REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(COMMERCIAL COURT)

CASE NO: 08283/2014

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

23/9/19

WHG VAN DER LINDE

In the matter between

Community Property Company (Pty) Ltd	Applicant
and	
Crowie Projects (Pty) Ltd	First respondent
Adv. PA Solomon, SC NO	Second respondent
Adv. P Ginsburg, SC NO	Third respondent
Adv. IV Maleka, SC NO	Fourth respondent

Judgment

Summary: Application for remittal of arbitral appeal award for *"good cause"* under section 32(2) of Arbitration Act 42 of 1965 on basis of ambiguity; applicant submitting award ambiguous for being unclear in describing the manner of computation of *"Actual Gross Rental"* in rental warranty in respect of *"Warranted Gross Rental"*;

Applicant contending further that arbitral appeal tribunal having failed to determine all aspects of dispute referred to it, and having failed first to have published indicative award as agreed;

Parties both having changed their positions from their pleadings and their positions before the arbitrator *a quo*, and raising different arguments on appeal before arbitral appeal tribunal, submitting that their historical positions admissible for interpreting appeal award;

Held: Arbitral appeal award to be interpreted in same way as court judgment and order, and other written instruments, and parties' historical positions admissible as context;

Held further: Remittal under section 32(2) underscoring finality of arbitral award and not to be equated with attempted appeal, which is conceptually different;

Held further: On the facts, arbitral appeal award latently ambiguous, failing to have been published first as indicative award, and failing to have determined all aspects of dispute referred to it;

Held further: Good cause shown, and matter remitted under section 32(2) of Arbitration Act 42 of 1965.

Van der Linde, J:

Introduction

[1] This is an opposed application under section 32 (2) of the Arbitration Act 42 of 1965 for the remittal of an arbitral appeal award published on 27 January 2014 by the 2nd, 3rd and 4th respondents. I shall refer to these three respondents who, appropriately, took no part in the proceedings, by their collective functional description (as the "arbitral appeal tribunal" or such like), and to the two protagonists by their procedural designations (except that I shall drop the adjectival "first" before "respondent").

[2] The notice of motion contains two substantive prayers: that the appeal award be remitted to the arbitral appeal tribunal,

"for reconsideration and for the making of a further or a fresh arbitration appeal award in relation to the following matters or issues:

1.1 What categories of 'expenses' or 'contributions' recoverable from tenants under lease agreements fall to be taken into account in the determination of 'Actual Gross Rental' for purposes of clause 6.5 of the Sale of Business Agreement, and more particularly (i) whether expenses incurred by tenants pertaining to the consumption by such tenants on their own leased premises of electricity, gas and water, fall to be included, and/or (ii) whether such amounts are limited to direct recoveries of items listed and budgeted for under the 'Opcost Recoverable' column in Appendix 21, being amounts which relate to the operating costs incurred in operating the shopping centre; and

1.2 The obligations of the parties in giving effect to the final determined interpretation of 'Actual Gross Rental,' including directions for the method of determination of the amounts owing pursuant to the said interpretation, an orders that the party which is determined to owe any amounts to the other party by way of a rental deficit or excess be required to pay the other the said amount."

[3] Section 32 of the Act provides as follows:

32 Remittal of award

(1) The parties to a reference may within six weeks after the publication of the award to them, by any writing signed by them 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 parties may specify in the said writing.
(2) The court may, 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, 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.
(3) When a matter is remitted under subsection (1) or (2) the arbitration tribunal shall, unless the writing signed by the parties or the order of remittal otherwise directs, dispose of such matter within three months after the date of the said writing or order.
(4) Where in any case referred to in subsection (1) or (2) the arbitrator has died after making his award, the award may be remitted to a new arbitrator appointed, in the case of a remittal under subsection (1), by the parties or, in the case of a remittal under subsection (2), by the court.

The dispute

[4] What happened is that the respondent had sold a shopping centre which it would yet construct (the "Bridge City" shopping centre) to the applicant in terms of a written agreement dated 12 September 2008. The sale agreement provided for a rental warranty by the respondent seller to

the applicant purchaser in terms of which for 42 months the rental payable by the tenants would be equal to an agreed warranted amount. If the rental payable by the tenants was less than the warranted amount, the respondent had to make good the downside to the applicant. But if it was more, the applicant had to pay the excess to the respondent. This accounting reckoning was to occur on a monthly basis

[5] Disputes arose between the parties and these were referred to arbitration. One of these disputes was precisely what was to be included in the rental payable by the tenants (called the *"Actual Gross Rental"*): only the floor space rental, or also other amounts? The respondent contended that the Actual Gross Rental should be calculated by taking into account the same components as went into contractually computing the agreed warranted amount (called the *"Warranted Gross Rental"*). Since the computation of the Warranted Gross Rental included not only floor space rental but also certain landlord's recoveries therefore, so went the respondent's argument, the computation of Actual Gross Rental should include also the landlord's recoveries, actual and deemed, in respect of operating costs as set out in appendices 14 and 21.[1]

[6] The applicant agreed that the Actual Gross Rental should be calculated in the same way as the Warranted Gross Rental in terms of appendix 14, but it interpreted appendix 14 very differently. It argued that in arriving at the Actual Gross Rental amount only the actual amounts in respect of rental recoverable in terms of the lease agreements were to be taken into account, and not also

---

[1] The respondent's pleaded case was that the Warranted Gross Rental of R147.31 pm² was contractually arrived at as set out in appendix 14 read with appendix 21, and that the Actual Gross Rental computation must thus match the same computation components. Appendix 14 reflected the sum of the budgeted monthly net income, and budgeted monthly recoverable operational costs. The budgeted monthly net income was calculated – taking into account the individual tenants' rentals listed under a column headed *"Actual Gross Rental/m²"* - at R127.50 pm². Appendix 14 referred, for the composition of the budgeted monthly recoverable operational costs (opcost), to appendix 21. Appendix 21 listed the anticipated recoverable expenses in respect of the shopping centre under various heads, reflecting the budgeted amount in respect of each, and totalling R19.81 pm². These heads are *"Cleaning"*, *"Security"*, *"Tenant Installation"*, *"Building Management"*, *"Municipal"*, *"Repairs and Maintenance"*, and *"Other Expenses"* (but not own electricity consumption). The respondent's position was that since these heads of expenses contractually went into calculating the Warranted Gross Rental of R147.31 pm², the actual amounts deemed recoverable by the landlord from the tenants in respect of the appendix 21 heads must go into calculating the Actual Gross Rental; annexure A to the respondent's amended statement of case illustrated the respondent's position graphically.

the actual (or deemed) operating expenses incurred by the landlord and recovered by it from the tenants.[2]

[7] The dispute was referred to arbitration before Adv. IJ Muller, SC who, after a hearing, published an award on 12 July 2013 in favour of the applicant's contentions.[3] In terms of the award the respondent had to pay the applicant R612 749.05 with interest at 15.5% pa from 17 August 2010, and R42 976 781.68 with interest at 15.5% pa from 1 February 2011. Costs awards in favour of the applicant followed.

[8] The respondent appealed to the arbitral appeal tribunal which upheld the appeal, set aside the arbitrator's award, and declared a proper interpretation of the rental warranty favourable to the respondent. An appropriate costs award followed. This application for remittal followed on 23 October 2018. The respondent did not make a point about the six weeks period referred to in section 32(2) of the Act.

The remittal power

[9] The applicant submitted that one appropriate standard against which to gauge *"good cause"* for the purposes of section 32(2), would be ambiguity in the award,[4] the converse of a pre-eminent requirement for all arbitral awards, being that of *"reasonable certainty"*.[5] That submission fitted the more profound question of asking whether the arbitral appeal tribunal has fulfilled its

---

[2] First instance arbitral award paras 28, 31.

[3] In arriving at his conclusion, the arbitrator accepted that the phrase *"(including rental prior to deducting operation and maintenance expenses)"* which appears in both relevant definitions has the same meaning. He interpreted appendix 14 to mean (award para 47) that the *"total gross income"* figure of R147.31 pm² there mentioned reflected the anticipated gross rental income for the shopping centre. However, critically, he reasoned that the R19.81 pm² ops cost figure in appendix 21 played no role in the calculation of the *"total gross income"* of R147.31 pm² reflected in appendix 14 (award, para 50). This R147.31 pm² was instead made up of R142.38 pm² in respect of *"Actual Gross Rental"* (plus R1 pm² as electricity margin), plus only R4.93 pm² in respect of *"sundry income"* from amongst others an ATM, signage, and external seating. He thus concluded that since the R147.31 pm² *"Warranted Gross Rental"* as defined was contractually arrived at without reference to the expenses heads listed in appendix 21, therefore, in arriving at the appropriate figure for *"Actual Gross Rental"*, by parity of reasoning, expenses of the kind listed in appendix 21 were not to be factored in either.

[4] Founding affidavit, para 11.

[5] The applicant referred to the judgment of Innes, CJ in Douglas v Pim, 1903 TS 306 at 309 where he spoke of the Roman-Dutch law having more elasticity that English law, and being prepared to refer an award back to the arbitrator, *"for a more definite statement as to his finding."*

function, being that of determining the entire dispute referred to it for determination; if not, remittal is justified.[6] If the award was ambiguous then, so went the applicant's argument, the arbitral function will not have been fulfilled.[7]

[10] The respondent did not in terms contest these submissions in principle, but relied on the Supreme Court of Appeal judgment in Leadtrain Assessments (Pty) Ltd and Others v Leadtrain (Pty) Ltd and Others[8] for the proposition that, at base, mere error on the part of the arbitrator would not justify a remittal; something more was required.[9] The applicant in turn considered this approach too vague.

[11] In my view the correct approach is this. Absent the high threshold of section 33 for setting aside,[10] an arbitral award in our law is final and not subject to an appeal.[11] This application is not concerned with an indirect appeal against the arbitral award; it is instead concerned with invoking a pertinent power conferred on courts to remit a matter which was referred to arbitration, back to the same 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."* A remittal under this section is therefore by definition a legislated exception to the arbitral notion of finality and, since the remittal is to the same tribunal, there can be no question of it being an appeal in disguise.[12]

---

[6] Basson v Herman, 1904 TS 94 (full court: per Innes, CJ, Wessels and Curlewis, JJ concurring) at 98: *"It is true that under Roman-Dutch law an arbitrator was bound to decide all questions submitted to him, but I am satisfied that the mere fact that the arbitrator left a certain point undetermined, did not necessarily render his whole award null and void. The Court has under our law a wide discretion, and could, in my opinion, refer the award back to the Arbitrator to be rendered final and complete."*

[7] The applicant stressed the helpful discussion of Prof Butler in para 139 of LAWSA, vol 2.

[8] Leadtrain Assessments (Pty) Ltd and Others v Leadtrain (Pty) Ltd and Others, 2013 (5) SA 84 (SCA) at [15].

[9] The respondent did not accept that the arbitral tribunal erred in any way; it submitted, as will appear more fully later, that the arbitral tribunal upheld the respondent's interpretation of the warranty provisions, and did so clearly and unambiguously.

[10] As to which, see Hyperchemicals International (Pty) Ltd and Another v Maybaker Agrichem (Pty) Ltd and Another 1992 (1) SA 89 (W).

[11] Section 28 of the Act. Section 69 of the English Arbitration Act 1996 allows for arbitral appeals on points of law to the courts, but it is a non-mandatory provision out of which the parties are free to contract in their arbitration agreement.

[12] An appeal in disguise was warned against in Kolber and Another v Sourcecom Solutions (Pty) Ltd and Others; Sourcecom Technology Solutions (Pty) Ltd v Kolber and Another, 2001 (2) SA 1097 (C) at [61].

[12] The power of remittal is conferred *"on good cause shown"*, and this is language of wide import, as Leadtrain itself stressed.[13] That same court – although it said that *"good cause"* must be applied in the context of the notion of finality – eschewed any suggestion at circumscribing the application of the concept.[14] But the court did say that good cause will *"pre-eminently"* exist where the arbitral has failed to deal with an issue that was before it.[15] The court said too that *"... 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)."*[16]

[13] As indicated, in this matter the applicant contended that good cause has been shown on at least three bases: that the arbitral tribunal had failed first to notify the parties indicatively of its intended conclusion so as to afford them an opportunity to put up further submission; had failed to deal with an issue that was before it; and had published an award that was ambiguous. There is, as shown, clear authority for the second basis. If the facts support an agreement to that effect, the first basis is conceptually no different.

[14] As to the third, I accept that in principle ambiguity – self-evidently, of the true legal kind[17] – would found a basis for remittal under section 32(2). After all, ambiguity affords a basis on which a court

---

[13] Op cit at [14], referring to South African Forestry Co Ltd v York Timbers Ltd, 2003(1) SA 331 (SCA) at [14].
[14] Ibid at [15]. If the notion of finality does feature in the present context, it serves to exclude from *"good cause"* the mere fact that the court itself would, on the merits, have come to a conclusion different from that of the arbitral tribunal.
[15] Op cit.
[16] Op cit.
[17] By this I mean ambiguity that persists after the proper application of the rules of interpretation of legal instruments, especially those rules pertaining to interpretation of court orders and arbitral awards. I return to this issue later, but refer in the meantime to Department of Transport and Others v Tasima (Pty) Limited; Tasima (Pty) Limited and Others v Road Traffic Management Corporation and Others (CCT 182/17; CCT 240/17) [2018] ZACC 21; 2018 (9) BCLR 1067 (CC) (17 July 2018): *"[42]As already alluded to above, the fate of this case hinges, in large measure, on the interpretation of the judgment and order of this Court in Tasima I. As to the proper approach in this regard, this Court in Parsons said the following:*
"The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention."[21] (Footnotes omitted.)
[43]In Firestone, the Appellate Division (now known as the Supreme Court of Appeal) said that the basic principles applicable to the construction of documents also apply to the construction of a court's judgment or

is empowered, even *mero motu*, to rescind or vary its own judgment or order,[18] a power not expressly conferred on arbitrators under section 30 of the Act, in terms of which an arbitral tribunal *"...may correct in any award any clerical mistake or any patent error arising from any accidental slip or omission."* Ambiguity is not included.

The parties' changed approach in relation to the dispute; and jurisdiction

[15] It is necessary now to consider the parties' changed contentions in relation to the dispute in its course through the two arbitrations. Some introductory remarks are first necessary. There is the question as to what extraneous material is admissible to interpret an arbitral award. Some of the authorities have been alluded to earlier in the context of ambiguity. One approach remains – despite the effect of Natal Joint Municipal Pension Fund v Endumeni Municipality[19] - to admit extraneous evidence as sparsely as possible.[20]

[16] The respondent relied on the trite authority of Firestone South Africa (Pty) Ltd v Gentiruco AG[21] for the proposition that if the judgment or order of a court (and it was accepted all round that the same approach applied to arbitral awards) is clear and unambiguous, *"no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it."* But of course Gentiruco went on to say, in language reminiscent of Delmas Milling,[22] that the more persistent the ambiguity despite the incremental admission of extraneous matter, the greater the field of admissible

---

order.[22] The court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary or qualify, or supplement it.[23]" See also the warning sounds raised in Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association, 2019 (3) SA 398 (SCA) at [66] – [69] against too readily permitting extraneous evidence to bedevil the interpretive function.

[18] Uniform rule 42 (1)(b).

[19] 2012 (4) SA 593 (SCA), a judgment widely followed and credited for ascribing to the interpretive function a unitary approach of considering text, context and purpose together.

[20] Blair Atholl op cit.

[21] 1977 (4) SA 298 (A) at 304 E-H.

[22] Delmas Milling Co Ltd v Du Plessis, 1955 (3) SA 447 (A) at 454 in fin per Schreiner, JA.

extraneous matter becomes.[23] And the respondent's position was that there was no ambiguity in the appeal award.

[17] The applicant disputed this position, arguing for ambiguity in the award (to which I return), and even the question as to precisely the issue was that ultimately served before the arbitral appeal tribunal was disputed in this application. Consequently both parties submitting that their (heads of) argument before the appeal arbitral tribunal was admissible to resolve this dispute.[24] The applicant went further and contended for the admission also of the argument and pleadings and the *viva voce* evidence[25] before the first instance arbitrator.

[18] There the parties appeared to ask the arbitrator to determine whether the interpretation pleaded by the one or the other was correct.[26] The arbitrator, concerned about issues jurisdiction, raised with the parties whether he had jurisdiction to determine the dispute on the basis of an interpretation that was not specifically pleaded by either of the parties, and after some time they agreed in writing to extend his jurisdiction accordingly.[27]

[19] The terms of that agreement included:[28] that in the event the arbitrator was inclined to adopt an interpretation of the disputed issues in the agreement which did not accord with the case pleaded by either party, the arbitrator was to issue an indicative award setting out the proposed declaratory order and the reasons therefore. Both parties would then have an opportunity, within ten days, to make further written submissions in regard to the declaratory order to be made, and after consideration of those submissions, the final award will issue.

---

[23] Compare also Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc and others, 1996 (3) SA 355 (A), referred to and relied upon by both parties.

[24] The mere fact of their agreement does not make otherwise inadmissible evidence admissible, since admissibility is a matter of law, for the court. An exception is evidence of subsequent conduct; Telcordia Technologies Inc v Telkom SA Ltd, 2007 (3) SA 266 (SCA) at [91]. It becomes admissible by mere agreement.

[25] The applicant referred to the evidence of the respondent's then managing director who, I was informed from the Bar, conceded before the first instance arbitrator that the respondent did not contend for recoveries of tenants' own electricity consumption revenue to be included in Actual Gross Rental.

[26] Clause 6.9 of the submission: *"The terms of reference of the Arbitrator are to decide the issues in dispute as they arise on the pleadings ..."*.

[27] The arbitration agreement provided in clause 6.9 that the arbitrator's terms of reference would be the parties' pleaded cases, but the written submission to arbitration defined *"disputes"* in clause 2.12.1 as including *"a dispute about the proper interpretation, calculation and application of the rental warranty."*

[28] Page 128.

[20] In the event, despite this agreement, the arbitrator *a quo* held himself jurisdictionally constrained by the pleadings. On appeal the parties were agreed and the arbitral appeal tribunal accepted that it had this extended jurisdiction.[29] In other words, the arbitral appeal tribunal accepted that it was not bound by what the parties argued the agreement meant; it was free to determine the proper interpretation of the agreement as it saw it. I return below to the other implication, if any, of this agreed approach on appeal.

[21] But the question remains whether all this material is admissible at all, given the remarks by the Blair Atholl court and its assertive underscoring of KPMG Chartered Accountants (SA) v Securefin Ltd and Another,[30] which warned against the admission of material extraneous to a written instrument. And even the question of what exactly was argued before the arbitral appeal tribunal really only goes to the interpretation of the appeal award, since the parties were agreed that that tribunal had jurisdiction to hear whatever it was that they argued before it, despite the fact that – as will appear – both parties had moved off their pleadings.

[22] Very often a court or arbitral tribunal will receive submissions concerning the proper interpretation of a written document and then produce a judgment or award which evidences that it took a different tack. It would be most dangerous and in fact wholly inappropriate then to suggest that the judgment/order or award must be interpreted in the light of the submissions.[31]

[23] However, in view of the parties' own agreement as to the admissibility of evidence of their earlier positions in the arbitration process, I did not hear contested argument on the point and weight aside, in view of the Endumeni approach, I will allow it as context.[32]

---

[29] Appeal award, para 9. The submission to arbitration made it clear, in any event, that the arbitrator would have the *"power and jurisdiction"* of a High Court Judge, implying that the arbitrator would apply the law as he found it, and not be bound by an incorrect submission of either party.

[30] 2009 (4) SA 399 (SCA).

[31] The definition of *"disputes"* in the submission to arbitration includes, after saying that the dispute is about the proper interpretation, calculation and application of the rental warranty the following: *"The parties accordingly are in dispute as to the net commercial effect and legal effect of the rental warranty provisions of the Sale Agreement and any payments that may be required to be made in consequence thereof."*

[32] In KPMG Chartered Accountants (SA) v Securefin Ltd, 2009(4) SA399 (SCA) at [39] it was said: *"Context is everything."* And in Endumeni, *"context"* was described as that which is *"provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence"*, at [18] (my emphasis). Compare Richter v Bloemfontein Town Council, 1922 AD 57 at 69.

[24] As said, the warranted amount of Actual Gross Rental was fixed at R147.31 pm² per month; there was no debate about that. The dispute between the parties concerned the question as to which amounts were, on a proper interpretation of the warranty, to be included in the computation of the rental payable by the tenants. The *"Actual Gross Rental"*, was defined in clause 2.1.2:

"2.1.2 'Actual Gross Rental' means the total monthly and the annual rand value of gross rental paid by all the Tenants to the Purchaser (as landlord) arising from the lease of floor space in the Shopping Centre (including rental prior to deducting operation and maintenance expenses, arrear rental, interest on arrear rental and the proceeds of advertising and promotions), that is to be calculated over a period of 24 (twenty four) months after the Transfer Date;".[33]

[25] As indicated, before the first instance arbitrator the applicant argued that only rental recoverable in terms of the tenant leases went into arriving at *"Actual Gross Rental"*, and this interpretation was upheld. The respondent argued that the monthly operating costs in respect of the heads of operating costs listed in appendix 21 were contractually deemed recoverable and had to be added to the rental figure, and this was rejected.

[26] On appeal to the arbitral appeal tribunal, the respondent as appellant abandoned what it expressly typified as its *"more ambitious"* argument that *"deemed recoveries"* of operating costs should be included in the calculation,[34] but *"persists on appeal with its submission that all the actual direct recoveries must be included in the computation of the actual gross rental."*

[27] It will be remembered that the first instance arbitrator reasoned that the appendix 21 recoverable opcost heads amounting to a notional R19.81 pm² played no contractually constitutive role in arriving at the R147.31 pm² Warranted Gross Rental, which amount was arrived at *"prior to deduction by the landlord of his operating and maintenance expenses."* Since – so reasoned the *a quo* arbitrator – the Actual Gross Rental amount was to be arrived at by conceptual parity, therefore the landlord's operating expenses (implicitly, what he recovered in respect of these from his tenants) were irrelevant to the computation of the Actual Gross Rental.

---

[33] The period of 24 months was later amended upwards to 42 months.
[34] Heads, para 16.

[28] As I understood the respondent's submissions in this court, its argument before the arbitral appeal tribunal took a leaf from the first instance arbitrator's reasoning: the argument accepted that the (limited) opcost items listed in appendix 21 *per se* played no constitutive role in defining the R147.31 pm² Warranted Gross Rental; appendix 21 was irrelevant. But it submitted that the Actual Gross Rental was to be arrived at by including all manner of actual revenue/recoveries by the landlord, without limitation (illustrated by the *"sundry income"* of R4.93), and without (certainly *before*) deduction – therefore including also the actual recoveries by the landlord in respect of tenants' own electricity consumption.

[29] For its part, on appeal the applicant defended the basis of its success before the first instance arbitrator,[35] and it attacked the respondent's argument as being new:[36]

"The impression which the Appellant seeks to convey is that it has merely pared down what it advanced in the arbitration, by jettisoning one aspect of the pleaded case but persisting with another. This is not correct. The Appellant is in fact advancing an entirely new and unpleaded case on appeal. Nothing remains of the case advanced unsuccessfully in the arbitration."[37]

The applicant considered that this argument *"was internally inconsistent and vague, and could thus not give rise to a sensible and enforceable award."*[38]

[30] But the applicant itself also advanced a case on appeal not pleaded by it, and in the alternative: *"However, if the Tribunal is inclined to find that the agreement bears a meaning other than what either of the parties pleaded, the Respondent will contend that there is only one other possible interpretation: namely, that the only amounts which can be included in the calculation of 'actual gross rental' (over and above contractual rental) are those actually paid to the Respondent by tenants in relation to the particular operational cost items budgeted for in the 'Opcost Recoverable' column in Appendix 21 to the Sale Agreement."*[39]

---

[35] Appeal award, para 7.1.

[36] Heads, para 5. It had said earlier, in para 3 of its heads, that the operating costs dispute had undergone a *"radical transformation."* The applicant said too that the import of the respondent's case on appeal appeared to be that the gross amounts paid to the landlord by tenants in relation to their own consumption of electricity, gas and water are to be included in arriving at Actual Gross Rental; heads, para 16.

[37] The applicant accepted that the arbitral tribunal had jurisdiction nonetheless to entertain the appeal; heads paras 12, 22.

[38] Founding affidavit, para 34; heads paras 15, 23.

[39] Heads, para 24.

As pointed out earlier, the landlord's recoveries of own consumption utilities is not mentioned in appendix 21.

[31] In other words, the applicant argued in the alternative for a position which overlapped to some extent with the position of the respondent before the first instance arbitrator – that appendix 21 defined for the purposes of appendix 14 the operating costs that went into fixing the warranted R147.31 pm^2 - but which was fundamentally inconsistent with the position which the arbitrator in the event adopted, as explained at the outset of this judgment. So the parties both went to the arbitral appeal tribunal with unpleaded cases.

[32] Finally, the applicant submitted on appeal that if the arbitral appeal tribunal were to uphold the appeal on the basis that some further direct recoveries were to be included, then any appeal award would have to *"define exactly [what] is to be included."*[40]

[33] In this court, the applicant submitted that in fact the respondent's position on appeal was not as unqualified as the respondent now contends and, in particular, that the respondent never submitted there that landlord's recoveries of tenants' own gross electricity consumption was to be included in the computation of Actual Gross Rental. It stressed especially in reply that, properly viewed, what was actually argued before the arbitral appeal tribunal were two positions only: the defence of the *a quo* award; and appendix 21 (but no *"deemed"* recoveries).

[34] Regrettably no clear, and certainly no agreed, picture emerges of what was actually argued before the arbitral appeal tribunal. Nonetheless, against this background one can now move to consider whether the arbitral appeal award is ambiguous, and whether it evidences that the arbitral engagement has been fully discharged.

The arbitral appeal award

[35] The arbitral appeal tribunal's reasoning started with approaching appendix 14 as reflecting the total anticipated *"Rental Income"* (a defined term) of the shopping centre, which meant *"all of*

[40] Founding affidavit, para 36; heads, paras 62, 63.

the gross income due to the Seller arising from the conduct of the Bridge City Business ... including ... without limitation, all income due from the Lease Agreements, as set out in Appendix 14." The arbitral appeal tribunal expressly stressed this language.[41]

[36] Thereafter appendix 14 was described. The tribunal stressed that the calculation of the *"total gross income"* of R147.31 pm² became the *"Warranted Gross Rental"*, and that this figure was based on, amongst other things, *"direct recovery for electricity which was expressly included in the calculation."* Like the first instance arbitrator, the appeal tribunal accepted that appendix 21 played no role in the quantification of the rental warranty of R147.31 pm².[42] It then proceeded to consider the relevant contractual provisions from the Endumeni perspective of, sequentially, text, context, and purpose.

[37] Starting with text, the arbitral appeal tribunal listed[43] the four reasons advanced by the respondent in support of its unlimited interpretation of *"... total ... value of gross rental paid by all the Tenants ..."* as appears in the definition of *"Actual Gross Rental."* One of these reasons stressed "*total*" and "*gross*", and submitted that this *"would encompass everything paid by the tenants under their leases, and that nothing is to be deducted from such amount; i.e. the gross amount without exception or deduction."*

[38] Having done this, the arbitral appeal tribunal – rejecting the (now) applicant's contention[44] - concluded:[45]

> *"We agree with the appellant's aforesaid submissions as to the clear language of the definition of the AGR. These submissions support the interpretation advanced by the appellant and are incompatible with that advanced by the respondent."*

[39] The arbitral appeal tribunal expressly rejected also the first instance arbitrator's reasoning that, since the appendix 21 opcost played no part in arriving at the warranted R147.31 pm², therefore

---

[41] Appeal award, para 27.
[42] Appeal award, para 30.2.
[43] At para 35 of the appeal award.
[44] Appeal award, paras 37 to 41.
[45] Appeal award, para 36.

no part at all of recoverable operational and maintenance expenses referred to appendix 21 could be reckoned as part of the Actual Gross Rental.[46]

[40] The arbitral appeal tribunal next held that the context of the warranty provisions *"support the contention advanced by the (then) appellant"*; and it spelled out *"that all income must be included without exception."*[47]

[41] In dealing with the purpose of the warranty, the arbitral appeal tribunal accepted that it was to underpin the calculation of the purchase price based on actual gross rental of R147.31 pm^2 as fixed in appendix 14. It reasoned that if the interpretation of the first instance arbitrator were upheld, the rental warranted would in effect be a profit warranty.[48]

[42] The arbitral appeal tribunal concluded in two important paragraphs:[49]

> *53. We therefore conclude that the proper interpretation of the warranty provisions contained in clause 6.5 of the SBA require that the operational and maintenance expenses recoverable from the tenants in terms of the lease agreements concluded by them should be included in the calculation of the AGR.*
> *54. We were invited by the respondent to indicate the precise categories of the actual expenses which must be included in the calculation of the AGR. We do not consider it desirable to do so, as the dispute before us related to the interpretation of the warranty provisions and not the calculation of the amounts claimable under the warranty provisions."*

[43] It would seem evident that the arbitral appeal tribunal regarded the question as to the precise categories of the actual expenses to be included in the calculation of the Actual Gross Rental, as not falling within the dispute before it. This issue is expanded on below.

Ambiguity?

[44] Against this background, and bearing in mind the parties' earlier, varying contentions, one may now turn to consider the argument for ambiguity. Something said about ambiguity in a legal sense to start off with would not be out of place. It used to be said that ambiguity arises when the words

---

[46] Appeal award, para 42 to 44.
[47] Appeal award, paras 46, 45.
[48] Appeal award, para 48.
[49] Appeal award, paras 53, 54.

used themselves are capable of more than one meaning; or it may also arise when the words are uncontentious, but give rise to an ambiguity when applied to the underlying facts within which they are required to function. The former was referred to as a patent ambiguity, the latter to a latent ambiguity.[50] And the admissibility of extraneous matter depended on the categorisation. In view of the modern, unitary approach to interpretation, the stepped approach has been rejected, and the distinction between the two forms of ambiguity would appear no longer relevant in this context.

[45] The applicant argued that the appeal award was ambiguous and did not spell out its conclusion with *"sufficient certainty."*[51]The applicant's submissions for ambiguity were these. First, as already indicated, it commenced by submitting that the respondent pleaded and argued before the first instance arbitrator, and subsequently also before the arbitral appeal tribunal, for Actual Gross Rental to include the appendix 21 opcost, as reflected in annexure A to its statement of claim. It referred particularly to the respondent's heads at paras 10, 11.2 (the reference there to *"a share"* of maintenance and operating costs), 15, and 16.

[46] So the argument was that the respondent had commenced by setting out, in the appropriate introductory part of its heads of argument, its historical contentions before the first instance arbitrator, and then in para 16 concluded by saying that it was persisting on appeal with its *a quo* appendix 21 argument, but limited to actual recoveries, and no longer contending for deemed recoveries. The submission was that the respondent had accordingly, on appeal before the arbitral appeal tribunal, *"anchored"* its case in, and thus capped its case by, appendix A to its statement of claim *a quo*, and appendix 21.

[47] The applicant did not initially see para 16 of the respondent's heads in that way. It contended in its heads before the appeal tribunal, as indicated above, that nothing remained of the respondent's earlier case; and that para 16 should not be read any differently. And in its own

---

[50] Delmas Milling, op cit, p454; Van Rensburg v Taute, 1975(1) SA 279 (A) at 303; The South African Law of Evidence, 3rd ed, Zeffertt & Paizes, p391.

[51] This is the trite standard: Delmas Milling op cit; Engelbrecht v Senwes Ltd, 2007 (3) SA 29 (SCA) at [7].

para 16 it envisaged that the respondent *"may be seeking an order"* that even own consumption items be included.

[48] Certainly the respondent's heads allowed for a submission that own consumption recoveries were included in Actual Gross Rental. But whatever was actually argued before the arbitral appeal tribunal, the substantive underlying question raised by the applicant's submissions before this court, is whether the appeal award is ambiguous because it could be read as upholding a contention on appeal by the respondent that what should be included in Actual Gross Rental were all the landlord's actual direct recoveries from tenants, but limited to the opcost items listed in appendix 21. I will deal with this below when considering the reasoning for its conclusion.

[49] The applicant submitted too that since the respondent's CEO in evidence expressly disavowed reliance on the inclusion of landlord's recoveries of tenants' gross own consumption of electricity, that meant that the respondent thereby limited its case from the get-go to exclude own consumption recoveries. Accordingly, so submitted the applicant, this could never have been the respondent's case on appeal; and that too contributed to the ambiguity. I return to this below.

[50] The applicant further submitted that an interpretation that allowed even own consumption recoveries to be included was commercially untenable, and inconsistent with the accepted purpose of the rental warranty, which was to underpin the calculation of the purchase price based on the R147.31 pm² mentioned in appendix 14. This was to secure for the applicant a return of 8,5% on its investment in perpetuity. Given that own consumption utilities, and for that matter recoveries of these, were wholly unpredictable, the conceptual design of the computation of the purchase price would be denied. The applicant submitted in this context that it was clear that only the landlord's margin on recoveries of tenants' gross own electricity consumption should be taken into account.

[51] Before referring to the applicant's other arguments for ambiguity, which I do below, it is necessary first to discuss this latter submission. The appeal award at paras 20 ff discussed the calculation of the purchase price of R738 041 425 in terms of the sale agreement, with reference

amongst others to appendix 14. It pointed out that one of the factors used in arriving at the purchase price, was the expected (not all leases had been concluded yet) *"Total Gross Rental/m²"* of R142.38 pm². To this was added *"sundry income"* of R4.93 which gave the *"Total Gross Income"* of R147.31 pm² per month. This is the amount that became the Warranted Gross Rental in appendix 14.

[52] But the R147.31 pm² per month was stated to include the total *"Rental Income"* for the first year of operation of the shopping centre; and *"Rental Income"* was a defined term which included *"all of the gross income due to the Seller arising from the conduct of the Bridge City Business as at the Transfer Date, including, without limitation, all income due from the Lease agreements, as set out in Appendix 14."* The arbitral appeal tribunal remarked that it followed that the agreed purpose of appendix 14 was to project all of the gross income derived from running the shopping centre, including all income due from the lease agreements. The appeal tribunal reasoned that the R147.31 pm² was based on a projected future gross rental plus direct recovery for electricity which was expressly included in the calculation.[52]

[53] I revert to the component parts of the R147.31 pm² below, but the calculation of the purchase price was a function not of *"Total Gross Income"* (R147.31 pm² – the rental warranty) nor of *"Total Gross Rental"* (column 6)(which included *"Recoveries/m²"*, which included the landlord's profit margin on the sale of electricity to tenants in a notional amount of R1), but of the projected *"Monthly Net Income"* which was arrived at by deducting from R147.31 pm², the appendix 21 listed anticipated operating costs of R19.81 pm² per month[53]that were recoverable from the tenants.

[54] Reverting to the component parts of the R147.31 pm² computation: The rental warranty in clause 6.5.1 is that the *"total ... gross rental"* (being the *"Actual Gross Rental"*) would be equal to the *"gross rental"* of R147.31 pm²" (being the *"Warranted Gross Rental"*). This amount of R147.31

---

[52] Appeal award, para 30.1.
[53] Appeal award, para 23.2.

pm² (the Warranted Gross Rental) is calculated as described in appendix 14, where – according to the arbitral appeal award, paragraph 30.1 - it is described at the *"total gross income."* As appears from paragraph 23.1 read with paragraphs 28.5 and 28.6 of the arbitral appeal award, the *"Total Gross Income",* which amounts to R147.31 pm² and became the rental warranty, includes *"direct recovery for electricity which was expressly included in the calculation"* (arbitral appeal award, paragraph 30.1).

[55] But the *"direct recovery for electricity which was expressly included in the calculation"* of the rental warranty of R147.31 pm² was in fact the direct recovery by the landlord not of the gross own consumption of electricity by the tenants, but instead the direct recovery by the landlord of only the landlord's projected profit margin on the sale of electricity to tenants, as reflected in column 5 of appendix 14.

[56] Since – as far as concerns tenants' gross own electricity consumption - the rental warranty was therefore calculated by including direct recoveries only of the landlord's profit margin on the on-sale of that electricity, the Actual Gross Rental should, on the applicant's argument, be calculated in the same way. After all, both the *"Actual Gross Rental"* definition and the *"Warranted Gross Rental"* definition are expressly concerned with calculating *"gross rental"*.

[57] Had it been otherwise, namely that the Warranted Gross Rental included only the profit margin on the on-sale of electricity but the Actual Gross Rental included both the profit margin and the net recoveries (i.e. the gross recoveries of the tenants' own consumption of electricity) on the on-sale of electricity to tenants, the rental warranty would have included a substantial structural rental excess payable by the landlord to the seller.

[58] Of course, the fact that in the computation of R147.31 pm² a notional profit margin amount of only R1 pm² was added in respect of rental recoveries, does mean that the actual profit amount would be higher than R1 pm², and to that extent there was in any event a systemic rental excess payable by the landlord to the seller. But at least the liability for that excess would make commercial sense. This cannot be said, went the argument, of a liability for a rental excess which

increases exponentially by the fact that the landlord would be obliged to make good to the seller net recoveries of tenants' own electricity consumption, and also on-pay the same net recovery to the electricity provider, when the landlord will have had no control at all - contractually or otherwise – over the extent of individual tenant's electricity consumption.[54]

[59] The arbitral appeal award was aware of the fact that the computation of the rental warranty of R147.31 pm^2 included only the landlord's profit margin on electricity recoveries and not the recoveries of gross own consumption of electricity by tenants. After all, the fifth column in appendix 14 does not postulate a notional amount in respect of recoveries of gross own consumption of electricity.

[60] The fact that the arbitral appeal award then does not expressly say – despite the applicant's express request - that the computation of Actual Gross Rental includes recoveries of gross own consumption of electricity as opposed to only the recoveries of the profit margin, could leave the impression that the tribunal took it for granted that the reader would accept that only the profit margin on electricity recoveries would go into the Actual Gross Rental computation.

[61] The respondent submitted that the arbitral appeal tribunal need not have amplified its reasoning, since its language was all-encompassing enough. The applicant's riposte was that unlimited language is not surprising in the context of the arbitral appeal tribunal's approach, which was to juxtapose only two positions, no more: the reasoning and conclusion of the arbitrator *a quo* on the one hand, against an argument that recoveries beyond mere base rental payable by the tenants did not go into the computation, on the other (arbitral appeal award, paragraph 7.1). This is borne out by the discussion at paragraph 37 and following, but especially paragraph 41, of the arbitral appeal award.

[62] But if one moves the focus away from the unlimited language to consider portions of the text, a potential ambiguity arises in the context of what precisely what recoveries in respect of electricity are to be included, for this reason. The arbitral appeal award rejects the arbitrator *a quo's*

---

[54] This feature was described in argument by the applicant as a "black hole."

reasoning that Actual Gross Rental and Warranted Gross Rental must be calculated in the same way,[55] but when it considers the context of the warranty provisions at paragraph 45 and following, it stresses the point that in the computation of the R147.31 pm², *"This again spells out that all income must be included without exception."* (emphasis provided)

[63] Consider the use of the word *"again"* here: the award had been making the point in the preceding paragraphs about the all-inclusiveness of the definition of *"Actual Gross Rental"*, but it appears also to have rejected the notion of parity in manner of computation of Actual Gross Rental and Warranted Gross Rental. But saying in paragraph 45 in this context that *"the definition of 'Rental Income' in clause 2.1.98 makes it clear that the rental income in appendix 14 includes 'all of the gross rental income due to the Seller arising from the conduct of the business ... including, without limitation, all income due from the Lease agreements, as set out in Appendix 14"*, appears to serve only one purpose, which is to stress that all contractual recoveries must go into *"Actual Gross Rental"* for the very reason that all contractual recoveries went into the computation of R147.31 pm² as well.

[64] There are other features of the arbitral appeal award that also suggest that – at least so far as concerns the question whether recoveries of only the landlord's margin on tenants' electricity consumption go into Actual Gross Rental, or whether recoveries of gross tenants' own consumption go into Actual Gross Rental – the arbitral appeal tribunal meant the former and not the latter.

[65] In the first point made in paragraph 46 of the arbitral appeal award the arbitral appeal tribunal considered that a fact that supported the respondent's contention was that *"appendix 14 provides for the addition of the landlord's margin of the direct recovery of its electricity costs from the tenants. This shows that something more than just the bare rental should be included."* The reference here to *"should be included"* is of course a reference to *"included in the computation*

---

[55] At appeal award para 43. The arbitrator *a quo* pointed out at para 28 of his award that it was common cause on the pleadings that Actual Gross Rental and Warranted Gross Rental should be calculated in the same way.

of Actual Gross Rental." But this reasoning and this proposition would appear only to have traction if it is accepted that Warranted Gross Rental and Actual Gross Rental have to be calculated in the same way (at least so far as it concerns recoveries in respect of tenants' consumption of electricity).

[66] The second point made in paragraph 46 has the same underlay. Here too the arbitral appeal tribunal reasons that because *"direct recoveries"* were included in appendix 14 in the computation of *"gross rental income"*, this meant that those *"direct recoveries"* were to be defrayed from the landlord's *"Total Gross Rental"*. It will be recalled that *"Total Gross Rental"* was the value that appears in column 6 of appendix 14, and that that column was a function of the *"Actual Gross Rental"* (column 4) and *"Recoveries"* (column 5) in appendix 14, making up R142.38 pm^2, which after adding the *"sundry income"* figure of R4.93, came to the R147.31 pm^2. Paragraph 46 then concludes: *"This again demonstrates that the direct recoveries are to be included in the computation of the AGR."*

[67] Again, the arbitral appeal tribunal's reasoning here appears to rely on the manner in which the rental warranted amount was calculated in order to arrive at a conclusion as to the manner in which the Actual Gross Rental had to be calculated. What is particularly telling here is that in this paragraph 46 the arbitral appeal tribunal specifically considers the manner in which recoveries in respect of electricity is factored into the calculation of the rental warranty of R147.31 pm^2 in appendix 14, as a basis for concluding that *"direct recoveries"* should be included in the computation of Actual Gross Rental.

[68] Concluding then on this part of the applicant's submissions, it would appear latently ambiguous as to whether the arbitral appeal tribunal actually meant that recoveries of tenants' gross own electricity consumption was also to be included in the computation of Actual Gross Rental.

[69] I return now to the applicant's other submissions concerning ambiguity. I have indicated that the applicant referred amongst others to paragraph 47 of the award which said that the purpose of the rental warranty was supported by the interpretation which the arbitral appeal tribunal was

giving to "Actual Gross Rental". It was accepted there that the purpose was to allow the purchaser to earn the return of 8,5% on its investment in perpetuity; and it was said that the arbitrator's conclusion was not compatible with this purpose.

[70] The applicant submitted that difficulty here is this: the arbitral appeal tribunal found that the purpose of the warranty was to underpin the calculation of the purchase price based on an actual gross rental of R147.31 pm² as set out in appendix 14. Although the arbitral appeal tribunal held that appendix 21 did not play any role in the quantification of the R147.31 pm², it pointed out that if the appendix 21 opcost figure of R19,81 pm² were deducted from the R147.31 pm², it gave the *"Total Net Income"* of R127,50 pm². However, it would seem that here the arbitral appeal tribunal adopted the submission of the respondent in paragraph 71 of its heads on appeal. There the respondent submitted, in the context of the purpose of the rental warranty of R147.31 pm²: *"If CPC limited its costs to the amount of R19,81 pm² calculated in appendix 21, it was assured of the "Total Net Income" of R127,50 pm² on which the calculation of the purchase price was based."*

[71] It appears then that the arbitral appeal tribunal, in applying Endumeni's prescript of considering the purpose of the rental warranty, was adopting the argument advanced by the respondent,[56] which was in turn based on the ability of the prudent purchaser of the shopping centre to contain its operating and maintenance costs to R19,81 pm². But the prudent purchaser would only be able to do so if recoveries of tenants' gross own consumption of electricity were not included, as appendix 21 did not, since even a prudent purchaser could not control the tenants' own consumption of electricity.

[72] And the applicant submitted that it is this very notion of the landlord's contractual recoveries in respect of the operation and maintenance expenses of the shopping centre, an appendix 21 concept, that the arbitral appeal tribunal had intended be included in Actual Gross Income, as paragraph 53 of the award evidences.

---

[56] Heads, para 71.

[73] The applicant next laid stress on the submission that paragraph 53 of the award was not compatible with the declaration at paragraph 64.1, which left a *"facial uncertainty"*; and that the language of *"actual contribution"* is not compatible with the notion of tenants' own consumption of electricity. The argument was that a tenant does not *"contribute"* to the maintenance and operation of the shopping centre by paying the landlord, not for its share[57] of common area electricity consumption, for its own consumption of electricity, a matter over which it has exclusive control. There is some merit in the point, but on its own it is not sufficient to render the entire award ambiguous.

[74] The applicant pointed also to the language in paragraphs 62 and 63 of the award, particularly the last sentence of paragraph 62: *"In the appeal hearing, however, wider argument in support of including own consumption recoveries in calculating the Actual Gross Rental, was advanced."* Paragraph 63 then continued:

"Whilst there may be some difference between the alternative argument advanced by the appellant before the Arbitrator and the argument on which we have found for the appellant on appeal, we are of the view that the divergence is not of such significance as to warrant an order that would deprive the successful appellant of its costs."

[75] The argument was that the arbitral appeal tribunal could not have had in mind the difference between appendix 21 actual recoveries of operation and maintenance costs, on the one hand, and all recoveries, including specifically tenants' own electricity consumption recoveries, on the other hand, when it referred to there being *"some difference"* between those two arguments. The difference between the two scenarios: landlord's margin on tenants' own electricity consumption and landlord's recoveries of tenants' gross own electricity consumption, was just far too great.

[76]Further, if the arbitral appeal tribunal, in paragraph 63, had meant – when referring to *"the argument on which we found for the appellant"* – to refer to *"wider argument in support of including own consumption recoveries in calculating the Actual Gross Rental"*, then it would in

---

[57] Compare the use of the word "share" in paragraph 11.2 of the respondent's heads of argument on appeal.

paragraph 63 have referred back to the *"wider argument"* to which it had referred in paragraph 62. There is an argument to support these language points, but again, on their own, they would not render the award ambiguous.

[77]Against these attacks on what precisely was argued by the respondent on appeal, and precisely what was meant by the language used by the arbitral appeal tribunal in its award, the respondent submitted that, in fact, it had on appeal argued for own consumption to be included; and that the arbitral award was clear and unambiguous in its terms, as already alluded to above. The respondent stressed, with reference to Frankel Max Pollak Vinderine, that only if ambiguity is found despite the clear language of the arbitral appeal tribunal, is there warrant to consider the extraneous evidence.

Conclusion on ambiguity

[78]On the issue then of the asserted ambiguity of the award the correct approach is, I believe, the following. It is correct that Gentiruco and Frankel Max Pollak Vinderine stress the importance of acceptance of ostensibly plain language at face value. But those were times before the ultimately general acceptance of the unitary approach to the interpretation of written instruments. That means, as I understand it, that interpretation is an endeavour in which text, context and purpose, all three, are considered in one – as opposed to a sequentially staged – process.

[79]This implies that even if language is on the face of it clear when textually viewed, that is only part of a wider enquiry. It also implies that the notion that once there is no patent ambiguity the enquiry permits of no intrusion of extraneous matter, is not correct. Ambiguity may take either a patent or a latent form, and a latent ambiguity may only emerge once text, context and purpose are considered in a unitary endeavour.

[80]If the unitary approach is adopted in this matter, then the enquiry inevitably moves beyond what might at first blush appear in paragraph 35 of the award to be a complete vindication of an argument by the respondent that there is no exclusion at all when considering the recoveries that

are to be included in Actual Gross Rental. Then the context includes the ambiguity which I have found above, namely that the rental warranty excludes tenants' own gross electricity consumption; and it includes the notion that if own gross electricity consumption were included, the rental excess could in a hypothetical case be constituted solely by tenants' own electricity consumption which cannot be controlled by the landlord and which the landlord as a conduit simply passes through to the electricity wholesale provider, whereas those amounts are excluded from the rental warranty of R147.31 pm^2.

[81]The context would include also the fact that the difference between the landlord's recovery of tenants' gross own consumption, and the landlord's margin on the on-sale, is commercially significant. I believe that this fact was not contentious.

[82]The context would also include that the raison d'être of the rental warranty was to underwrite the 8,5% return on the purchaser's investment which in turn informed the calculation of the purchase price; but which would be achievable if the operating and maintenance expenses could be kept in check; and which in turn would by definition likely be unattainable if tenants' own consumption of electricity were included in the computation of Actual Gross Rental.

[83]And the context then includes that the CEO of the respondent testified that the respondent was not laying claim to the inclusion of own consumption in the computation of Actual Gross rental. That this was the evidence was not contentious either. And I am not at all convinced that that evidence is not, in any event, admissible to interpret the warranty provisions. It would constitute evidence of common conduct subsequent to the conclusion of the agreement on the issue as to how the parties viewed this feature of the agreement, even in the case of an agreement that is thought to be unambiguous.[58]

[84] If this is the appropriate context, then one would have expected the arbitral appeal award to have explicitly addressed the question whether tenants' gross own electricity consumption is be included in the computation of Actual Gross Rental particularly given, as indicated, the explicit

[58] Telcordia Technologies Inc v Telkom SA Ltd, 2007 (3) SA 266 (SCA) at [91].

request. The question of the role played by tenants' own electricity consumption is, in my view, too complex and too commercially prominent an issue to have been left over for deductive reasoning from broad premises.

Other factors

[85]Two further issues in the context of *"good cause"*, need to be addressed. One is this: the extended jurisdiction upon which the parties explicitly agreed in writing, and which the arbitral appeal tribunal explicitly accepted, provided that if the decider were to reach an interpretation of the warranty provisions not pleaded by either, then an indicative award was required, with opportunity for the parties to make further submissions. The arbitral appeal tribunal did not provide an indicative award here, despite it being accepted all round that the arbitral appeal tribunal found for a position different from that pleaded by either.

[86]Conceivably, the arbitral appeal tribunal could have reasoned that the parties' earlier written agreement had envisaged a scenario where the parties themselves stick, in their arguments, to what they have pleaded, and the arbitrator decides to adopt neither position. And, conceivably, what has played out here is not principally different. Assuming that what the parties argued on appeal ought to have been regarded as their pleadings: the applicant's argument was certainly not accepted by the arbitral appeal tribunal and – on the argument – the arbitral appeal tribunal accepted the respondent's argument. So an indicative award was not called for.

[87]I do not believe this reasoning would have been correct. First, on the facts, as said earlier, the arbitral appeal tribunal itself expressly recorded that the parties accepted that the arbitral appeal tribunal had the same powers as the arbitrator a quo.[59] There was no qualification by the arbitral appeal tribunal that it was adopting only one part of that agreement, even if it was, that it was in fact doing so.

---

[59] Appeal award, para 9.

[88]But second, in any event, there is unlikely to have been an agreement or even understanding to nullify in any of its terms the parties' written agreement to extend the jurisdiction, since the applicant's heads of argument on appeal explicitly refers to and relies on those terms.[60] So it seems to me that an indicative award was indicated, or at least reasonably expected, and not declined upfront nor given.

[89]The second issue in the context of *"good cause"* is the ambit of the submission to arbitration. The submission formed part of the pleadings, and provides for the appeal over which the arbitral appeal tribunal presided. It defined the *"disputes"* between the parties in clause 2.12. These included not only the question as to the proper *"interpretation, calculation and application"* of the rental warranty provisions, but also, as pointed out earlier in this judgment, the net commercial and legal effect of the warranty provisions.

[90]Yet when the arbitral tribunal was asked to indicate the precise categories of the actual expenses which must be included in the calculation of the Actual Gross Rental, it declined to do so. Had it done so, the issues as the where own consumption features might have been beyond dispute.

[91]For the respondent it was argued that the arbitral tribunal was entitled to decline to do so, since what remained after its conclusion was a matter of simple arithmetic. However, that is not how the arbitral appeal tribunal itself saw it.[61] It considered that that issue was not included in the dispute between the parties. I do not believe that that is correct.

[92]The definition of the dispute explicitly goes beyond the mere interpretation of the rental warranty, and includes *"the calculation and application (including the respective parties rights and obligations) of the rental warranty"*; and the *"net commercial effect and legal effect of the rental warranty provisions."* In a large and complex commercial arrangement such as this one, it is understandable that the parties would wish this kind of detailed determination of their disputes, and so this part of the definition is material. As I see it, the applicant's request referred to in

---

[60] Heads, para 24.
[61] Paragraph 54.

paragraph 54 of the award was covered by the terms of the submission to arbitration, and it was not open to the arbitral appeal tribunal to decline it.

Conclusion

[93] In my view, for the reasons set out above, good cause for a remittal has been shown. The reasons are, in sum, the findings that there is a latent ambiguity in the award; that the jurisdiction which had been agreed upon for the arbitral appeal tribunal, and which the tribunal had in any event assumed, required of it to formulate an indicative award prior to issuing a final award; and that the arbitral appeal tribunal had not discharged the full ambit of the dispute that had been referred to it for determination.

[94] It was not suggested that the passage of time since the publication of the arbitral appeal award affects the relief claimed, nor that in form it was inappropriate. I accordingly make an order in terms of paragraphs 1,2 and 3 of the notice of motion, costs to include the costs consequent upon the employment of two counsel.

WHG van der Linde
Judge, High Court
Johannesburg

Date argued: 14 August, 2019
Date judgment: September, 2019

For the applicant: Adv. JJ Gauntlett, SC OC
Adv. MW Janisch, SC
Instructed by:
Cliffe Dekker Hofmeyr Inc
Applicant's attorneys
12th Floor
11 Buitengracht Street
Cape Town
PO Box 695, Cape Town
Tel: 021-405-6080
Fax: 021-405-6112
Ref: L Rhoodie/PM/10079472

For the first respondent: Adv. WH Trengove, SC

Adv. JPV McNally, SC
Adv. SL Mohapi

Instructed by:
Paul Friedman & Associates Inc
First Respondent's attorneys
230 Athol Street, Highlands North
Johannesburg
Tel: 011-483-1967
Ref: P Friedman/GK/C 1242