

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG



(1) Reportable: yes
(2) Of interest to other Judges:
yes
(3) Revised

Date: 10/04/2024

A Maier-Frawley

CASE NO: 017197/2022

In the matter between:

LUGEDLANE DEVELOPMENTS (PTY) LTD

First Applicant

MJEJANE RIVER LODGE PROPERTIES (PTY) LTD

Second Applicant

and

**MJEJANE PARENT GAME RESERVE
HOMEOWNERS ASSOCIATION**

First Respondent

**MJEJANE GAME RESERVE HOMEOWNERS
ASSOCIATION**

Second Respondent

MJEJANE TIME SHARE BLOCK LTD

Third Respondent

MOHAMMED CHOCHAN SC N.O

Fourth Respondent

J U D G M E N T

MAIER-FRAWLEY J:

Introduction

1. The applicants have applied in terms of s 33(1) read with s 33(1)(b) of the Arbitration Act, 42 of 1965 ('the Act') for the review and setting aside of

an arbitration award published by the fourth respondent (the arbitrator) on 15 March 2022 ('the award') pursuant to an arbitration conducted between the applicants, as defendants, and the first, second and third respondents, as claimants. They seek relief on grounds that the arbitrator both exceeded his powers and committed a gross irregularity. The applicants further seek condonation for the late filing of this application in terms of s 38, read with s 33(2) of the Act.

2. The first applicant, Luggedlane Developments Pty Ltd ('Luggedlane'), is the developer of the Mjejane Game Reserve and the Luggedlane Tourism Estate Township, having assumed this role pursuant to a shareholders' agreement concluded on 21 January 2005.¹ It is a member of the first respondent, Mjejane Parent Game Reserve Homeowners Association ('Parent HOA') during the development period, which period is as defined in the first respondent's articles of association. The second applicant, Mjejane River Lodge Properties (Pty) Ltd ('MRLP'), owns the portion of land on which the Mjejane River Lodge is situated. MRLP is member of the Parent HOA and the second respondent by virtue of its ownership of that portion.
3. The Parent HOA, the second respondent, Mjejane Game Reserve Homeowners Association ('HOA'), and the third respondent, Mjejane Share Block company Ltd ('MSBC') oppose the application and have filed a counter-application to have the award made an order of court in terms of s 31 of the Act.
4. The Parent HOA was established and registered as a non-profit company on 9 April 2008, *inter alia*, to regulate the affairs of its members and to

¹ The Mjejane Trust was a party to the shareholders' agreement.

establish rules for the development. The HOA was later established as a member association, as contemplated in Article 5 of the Parent HOA's articles of association and thereupon became a member of the Parent HOA. The third respondent, MSBC, is a member of the Parent HOA.

5. And so, the first applicant (during the development period), the second applicant, and the second and third respondents are all members of the Parent HOA.
6. The arbitrator (fourth respondent) abides the outcome of these proceedings.
7. Where reference is made to Lugedlani and MRLP jointly in the judgment, they are referred to as the applicants. Where reference is made to the first, second and third respondents collectively in the judgment, they will be referred to as 'the respondents'. Where reference is made to the applicants and the first, second and third respondents collectively in the judgment, they will be referred to as 'the parties'.

Background

8. The relevant background was set out comprehensively in the award and will therefore not be repeated herein. I set out the factual matrix in this matter in so far as is necessary for the determination of the review.
9. For present purposes, the relevant background context, as recorded in clauses 3 and 4 of the Parent HOA's Articles of Association ('the articles'), will suffice. Clause 3 of the articles records that the property (defined in the articles as the remaining extent of the Farm Lodwichs Lust No 163, Registration Division J,U Mpumalanga measuring 3825,2662 hectares and any adjacent land if incorporated into the Mjejane Game Reserve) had

been settled on the trustees for the time being of the Mjejane Trust,² pursuant to a land claim in terms of the Restitution of Land Rights Act 22 of 1994, and was to be developed as an eco tourism project and maintained an eco tourism destination. The reserve was to comprise five different development nodes (defined in the articles as the five separate erven in the Township of Lugedlane Tourism Estate by the developer on the property), all with the same overall eco tourism objectives. Each development node was to be maintained and administered for the benefit of the HOA's members who are the owners of properties in the development nodes. The company (defined in the articles as the Parent HOA) was formed as a parent association for the control of the whole of the Reserve.

10. Clause 4 of the articles provides that the reserve will be administered as an eco tourism reserve by the Parent HOA and the member associations (formed for the benefit and control of each of the development nodes) in terms of their respective articles of association. The wilderness area and the nature reserve would remain the property of the Trust and would not be transferred to the Parent HOA or any of the member associations. The reserve will initially comprise five development nodes, each to be developed as provided for in clause 4.5 of the articles.
11. The HOA became the only such 'member association' ultimately established. On 30 June 2014, the HOA adopted a new Memorandum of Incorporation ('MOI'). In terms of clause 3.5 thereof, the HOA was established for the control of the respective development nodes, and together with the Parent HOA, the control of the Reserve, for the benefit

² The Mjejane Trust owned the land on which the development took place and still owns land comprising the Mjejane Game Reserve. The Trust is a shareholder of Lugedlane and MRLP.

of members. Under clause 6 of the MOI, Luggedlane (during the development period, as defined in the MOI) and all owners of property on the development nodes (being the area adjacent to the Mjejane Game Reserve) are members of the HOA. In terms of clause 12.2, Luggedlane, as developer, has the right to appoint, remove and replace two directors on written notice to the HOA during 'the development period'.³

12. In terms of clause 2.1.13 of the articles, the 'development period' was defined as:
 "the period from registration of the Articles [being the parent HOA's articles] until all the Development Nodes have been fully developed in that all portions in all the development Nodes have been sold and transferred away from the Developer and improvements erected thereon, or until the Developer notifies the Company that the Development Period has ended, whichever is the earlier."
13. In terms of clause 6.1 of the articles, Luggedlane would remain a member of the Parent HOA during the development period, as defined in clause 2.1.13 of the articles.

³ The development period in the MOI is defined to mean:

*" the period from the registration of this MOI until 80% (eighty percent) of the aggregate of all Portions in all the Development Nodes, other than Erf 4 Development. Portions held by the Developer for investment purposes only and not as trading stock will be counted in the 80% (eighty percent, **have been transferred away from the Developer** or alternatively, **until the Developer notifies the Company in writing** that the Development Period has ceased, whichever is the earlier."*

The obvious differences between the development period, as defined in the MOI, as opposed to the period as defined in the Parent HOA's Articles, have been highlighted for ease of reference.

14. In terms of clause 11.4 of the articles, Luggedlane was entitled to appoint 2 directors to the board of the Parent HOA during the development period (as defined therein).⁴
15. Other members of the Parent HOA, entitled to appoint directors, included: (i) MSBC (1 director in terms of clause 11.5 of the articles; (ii) HOA (one director in terms of clause 11.5 of the articles) and (iii) MRLP (one director in terms of clause 11.5 of the articles).
16. On 4 August 2021, Luggedlane gave notice to the Parent HOA of the exercise by it of its right to appoint Messrs Zeelie and Lushaba as directors of the Parent HOA.
17. In a letter dated 6 August 2021 addressed by Bowmans⁵ (acting on behalf of the Parent HOA) to the applicants, the Parent HOA disputed Luggedlane's right to appoint directors in terms of clause 11.4 of the articles on the basis that the development period of the Parent HOA had ended, in consequence whereof, Luggedlane was no longer a member of the Parent HOA by reason of the following:⁶
 - (i) 'The Development Period is over as advised by Luggedlane in March 2019 to our client'; and

⁴ **Article 11.4** provides: "*The Developer shall during the Development Period have the right to appoint 2 (two) Directors and shall have the right to remove and replace such Directors on written notice to the Company.*" The 'Company' is defined as the Parent HOA in clause 2.1.7 of the Articles.

Article 11.5 provides: "*Each Member shall have the right to nominate and appoint one Director together with the right to remove and replace those Directors on written notice to the Company.*"

Article 6.1 provides: "*The Members Associations, the Developer during the Development period and the owners of the Commercial Portions shall be members of the Company. No other person shall be entitled to be a Member of the Company.*"

⁵ Bowman Gilfillan Attorneys.

⁶ Paras 4.3; 5 and 6 of the letter of 6 August 2021.

(ii) 'In June 2021 Luggedlane abandoned the Mjejane Game Reserve, removed its equipment and retrenched its staff that were working on the Mjejane Game Reserve. This abandonment of its duties is a repudiation of the Articles of Association, which repudiation the Parent HOA accepted with immediate effect. The repudiation is indicative that the Development Period is over at the instance of Luggedlane.'

18. Pursuant thereto, on 15 August 2021, Bowmans addressed a further letter to the applicants in which the Parent HOA declared a dispute in terms of clause 37 of the articles. Par 8 of the letter records that *"A dispute has arisen as to whether the Development Period is over, and if Luggedlane is a member of our client or not (**'the Dispute'**)."*
19. The dispute was duly referred to arbitration. The terms of reference agreed to by the parties were recorded in the minutes of a pre-arbitration meeting held between the parties on 10 September 2021 ('the minute'). In terms of paragraph 9 of the minute, the parties agreed that the arbitration will be governed by the AFSA Commercial Rules.
20. In paragraph 11 of the minute, the parties agreed as follows:

"It has been agreed that the Parties will exchange position papers (as opposed to formal pleadings) but reserve the right to lead evidence should they require to do so. Absent that, the position papers and the relevant documents attached to the position papers would be sufficient for the determination of the dispute. The Parties agree for the sequential exchange of position papers."

“41.1 Declaring that:

41.1.1 the development period as referred to in the first claimant’s articles of association has ended; and

41.1.2 the first defendant is no longer a member of the first claimant; and

41.1.2 The first defendant is no longer entitled to nominate and/or appoint directors to the board of the first claimant.

41.2 Costs of suit.”

25. In their position paper, the applicants (as defendants) sought the following counter-relief:

“1. An order dismissing the claimants’ claims;

2. An order declaring that the first defendant [Lugedlane] is a member of the first claimant [Parent HOA];

3. An order declaring that:

3.1. Sylvester Bongaini Lushaba is validly appointed by the first defendant as a director of the first claimant with effect from 4 August 2021 in terms of clause 11.4 of the first claimant’s articles of association;

3.2 Petrus Zeelie is validly appointed by the first defendant as a director of the first claimant with effect from 4 August 2021 in terms of clause 11.4 of the first claimant’s articles of association;

3.3 Gert Johannes Coetzee is validly appointed by the second defendant as a director of the first claimant with effect from 4 August 2021 in terms of clause 11.5 of the first claimant’s articles of association.

4. An order declaring that:

4.1 Mark David Chewins;

4.2 Lesley Richard Penfold;

21. In paragraph 8 of the minute, the issues in dispute between the parties were recorded as:
- “ 8.1 Whether the Development period as set out in the Parent HOA’s Articles of Association has ended; and
- 8.2 Pursuant thereto, the identity of the directors of the Parent HOA.”
22. Position papers were thereafter exchanged by the parties, which included a statement of claim by the respondents (as claimants); the position paper of the applicants (as defendants); and the respondents’ replication/rebuttal paper, together with annexures thereto.
23. In paragraph 40 of their position paper, the respondents (as claimants) framed the dispute as follows:
- “ 40.1 The claimants dispute:
- 40.1.1 the basis upon which the first defendant [Lugedlane] has appointed Messrs Zeelie and Lushaba as directors of the first claimant; and
- 40.1.2 that the first defendant is still a member of the first claimant [Parent HOA] (on the basis that the “development period” as referred to and defined in the Articles, has ended).
- 40.2 The aforesaid constitutes a dispute as contemplated in article 37 of the Articles and the claimants, in terms of the letter dated 15 August 2021...referred the dispute to arbitration.” (emphasis added)
24. The respondents (as claimants) sought the following relief in their position paper:

4.3 Peter Leon Trickett;

4.4 Jan Morgan; and

4.5 Gavin John Walker

are not validly appointed directors of the first claimant.

5. An order declaring that Mark David Chewins, Lesley Richard Penfold, Peter Leon Trickett, Jan Morgan and Gavin Walker shall forthwith be removed as directors from the company records of the first claimant.

6. An order that the second claimant [HOA] and the third claimant [MSBC] pay the defendants' costs of suit, including the costs of two counsel where so employed, jointly and severally, the one paying the other to be absolved."

26. The relief sought by both Luggedlane and MRLP in prayers 4 and 5 above was based on what had been alleged in paragraphs 16 to 28 of their position paper, wherein the validity of the appointment of directors (being those mentioned in the applicants' prayers 4.2 to 4.5 above) at an annual general meeting purportedly held on 26 August 2020 or 26 August 2021, was disputed for reasons given in the position paper. The allegations concerning the validity of the appointment of the directors in question were denied in the claimants' replication/rebuttal paper.

27. Both parties presented oral evidence at the arbitration.

Discussion

Condonation

28. The award was published on 15 March 2022. In terms of s 33(2) of the Act, the application ought to have been launched within 6 weeks of the date of publication of the award, i.e., by 26 April 2022. It was launched 4 months later. In terms of s 38, the court may, on good cause shown, extend any

period of time fixed by or under the Act, whether such period has expired or not.

29. Mr Zeelie (the deponent to the applicants' affidavits) states that after the conclusion of the arbitration and whilst acting in his capacities on behalf of the Trust, Luggedlane and MRLP, he was involved in an extensive process of negotiation with the parent HOA and HOA, aimed at achieving a settlement with a view to resolving all existing disputes and a number of broader disputes and ancillary issues (for example, the provision of electricity and water to the HOA on the Mjejane Game Reserve) between them. Although negotiations were partly fruitful, resulting in an agreement being reached on 13 April 2022, the parties committed themselves therein to pursue further negotiations towards resolving any pending disputes between them.
30. Further negotiations were conducted during May and June 2022 on the various dates set out in the founding affidavit. Mr Zeelie states that he had hoped that the negotiations would result in a resolution of the various disputes in such a manner as would circumvent the need to proceed with this litigation. To this end, he says that he resolved to hold off on further litigation, including this application, in order to foster an environment of *bona fides* for the conduct of negotiations. Mr Zeelie's hopes for a negotiated outcome in respect of the disputes were dashed when negotiations, whilst pursued and conducted in good faith, ultimately collapsed.
31. I accept that there were *bona fide* reasons underlying the delay in launching this application, premised on *bona fide* settlement negotiations that were ongoing between the parties, as corroborated in the letter

addressed by the chairman of the HOA on 22 July 2022 regarding the negotiations and the regrettable outcome thereof. I also accept that Mr Zeelie's belief that the pursuit of further litigation whilst settlement negotiations were ongoing would not cultivate an environment conducive to achieving a successfully negotiated outcome for all parties. This is understandable, when considered in the context in which any broader settlement of all disputes between the parties would inure to the benefit of *all* parties involved.

32. The respondents have criticized Mr Zeelie for having made a deliberate decision not to abide by the six week time period provided for in the Act, which decision, they contend, not only served to delay the prosecution of this review but also to thwart the finality of the arbitration award. The criticism is in my view unduly harsh, in the absence of any prejudice to the respondents having been demonstrated by them as a result of the delay.
33. Where there is non-compliance with stipulated time periods, satisfactory explanations must be provided. As recognized by the Supreme Court of Appeal in *Mabunda*,⁷ the court has an overriding discretion to consider all the circumstances of the case.⁸ The overriding factor was set out in *Van Wyk v Unitas*⁹ as being the interests of justice. The applicants have in my view provided a cogent reason for the default. Even if it can be said that the explanation for the non-compliance was inadequate, as contended by

⁷ *Road Accident Fund and Others v Mabunda Incorporated and Others* (1147/2020); *Minister of Transport v Road Accident Fund and Others* (1082/2020) [2022] ZASCA 169 (1 December 2022) at par 34 ("*Mabunda*").

⁸ *Shaik and Others v Pillay and Others* 2008 (3) SA 59 (N) at 61E-F.

⁹ *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* ; 2008 (2) SA 472 (CC) at 477 A-B ("*Van Wyk v Unitas*").

the respondents, recently, in *Motubatse*,¹⁰ the Supreme Court of Appeal reiterated the trite principle that good prospects on the merits may compensate for a poor explanation for the delay.¹¹ In the light of the issues in this matter, it is in the interests of justice that condonation be granted. Finally, the prospects of success, including absence of measurable prejudice to the respondents, weigh in favour of granting condonation.

Exceeding of powers

34. The application is brought in terms of section 33(1) read with 33(1)(b) of the Act, which in relevant part, provides:

“(1) Where –

(a) ...

(b) An arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(c) ...

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.”

35. The applicants rely on cases such as *Hos-Med*¹² and *Close-Up Mining*¹³ for the contention that it was ‘clearly’ agreed by the parties in paragraph 11

¹⁰ *Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government v Motubatse & Another* (182/2021) [2023] ZASCA 162 (30 November 2023) at par 12 (“*Motubatse*”).

¹¹ *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720E-G; *Darries v Sheriff, Magistrate’s Court, Wynberg and Another* 1998 (3) SA 34 (SCA) at 40H-41E; *Valor IT v Premier, North West Province and Others* [2020] ZASCA 62; 2021 (1) SA 42 (SCA) para 38.

¹² *Hos+Med Medial Aid Scheme v Thebe ya Pelo Healthcare and Others* 2008 (2) SA 608 (SCA at par 30, where the following was said:

“In my view it is clear that the only source of an arbitrator’s power is the arbitration agreement between the parties and an arbitrator cannot stray beyond their submission where the parties have expressly defined and limited the issues, as the parties have done in this case to the matters pleaded. Thus the arbitrator ... had no jurisdiction to decide a matter not pleaded.... It is of course possible for

of the pre-arbitration minute that the parameters of their dispute would be determined by the position papers filed. They argue that the arbitrator could therefore not go beyond the pleadings and decide an issue not pleaded, and that he exceeded his powers by deciding the disputes in the arbitration on the basis of a determination of facts which were not pleaded by the parties. In other words, the arbitrator was required to determine the dispute, as pleaded in the respective position papers, and no agreement between the parties authorised the arbitrator to go beyond what was pleaded to determine the relief sought.¹⁴

36. The gravamen of the applicants' complaint concerns the arbitrator's finding that Luggedlane had, through the subsequent conduct of Luggedlane's director, Mr Joubert, notified the Parent HOA (as well as the HOA) that the development period had ended, in circumstances where the issue (of what essentially comprised a tacit notification based on the conduct of one director) had not been pleaded.

37. In answer thereto, the respondents alleged as follows:¹⁵

"The dispute was referred to arbitration, before the parties had exchanged their position papers. **The position papers provided** clarity as to the parties' respective contentions and of **the issues that would have to be determined**, as part of the

parties in an arbitration to amend the terms of the reference by agreement, even possibly by one concluded tacitly, or by conduct, but no such agreement that the pleadings were not the only basis of the submission can be found in the record in this case, and Thebe strenuously denied any agreement to depart from the pleadings." (emphasis added)

¹³ *Close-Up Mining (Pty) Ltd and Others v The Arbitrator, Judge Phillip Moruchowitz and Another* (286/2022) [2023] ZASCA 43 (31 March 2023).

¹⁴ Paras 98 & 99 of the Founding affidavit..

¹⁵ Paras 59 & 60 of the Answering Affidavit.

determination of the dispute... The dispute was referred to arbitration, before the parties had exchanged their position papers. As can be seen from the award, **the Arbitrator correctly identified the dispute and proceeded to determine the dispute as it presented on the pleadings.**

In the process, the Arbitrator received and considered evidence (viva voce evidence and numerous documents) and heard and considered the parties' submissions... Whilst the position papers, to a certain extent, foreshadowed the evidence that the parties intended to adduce, the position papers were by no means conclusive on the matter and the parties remained entitled to adduce the evidence of their choice, in the manner that they chose..." (emphasis added)

38. In reply, the applicants averred as follows:¹⁶

"The dispute over whether the parent HOA's development period had ended was narrowly defined by the respondents, as **claimants**, who **expressly pleaded the basis (sic) upon which it was alleged that the parent HOA's development period had ended** in paragraphs 10 to 39 under the heading "THE DEVELOPMENT PERIOD IS OVER"

The version pleaded in paras 10 to 39 of the respondents' position paper was denied by the applicants and **the factual dispute over those particular pleaded bas[e]s upon which it was alleged that the development period had ended, was the subject of oral evidence and argument.**

By straying beyond the bounds of the position papers, the Arbitrator took it upon himself to determine the existence of facts and adjudication of controversies which the parties had not mandated him to do." (emphasis added)

39. The central dispute referred to arbitration was whether or not the development period (as defined in the Parent HOA's articles) had ended.

¹⁶ Paras 95-97 of the Replying Affidavit.

If the development period had ended, then it would follow that Luggedlane would not be entitled to appoint directors to the board of the Parent HOA and that it would also lack *locus standi* to challenge the validity of the appointment of directors to the board.

40. In terms of clause 2.1.13 of the parent HOA's articles, the development period could end in one of two ways: (i) if all the development nodes had been fully developed in that all portions in all the development nodes had been sold and transferred away from the developer (the developmental basis) or (ii) if the developer had notified the parent HOA that the development period had ended (the notification basis).
41. There was no controversy between the parties in the arbitration that all portions in all the development nodes had not been sold and transferred away from the developer. The case for the respondents (that the development period defined in the Parent HOA's articles had ended) was thus founded on the notification basis.¹⁷
42. In their position paper, the respondents alleged that the development period had ended by notification on the basis of either:
 - (i) what had been conveyed in correspondence exchanged between Mr Zeelie (in his capacity as the appointed interim administrator of the Mjejane Trust and Mr Joubert (a director of Luggedlane) on 17 March 2021 (par 11)¹⁸ and/or what had been stated in Annexure 'A'

¹⁷ This was recognized by the Arbitrator in par 33 of the Award. In par 34 of the Award, the Arbitrator identified that the issue for determination was whether "*Lugeldlane had notified the Parent HOA that the Development Period had ended.*" (emphasis added)

¹⁸ The correspondence was contained in annexure 'MJ4' to the respondents' statement of claim. It commenced with an email from Mr Zeelie to Mr Joubert wherein Mr Zeelie stated, *inter alia*, that " *The HOA will need to pay for the equipment and staff directly, as the development period has ended in 2018, where (sic) it was resolved as such by the HOA at their AGM.* Mr Joubert replied thereto, stating, *inter alia*, that "*Your allegations about payments after the ending of the Development Period*

to a letter addressed by Mr Zeelie to the HOA on 10 June 2021;¹⁹
(paras 17/18); and/or

- (ii) by agreement between Luggedlane and HOA that the development period was over, as recorded in clause 10 of the written 'LD agreement'²⁰ that had been entered into between Luggedlane and the HOA) (par 19); and/or
- (iii) the repudiation by Luggedlane of its obligations under the Parent HOA's articles, which repudiation the respondents alleged was indicative that the development period was over at the instance of Luggedlane (paras 14/15)

43. The applicants denied that the development period was over in their position paper. The particular pleaded bases on which the respondents alleged that the development period had ended, as set out above, were *inter alia*, disputed by the applicants in their position paper by reason of the following:

- (i) apropos the correspondence of 17 March 2021, the exchange between Zeelie and Joubert did not relate to the development period of the Parent HOA, but rather to the development period of the HOA;

are quite unfounded and show a clear misunderstanding by you of the position." Mr Zeelie in turn replied thereto, stating, *inter alia*, that "As I have it, the HOA decided at an AGM in 2018 that the development period is over. You furthermore agreed on behalf of Luggedlane and with the HOA, in writing in March 2019 that the development period is over."

¹⁹ The respondents relied on the contents of annexure 'MJ7' to their statement of claim wherein Mr Zeelie stated that the HOA "...failed to inform your members that the Development Period has ended several years ago..."

²⁰ Clause 10 reads:

"It is recorded that the development period is over." In terms of clause 2.8.8 of the LD Agreement, the 'development period' was defined as "*the Development Period as defined in the MOI.*"

- (ii) apropos the letter (and annexure thereto) of 10 June 2021, which had been addressed by the Mjejane Trust to the HOA, the letter: (i) made no reference to informing the members of the Parent HOA that the development period was over; (ii) referred to the HOA's development period as defined in its MOI, and therefore bore no relevance to the Parent HOA or the development period as defined in the Parent HOA's articles;
- (iii) apropos the LD agreement, *inter alia*, that the agreement referred to the HOA's development period and not that of the Parent HOA;
- (iv) apropos the alleged repudiation, same was denied for reasons more fully provided in paragraph 53 to 55 of the applicants' position paper.

44. In granting relief in favour of the respondents, the arbitrator did not uphold any of the pleaded bases on which the respondents alleged that the development period had ended. As regards the correspondence relied on by the respondents, he made no finding that what had been conveyed therein constituted the requisite notice to the Parent HOA.²¹ Regarding the agreement recorded in the LD Agreement, he found that the recordal in clause 10 was in relation to a definition in the HOA's MOI and not the Parent HOA's Articles;²² that the effect of the non-fulfilment of the condition precedent in the LD agreement was that Lugedlane was no longer bound by what it had recorded because '*the recordal in clause 10 did not survive the LD Agreement as a result of it failing due to the non fulfilment of the condition precedent*' and that '*the HOA may not rely on the recordal as constituting notice to the Parent HOA.*' As regards the

²¹ See par 48 of the Award. It may be noted that the arbitrator made no finding on the correspondence ground.

²² Par 38 of the Award.

repudiation ground, the Arbitrator stated that *'In light of the conclusion that I have reached regarding the notice by Luggedlane that the Development period had ended, it becomes unnecessary to consider the further claim by the HOA that Luggedlane had repudiated its obligations by abandoning the development and for that reason, the Development Period had ended, or that Luggedlane had lost its right to nominate directors to the board of directors of the Parent HOA.'*

45. Instead, the arbitrator found that the development period of the Parent HOA had ended on the basis of the conduct of Mr Willie Joubert. Under the rubric 'Subsequent Conduct', the Arbitrator relied entirely on what had emerged in the evidence of witnesses who had testified on behalf of the respondents. The arbitrator found, amongst others, that *'Mr Joubert had conducted himself such that he had signalled that it had come to an end',*²³ that *'Mr Joubert's conduct [in acting on the basis that the development period had ended] consequently constituted the requisite notification that the Development period had ended',*²⁴ and that *'Luggedlane, represented by Mr Joubert, had notified both the HOA and the Parent HOA that the Development period had ended'*²⁵
46. The applicants aver that the aforementioned basis, which was premised on the thoughts and conduct of Mr Joubert, had not been pleaded by the respondents and was thus never contemplated as a point of dispute

²³ Par 61 of the Award

²⁴ Par 55 of the Award.

²⁵ The Arbitrator reasoned that Luggedlane had notified the HOA (par 56 of Award) and that notification to the HOA amounted to notification to the Parent HOA, since both the HOA and the Parent HOA were represented by the same directors (paras 60 and 61 of the Award) and therefore *"the directors of the Parent HOA by virtue of them being also directors of the HOA, knew of the recordal in the LD Agreement as well as Mr Joubert's subsequent conduct."*

between the parties.²⁶ This was denied by the respondents in the answering affidavit on the basis that *'this was precisely what had been pleaded and this was precisely what was considered and ultimately determined by the Arbitrator.'*²⁷ The respondents further averred that factual disputes had emerged on the position papers and that the arbitrator determined those disputes *'as necessary. In the process, he determined the dispute on the basis (and within the parameters) of what had been pleaded.'*²⁸

47. Contrary to what was contended by the respondents that *'this was precisely what was pleaded'* a perusal of the position papers reveals that the respondents had indeed failed to plead the basis upon which the arbitrator had ultimately determined that the relevant development period had ended when granting relief in favour of the respondents. That the subsequent conduct of Mr Joubert, essentially premised on a tacit notification by Luggedlane to the Parent HOA that the development period was over, was *not* pleaded as a factual basis in support of the allegation that the development period had ended, permits of no dispute. Not only is this evident from the pleadings themselves, but it is also evident from

²⁶ Par 106 of the founding affidavit.

²⁷ Par 66 of the answering affidavit.

²⁸ The respondents averred in paragraph 60.3 of the answering affidavit that ***"the position papers were by no means conclusive on the matter and the parties remained entitled to adduce evidence...The Arbitrator, as he was mandated and obliged to do - determined the dispute with reference to the pleadings (or position papers) and the evidence and in the process, the Arbitrator did not determine a different dispute than the one that had been referred to Arbitration, nor did he extend or enlarge the disputes or issues."*** (emphasis added)

This statement may of course be read to mean that evidence was also allowed to be adduced, and therefore, the position papers were not conclusive. However, the latter part of the statement reflects that the respondents appreciated that the evidence adduced could not extend or enlarge the disputes or issues raised in the pleadings.

the terms of the award. In paragraph 35 of the award, the arbitrator identified and set out the three pleaded factual bases upon which the respondents averred the arbitrator ought to find that the Parent HOA's development period had ended. In paragraph 36 of the Award, the Arbitrator went on to state that: *"At the end of the Arbitration, Mr Daniels SC who appeared for the HOA...also placed reliance on Mr Joubert's conduct particularly in appointing civil contractors to determine the cost of the infrastructure on the Game Reserve as further evidence that the Development Period had ended and that the Parent HOA had been notified thereof."*

48. That then brings me to a consideration of the parties' agreed terms of reference and the parameters of the arbitrator's mandate for purposes of determining whether or not the arbitrator extended the reach of his jurisdiction. This requires an interpretative exercise according to the well-known triad of text, context and purpose.²⁹ The starting point is the parties' agreement, as recorded in paragraph 11 of the pre-arbitration minute. For convenience, I set it out again:

"It has been agreed that the Parties will exchange position papers (as opposed to formal pleadings) but reserve the right to lead evidence should they require to do so. Absent that, the position papers and the relevant documents attached to the position papers would be sufficient for the determination of the dispute. The Parties agree for the sequential exchange of position papers." (emphasis added)

²⁹ *Capitec Bank Holdings Limited and Another c Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA), par 25.

The *context* is to be found in the parties' agreement as recorded in the pre-arbitration minute, which is to be considered together with the *purpose* of the AFSA rules and the *wording* of par 11 of the minute.

49. Whilst no formal arbitration agreement was entered into, it was expressly agreed in par 9 of the parties' pre-arbitration minute that the arbitration would be governed by the AFSA commercial rules (the 'AFSA rules'). In *Close-Up Mining*,³⁰ the Supreme Court of Appeal held, *inter alia*, the following:

- (i) The AFSA rules, taken as a whole, require that the exchange of pleadings is the procedure that is to be followed by the parties to define their primary substantive disputes (par 32);
- (ii) The AFSA rules do not contemplate that a party to the arbitration may raise a substantive dispute outside of the pleadings, and that such dispute (i.e., one raised outside the pleadings) may be adjudicated by the arbitrator if he decides, on a discretionary basis, to do so (par 33);
- (iii) As the AFSA rules require the parties to raise their substantive disputes in the pleadings, if the pleadings fail to reflect the dispute adequately, then an amendment of the pleadings must be sought, and it is for the arbitrator to decide whether to permit the amendment (par 34);
- (iv) It is the parties' agreement that determines what dispute must be decided and the powers conferred upon the arbitrator to do so (par 35); It is also the agreement of the parties, taken together with acceptance by the parties of the conditions on which the arbitrator accepts appointment, that determine the jurisdiction of the arbitrator to the matters referred to arbitration (par 10)
- (v) Under the principle of party autonomy, there is no reason why the parties cannot agree to confer upon an arbitrator the competence to decide matters that have not been pleaded, under a

³⁰ Cited in fn 13 above.

discretionary competence. If the parties agree to confer upon the arbitrator a discretionary competence to decide a matter that has not been pleaded, but one that crystalizes outside of the pleadings, there is no reason why the parties' agreement should not be honoured (par 11);

- (vi) The AFSA rules point to the opposite conclusion - that no such discretionary power is conferred upon the arbitrator (par 35);
- (vii) The parties are free to include such a discretionary power in their agreement and thereby to permit the arbitrator to extend the reach of his own jurisdiction, however, in such event, the parties should ordinarily make it plain that that is what the parties intended (par 35).

50. In my view, what the parties agreed and expressed in paragraph 11 of the minute, when considered contextually and purposively, was that they would raise all their substantive disputes in the pleadings, having agreed to the exchange of pleadings as the procedure that they would follow to define their primary substantive disputes. Absent the leading of evidence to resolve disputes raised in or arising from the pleadings, the arbitrator was empowered to determine the disputes raised in the position papers by having recourse to the papers as they stand. Put differently, the parties' agreement provided for the arbitrator to determine the disputes raised in or emerging from the pleadings (position papers). This he could do by having recourse to the papers alone, or, as an aid to resolving disputes of fact emerging on the papers, after the hearing of oral evidence if the parties so required.

51. This does not mean that the leading of evidence could enlarge the scope of the disputes raised in the pleadings or the ambit of the pleadings. That

much is evident from what both parties understood and intended, as expressed in their affidavits, as demonstrated earlier in the judgment.³¹ If the parties wanted the arbitrator to determine issues that crystallized in evidence outside the scope of the pleadings, they should have said so clearly, or, in the words of Unterhalter AJA in *Close-Up Mining*, they should have '*made it plain*'. No such agreement - to extend the competence of the arbitrator to decide the disputes on the basis of what had crystallized outside the pleadings - was either expressed in or is discernible from paragraph 11 (or elsewhere in the minute). It bears mention that the respondents have not relied on nor contended for any tacit agreement that conferred upon the arbitrator the competence to decide matters that had not been pleaded.³²

52. The arbitrator accordingly did not have the discretionary power to decide issues of fact which had not been pleaded. The ineluctable conclusion therefore is that the arbitrator exceeded his powers in granting relief on the basis of a determination of an issue that arose outside of the pleadings, in oral evidence, but which he was not vested with jurisdiction to adjudicate upon.

Gross Irregularity

53. The applicants contend that the arbitrator failed to consider and adjudicate MRLP's claims for counter-relief in the arbitration and that such failure amounts to a gross irregularity within the contemplation of s 33(1)(b) of the Act.

³¹ In paras 36 to 38 above.

³² Parties can by tacit agreement enlarge the scope of the submission, however, courts are reluctant to find that there has been a tacit extension where the submission to arbitration is by written agreement. See *The Law of South Africa (LAWSA)* vol 2, third ed, par 90; *Harris v SA Aluminium Solder Co (Pty) Ltd* 1954 (3) SA 388 (N) at 391A.

54. In *Palabora*,³³ the Supreme Court of Appeal held that where an arbitrator for some reason misconceives the nature of the enquiry in the arbitration proceedings with the result that a party is denied a fair hearing or a fair trial of the issues, that constitutes a gross irregularity. But where an arbitrator engages in the correct enquiry, but errs on either the facts or the law, that is not an irregularity and is not a basis for setting aside the award.
55. Later, in *Eskom Holdings*,³⁴ the Supreme Court of Appeal held that the ultimate test of whether an arbitrator's conduct constitutes a gross irregularity is whether the conduct of the arbitrator prevented a fair trial of the issues.
56. The basic principle was laid down decades ago in *Ellis v Morgan*,³⁵ where the court held as follows:
 "But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as for example, some highhanded or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined." (emphasis added)
57. In *Sidumo*,³⁶ the Constitutional Court noted that the general principle enunciated in *Ellis v Morgan* was later qualified by Schreiner J in *Goldfields*,³⁷ as follows:

³³ *Palabora Copper (Pty) Ltd v Motlokwa Transport & Consturction (Pty) Ltd* 2018 (5) SA 462 (SCA).

³⁴ *Eskom Holdings Limited v The Joint Venture of Edison Jehano (Pty) Ltd and KEC International Limited and Others* (177/2020) [2021] ZASCA 138 (6 October 2021) at par 22.

³⁵ *Ellis v Morgan*, *Ellis v Dessan* 1909 TS 576.

³⁶ *Sidumo and Another v Rustenberg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) at paras 263-264.

"The law, as stated in *Ellis v. Morgan (supra)* has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as gross irregularity; behaviour which is perfectly well-intentioned and *bona fide*, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity."³⁸ (emphasis added)

58. The Constitutional Court further affirmed the following:

"In *Goldfields*, Schreiner J distinguished between "patent irregularities", that is, those irregularities that take place openly as part of the conduct of the proceedings, on the one hand, and "latent irregularities", that is, irregularities "that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given" by the decision-maker. In the case of latent irregularities one looks at the reasons not to determine whether the result is correct but to determine whether a gross irregularity occurred in the proceedings. In both cases, it is not necessary to show "intentional arbitrariness of conduct or any conscious denial of justice."³⁹

59. The respondents relied on cases such as *Telcordia*,⁴⁰ and *Lufuno*,⁴¹ for their submission that the application ought to be dismissed on the basis

³⁷ *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another* 1938 TPD 551 at 560..

³⁸ *Sidumo*, par 263.

³⁹ *Id*, par 264.

⁴⁰ *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at paras 85-86, where, *inter alia*, the following was said:

"The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. 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*... Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power..."

that: (i) that the applicants are disgruntled litigants that seek, in essence, a re-hearing of the same disputes and issues that were resolved and determined upon publication of the award, in circumstances where the application is, in reality, an appeal (dressed up as a review); and (ii) the court should apply the trite proposition that requires our courts to be slow to interfere in the arbitration process, as an extension of the principle that the parties' freedom to arrange their affairs, contractually, will as a rule be respected.

60. Counter-relief⁴² had been sought by both Luggedlane and MRLP in the arbitration. In their position paper, the applicants set out the factual basis in support of the counter-relief sought.⁴³ The arbitrator dismissed the relief sought by Luggedlane and MRLP in the award.

In *Telcordia*, unlike the instant case, the court found that the arbitrator had, according to the Parties' terms of reference, the power (i) not to decide an issue which he deemed unnecessary or inappropriate; (ii) to decide any further issues of fact or law, which he deemed necessary or appropriate; (iii) to decide the issues in any manner or order he deemed appropriate; and (iv) to decide any issue by way of a partial, interim or final award, as he deemed appropriate.

⁴¹ *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) at paras 26-27, where the Constitutional Court stated as follows:

"Because the courts are requested to adopt, support and trigger the enforcement of arbitration awards, it is permissible for, and incumbent on, them to ensure that arbitration awards meet certain standards to prevent injustice. In *Telcordia Technologies Inc v Telkom SA Ltd* the Supreme Court of Appeal stressed the need, when courts have to consider the confirmation or setting aside of arbitral awards, for adherence to the principle of party autonomy, which requires a high degree of deference to arbitral decisions and minimises the scope for intervention by the courts. The decision of the Supreme Court of Appeal in the present matter was informed by this principle. Resolving, for the purposes of the present case, the tension between this principle and the duty of the courts to ensure, before ordering that an arbitration award be enforced by the state, that the award was obtained in a manner that was procedurally fair, as required by section 34 of the Constitution..." (footnotes omitted)

⁴² The counter-relief which both applicants sought in the arbitration is set out above, in par 25 of the judgment.

⁴³ This was dealt with in paras 16 to 26 under the rubric "INVALID APPOINTMENT OF DIRECTORS" in the applicants' (as defendants) position paper. The allegations therein were denied by the respondents in par 1 of their rebuttal paper.

61. As far as Luggedlane was concerned, the counter-relief sought by it in prayers 2, 3 and 3.1 to 3.2 would follow consequentially upon a finding by the arbitrator that the development period had *not* ended.⁴⁴ And if the development period had *not* ended, it would follow that Luggedlane would retain *locus standi* to challenge the validity of the composition of the Parent HOA's board of directors. Conversely, a finding by the arbitrator that the development period *had* ended, would necessarily preclude Luggedlane from appointing directors to the Parent HOA's board or to challenge the validity of the appointment of those directors listed in prayer 4 of its counterclaim, since Luggedlane would no longer be a member of the Parent HOA. That would necessarily mean that Luggedlane would not be entitled to seek the counter-relief set out in prayers 4 and 5 of the applicants' position paper.
62. The same consequences would not, however, pertain to the counter-relief that was sought by MRLP in prayers 4 and 5, for the simple reason that MRLP was and remained a member of the Parent HOA and was thus vested with *locus standi* to challenge the validity of the appointment of directors of the Parent HOA's board independently of Luggedlane. Its claims therefore remained extant, irrespective of whether or not the development period had ended.
63. The respondents argue that the applicants' counterclaims were dismissed because they turned on the principal issue in dispute, namely, whether the development period was over. This, so it was contended, is because a determination that the development period was over would lead to an

⁴⁴ This is because Luggedlane would remain a member of the Parent HOA during the development period.

automatic dismissal of the relief sought in the counterclaim. The submission is correct apropos Luggedlane, but not apropos MRLP, as discussed further below.

64. The respondents further argue that it *'would make no sense for the first and second applicants' counterclaims for an award in terms of prayers 2 and 3 of the counterclaim to be dismissed and for the first applicant's claim for an award in terms of prayers 4 and 5 to be dismissed, but for it to be upheld insofar as the second applicant was concerned.'* I do not agree. The counter-relief sought in prayers 1 to 3, read with 3.1 and 3.2, clearly related only to Luggedlane. The counter-relief sought in prayer 3.3 pertained to MRLP, whilst the counter-relief sought in prayers 4 and 5 pertained to both Luggedlane - premised on a finding that the relevant development period had not ended, *and* MRLP – irrespective of a finding on whether or not the relevant development period had ended. The consequence of a finding that Luggedlane was no longer a member of the Parent HOA, was that Luggedlane was precluded from seeking or obtaining the relief in prayers 4 and 5. Such a finding had no bearing on the relief sought by MRLP in prayers 4 and 5. It follows that an outcome whereby relief is granted favour of MRLP in respect of claims 4 and 5 will lie independently from the dismissal of such claims in respect of Luggedlane. In other words, a determination that the relevant development period was over would not lead to an automatic dismissal of the counter-relief sought by MRLP in the applicants' position paper.
65. In paragraph 64 of the Award, the arbitrator recorded the parties' agreement that, in the event that he were to find that the development

period had ended, the award as sought by the respondents⁴⁵ (as set out therein) should be granted.

66. The arbitrator stated as follows in paragraph 65 of the Award:

“The parties were equally in agreement that the result of this outcome⁴⁶ would be a dismissal of the awards sought by Luggedlane regarding the validity of the appointments of directors of the Parent HOA and the ancillary relief sought by it in Prayers 4 and 5 of its Position Paper. Those prayers are accordingly dismissed with costs.” (emphasis added)

67. In their written argument, the applicants submit that while the consequences referred to by the arbitrator in paragraph 65 of the award would flow in respect of Luggedlane, entitling the arbitrator to dismiss the relief sought by Luggedlane, *‘the applicants refute that such agreement, as is referred to by the arbitrator supra, was in place in respect of MRLP. It is further argued that the reasoning which would logically apply, premised on the findings and rulings made in paragraph 64 of the award, cannot apply to MRLP’ as member of the Parent HOA with locus standi to challenge the validity of the appointment of directors to its board as it did in prayers 4 and 5 of its Position paper, independently of Luggedlane. And yet, no mention is made by the arbitrator of MRLP’s claims.’* Based on what I have earlier found, these submissions appear to me to be correct. As the award itself reflects, the relief in reconvention was said to be a dismissal of the *awards sought by Luggedlane*.

68. There was some controversy between the parties regarding the agreement referred to in paragraph 65 of the award. According to the

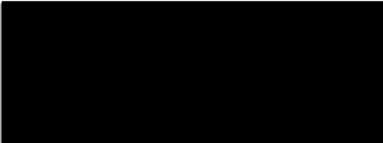
⁴⁵ Being a declarator that: (i) the Development Period in terms of the Parent HOA’s articles has ended; (ii) Luggedlane is no longer a member of the Parent HOA; (iii) Luggedlane is no longer entitled to nominate and/or appoint directors to the board of the Parent HOA; and (iv) Luggedlane is to pay the costs of the arbitration.

⁴⁶ i.e., an award in favour of the respondents in the terms set out in fn 44 above.

applicants, the record does not appear to reflect the agreement referred to by the arbitrator, nor would any inadvertent agreement by counsel bind the parties in a manner which was not reflected in either the pleadings or the minutes recording pre-arbitration agreements. If such agreement was concluded, then it would only relate to any awards sought by Luggedlane, premised upon a finding that the development period had ended. According to the respondents, their 'understanding' was that when the parties presented their arguments to the arbitrator, it was clarified that, should the arbitrator find in favour of the respondents, the counterclaims would not arise for consideration. In reply, the applicants point out that the counter-relief sought in prayers 4 and 5 of the applicants' position paper was completely separate and independent from the dispute over whether the Parent HOA's development period had ended, and would thus not have featured in any agreement reached in relation to Luggedlane.

69. In my view, it is not necessary for me to resolve that controversy. I will assume, without finding, that an agreement in the terms set out in paragraph 65 of the award was concluded. What is strikingly obvious therefrom is that the agreement ostensibly related only to the awards sought by Luggedlane.
70. That the arbitrator failed to consider MRLP's claim for counter-relief as sought in prayers 4 and 5 of its position paper is indisputable. In ignoring or otherwise implicitly dismissing MRLP's claims (conduct that may well have been 'perfectly well-intentioned and *bona fide*, though mistaken') he committed a gross irregularity in the sense conveyed by the authorities quoted above.

71. The relief sought in the main and counter-applications were incompatible or incapable of existing together, it being axiomatic that the grant of the main application would per force result in the dismissal of the respondents' counter-application (or vice versa). For all the reasons given, the main application should succeed, in consequence whereof the counter-application falls to be dismissed.
72. As regards costs, the general rule is that costs follow the result, both in respect of the main application and the counter-application. I see no reason to depart therefrom.
73. Accordingly, the following order is granted:
1. The time period provided for in section 33(2) of the Arbitration Act, 1965 (the 'Act') is hereby extended in terms of s 38 of the Act and the failure by the applicants to launch this application before the expiry of the time-period provided in section 33(2) is condoned.
 2. The arbitration award published by the fourth respondent on 15 March 2022 in respect of the arbitration conducted between the first, second and third respondents, as claimants and the applicants as defendants is hereby set aside in terms of s 33(1) of the Act.
 3. The dispute referred to arbitration between the first, second and third respondents, as claimants and the applicants as defendants is remitted for adjudication before a different arbitrator on the position papers as already exchanged and on such terms as the parties may agree to.
 4. The first, second and third respondents are to pay the costs of the application, jointly and severally the one paying the other to be absolved.
 5. The first, second and third respondents' counter-application is dismissed with costs.



**AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG**

Date of hearing: 31 January 2024
Judgment delivered 10 April 2024

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 10 April 2024.

APPEARANCES:

Counsel for Applicants:	Adv GR Eagen
Instructed by:	Du Toit-Smuts Attorneys c/o MKM Attorneys
Counsel for Plaintiff :	Adv J Daniels SC together with Adv K Reid
Instructed by:	Bowman Gilfillan Attorneys