' determination of the dispute. That accords entirely with what Gardiner J said, nearly a century ago, in *Clark v African Guarantee and Indemnity Co Ltd*[56]that, whilst arbitrators must carry out their duties in a judicial manner, that does not mean that they must observe the precision and forms of courts of law."

The court has therefore been flexible, and has shown that arbitrators may divert from the strict rules of evidence applied in court, get all relevant evidence as well as speed up the process. In concluding the matter of *Dexgroup (Pty) Ltd*, the court further held that;

> "In my view the modern demands of arbitration dictate that arbitrators should be free, in the absence of anything in the arbitration agreement to the contrary, to determine the admissibility of evidence without being shackled by formal rules of evidence. The correct approach is that arbitrators may follow such procedures in regard to the admissibility of evidence as they deem appropriate, provided always that the parties are afforded a fair hearing."

Based on the information given in the paragraph above, it may be concluded that the arbitral tribunal should ignore any evidence that could possibly be in the hands of any of the parties. This therefore means that if any party has or claims to have any evidence; they should be given a reasonable opportunity to present such evidence.

[56]Clark v African Guarantee and Indemnity Co Ltd 1915 CPD 68 at 77.

It should not also mean that the tribunal should waste a lot of time in waiting for evidence to be availed by the parties or their witnesses.

It may be considered an act of gross irregularity if a tribunal fails or ignores any evidence that a party would reasonably be able to avail, given an opportunity to do so.

A tribunal will be in gross irregularity if it decides on a matter without all relevant evidence, or fails to give any of the parties time to present their evidence. While a tribunal is not a court of law, the tribunal should not accept any evidence of clearly biased witnesses, and all evidence should be treated impartially and fairly.

In the next chapter, the writer will make a conclusion and recommendations in relation to gross irregularity as a ground for setting aside an arbitral award in South Africa.

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

4.1 Summary

The writer set out to write on gross irregularity as a ground for setting aside an arbitral award in South Africa. In doing this, the writer considered several decisions of the court in South Africa, in relation to factors that constitute gross irregularity in arbitration. The writer also looked at the law of arbitration in the country relative to setting aside an award.

The reason why the writer considered the topic is because South Africa has a progressive economy is a leading developing country and major businesses are conducted within the country which would require robust arbitration laws. It was also because, the South African Arbitration Act was enacted in 1965 and a lot has since happened between then and now.

The challenge the writer set out to establish was a ground of gross irregularity as used to set aside arbitral awards in the country.

The challenges were that the Arbitration Act in the country is old, it does not cater for international arbitration and therefore enforcing the same in the country can be a challenge. The writer was unable to engage in interviews with the arbitration practitioners, business people, and arbitrators.

4.2 Conclusion

This dissertation has covered several grounds that constitute gross irregularity as adapted by the courts in various decisions. The writer tried to relate each ground as used by the court, to the ground set out in section 33(1)(b). South Africa as a major player in International trade and one of the dominant economies in the region requires a robust arbitration law. It requires clear guidelines on when gross irregularity as a ground may be raised to set aside an arbitral award. It may also be concluded that, because the Arbitration Act only covers domestic arbitration, South Africa is not an attractive place for international arbitration. It should be noted that although the court assists in the

arbitral proceedings the power it is given by the act to intervene in arbitral proceedings is undesirable and excessive. Based on the work covered above, it may be concluded that, the South African Arbitration Act 42 of 1965 is outdated. For this reason among others, there are no major International bodies based in South Africa.

The Court has previously been called upon to interpret what constitutes gross irregularity. While the court will pronounce itself from time to time, the unclear spelling to what constitutes gross irregularity delays the process of arbitration, whose advantages include speedy resolution of disputes.

4.3 Recommendations

Based on the conclusions above, there is an urgent need to revise the arbitration law in the country. It is the recommendation of the writer that the country adapts the UNCITRAL Model Law 2006 as its International arbitration act. Further to this, the country should review the Arbitration Act 42 of 1964 to align it with the best arbitration laws in the world. South Africa should also consider partnerships with reputable International arbitration bodies to make it attractive and reliable as an arbitration destination.

In revising the current law and enacting the new International arbitration law, the legislature should limit court interference with arbitration.

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