REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case No: 30236/2021

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/ NO.
(2) OF INTEREST TO OTHER JUDGES: YES/ NO.
(3) REVISED.
DATE: 21.11.2022
SIGNATURE:

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION	Applicant
and	
IMBEU DEVELOPMENT AND PROJECT MANAGEMENT (PTY) LTD	First Respondent
ADV NASREEN RAJAB-BUDLENDER SC	Second Respondent

JUDGMENT

Todd AJ

1. This is an application for leave to appeal the judgment and order that I handed down in this matter on 22 September 2022.

2. The grounds on which the Applicant seeks leave to appeal are set out in an application for leave to appeal delivered on 13 October 2022. In addition the Applicant delivered heads of argument the day before the application for leave to appeal was heard.

3. The primary ground on which leave to appeal is sought is that this court erred in the manner in which it dealt with the question whether the arbitrator exceeded her powers. This was dealt with in paragraphs 54 to 61 of the judgment. In simple terms, the question dealt with there was whether or not the arbitrator had exceeded her powers when she determined the issues that had been referred to her on a basis that had not been contended for by either party in the pleadings that they had exchanged in the course of the arbitration process.

4. In this regard Mr Ndou, who appeared for the Applicant, contended that I erred in distinguishing the *Hos+Med* decision as I did in paragraph 56 of the judgment. Mr Ndou submitted that as a matter of law the parties to an arbitration and the arbitrator are bound by and limited to the pleaded cases.

5. Mr Ndou went further, submitting that an arbitrator's powers are in fact derived from the pleadings and not from the arbitration agreement. This is clearly not correct. There can be no doubt that the source of an arbitrator's power (in this context) is the agreement between the parties to submit one or more specific issues to arbitration. When, however, the parties adopt arbitration rules that require the exchange of pleadings, or separately agree to the exchange of pleadings, or are directed to do so by the arbitrator in the exercise of powers conferred on her, it is not always clear whether or to what extent an arbitrator's powers may be impacted by the terms of pleadings so exchanged.

6. Mr Sibuyi, for the First Respondent, pointed out that in the present matter the parties had expressly agreed, in their pre-arbitration minute, that the arbitrator would enjoy all of the powers set out in the AFSA Rules. This would ordinarily regulate the procedural powers conferred on the arbitrator, but would not define what issues had been referred to the arbitrator for determination and whether and to what extent these might be expanded upon or limited by an exchange of pleadings.

7. In the absence of agreement between the parties when they define the issues that are to be determined by arbitration that the arbitrator's powers will be confined to determining those issues on a basis defined or contended for in pleadings, it seems to me that no such limitation should be inferred.

8. If it is clear what questions the parties have agreed to submit to the arbitrator for determination, as was the case here, then it seems to me that an exchange of pleadings does not serve to limit the power conferred on the arbitrator to determine those questions. On the contrary parties may, in the course of proceedings, introduce amendments to their pleadings without violating or amending the ambit of the power that has been conferred on the arbitrator.

9. Whether and in what manner pleadings will be exchanged and may be amended will ordinarily be determined by procedural rules and where necessary the arbitrator herself (assuming such power has been conferred on her by the parties).

10. I remain of the view that in the present matter there was no evidence indicating that the parties had expressly or impliedly limited the arbitrator's powers to decide the issues that they had referred to her for determination, which were clearly described, only on a basis pleaded by one or other of the parties. In my view, as indicated in the

judgment, this distinguished the matter from the facts in *Hos+Med* as recorded in that judgment.

11. Nevertheless, it seems to me that there is a reasonable prospect that another court might disagree with me on this point and might find that the facts of this matter fall sufficiently closely within the ambit of the principle in *Hos+Med* to reach a conclusion that the arbitrator did exceed her powers; or might find that an agreement to exchange pleadings establishes by implication a limitation on the arbitrator's power, although this might be more difficult to accept in light of the considerations mentioned above regarding the possible amendment of pleadings from time to time.

12. In any event, I consider that an appeal would have a reasonable prospect of success on this ground, in the sense contemplated in section 17(1)(a)(i) of the Superior Courts Act.

13. As regards the separate ground on which leave to appeal is sought arising from the arbitrator's treatment of the Applicant's counter-claim, Mr Ndou submitted that I erred in distinguishing the decision in *Palabora* as I did in paragraphs 62 and 63 of the judgment.

14. I do not believe that an appeal would have a reasonable prospect of success on this ground. Of course if another court were to find that the arbitrator exceeded her powers in the manner in which she decided the main claims it would necessarily follow that in a fresh determination of the matter both the main claims and the counter claim would stand to be determined afresh. The terms on which a matter would be remitted to arbitration following a successful appeal on an exceeding of powers ground would be determined by the appeal court.

15. I have also carefully considered the range of further grounds raised by the Applicant in its written heads of argument in support of its application for leave to appeal. In my view none of these would have a reasonable prospect of success. Nor are there any compelling reasons for an appeal to be heard as contemplated in section 17(1)(a)(ii) of the Superior Courts Act.

16. Of these further grounds I deal specifically only with what are described as grounds eight, nine and ten, cumulatively dealt with in paragraphs 40 to 44 of the Applicant's heads of argument. In paragraph 44 of its heads of argument the Applicant states the following:

> *"Another court will find that the second respondent committed cumulative grounds of gross irregularity and exceeding of powers, all provide evidence of misconduct, (sic) and are sufficiently compelling to justify an inference of what has variously been described as 'wrongful and improper conduct'. Thus leading to a conclusion that the award is reviewable on grounds of misconduct as well."*

17. In my view there is no reasonable prospect that another court would conclude that the arbitrator committed misconduct, whether on the basis of the cumulative complaints set out by the Applicant or otherwise.

18. In summary, there are no grounds on which to grant leave to appeal with a view to traversing matters other than the question whether the arbitrator exceeded her powers when she made a determination on a basis that was not pleaded by the parties. I intend to grant leave to appeal in terms that limit the issues on appeal as contemplated in section 17(5)(a) of the Superior Courts Act.

Order

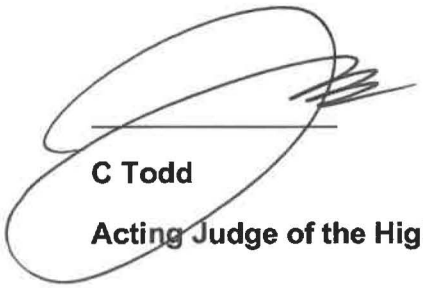
In the circumstances I make the following order:

1. The Applicant is granted leave to appeal, subject to the condition in paragraph 2 below;

2. The issues on appeal are limited to the question whether the arbitrator exceeded her powers by making a determination on the issues referred to her on a basis that was not pleaded by either party;

3. The appeal will be heard by a full court of the division;

4. Costs of this application will be costs in the appeal.



C Todd

Acting Judge of the High Court of South Africa

REFERENCES

For the Applicant:	Mr P Ndou.
Instructed by:	Ndou Attorneys
For the First Respondent:	Mr D Sibuyi
Instructed by:	DMS Attorneys
Hearing date:	16 November 2022
Judgment delivered:	21 November 2022