IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

In the matter between: Case number: **A117/2020**

ISA & PARTNERS (PTY) LTD Applicant

and

M3D SUPPLIERS (PTY) LTD t/a S&W CONSULTING 1st Respondent

GEORGE GEORGHIADES N.O. 2nd Respondent

CORAM: DAFFUE J et MAJOSI AJ

ORDER GRANTED ON: 1 FEBRUARY 2021

JUDGMENT BY: DAFFUE J

REASONS DELIVERED: 9 FEBRUARY 2021

REASONS

I INTRODUCTION

[1] On Monday, 1 February 2021 we heard arguments in an opposed application via a virtual hearing on the Webex internet platform. The parties were informed that judgment would be delivered within

a few days by electronically forwarding same to the email addresses of the attorneys and advocates concerned. Later that day we decided to issue orders which were electronically forwarded to both counsel and the two sets of attorneys. For the sake of completeness, the orders are incorporated herein as follows:

"1. The applicant's application for leave to supplement its application papers is dismissed with costs.

2. The applicant's main application is dismissed with costs.

3. Reasons shall be delivered electronically in due course."

These are the reasons.

[2] The civil action instituted by the plaintiff (the first respondent in this application) against defendant (the applicant in this application) in the Regional Court, Welkom under case no 427/2014 could not be finalised and dragged on until 7 March 2018 when the parties agreed that the action be stayed pending the determination of the disputes on arbitration. An arbitration hearing eventually took place from 17 to 20 June 2020 in Pretoria whereupon the arbitrator handed down his award on 16 July 2020. The unsuccessful party in the arbitration proceedings, being dissatisfied with the outcome, approached this court for relief. The provisions of s 33 of the Arbitration Act, 42 of 1965 ("the Act") and the possible applicability of rule 53 of the Uniform Rules of Court will be considered in this judgment.

II PARTIES

[3] Applicant is ISA & Partners (Pty) Ltd, a company with its principal place of business and registered address in Welkom, Free State Province. It has been represented in the proceedings before us by Adv EG Lubbe, duly instructed by Webbers Attorneys, Bloemfontein.

[4] First respondent is M3D Suppliers (Pty) Ltd, t/a S&W Consulting, an entity that conducts business as consulting and electrical engineers with registered address in Harrismith, Free State Province. The first respondent was represented in the proceedings before us by Adv J Eastes of Pretoria, duly appointed by Jarvis Jacobs Raubenheimer Inc, who made use of Rossouws Attorneys in Bloemfontein as the local correspondents.

[5] The second respondent is Mr George Georghiades who acted as arbitrator in the arbitration proceedings. He does not oppose the application and played no role in the High Court proceedings.

III THE RELIEF SOUGHT

[6] *Ex facie* the notice of motion applicant sought the following relief:

"1. The award of the Second Respondent dated 16 July 2020 is set aside;
2. The dispute between the applicant and the first respondent is referred to hearing afresh before a newly constituted arbitration tribunal;
3. The First Respondent to be held liable for the costs of the application;

4. Granting such further and/or alternative relief as the above Honourable Court deems meet."

[7] In support of the relief sought applicant's deponent, Mr Christopher Kimaru deposed to an extremely brief affidavit. He is the project manager and director of applicant and the person that not only attended the arbitration proceedings, but testified on behalf of applicant. The following issues were raised in the brief affidavit:

7.1 The application is brought in terms of s 33(1) of the Arbitration Act, 42 of 1965[1];

7.2 The deponent has "serious concerns regarding the selection and appointment of Georghiades and will more fully deal with this issue after the record has been filed."[2]

7.3 The deponent was advised that he was entitled to supplement his affidavit and the notice of motion on receipt of the record of proceedings.[3]

7.4 In an attempt to make out a case the following legal conclusions were arrived at without alleging any facts whatsoever:

"Suffice to state that in considering the award it is clear that Georghiades misconducted himself in relation to his duties as arbitrator, that he has committed gross irregularities in the conduct of the arbitration proceedings and that he has exceeded his powers."[4]

[1] Founding affidavit para 7
[2] Ibid para 9 p 8
[3] Ibid para 10
[4] Ibid

> The quoted sentence is merely a regurgitation of s 33(1)(a) and (b) of the Act. Applicant failed to place essential evidence before the court in support of its case. It is also apparent from the contents of the notice of motion that applicant was under the impression that the procedure set out in rule 53 of the Uniform Rules of Court was applicable.[5]

IV POINTS *IN LIMINE*

[8] Two points *in limine* were raised by first respondent in the answering affidavit. It is claimed in the first place[6] that the process envisaged in ss 33(1) and (2) of the Act is *sui generis* and that the provisions of rule 53 do not apply. It is apparent from the notice of motion and founding affidavit that applicant seeks an order that second respondent's award be set aside and not that it or any proceedings be reviewed. This alleged irregularity was brought to the notice of applicant in a letter dated 27 October 2020, annexed as annexure "M1".[7] Applicant was informed in no uncertain terms that its application was defective, that it did not have a right to supplement the founding affidavit and that first respondent would proceed to deliver its answering affidavit which it did on 10 November 2020. Consequently, first respondent sought dismissal of the application with costs on an attorney and client scale.

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[5] Paras (a) & (b) on p 2 & para (c) on p 3
[6] Paras 8 & further pp 56 & 57
[7] Paras 8 – 13, pp 56 – 58 & P 74

[9] The second point in *limine* was raised in the alternative. In terms thereof, and only if it was found that rule 53 was applicable, then the notice of motion does not set out the decision or proceedings sought to be reviewed, but furthermore, the founding affidavit does not set out the grounds, the facts and the circumstances upon which applicant relies and consequently, there was a failure to comply with rule 53(2). Therefore, if the application was considered as an application in terms of rule 53, it was also totally defective insofar as no cause of action was disclosed. In this regard, no facts were relied upon in the founding affidavit. Bald and unsubstantiated allegations were made in order to copy the requirements of s 33(1) as indicated *supra*. It must be mentioned at this stage already that insofar as rule 53 is not applicable, applicant did not have a right to deliver a supplementary founding affidavit as envisaged in rule 53(4) as it also accepted in the founding affidavit in support of the application for leave to file a supplementary affidavit.[8]

V THE APPLICATION FOR LEAVE TO FILE A SUPPLEMENTARY AFFIDAVIT

[10] Applicant did not heed the warning contained in the letter dated 27 October 2020, annexure "M1", whereupon first respondent filed its answering affidavit on 10 November 2020. Insofar as the court files were marked as a rule 53 application, the matter was set down for hearing of the "review" application on 1 February 2021. On 11 December 2020 these files were allocated to the scribe hereof and an acting judge still to be appointed. On that same day

[8] Para 3, p 176

I requested my secretary to issue emails to the legal representatives of the parties, indicating *inter alia* that no supplementary affidavit was filed as applicant intended to do, but if rule 53 was not applicable, applicant did not have a right to supplement and furthermore, that notwithstanding the two points *in limine* taken by first respondent, applicant had failed to reply thereto. First respondent's attorneys indicated that they were ready to proceed on the 1st of February 2021, but applicant's attorneys held a different view.

[11] About a month after my emails and two and a half months after the written warning of first respondent's attorneys, a notice of motion was filed on 7 January 2021 in terms whereof applicant sought leave to supplement its papers. In the supplementary affidavit applicant's deponent made certain allegations in an attempt to support its claim that second respondent's award should be set aside. I shall briefly return hereto.

[12] On 15 January 2021 first respondent gave written notice to oppose the application to supplement and also filed an answering affidavit on 29 January 2021 to which applicant did not reply as is also the case in the main application.

[13] When the matter was heard, I directed that we be addressed on all disputes to prevent a situation where we had to adjourn in order to consider judgment on a separate issue. Consequently, I shall deal with the application for leave to file a supplementary affidavit when the evidence and submissions of counsel are evaluated.

VI SECTION 33 OF THE ARBITRATION ACT

[14] Sub-sections 33(1) and (2) of the Act read as follows:

"**33 Setting aside of award**

(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. (emphasis added)

(2) An application pursuant to this section shall be made within six weeks after the publication of the award to the parties: Provided that when the setting aside of the award is requested on the grounds of the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, such application shall be made within six weeks after the discovery of that offence and in any case not later than three years after the date on which the award was so published."

[15] Preis J was of the view that the form of review contemplated in s 33 was *sui generis* and that the provisions of rule 53 did not apply in such a case.[9] This *dictum* has not been attacked in any reported or unreported judgment. During the course of his

[9] Government of the Republic of South Africa v Midkon (Pty) Ltd and another 1984 (3) SA 552 (T) p 558D - I

judgment in *Telcordia Technologies Inc v Telkom SA Ltd*[10] Harms JA on more than one occasion referred to the judgment of Preis J, but did not criticize the aforesaid *dictum*, although he made the following general comment:[11]

"[32] The grounds for any review as well as the facts and circumstances upon which the applicant wishes to rely have to be set out in the founding affidavit. These may be amplified in a supplementary founding affidavit after receipt of the record from the presiding officer, obviously based on the new information which has become available." (emphasis added)

[16] It needs to be pointed out that the Constitutional Court made it clear in *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another*[12] that private arbitration agreed upon by parties is a choice to be respected by the courts and that the courts should be careful not to undermine the achievement of the goals of private arbitration. I quote the following two passages from the majority judgment written by O'Regan ADCJ:

"[219] The decision to refer a dispute to private arbitration is a choice which, as long as it is voluntarily made, should be respected by the courts. Parties are entitled to determine what matters are to be arbitrated, the identity of the arbitrator, the process to be followed in the arbitration, whether there will be an appeal to an arbitral appeal body and other similar matters." [13]

The learned judge went on as follows:

"[235] …. it seems to me that the values of our Constitution will not necessarily best be served by interpreting s 33(1) in a manner that enhances the power of courts to set aside private arbitration awards. Indeed, the contrary seems to be the case. The international and comparative law considered in this judgment suggests that courts should be careful not to undermine the

[10] 2007 (3) SA 266 (SCA)
[11] Ibid para 32
[12] 2009 (4) SA 529 (CC)
[13] Ibid para 219

achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. Section 33(1) provides three grounds for setting aside an arbitration award: misconduct by an arbitrator; gross irregularity in the conduct of the proceedings; and the fact that an award has been improperly obtained. In my view, and in the light of the reasoning in the previous paragraphs, the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration."[14] (emphasis added)

[17] In *Telcordia*[15] Harms JA observed as follows:

"[67] In any event, the parties bound themselves to arbitration in terms of the Act and if the Act, properly interpreted, does not allow a review for material error of law, one cannot imply a contrary term. Also, parties cannot by agreement extend the grounds of review as contained in the Act."

Further on the learned judge continued as follows:[16]

"An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the *nature of the inquiry.*"

It is also stated that:[17]

"[86] ….if he (the arbitrator) errs in his understanding or application of local law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd." (emphasis added)

VII GENERAL PRINCIPLES APPLICABLE TO OPPOSED APPLICATIONS

[18] A party must stand or fall by his founding affidavit. The case must be properly pleaded in the founding affidavit.[18] In application

[14] Ibid para 235
[15] Loc cit para 67
[16] Ibid para 85
[17] Ibid para 86

proceedings the affidavits fulfil a dual purpose: they are to define the issues between the parties and in addition, to place the essential evidence before court. A founding affidavit must contain factual averments that are sufficient to support the cause of action on which the relief that is being sought is based. The respondent is called upon to either affirm or deny the facts contained in the founding affidavit. The aforesaid principles have been restated more than four decades ago in *Director of Hospital Services v Mistry*.[19] and followed ever since.

[19] Even if the application should be deemed to be falling within the purview of rule 53 it is clearly defective in so far as no cause of action is disclosed in the founding affidavit accompanying the notice of motion issued on 16 September 2020. Rule 53 provides for an elaborate process. In terms of rule 53(1)(b) an applicant is expected to call upon the magistrate, presiding officer, chairperson or officer, as the case may be, (take note there is no reference to an arbitrator in the sub-rule) to despatch the record of proceedings to the registrar who in turn should present it to the applicant, who under sub-rule 53(4) has the right to supplement his/her founding affidavit and to amend, add to, or vary the terms of the notice of motion. However, in my view such right is not afforded to an applicant who in the first place failed to make out a case as required in rule 53(2). This sub-rule is cast in peremptory terms. It does not afford an applicant the right to make bold averments without relying on any primary evidence in support thereof.

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[18] Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA) at p 200D; Wightman t/a JW Construction v Headfour (Pty) Ltd and another 2008 (3) SA 371 (SCA) para 12;
[19] 1979 (1) SA 626 (A) at 635H – 636C

VIII EVALUATION OF THE EVIDENCE AND SUBMISSIONS BY COUNSEL

Appointment of the arbitrator

[20] It is necessary, before all else, to deal with the appointment of Mr George Georghiades, the second respondent, as arbitrator. I have reason to believe that the applicant's deponent is not *bona fide* in his attack on the selection and appointment of second respondent as arbitrator. Applicant was at all relevant times represented by an experienced and senior attorney, Mr George Maree of Maree Gouws Attorneys and an equally experienced counsel, Adv Obie Oberholzer. Mr Maree is the senior partner of the aforesaid firm of attorneys and Mr Oberholzer was the civil magistrate in Welkom before he retired from the Department of Justice and started to practise as advocate for his own account. Although all this does not appear from the record, these facts are well-known in the legal fraternity in the Free State and I, having personal knowledge thereof, am prepared to take judicial cognisance of these facts. The deponent and his legal team did the trouble to travel to Pretoria where the arbitration proceedings were conducted over a period of three days from 17 to 20 June 2020. As indicated by Mr Wessels of first respondent in his answering affidavit, the audio record of the proceedings reveals the following:[20]

"The Arbitrator: Then in terms of preliminary points uhm my understanding I have nothing that has been put before me in terms of any points which we need to make any preliminary submissions on. At this stage I do know that Adv Obie, prior to the

[20] On 17 June 2020, 7 minutes and 4 seconds into the record

meeting requested that the pages be paginated accordingly uhm I gets the thumbs up from Mr Marais to say that it has been done. Are you happy to continue or would the parties like to spend 2 minutes? I take it that there are no preliminary submissions that needs to be made. Mr Raubenheimer anything from your side?

Raubenheimer: No.

Adv Oberholzer: No

Arbitrator: Mr Raubenheimer, anything from your side?

Raubenheimer: No.

Adv Oberholzer: Maybe just take a minute or 2. There are 2 or three small typing errors but I can do that at a later stage.

Arbitrator: Are you happy to continue?

Adv Oberholzer: Ja."

This evidence stands uncontested and the passage on paragraphs 36 and 37 of the transcribed record of the arbitration proceedings verifies the aforesaid quotation. We therefore know that applicant's legal representatives, Adv Oberholzer and Mr Maree, confirmed that no preliminary issues had to be dealt with and that the matter could proceed on the merits, where after Mr Eastes for first respondent proceeded with his opening address. Applicant's deponent, Mr Kimaru, was present during the arbitration proceedings.

[21] Mr Lubbe submitted that the arbitrator could not be validly appointed as the parties failed to comply with clause 4.1[21] of the initial arbitration agreement entered into on 30 September 2019 in the boardroom of Javis Jacobs Raubenheimer Inc in Pretoria. The record speaks for itself. Clause 4.1 provides that the parties had to

[21] Pleadings p 104

agree within 14 days in writing to the appointment of an arbitrator who had sufficient knowledge and experience in the engineering profession, preferably regarding the rendering of electrical engineering services. In the absence of an agreement the plaintiff, that is the first respondent herein, would be entitled to request the Engineering Council of South Africa, alternatively the Arbitration Foundation of South Africa or the Association of Arbitrators to appoint a suitable arbitrator. The arbitration agreement was signed by Me Maritz on behalf of Jarvis Jacobs Raubenheimer Inc, Mr George Maree of Maree Gouws Attorneys, Welkom and the appointed arbitrator, Mr George Georghiades. That same day an addendum to the arbitration agreement was entered into and signed by the same three persons.[22] In this document the parties merely agreed that the arbitration would be dealt with in terms of the Rules for the Conduct of Arbitrators instead of the Magistrate's Court Rules. A pre-arbitration meeting was also held the same day, attended to by the arbitrator, Adv Eastes, Me Melisa Maritz, Mr George Maree and Adv PW Oberholzer. All five of them signed the attendance register.[23]

[22] On 9 October 2019 the arbitrator made his first written procedural directive.[24] On 9 March 2020 a round table facilitation meeting was again held at the same venue in Pretoria where after the arbitrator issued his second written directive on 10 March 2020. Due to the lockdown regulations that came into being just thereafter, the arbitration hearing could not start before June 2020.

[22] Record pp 115 & 116
[23] Annexure "M7" p 117
[24] Annexure "M8" p 118 - 124

[23] The uncontested facts presented to the court are clear: Mr Kimaru's alleged "serious concerns" regarding the selection and appointment of the arbitrator are baseless. Not only did he fail to provide a factual foundation for his concerns in the founding affidavit, but the record, which he believed would assist him, is indeed indicative of the fact that the arbitrator was properly appointed.[25] Even if the selection and appointment of the arbitrator was not exactly in accordance with the first agreement, the parties indicated their satisfaction with his appointment and never doubted that.

Application for leave to file supplementary affidavit

[24] Although, I ultimately come to the conclusion herein that the supplementary affidavit should not be allowed as part of the evidential material before us as it is really *pro non scripto*, it is interesting to note that Mr Kimaru tried to make the point therein that the arbitrator lacked the required knowledge, that he had a "hostile alternatively biased attitude" towards the applicant and that he and counsel for the first respondent (Mr Eastes) "'connected' on a level, wherefore I expected coercion."[26] Mr Kimaru also contended that the record was necessary for the applicant's legal representatives to establish irregularities during the arbitration "and to confirm my instructions in that regard."[27] The deponent clearly wanted to create the impression that he was fully aware of irregularities that

[25] It is first respondent's case that at no stage before, during or after the arbitration hearing, or even before or after the ruling by the arbitrator until 16 September 2020 when the application was instituted, was a complaint raised about the arbitrator, his appointment or any other issue pertaining thereto. See paras 39.30 – 39.31 pp 71 & 72 of the record as well as annexure "M12", the affidavit of Mr Raubenheimer of Jarvis Jacobs Raubenheimer attorneys.

[26] Paras 3.1 and 4, p 190

[27] Para 7 of the founding affidavit, p 178

occurred during the arbitration hearing. All those alleged irregularities should have been set out in sufficient factual detail in the founding affidavit filed in accordance with the provisions of s 33 of the Act. Instead, the deponent merely regurgitated the requirements contained in s 33 (1)(a) and (b) of the Act. This failure, on its own, is sufficient reason not to accept the supplementary affidavit as evidential material before the court. Applicant has failed to make out a proper case requiring an answer, whether the matter is considered based on the principles applicable to motion procedure in general, an application in terms of s 33 of the Act, or a review application based on rule 53. I return hereto again *infra*.

[25] The supplementary affidavit sought to be introduced into the record is also hopelessly out of time. Applicant averred that the arbitrator's award dated 16 July 2020 was only made available and published on 5 August 2020.[28] I have serious doubts about the correctness of this allegation based on the probabilities, but this aspect has not been dealt with by the first respondent in its answering affidavit and needs no further consideration. The arbitrator's award, attached to the founding affidavit, was published at Mbombela (Nelspruit) on 16 July 2020.[29] It is apparent that the arbitrator made an audio recording of the proceedings as is apparent from the award.[30]

[28] Para 7 p 8 of the record
[29] Record p 46
[30] Para 2.3 p 45 of the record

[26] I considered Mr Lubbe's heads of argument dealing with applicant's criticism of the manner in which the arbitration proceedings were conducted by the arbitrator. He obviously relied upon the allegations contained in the supplementary affidavit. Although I have come to the conclusion that the supplementary affidavit should not be allowed, I considered some of the aspects relied upon with reference to the transcription of the arbitration proceedings. In my view applicant was on a futile nit-picking exercise and I do not even deem it necessary to quote some examples. I agree with Mr Eastes that applicant is apparently of the view that the matter should be dealt with as an appeal, instead of a limited review in terms of s 33 of the Act.

[27] In my view the supplementary affidavit should not be allowed and the application in that respect should be dismissed with costs for one or more or all of the following reasons:

27.1 There should be finality in litigation. This matter has been dragging on since 2014 when action was instituted in the Regional Court, Welkom, where after there was an agreement that the matter be dealt with on arbitration.

27.2 The arbitration award was published as long ago as 16 July 2020.

27.3 Applicant's deponent not only attended, but also testified during the arbitration proceedings; he knew what occurred during these proceedings whilst represented by two senior legal representatives and if irregularities were detected,

these would surely be discussed between the client and the legal team in order for objections to be made immediately.

27.4 An audio recording was made available to the parties and if there was a problem with electronic sending thereof, CD's could have been requested and sent by courier to the new attorneys. Nothing prevented the applicant and its new legal team to listen to the audio recording during August or September in order to detect alleged irregularities. However, on Mr Kimaru's own version, this was not even necessary as he was personally aware of irregularities and the record would merely serve to confirm his knowledge in this regard as indicated *supra.*[31] The information required to lay a factual foundation and make out a *prima facie* case for relief was on applicant's version always within the knowledge of its deponent. No reasons, let alone acceptable reasons, were advanced for the failure to present primary evidence to the court in the founding affidavit.

27.5 There is no satisfactory explanation for any of the delays, ie from the date of the publication of the award, or the alleged receipt thereof, until the record was eventually transcribed on 7 December 2020. It is also apparent that the audio recording was requested from the arbitrator at a very late stage – not during August or September as one would have expected, bearing in mind that a new legal team came on board – and that it was initially sent to applicant's new

[31] Paras 3.1 and 4, p 190

attorneys on 7 October 2020.[32] If it was deemed necessary to listen to the audio recordings in order to advise client properly, these should have been obtained before the application was issued on 16 September 2020. In any event, if there was a problem with the downloading of the recording, it could surely be sent to Bloemfontein by courier once CD's thereof had been made. In fact, this should have been done before applicant embarked on a speculative process of creating suspicion without any factual foundation.

27.6 The application for leave to file a supplementary affidavit was issued on 7 January 2021 and on the eve of the hearing of the main application.

27.7 Applicant was never interested in having finality in this application and first respondent had to take the initiative to ask for a date of hearing and to enrol the application accordingly.

27.8 Applicant's serious and unsubstantiated allegations pertaining to the selection and appointment of the arbitrator cast serious doubt on the *bona fides* of applicant in launching the application for leave to supplement as well as the main application to have the award of the arbitrator set aside.

[32] Annexure "FA1," 181

Review in terms of Rule 53 of the Uniform Rules of Court

[28] I indicated earlier that Harms JA made it clear that the grounds for any review as well as the facts and circumstances upon which the applicant wishes to rely have to be set out in the founding affidavit. This is also clear from the peremptory provisions of Rule 53(2). There is not a dearth of evidence in the founding affidavit indicating compliance with these peremptory provisions. Therefore, and on the basis that applicant could rely on rule 53, although it ultimately accepted that it had no right to supplement in terms of rule 53(4),[33] applicant was in any event not entitled to rely on rule 53 for assistance.

The main application in terms of s 33 of the Act

[29] It is reiterated that, save for a "concern" raised and repetition of the requirements contained in s 33 of the Act, applicant failed to present any evidence to the court in order to make out a case for the relief sought. I have already referred in detail to the unsubstantiated "serious concerns" raised pertaining to the appointment of the arbitrator and the uncontested as well as objective evidence to contradict such concerns. Nothing more can or should be said in this regard, save to reiterate that no case has been made out.

[30] No evidence was placed before the court pertaining to any alleged misconduct by the arbitrator, alleged gross irregularities in the conduct of the arbitration proceedings, or the arbitrator exceeding

[33] Para 3, p 176

his powers. I referred[34] to the approach to be followed in reviewing an arbitrator's award and showed that the Constitutional Court reiterated in *Lufuno Mphaphuli* that courts should construe the grounds contained in s 33 "reasonably strictly." The applicant has to stand or fall by his founding affidavit and cannot make out a new case in a replying affidavit, or as it tried to do, in a supplementary affidavit once first respondent had filed an answering affidavit and in the circumstances that applied in *casu*. Applicant did not place the faintest of evidence before the court in the founding affidavit in order to convince us that any of the requirements of s 33 of the Act have been met.

[31] Even if the arbitrator committed any error of law, which has not been proven, that does not warrant a setting aside of the award as set out by Harms JA in *Telcordia supra*.

[32] Consequently the main application for the setting aside of the arbitrator's award in terms of s 33 of the Act had no merits and for that reason the main application was dismissed with costs.

Costs

[33] First respondent sought a punitive costs order against applicant in respect of both applications. Although this may be a borderline case, I was not convinced that such orders were justified as it would mean that every litigant's misunderstanding of the law and practice and procedure should be penalised. Therefore, the usual orders were issued.

[34] Para 14 supra

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J P DAFFUE J

I confirm

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O R MAJOSI AJ

On behalf of Applicant	:	Adv EG Lubbe
Instructed by	:	Webbers Attorneys Bloemfontein
On behalf of 1st Respondent	:	Adv J Eastes
Instructed by	:	Jarvis Jacobs Raubenheimer Inc c/o Rossouws Attorneys Bloemfontein