

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

**Case No: 6577/22**

In the matter between:

**JURIE WYNAND ROUX**

Applicant

And

**UNIVERSITY OF STELLENBOSCH**

First Respondent

**AR SHOLTO-DOUGLAS SC N.O.**

Second Respondent

**CM ELOFF SC N.O.**

Third Respondent

**RETIRED JUSTICE LTC HARMS N.O.**

Fourth Respondent

**M VAN DER NEST SC N.O.**

Fifth Respondent

Consolidated by agreement with:

**Case No: 11368/15**

In the matter between:

**UNIVERSITY OF STELLENBOSCH**

Applicant

and

**JURIE WYNAND ROUX**

First Respondent

**JOHANNES CHRISTIAAN DE BEER**

Second Respondent

**Coram:** Justice VC Saldanha

**Heard:** 25 January 2023

**Delivered electronically:** 25 April 2023

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## **JUDGMENT**

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### **SALDANHA J:**

- [1] The applicant (the University) under case number 11368/2015 seeks an order against the first respondent (Mr Roux) that a final arbitration award and an arbitration appeal award (the arbitration awards) granted in its favour be made orders of court. In response, Mr Roux as the applicant under case number 6577/2022 Mr Roux, seeks the review and setting aside of the arbitration awards in terms of Section 33 of the Arbitration Act 42 of 1965 (the Arbitration Act)<sup>1</sup>.
- [2] The arbitrators found that Mr Roux had unlawfully transferred in excess of R35 million from the unrestricted reserves of the University, into four accounts under his control in its rugby club (Maties Rugby), over an extended period of ten years whilst employed in the finance department of the University of Stellenbosch. Mr Roux was ordered to repay a total amount of R37 116 402.00 as damages to the University for his unlawful expenditure of the funds of the University.

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<sup>1</sup>33 Setting aside of award (1) Where- (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or (c) an award has been improperly obtained, the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

[3] The relief under case 11368/2015 was sought in the following terms:

1. That the Final Arbitration Award and the Award and the Award of the Appeal Tribunal annexed to the Founding Affidavit and marked "C" and "D" respectively, be made an order of this Honourable Court and that in terms thereof:

1.1 The First Respondent is directed:

1.1.1 to pay the Applicant the sum of R37 116 402.00; and

1.1.2 to pay interest on the amount of R37 116 402.00 at the prescribed rate from date of service of summons commencing action, namely 23 June 2015, until payment in full.

1.2 The Second Respondent is directed:

1.2.1 to pay the Applicant the sum of R1 904 511.00;

1.2.2 to pay interest on the amount of R1 904 511.00 at the prescribed rate of interest from date of service of summons commencing action, namely 19 June 2015, until payment in full; and

1.3 In respect of the Second Respondent, it is declared, as between him and the Applicant, that the monetary order granted against the Second Respondent in the Final Arbitration Award (as referred to in para 1.2 above) falls within the ambit of section 37D(1)(b)(ii) of the Pension Funds Act No. 24 of 1956;

1.4 The First Respondent is directed to pay the Applicant's costs of suit, such costs to include the costs consequent upon the employment of two counsel;

1.5 The Second Respondent is directed to pay the Applicant's costs of the case before the arbitration hearing, and 5% of the Applicant's subsequent costs of the arbitration, such costs to include those costs consequent upon the employment of two counsel;

1.6 The First Respondent is directed to pay the Applicant's costs of the appeal, such costs to include the costs consequent upon the

employment of two counsel, and the costs of the Arbitration Appeal Tribunal;

1.7 The Second Respondent is directed to pay 5% of the Applicant's costs of opposing his appeal, including the costs consequent upon the employment of two counsel.

2. Costs of this application; and

3. Further and/or alternative relief.

[4] In respect of the second respondent, Mr De Beer, the arbitration awards were, made orders of court on an unopposed basis on the 25 April 2022.1

[5] The relief under 6577/2022 was sought in the following terms:

1. Extending, in terms of section 38 of the Arbitration Act 42 of 1965 ("the Arbitration Act") the period of six weeks for an application to review an award from 20 January 2022 until the date on which this application is issued.
2. Reviewing and setting aside in terms of section 33 of the Arbitration Act the following awards:
  - 2.1 The Final Arbitration Award of the Second Respondent, dated 23 December 2020;
  - 2.2 The Award of the Appeal Tribunal comprising of the Third to Fifth Respondents, dated 7 December 2021; and
  - 2.3 Replacing both awards with an order that the First Respondent's claim is dismissed with costs, including the costs of two counsel.
3. In the alternative to paragraph 2 above, setting aside the Award of the Appeal Tribunal and remitting the matter to a freshly constituted Appeal Tribunal for reconsideration of whether, for the reasons set out in the founding affidavit, the common law should be developed in terms of

section 39(2)<sup>2</sup> of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) and if so, whether the First Respondent’s claim should nevertheless be granted.

4. In the alternative to paragraphs 2 and 3 above, setting aside the Award of the Appeal Tribunal and the Final Arbitration Award and remitting the matter to a newly appointed arbitrator for reconsideration of whether, for the reasons set out in the founding affidavit, the common law should be developed in terms of s 39(2) of the Constitution and if so, whether the First Respondent’s claim should nevertheless be granted.
5. That the First Respondent pays the cost of this application, save that in the event that any other Respondent opposes, that such Respondent(s) be ordered liable to pay the Applicant’s costs jointly and severally, the one paying the other to be absolved, with the First Respondent.
6. Further and/or alternative relief.

[6] In respect of the application under case number 11368/2015 the respondent, Mr Roux initially opposed the application on three grounds. Firstly, he relied on the application brought under case number 6577/22 for the setting aside of the arbitration awards. He contended that if one or both of the awards were set aside, none could be made orders of this court. The second ground of opposition related to alleged differences between the awards made by the Initial Arbitrator and that made by the Appeal Tribunal. The third ground related to Mr Roux’s contention that the University had failed to comply with the provisions of Rule 41A of the Uniform Rules of Court <sup>3</sup> in that it failed to refer the matter to mediation. In the heads of argument, filed on his behalf in

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<sup>2</sup> When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

2 (a) In every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation.

(b) A defendant or respondent shall, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiff’s or applicant’s attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation.

that application, it was contended that for Mr Roux, the manner of compliance with the awards (if made orders of court) was of fundamental importance. For him, avoiding sequestration through an agreed payment plan was par excellence, a matter that could and should be mediated. It was then almost rhetorically asked 'Whether that was an option or was the University intent on sequestrating Mr Roux?'. The latter ground of opposition as well as that related to the alleged differences in the arbitration awards were abandoned at the hearing of this application. This judgement therefore deals primarily with the relief sought for the setting aside of the arbitration awards and the consequent relief under case number 11368/2015.

## **BACKGROUND (TO THE LITIGATION)**

[7] During June 2015, the University commenced action proceedings under case 11368/15 against both Mr Roux and Mr De Beer in which it claimed, amongst others, the payment of damages arising out of the breach by each of them in terms of their employment contracts with the University. On 15 May 2019, the parties agreed to arbitrate the pleaded issues and Mr AR Sholto-Douglas SC was appointed arbitrator (the Initial Arbitrator). The arbitration was heard during December 2019 and a final award was published on 23 December 2020. In respect of Mr Roux the following award was made;

- i) The first defendant (Mr Roux) is to pay the plaintiff the sum of R37 116 402;
- ii) both amounts (inclusive of the amount ordered against Mr De Beer) shall bear interest at the prescribed rate from the date of service on each of them of the summons commencing the action until payment in full;
- iii) the defendants are ordered to pay the plaintiff's costs of suit in the proportions determined on taxation, such costs to include those consequent on the employment of two counsel;
- iv) the costs of the application to recall Ms Swart are to be costs in the course.

[8] Mr Roux and Mr De Beer appealed the final award by way of an automatic right in terms of the Arbitration Agreement<sup>4</sup>, to the Appeal Tribunal that consisted of Mr CM Eloff SC, Retired Justice Harms and Mr M Van Der Nest SC. The appeal was heard on 25 and 26 October 2021 and the award of the Appeal Tribunal was published on 7 December 2021. In respect of Mr Roux the Appeal Tribunal made the following award;

”75.1 Mr Roux`s appeal against the arbitrator`s award is dismissed with costs;

75.2 Such costs are to include the costs consequent upon the employment of two counsel, and the costs of the Arbitration Appeal Tribunal<sup>5</sup>’.

## **IN LIMINE**

[9] The University raised four points *in limine* as to why Mr Roux was not entitled to the relief sought in the proceedings under case 6577/22;

- i. That Mr Roux was not entitled to condonation for the late filing of the application (outside the six-week period stipulated in section 33(2) of the Act<sup>6</sup> and in particular in respect of the setting aside of the final

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<sup>4</sup> 8.1 Any Party shall have an automatic right to appeal the final award of the Arbitrator.

<sup>5</sup> 75.3 Mr De Beer`s appeal against the arbitrator`s award succeeds to the extent that paragraph 21.7.5 of the arbitrator`s award is deleted, and substituted by the following wording:

21.7.5.1 the first defendant is ordered to pay the plaintiff`s costs of suit, such costs to include those costs consequent upon the employment of two counsel;

21.7.5.2 the second defendant is ordered to pay the plaintiff`s costs of the case before the hearing, and 5% of the plaintiff`s subsequent costs of the arbitration, such costs to include those costs consequent upon the employment of two counsel.’

<sup>6</sup>33 (2) An application pursuant to this section shall be made within six weeks after the publication of the award to the parties: Provided that when the setting aside of the award is requested on the grounds of corruption, such application shall be made within six weeks after the discovery of the

award made by the Initial Arbitrator. The University contended that Mr Roux had provided no tenable explanation for the more than 14-month delay in bringing the application. This issue will be considered after the court has dealt with the merits of the application as to whether “good cause” as required by section 38<sup>7</sup> has been demonstrated.

- ii. The second point *in limine* related to the fact that the awards had already been made orders against Mr De Beer in terms of section 31(1) of the Act. The University claimed that there was no suggestion that the orders made under case 11368/15 against De Beer were incorrectly made and that this court could not refuse to make similar orders in this application save for Mr Roux`s claim that the earlier orders by the arbitrators were wrong. The claim by the University on this point is in my view without merit as Mr Roux is entitled to a determination of this application before the award is made an order of court against him.
- iii. The third point *in limine* related to the fact that the parties had amongst themselves resolved that their disputes were to be decided by way of private arbitration and were bound by the outcome thereof. That issue forms part of the subject matter of these proceedings.
- iv. The fourth point *in limine* related to a claim by the University that after the award by the Appeal Tribunal was handed down, Mr Roux through his attorneys, by way of correspondence to the University`s attorneys acquiesced to the arbitration orders by the making of a proposal for the parties to enter into negotiations for a payment plan in respect of the awards. That contention will likewise be addressed later.

## **THE GROUNDS FOR THE SETTING ASIDE OF THE AWARDS (THE CHALLENGES)**

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corruption and in any case not later than three years after the date on which the award was so published.

<sup>7</sup> The court may, on good cause shown, extend any period of time fixed by or under this Act, whether such period has expired or not.



[10] In the founding affidavit deposed to by Mr Roux's legal representative, Mr Frederick Petrus Senegal Erasmus the grounds for the setting aside of the awards by the arbitrators as having committed gross irregularities in the conduct of the proceedings were that;

- “9.1 Finding in the context of an employment relationship, that unauthorised expenditure by an employee, within the scope of the employer's business and calculated to benefit the employer and not the employee, constitutes a loss which flows directly, naturally and generally from the breach of the employment contract and does not constitute special damages. (That was referred to as the “special damages” challenge.)
- 9.2 Finding that the employee and not the employer bears the onus to establish that a compensating benefit was received for unauthorised expenditure within the scope of the employer's business by an employee. (That was referred to as the “onus” challenge.)
- 9.3 In the alternative to subparagraphs one and two above, failing to consider whether the common law should be developed in terms of section 39(2) of the Constitution, and developing the common law by finding that special damages should have been pleaded and that the employer bore the onus to show that it did not receive a compensating benefit. (This was referred to as the “constitutional duty” challenge.<sup>8</sup>

The central challenge that the arbitrators failed to properly determine whether it was in fact the University as opposed to Mr Roux who bore the onus in respect of the proof of compensatory benefits allegedly obtained by the University as a result of the unlawful conduct of Mr Roux related to the reliance by the arbitrators on the decision of Nienaber JA on behalf of the

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<sup>8</sup> Mr Roux complied with the provisions of Rule 16A. of the Uniform Rules. Notice was given that a Constitutional issue was to be raised in the application. The wording of the Notice was based substantially on the contents of paragraph 9.1, 9.2 and 9.3 of the founding affidavit (referred to above).

majority in *Minister Van Veiligheid En Sekuriteit v Japmoco BK 2002 (5) SA 649 (SCA.)* It concerned a situation, where broadly speaking the buyer of a stolen vehicle has a contractual claim for damages against the seller for excussion but the buyer also had a delictual claim against the thief who sold the vehicle to the seller. When sued, the thief contended that the buyer's loss was reduced by payments made by the seller pursuant to the contractual claim. The judgment described the situation as;

'Dat 'n koper dus 'n kontraktuele skadevergoedingseis weens uitwinning teen sy verkoper mag hê, is opsigself geen antwoord op die koper se deliktuele skadevergoedingseis teen die dief (wat die saak aan die verkoper verkoop het) nie. Maar waar die koper wat uitgewin word óf van die dief óf van sy voorganger in titel daadwerklike betaling ontvang, ter af van sy eis ex delicto of ex contractu, na gelang van die geval, verminder dit die omvang van die skade wat hy ly end us van sy eis. Betaling of waarde ter delging of vervreemding van die vorderingsreg moet dus wel in ag geneem word. En dit is presies waar die knop, om die redes wat volg, in die onderhawige geval vir die eiser lê.'

- [11] Following on that Nienaber JA dealt with the issue of the onus in respect of the "compensatory benefit" that the buyer obtained as follows:

'[25] Die eiser se verdere betoog, dat die verweerder dit as 'n spesifieke geskilpunt moes geopper het indien hy op die terugbetalings deur Pro-fit as 'n verweer wou staatmaak, kan eweneens nie opgaan nie. Die Hof a quo het die betoog aanvaar. Ek nie. In die eerste plaas was die kwessie reeds op pleitstuk-stadium geopper. In die tweede plaas sien ek dit, andersm as die Hof a quo, nie as 'n verskyningsvorm van die algemene reël dat 'n benadeelde nie vergoeding kan verhaal wat hy redelikerwys kon vermy of verminder het nie (vgl Neethling, Potgieter en Visser aw te 228). Daardie beginsel is, net soos die res inter alios acta-beginsel, nie hier van toepassing nie. Dit gaan hier om die primêre vraag of die eiser die omvang van sy skade bewys het, nie of hy sy bewese skade redelikerwys kon beperk het nie. Waar 'n eiser, soos hier, die omvang van sy skade prima facie bewys, berus dit by die verweerder om aan te toon dat daar sekere voordele is wat die eiser toekom en wat

na regte van die skadevergoedingsbedrag afgetrek moet word (vgl Visser en Potgieter Skadevergoedingsreg te 215:

'The principle is well known that a plaintiff has the onus to prove the extent of his or her loss as well as how it should be quantified (expressed in an amount of money). However, in terms of the correct approach to the collateral source rule, it does not relate to the assessment of damage but concerns the normative question whether the particular benefits have to be deducted from an amount of damages; in other words, its relates to the adjustment of an amount of damages in favour of a defendant. It would therefore be logical to accept that, once a plaintiff has proved his or her damage and quantified such loss, any subsequent reduction thereof in favour of the defendant is a matter that the latter has to prove. ...However, if the incorrect theory is adopted that the collateral source rule relates to the assessment of damage, it will be for a plaintiff to prove that particular benefits do not reduce his or her damage (and damages).'

Word daardie feit deur die *verweerder bewys of deur die eiser erken*, maar die omvang daarvan is onseker, berus dit by die eiser, wat beter as die verweerder daartoe in staat is, om dit te kwantifiseer, ten einde te bewys wat die balans is waarop hy teenoor die verweerder op betaling geregtig is. Doen hy dit nie, altemit omdat hy hom op 'n verkeerde beginsel beroep, loop hy die risiko dat hy nie die omvang van sy skade bewys het nie. Vir sover die eiser in die onderhawige geval terugbetalings van Pro-fit ontvang het, is die vergoeding wat hom toekom dermate verminder. As daar op die getuienis nie gesê kan word in watter mate die omvang van die eiser se skade deur sodanige betalings verminder is nie, is dit nie moontlik om te bepaal wat die balans van sy eis teen die verweerder is nie. Dit het by die eiser berus, wat hy maklik kon doen, om te bewys welke betalings hy ter afbetaling van sy eis teen Pro-fit ontvang het, asook wat die samewerkingsooreenkoms presies daarvoor bepaal het. Aangesien dit nie gebeur het nie, het die eiser nie die omvang van sy skade bewys nie. Die Hof a quo moes gevolglik absolusie van die instansie beveel het, eerder as om die eiser se eis te handhaaf.' (my underlining)

In a nutshell, the plaintiff bears the onus to prove its damages on a prima facie basis. To the extent that the defendant claimed that the plaintiff obtained a benefit that must be taken into account in the overall quantification of the

plaintiff's damages, the benefit must be proved by the defendant (and therefore properly pleaded as held by the arbitrators)<sup>9</sup>, unless admitted by the plaintiff. Where the quantum of the benefit is uncertain the plaintiff is required to assist the court in the quantification of the benefit, to the extent to which the damages proved by the plaintiff must be reduced.

The "onus challenge" related to application of the decision of Nienaber AJ in the context of an employment relationship while the alternative "constitutional duty" challenge related to its development in terms of the Constitution in that context. I will revert to these issues and various ways it was contended for on behalf of Mr Roux.

- [12] In the heads of argument filed by counsel for Mr Roux, and to what counsel for the University referred to as the cornerstone of the challenges on onus, that of special damages and that based on the Constitution, it was submitted on behalf of Mr Roux that, *'it is common cause that expenditure was legitimate in the sense that it fell within the scope of the University's business and benefitted the University'*. From that premise, Mr Roux contended that a question allegedly not answered by the Appeal Tribunal was 'What is the loss if the University's funds are spent on one legitimate cause (as identified by Mr Roux rather than another?) In essence, Mr Roux contended that the impugned and admittedly unauthorised allocations (to which he conceded in these proceedings) and subsequent expenditure was incurred in the scope of

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<sup>9</sup> The initial arbitrator remarked at para 151 of the final award that it was not Mr Roux's pleaded case that his conduct caused the University to obtain some advantage from the transfers out of the University's accounts. He would, had that been his case he would have been required in accordance with rule 22(2) to have pleaded that defence.

149. Rule 22(2) provides:

'The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies (emphasis added)'. Para 150, The authors of Erasmus Superior Court Practice comment as follows regarding the underlined portion of the rule:

'What is required of the defendant is that he states the grounds of his defence with sufficient precision, and in sufficient detail to enable the plaintiff to know what case he has to meet ...In some cases, even if the defendant deals with all the allegations in the plaintiff's combined summons or declaration, his defence will not properly appear. A bare denial of the plaintiff's allegations may in certain circumstances not fully convey to the plaintiff the nature of the case he has to meet. An explanation or the qualification of a denial will, for example, be necessary where the denial is partial or where it implies some positive allegation by way of explanation upon which the defence will rest'.

the University's business and for its benefit. That being so, it was contended on behalf of Mr Roux, that in the absence of the University disproving the alleged "common cause benefits or value" received by it, the University had failed to prove that it suffered any loss.

- [13] Counsel for the University contended that the "postulate" that the expenditure was legitimate and resulted in a benefit to the University was both factually wrong and made without any proper reference to the actual awards by the arbitrators, the affidavits filed in these proceedings and to legal authority. The University contended that in considering the findings of the arbitrators, the pleaded position adopted by Mr Roux's during the trial, the disputed contentions in the answering affidavit of the University in these proceedings and Mr Roux's reply thereto, the claims that it was both common cause or proven that the expenditure was both legitimate and made in the course of the business of the University and the submissions that flowed therefrom were no more than perplexing and entirely without merit.
- [14] It is therefore necessary to consider what exactly the factual findings were of both the Initial Arbitrator and the Appeal Tribunal with regard to the issues as to whether the University obtained any benefit as a result of what had been proved to have been both the unlawful conduct on the part of Mr Roux and whether such expenditure was legitimate and in the scope of the business of the University.
- [15] In an attempt to bolster the contention that the University had in fact received a benefit as a result of the unlawful conduct of Mr Roux and that the expenditure was legitimate and made within the scope of the business of the University, his counsel filed an extensive pre-argument Note (the Note) with particular references to extracts of evidence in the affidavits filed in these proceedings, the findings by both the Initial Arbitrator and the appeal tribunal with regard to alleged benefits obtained by the University and crucially

whether the expenditure at the hand of Mr Roux was legitimate fell within the scope of the business of the University.

[16] After a careful consideration of the affidavits filed by the parties in the application with regard to these disputed contentions and after a lengthy debate with counsel for both parties at the hearing of the application it appeared that apart from the application of the common law by the arbitrators as set out in *Japmoco* (above) and the test that the Appeal Tribunal would have applied to determine whether any benefits were in fact proved, the crux of the findings by the Appeal Tribunal, on these very issues was to be found in the following paragraphs of its award under the following heading:

'The suggested 'legitimacy' of the expenditure of US's unrestricted funds

29. A component of Mr Roux's response to US's claim, albeit that it was not specifically pleaded, was that the US's funds in question had been legitimately expended from the four cost centres (referred to in paragraph 17.2 above). In particular, he said that these expenses had occurred 'in die normale gang van die Rugby Klub en sy uitgawes'<sup>10</sup>. This was, so it was argued on behalf of Mr Roux, not controverted by Mr Lombard or KPMG (i.e., a reference to Mr Waligora and his team).

'30. However, whether the expenditure of the said funds in the manner in which this had occurred would, in normal circumstances, have qualified as

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<sup>10</sup> It appeared in the heads of argument filed on behalf of Mr Roux before the appeal tribunal and attached to the founding affidavit in this application, the evidence by Mr Roux was recorded as: "...[O]ns kan honderde transaksies kry wat niks met transformasie te doen het nie want dis in die normale gang van die Rugby Klub en sy uitgawes. Ek sê weer, selfs hierdie proses een en elke keer twee rekenmeesters, twee universiteits getekenmagtigde amptenare wat een en elke keer hierdie uitgawes goedgekeur het as legitieme universiteitsuitgawes. Dit is so getuig deur KPMG en mnr Lombard het ook gesê dat hy dit nie kan betwyfel nie". [Record vol 22 pp2398/20-2399/2].

legitimate expenditure by the Rugby Club of its funds overlooks the following core points:

30.1 the allocation of the funds to the four cost centres that ultimately ended up in the funds of the Rugby Club from where they were expended, had not been budgeted or authorised. These funds could thus not have been legitimately applied in the manner they were;

30.2 therefore, the misapplication of US's unrestricted reserves for purposes other than what had been budgeted and authorised ultimately placed those funds beyond the reach of US in the sense that they could no longer apply the funds for purposes that could and would have been authorised by its Council. The funds, having been expended, were irretrievable.'

[17] I will return to this finding of the illegitimacy of the expenditure by the Appeal Tribunal later in the judgment.

[18] By way of a preliminary observation, Mr Roux's defences to the claim by the University had significantly morphed from his initial pleaded case in the arbitration proceedings from that of a bald denial to all of the central claims made against him by the University. So too did the contentions in these proceedings and in respect of the nature of the challenges to the arbitrators' awards. The arguments on Mr Roux's behalf with subtle nuance differed from the affidavits filed in these proceedings to the heads of argument filed on his behalf and from which support was sought in the Note and eventually in the oral arguments in which the postulate on which Mr Roux had based his challenges, came under severe scrutiny and criticism by the University. A further criticism made more than once by counsel for the University was that Mr Roux impermissibly sought to treat these proceedings as yet another appeal of the awards of the arbitrators. That criticism did not in my view appear to be entirely without merit.

## BACKGROUND FACTS

- [19] The evidence in the arbitration proceedings were extensively set out in the award of the Initial Arbitrator and need no more than briefly be set out for context.
- [20] The applicant, Mr Roux, a qualified accountant with a LLB degree was employed by the University in its finance department from 23 May 2004 to 30 September 2010. During the last three years of his employment he held the position of Senior Director: Finance and Asset Management and reported to a Mr Manie Lombard. Both Mr Roux and Mr De Beer held senior positions in the University's rugby club, Maties Rugby. Mr Roux held the position as treasurer and thereafter as chairperson during periods between 2002 to 2010.
- [21] The University received income from three main sources namely, state subsidies, student fees and income which included accommodation fees and from third-party income described as 'buitefondse' from private research grants, donations, bequests and from the University's commercial innovation and other similar activities<sup>11</sup>.
- [22] Some of the income, if unspent during a financial year, accumulated as part of the University's reserves. The reserves were categorised as restricted and unrestricted. The unrestricted reserves fell exclusively under the authority of the University's Council.
- [23] The essence of the University's pleaded claim against Mr Roux was that he had breached his contract of employment where, without the knowledge and authority of the University and through the use of the University's software

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<sup>11</sup> Counsel for the University pointed out that unauthorised expenditure of these public funds were of the utmost seriousness and referenced, the National Treasury guidelines that required unauthorised and irregular expenditure of public funds to be claimed from the guilty party. See, for example, National Treasury, "*Irregular Expenditure Framework*", available at <http://www.treasury.gov.za/legislation/pfma/TreasuryInstruction/AccountGeneral.aspx>.



programme that formed part of its electronic financial system, Mr Roux re-allocated funds totalling R35 120 04 from the unrestricted cost centre to four cost centres under his control (H260/1 R593/4). These funds were misapplied by him from the rugby club`s cost centres. In addition, and also in breach of his contract of employment and without authority, Mr Roux caused a further amount of R1 804 398 to have been unlawfully paid from the funds of the University to the Western Province Rugby (Pty) Ltd or the Western Province Rugby Institute (WPRI). The University claimed that it had suffered damages in the total amount of R37 116 402.00 as a result of Mr Roux`s unlawful conduct. Of particular significance was that this entire scheme conducted by Mr Roux was only discovered almost a year after he left the employment of the University in the course of auditors KPMG conducting an investigation into perceived irregularities in the student fees office.

- [24] The initial plea by Mr Roux was that of a bald denial in particular with regard to whether he has breached the terms of his contract of employment, that he had made unauthorised allocations to the four cost centres under his control and that he had in fact expended the funds. In respect of the disputed contentions the University pointed out that all of these substantive allegations made were met with bare denials by Mr Roux who had carefully avoided disclosing his defence until late in the proceedings. As a result, the University was required to have led a considerable body of evidence over a period of six weeks during the arbitration proceedings. It claimed that Mr Roux had, demonstrated a reluctance on his part to disclose his defence in his initial pleadings, which persisted even during the cross-examination of the University`s witnesses. To that extent no version was put to them on his behalf.

#### **THE FINDINGS OF THE INITIAL ARBITRATOR AND THE APPEAL TRIBUNAL**

- [25] The Appeal Tribunal identified the core issues against Mr Roux as follows:

- 25.1 the applicable terms of his contract of employment with the University.
- 25.2 whether Roux had breached his contract of employment.
- 25.3 whether such a breach had caused the University to suffer damages and if so the quantification thereof.
- 25.4 whether the expenditure from the cost centres to which Mr Roux had allocated funds was “legitimate”.

In the consideration as to whether Mr Roux had breached his employment contract both the Initial Arbitrator and the Appeal Tribunal dealt extensively with the movement of funds by Mr Roux through the University's electronic accounting system from the unrestricted reserves to that of the four cost centres of the Maties Rugby club under his control. In that context they dealt in detail with the evidence of Mr Lombard, who occupied the position of Senior Director; Finance and then that of Chief Director; Finance. Briefly stated, Mr Lombard testified about the allocation of funds from the central cost centre and the closing-of, of various budget cost centres that were available for use in the following year. He explained how the funds allocated by Mr Roux to the four cost centres in the rugby club were derived from the University's accumulated unrestricted reserves. Those allocations, Mr Lombard claimed, were despite Mr Roux's assertions to the contrary, clearly not part of his daily financial management activities. (my underlining)

- [26] Both the Initial Arbitrator and the Appeal Tribunal found that to the extent that Mr Lombard's evidence was not reconcilable with that of Mr Roux, they preferred the version of Mr Lombard. They had also found that Mr Roux had surreptitiously manipulated the University's unrestricted reserves that fell solely under the authority of the Council of the University. That, Mr Roux had made such funds available to the four cost centres under the Maties Rugby Club and then spent the funds.
- [27] During the course of the proceedings before the Initial Arbitrator, and only after the relevant evidence was already lead and proved, Mr Roux amended

his plea in which concessions were made in respect of his employment contract that had a bearing on the obligations that were alleged to have been breached by him. As a result, it was ultimately not disputed by him that in the capacities in which he had been employed by the University between 2002 and 2010 that he was obliged to have acted in a manner consistent with the University's statutes, codes, procedures and the regulations and so too, with policies and principles of the University approved by its Council. It was both proved in the initial arbitration and found that Mr Roux owed the University a duty of good faith which entailed that he was obliged not to work against its interests. Moreover, it was proved he was obliged to utilise University's assets only as and when authorised to do so and in accordance with the statutory and regulatory framework of the University. The Appeal Tribunal held that the Initial Arbitrator had correctly remarked that in the position held by Mr Roux in the University he had been placed in a position of trust where reliance on his honesty, integrity and trustworthiness were essential. In respect of the principles of financial management the University contended that it included, amongst others, at the relevant time, that the 'verkryging' and the use of money and assets of the University could only be done in terms of principles of good governance and the overall accepted practices of 'algemene aanvaarde rekeningkundige praktyk...Finansies word bestuur in terme van een geïntegreerde begroting...' (in terms of the international standard of Generally Accepted Accounting Principles, GAAP) The budget of the University was one of its central instruments in its strategic and transformational management and was based on a zero balance budgeting principle. The budget of the University was developed and determined on its long term financial plans and based on its business plan and that of its various departments. In the ultimate version of his plea the Initial Arbitrator noted that Mr Roux was not prepared to admit the governing financial management principles of the University.

- [28] In response to the claim and evidence of his lack of authority to access unreserved funds and to make them available to the four cost centres of the

rugby club Mr Roux “vaguely” claimed in his amended plea as noted by the Appeal Tribunal that he had ostensibly obtained authorisation to make the allocations (and therefore the expenditure) in furtherance of the University’s commitment to transformation from the Vice Chancellor of the University, the late Professor Russel Botman and one of the Vice Chancellor’s, Professor Julian Smith. The Appeal Tribunal endorsed the Initial Arbitrator’s swift rejection of Mr Roux’s contention and very little, if any, reliance was placed on this claim by him in the appeal.

[29] The Appeal Tribunal also noted that the plea filed by Mr Roux revealed that instead of making positive statements as to the principles of financial management that were on his version, applicable at the relevant time, he mostly contented himself with bare denials. It pointed out that with regard to questions put to Mr Roux in cross-examination, his answers failed to yield any useful responses. It noted that Mr Roux’s strategy was in various instances glaringly “evasive, consisting as it did of reams of bald denials in his ultimately amended plea. His evidence they noted was evasive, argumentative and smacked of sophism.”

[30] The arbitrators found that Mr Roux had planned these transfers methodically and then surreptitiously executed the scheme over several years by circumventing the decision making and budgeting processes of the University. He was found not to have acted in good faith and was dishonest in his conduct. The Appeal Tribunal remarked further that:

‘A considerable body of evidence was adduced on behalf of US in relation to the manner in which the components of the re-allocated funds that had derived from the unrestricted reserves were applied or rather “misapplied” by Mr Roux. This included the evidence of Mr R Waligora, which was based on a series of documents that he had prepared and that became known as “Roy1” to “Roy8”, and the detailed annexures thereto. This detailed evidence was not addressed by Mr Roux ...’

The Appeal Tribunal found that:

Some of the funds ...

- (1) found their way into Mr Roux's personal account, which he said was a repayment of amounts that had been owing by the Rugby Club to a student. It turned out that an amount that Mr Roux had arranged to be paid to this student as a bursary was in truth for rental, which was alleged to have been owing by the Rugby Club to this student, but who had no longer been a student of US;
- (2) were said by Mr Roux to have been spent on rental and food for rugby players, but which expenses had been shown in the financial statements as bursaries;
- (3) and, specifically, those in cost centre R593 were used by Mr Roux to pay for travel and subsistence, clothing, refreshments, golf balls, entertainment, and for a house dance for one of the residences.'

The finding of the Initial Arbitrator and endorsed by the Appeal Tribunal was recorded as;

"... It is not in dispute that the funds allocated to the four cost centres by Roux found their way out of the University. The fact that the correct procedures may have been followed in expending the proceeds of the allocation does not render the expenditure legitimate where the source of the expenditure is allocations made in breach of Roux's contract of employment...

... Roux was not entitled to allocate funds to the four cost centres and payments made from these cost centres did not take on a cloak of legitimacy merely because the correct procedure was followed in authorising and making subsequent payments ..."

- [31] Further, in respect of the contention by Mr Roux that the University had not established the quantum of its loss, the Appeal Tribunal dealt extensively with

that claim. The Initial Arbitrator found that the University had suffered a patrimonial loss through the unlawful allocations and expenditure as follows;

“.....But there is no invitation to indulge in speculation ... The amount of money lost to the University as a consequence of Roux’s breach, both in respect of the allocation of funds to the four cost centres and in relation to the payment required to be made to rectify the deficit in R593, is established merely by having regard to the admitted transactions [see par 36-38 of the Arbitration Award.

...It is clear from the particulars of claim that the reduction of its patrimony of which the University complains is precisely the sum allocated to the four cost centres by Roux and subsequently paid out of the University, coupled with the deficit in R593 ... The University proved a reduction in its patrimony equal to the amount of its claim in the sense that its reserves would, over the relevant period, have been greater than they were to the extent of the loss suffered.’

The Initial Arbitrator also found that Mr Roux had not pleaded that the money expended by Mr Roux had been used to acquire some asset, the value of which should be taken into account in assessing the damages. Absent that pleading and proof of the allegation it was not incumbent upon the University to prove “the nature, extent and value” of any benefit obtained as a result of the unlawful expenditure of the funds improperly allocated to the cost centres of the rugby club. I should point out though, that the “value” of the benefits related to the quantification of the damages as per *Japmoco*. The University would, if benefits were pleaded and proved have been required to have assisted the Initial Arbitrator in the quantification of the benefit.

In the heads of argument filed in the appeal (and attached to the founding affidavit) Mr Roux contended that the University had “obtained value from the expenditure of the funds which had to be taken into account in quantifying damages”. He claimed that ‘One knows that the University obtained value (and in any event the contrary was not proved by the University) because it is

not in issue that the expenditure was legitimate.” The Appeal Tribunal dealt with the contentions as follows;

- ‘37. Turning to the first leg of these submissions, once it is accepted, as we have, that the entire amount of the re-allocated funds were placed beyond the reach of US, it follows that the quantum of the US’s loss is the aggregate of the amounts that were re-allocated and expended. Little or none of that was challenged.
38. The second leg, that Mr Waligora accepted that KPMG’s quantification of funds re-allocated did not establish that it had suffered a loss, must be considered in perspective. Whilst Mr Waligora accepted in cross-examination that he and his firm had not been mandated to quantify damages, whether the results of the exercises that he and his team had performed constituted a quantification of the loss suffered by US, is a legal question. The conclusion from the findings recorded earlier herein is that US was deprived, as a result of Mr Roux’s conduct, of the entirety of the funds that he had re-allocated and were subsequently misapplied as set out earlier.
39. The quantum of US’s loss is thus the difference between the position in which US would have found itself but for Mr Roux’s conduct, and that in which it found itself in consequence thereof. This loss flowed directly, naturally and generally from Mr. Roux’s conduct and was not too remote to be recoverable as such’.

[32] Counsel for the University contended and correctly so that Mr Roux’s criticisms of how the arbitrators dealt with the issue and application of the law on patrimonial loss was demonstrative of how he impermissibly sought to “appeal” the Appeal Tribunal’s finding by use of the section 33 (1) application.

[33] The Appeal Tribunal then dealt with the issue of the onus which had been raised in contention before it by Mr. Roux. It agreed with the findings of the Initial Arbitrator in its application of the principles set out in the decision of *Japmoco*. The Appeal Tribunal states further:

‘42. In any event, an examination of the question whether US received any net value from any of the ultimate uses to which its funds was put would in our view entail both an objective and a subject test. Thus, whilst it may be so that, viewed purely objectively, some of the ultimate expenditures could have enhanced the reputation of Maties Rugby, the extent of which was not established, US did not subjectively choose to spend its funds in the manner in which they were ultimately used. Such expenditure thus occurred against its will. The arbitrator accordingly correctly found that Mr Roux had not established that the misapplication of US’s funds resulted in it having received any net value<sup>12</sup>.’

Counsel for Mr Roux sought to rely on the Appeal Tribunal’s exposition of the test as to whether the University had received any nett value from any of the ultimate uses which the funds were put to as support for their contention that there was a finding by the Appeal Tribunal that on an objective assessment, benefits had accrued to the University. Such contention flew in the face of the actual words of the appeal tribunal. The Appeal Tribunal made the point that “such ultimate expenditures could have enhanced the reputation of the Maties Club to the extent of which was not established” (my underling) More so, subjectively, the University had not chosen to spend its funds in the manner in which they were ultimately used. The exposition of this test could hardly be support for Mr Roux’s repeated and incorrect assertions that there was a finding that he had established a benefit for the University in the unlawful expenditure of the University’s funds and more so that such funds were spent in the scope of the University’s business. Counsel for Mr Roux also sought to criticise the Appeal Tribunal’s view of the test as both objective and subjective, by contending that a subjective test in the determination of whether there was a loss was wholly foreign to our law.

[34] After Mr Roux testified in the arbitration proceedings and having belatedly filed expert notices his counsel indicated that they would lead evidence with regard to the quantification of the alleged benefits derived by the University. The transcript of the record on that development in the proceedings was

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<sup>12</sup> I have included the full text of the Appeal Tribunal’s finding as it is necessary to reflect it properly.



attached to the University's answering affidavit, to which I will revert later. It showed, however, that Mr Roux had adopted and carefully considered his position and ultimately elected not to lead evidence with regard to the issue of benefits. The Initial Arbitrator remarked as follows:

"Roux gave notice of his intention to call an expert to give evidence on the financial benefit to the University in the form of the enhancement of its reputation resulting from increased television viewership of its rugby matches ... On more than once occasion... the University indicated that it would object to the introduction of such evidence on the basis that it was not foreshadowed in Roux's pleading. The matter was not pressed on behalf of Roux and no expert was called ...".

[35] In these proceedings Mr Roux did not dispute the factual findings by the Initial Arbitrator nor that of the Appeal Tribunal. He also accepted that his allocation of the funds to the various cost centres of the rugby club were unauthorised. He contended though, that the University had failed to prove that it had suffered any patrimonial loss as a result of the expenditure of the funds as he maintained that the expenditure was to the benefit of the University.

[36] Mr Roux also accepted in these proceedings that he had '*elected not to lead evidence regarding the benefits that the University received from the expenditure*'. Needless to say, his contention was that there apparently was no onus on him to do so.

[37] In the answering affidavit by the University in response to the claims made on behalf of Mr Roux that the expenditure was both legitimate and for the benefit of the University, the University pointed out:

"... it was Roux who elected not to lead evidence regarding the alleged benefits from his unauthorised expenditure of the University's unrestricted reserves (some of which, contrary to the founding affidavit, made its way into his bank account and some of which was spent on inter alia travel, clothing, refreshments, wine, golf and entertainment; see Appeal Award paragraph 27)."

and later:

“I deny that the Initial Arbitrator or the Appeal Tribunal found that the unauthorised expenditure of Roux (an employee) was calculated to benefit the University (his employer). The contrary was found (see Initial Award paragraphs 151-153, 155 and 165 – 167, and see the Appeal Award paragraphs 27 – 30 and 36.4, read with paragraphs 40 – 42).”

and finally,

“I deny in particular ... that ...’

40.2 It was Roux’s version that the funds transferred by him to cost centres H260, H261 and R593, R594 (“the four cost centres”) were used, “by the Rugby Club for legitimate ends in furtherance of its mandate, and therefore for the benefit of the University”.

40.3. There was any finding in the Initial Award that the funds were used to provide, “transformational scholarships to needy students ...”. (On the contrary, Roux’s case was initially that he had not, at all, transferred or spent the funds that were the subject of the arbitration proceedings – this proved to be false.)

40.4. Roux did not receive any of the money and/or that it was used for University business.”

[38] In respect of each of the references referred to in the answering affidavit and largely in response to the heads of argument on behalf of the University, counsel for Mr Roux as already indicated, submitted the Note and sought to point out what they regarded as inconsistencies in the University’s denial of it having received a benefit and that the expenditure was in the scope of business. The Note sought to point out that in some instances the University flatly denied that any benefits were received or that it was in the scope of the business of the University while in other instances it simply did not deal with the contentions in the answering affidavit. In its replying affidavit Mr Roux sought to point out that there was approximately R15 million that had been paid in bursaries. None of that, the University contended was either pleaded nor proved in the initial arbitration proceedings. It was also pointed out in the Note that in the replying affidavit, Mr Roux claimed that in response to a request for ‘documentation reflecting all subsidies received from the University

from government for every Maties Rugby Club player who received a bursary during the period 2003 up to the present date' the University did not deny that such subsidies were received '– it is common knowledge that they are' – but that the University had claimed that such information was not 'relevant to any matter in question as defined in the pleadings'. Counsel for Mr Roux contended that in the light of these responses and the fact that Mr Roux had no access to the Universities records it would have been impossible for him to have proved any compensatory benefits.

[39] To the extent that Mr Roux claimed that the University received a benefit by virtue of the subsidies it obtained from central government for students who had attended the University by virtue of scholarships it was unclear to this court how exactly a subsidy obtained from the national government constituted a benefit to the University.

[40] Counsel for Mr Roux in both the Note and in oral argument also sought to rely on the oral submissions of its erstwhile counsel Mr Fagan in the initial arbitration that was reflected in the transcript attached to the answering affidavit. He stated 'the objection (to the expert evidence) is because we have merely denied the allegation of damages and we haven't expanded on that. That precludes us from leading evidence as to who, what value this Rugby Club initiative and so might have had for the University...'. Mr Fagan had submitted to the Initial Arbitrator 'you know what our position is, we say there is benefits and this is a quantification of that'. That evidence was strenuously objected to by the University.

[41] It is not necessary to deal in detail with each and every claim made in the Note in support of Mr Roux's contention that it was either "common cause" or "not disputed" or in fact "found" or simply "not dealt with" by the Initial Arbitrator and the Appeal Tribunal that the expenditure was for the benefit of the University, legitimate and in the scope of its business. I am more than satisfied that on the conspectus of all of the evidence referred in these

proceedings and in particular on the actual findings made by both the Initial Arbitrator and the Appeal Tribunal that the contention that the expenditure was for the benefit of the University, inasmuch as it was not proved, or that it was legitimate and in the course of the business of the University was without merit and certainly not supported by the findings of the arbitrators. During the course of argument counsel for Mr Roux sought to suggest that the findings of the arbitrators both in the Initial Arbitration and the appeal with regard to a finding of benefits had 'come close to it'. There was in my view, hardly any support for such a tenuous contention on the papers before this court. Moreover, counsel for the Mr Roux than sought to suggest that "benefits" that accrued should be construed on the basis as he put it "at least in the sense that the expenditure was in the course of the business of the University" and added that it the really two sides of the same coin.

- [42] It was in my view clear that counsel for Mr Roux misconstrued the actual finding of the Appeal Tribunal as to whether the expenditure was legitimate and fell within the scope of the University's business. As already alluded to, the Appeal Tribunal pointed out that Mr Roux had claimed that these expenses occurred 'in die normale gang van die Rugby Klub se uitgawes'. The Appeal Tribunal pertinently found that whether the expenditure of the said funds in the manner in which it had occurred would, in "normal circumstances," have qualified as legitimate expenditure by the University of its funds overlooked the core findings referred to above (paragraphs 29-30 of the award of the Appeal Tribunal paragraph, see para 16 above). Mr Roux seemingly failed to appreciate that the Appeal Tribunal stated that 'in normal circumstances" such expenditure would have qualified as legitimate expenditure of the rugby club. Needless to say, the expenditure had not occurred in normal circumstances but had been unlawfully allocated by Mr Roux to the four cost centres and were ultimately and unlawfully expended through the accounts of the rugby club having neither having been budgeted for nor authorised by the University. The finding was unambiguous that the funds could not have been legitimately applied in the manner that they were. The Appeal Tribunal unequivocally found that the misapplication of the

University's unrestricted reserves for purposes other than that budgeted for, unauthorised and were ultimately placed beyond the reach of the University were unlawfully expended. In that sense the University could no longer apply such funds for the purposes that could or would have been authorised by its Counsel. The funds having been expended on amongst others, activities such as a house dance, beer tents at rugby matches, golf balls etc., etc. were irretrievably lost to the University. The arbitrators had moreover not made any findings that the misallocated funds were expended for the purposes of transformation. Moreover, Mr Roux had undermined the contentions made in the "postulate" by his counsel by his very pleaded case in which he denied, amongst others, not only having made any unlawful allocations but also having unlawfully expended of the funds of the University.

- [43] Counsel for the University contended that the position now adopted by Mr Roux in these proceedings should not be countenanced as he elected not to properly plead his defences and had neither had he lead the necessary evidence to support it during the initial arbitration proceedings. Inasmuch as the arbitrators found that the expenditure was not legitimate and not for the benefit of the University there was no factual basis for this court to explore the central challenge and on onus nor that of the special damages challenge or that of the "constitutional duty" challenge.

### **ARBITRATION IN SOUTH AFRICAN LAW AND THE LEGAL BASIS FOR SETTING ASIDE AN AWARD**

- [44] The application for the setting aside of the award by the Initial Arbitrator and the Appeal Tribunal arose within the context of arbitration proceedings conducted in terms of the Arbitration Act. These proceedings are distinguishable from a review under Section 33<sup>13</sup> of the Constitution in which

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<sup>13</sup> 33. (1) Everyone has the right to administrative (1) action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. (3) National legislation must be enacted to give effect to these rights, and must— Chapter 2: Bill of Rights 14 (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote an efficient administration.

the provisions of the Promotion of Administrative Justice Act 3 of 2000 are applicable. So too, although the grounds of a review in terms of Section 145(2)(a)(ii)<sup>14</sup> of the Labour Relations Act No. 66 of 1995 are similarly worded, reviews under the LRA are infused with the values of fairness as reflected in labour jurisprudence<sup>15</sup>. In effect, the basis for the setting aside of an award under the Arbitration Act are considerably narrower than either under PAJA or the LRA.

[45] Mr Roux, relied principally on Section 33(1)(b) of the Arbitration Act which provides:

‘Where-(a)...

(b) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or

(c)....’

[46] It is therefore necessary to consider the meaning of gross irregularity in the context of arbitration proceedings. The University contended that in interpreting the findings of an arbitrator there is no assumption in law that he or she knows and correctly applies the principles of our law. If an arbitrator misdirects him or herself on the law that would in itself be no reason for setting aside a finding. The Arbitration Act does not allow for review on the ground of material error of law<sup>16</sup>.

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<sup>14</sup>145(2)(a)(ii) ‘that a defect referred to in subsection (1), means: ‘a... that the Commissioner (i) committed misconduct in relation to the duties of the commissioner as an arbitrator; (ii) committed gross irregularity in the conduct of the arbitration proceedings; or....’

<sup>15</sup> See also *Herholdt v Nedbank (Cosatu as Amicus Curiae – 2013 (6) SA 224 (SCA)*.

<sup>16</sup> Ramsden: *The Law of Arbitration* (2010 reprint) 201, Harms JA in *Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA)* at para 67, following a recordal of the origins of the Act and in application to the authorities to the contention raised by the respondent in that matter ...” In any event the parties bound themselves to arbitration in terms of the Act, and if the Act, properly interpreted, does not allow a review for a material error of law, one cannot imply a contrary term. Also parties cannot by agreement extend the grounds of review as contained in the Act”.

[47] It is an accepted principle that where the legal issue is left for the decision of a functionary any complaint about her or his decision must be directed at the method and not the result. This principle was stated by Innes CJ as early as the decision in *Doyle v Shenker & Co Ltd* 1915 AD 233 where he held:

“Now a mere mistake of law in adjudicating upon a suit which the Magistrate has jurisdiction to try cannot be called an irregularity in the proceedings. Otherwise review would lie in every case in which the decision depends upon a legal issue, and the distinction between procedure by appeal and procedure by review, so carefully drawn by statute and observed in practice, would largely disappear. ...”<sup>17</sup>

[48] This principle was referred to by Harms JA in the leading decision that dealt with the setting aside of an arbitration award in *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA). It was also reaffirmed by Hoexter JA in *Administrator, South West Africa v Jooste Lithium Myne Eiendoms Bpk* 1955(1) SA 557(A) at 569B-G:

‘It cannot be said that the wrong interpretation of a regulation would prevent the Administrator from fulfilling its statutory function or from considering the matter left to it for decision. On the contrary, in interpreting the regulation the Administrator is actually fulfilling the function assigned to it by the Statute, and it follows that the wrong interpretation of a regulation cannot afford any ground for review by the Court.’

[49] In the context of arbitration proceedings Harms JA in *Telcordia* remarked:

“[50] By agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else...”

[51] Last, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in s 33(1) of the Act. By necessary

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<sup>17</sup> At 236-237;

implication they waive the right to rely on any further ground of review, 'common law' or otherwise. If they wish to extend the grounds, they may do so by agreement but then they have to agree on an appeal panel because they cannot by agreement impose jurisdiction on the court...".

[50] The deference to party autonomy was reaffirmed by O' Regan (ADCJ) for the majority in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) when litigants agree to the adjudication of their disputes by arbitration rather than through the courts such election should be respected. With regard to the raising of a constitutional point, O' Regan ADCJ held at para 237 that:

'... ordinarily the question whether a particular arbitration award should be set aside, turning as it must on the precise terms of the arbitration agreement which regulated it, will not raise a constitutional issue of sufficient substance to warrant being entertained by this Court.'

[51] The approach to proceedings under section 31(1)(b) of the Arbitration Act was considered at length by O' Regan ADCJ and the central role that fairness plays in such proceedings:

'[221] At Roman-Dutch law, it was always accepted that a submission to arbitration was subject to an implied condition that the arbitrator should proceed fairly or as it is sometimes described, according to law and justice. The recognition of such an implied condition fits snugly with modern constitutional values. In interpreting an arbitration agreement, it should ordinarily be accepted that when parties submit to arbitration, they submit to a process they intend should be fair.

O'Regan ADCJ added:

[223] Of course, as this court has said on other occasions, what constitute fairness in any proceedings will depend firmly on context.' (footnotes omitted)



After a detailed survey of the origins of the provisions in the Act and a comparative to that with international instruments and law O`Regan ADCJ concluded:

'[235] To return then to the question of the proper interpretation of section 33(1) of the Arbitration Act in the light of the Constitution. Given the approach not only in the United Kingdom (an open and democratic society within the contemplation of section 39(2) of our Constitution), but also the international law approach as evinced in the New York Convention (to which South Africa is a party) and the UNCITRAL Model Law, it seems to me that the values of our Constitution will not necessarily best be served by interpreting section 33(1) in a manner that enhances the power of courts to set aside private arbitration awards. Indeed, the contrary seems to be the case. The international and comparative law considered in this judgment suggests that courts should be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently. Section 33(1) provides three grounds for setting aside an arbitration award: misconduct by an arbitrator; gross irregularity in the conduct of the proceedings; and the fact that an award has been improperly obtained. In my view, and in the light of the reasoning in the previous paragraphs, the Constitution would require a court to construe these grounds reasonably strictly in relation to private arbitration.'

Importantly, it was also reaffirmed by the Constitutional Court in the concluding remarks of paragraph 261; '...In each case the question will be whether the procedure followed afforded both parties a fair opportunity to present their case.'

[52] Counsel for the University contended and correctly so, in my view, that it was in the sole domain of the arbitrators in this matter to determine the factual findings and the application of legal principles to those facts. The question as to whether the common law should be developed and how that development should be made was by agreement between the parties left to the arbitrators and not a court to decide. Those questions are to be distinguished from whether the arbitrators as contended for by Mr Roux, on the facts of this

matter and in the context of an employment relationship the arbitrators committed gross irregularities on the question of onus, that on the special damages challenge and in the alternative by simply having failed to consider whether the common law had to be developed in terms of section 39(2) of the Constitution<sup>18</sup>.

[53] In *Telcordia Harms* JA makes the point on which counsel for Mr Roux principally relied upon in these proceedings:

‘[69] Errors of law can, no doubt, lead to gross irregularities in the conduct of the proceedings. *Telcordia* posed the example where an arbitrator, because of a misunderstanding of the audi principle, refuses to hear the one party. Although in such a case the error of law gives rise to the irregularity, the reviewable irregularity would be the refusal to hear that party, and not the error of law. Likewise, an error of law may lead an arbitrator to exceed his powers or to misconceive the nature of the inquiry and his duties in connection therewith.’

[54] In that regard Harms JA referred to the judgments of Greenberg and Schreiner JJ in the matter of *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 551. That matter dealt with the review of a decision of a lower court

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<sup>18</sup> Counsel for the University usefully referred to a presentation delivered by Brand JA titled “JUDICIAL REVIEW OF ARBITRATION AWARD” at the University of Stellenbosch, where amongst others, he stated; ‘...It is remarkable that the advantages of arbitration are as true today as they were when Voet described them in his day. He wrote that arbitration was often resorted to for “the termination of a suit and the avoidance of a formal trial” as an alternative to the “heavy expenses of lawsuits, the din of legal proceedings, their harassing labours and pernicious delays, and finally the burdensome and weary waiting on the uncertainty of law”. His comments bring another age-old truth into sharp relief: the primary and essential value of arbitration lies in the very fact that it exists as a way of avoiding a formal trial. Indeed, the advantages of arbitration are unfailingly framed in comparison with the disadvantages of litigation, and centre on the ways in which arbitration offers a means of circumventing these.

It stands to reason, then, that these advantages are diminished, or even largely destroyed, if the courts should adopt an over-keen approach to intervene in arbitration awards. This is so because an interventionist approach by the courts is likely to encourage losing parties who feel that the arbitrator’s decision is wrong – as losing parties mostly do – to take their chances with the court. And if arbitration becomes a mere prelude to judicial review, its essential virtue is lost. There is also the argument that is wrong in principle for the courts to meddle in disputes that the parties themselves clearly chose to withdraw from them.

After all this it seems that gross irregularity in the conduct of proceedings now bears two meanings in consensual or private arbitrations, on the one hand, and LRA arbitrations, on the other hand, while in statutory arbitrations, outside the field of the LRA, the position is governed by section 6 of PAJA.

Counsel for Mr Roux appropriately pointed to the following remarks made in the paper; ‘...On the other hand, courts cannot distance themselves completely from the arbitration process. The paradox intrinsic to arbitration is that it requires the force and assistance of the very institution from which it seeks to escape”

on the statutory ground of “gross irregularity” where it held that the term gross irregularity encompassed the situation where the decision maker had misconceived the whole nature of the enquiry or his duties in connection therewith. Harms JA noted that in the light of the general acceptance of the rule, also by that court, a reconsideration of its validity did not arise. He added that did not end the enquiry because it was apparent in that matter that both the High Court and Telkom had misunderstood the rule and misapplied it. He thereupon dealt with an analysis of the case law and considered whether the arbitrator’s alleged misconceptions fell within the rule.

[55] In that regard he began with the statement of Mason J in *Ellis v Morgan*<sup>19</sup> which laid down the basic principle in the following terms;

“73. The *Goldfields Investment* qualification to the general principle was illustrated in the situations where the decision-making body misconceived its mandate, whether statutory or consensual. By misconceiving the nature of the inquiry a hearing cannot in principle be fair because the body fails to perform its mandate. In that matter the magistrate had failed to appreciate that it was required not to deal with an appeal against a property evaluation as an ordinary appeal but one that involved the terms of the ordinance which required a rehearing with evidence. The magistrate refused to conduct a rehearing and limited the inquiry to a determination of the question as to whether the valuation had been ‘manifestly untenable’. That meant that the appellant did not have an appeal hearing to which it was entitled because the magistrate had failed to consider the issue prescribed by statute. In that regard it was found that the magistrate had asked himself ‘the wrong question’, that was, a question other than that which the Act directed him to ask. In that sense the hearing was held to be unfair. It was against that setting that the words of Schreiner J had to be understood:

‘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 a gross irregularity; behaviour

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<sup>19</sup> *Ellis v Morgan*, *Ellis v Dessai* 1909 TS 576 at 581.

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. Many patent irregularities have this effect. And if from the magistrate's reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the Court's not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the inquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial. I agree that in the present case the facts fall within this latter class of case, and that the magistrate, owing to the erroneous view which he held as to his functions, really never dealt with the matter before him in the manner which was contemplated by the section. That being so, there was a gross irregularity, and the proceedings should be set aside.'

- [56] The third exception to the general rule discerned by Harms JA and relied upon by counsel for Mr Roux was that related to orders made where a jurisdictional fact was missing or put differently "a condition for the exercise of a jurisdictional fact had not been satisfied". In that regard Mr Roux contended that the failure on the part of the University to have pleaded special damages as opposed to general damages and the finding by the arbitrators of the claim having been based on no more than general damages constituted a gross irregularity in the proceedings.

[57] In considering what “the nature of enquiry” entailed in the context of a gross irregularity, the duties of the arbitrator and the scope of his/her powers Harms JA in held that:

[83] In short, the arbitrator had to (i) interpret the agreement; (ii) by applying South African law; (iii) in the light of its terms, and (iv) all the admissible evidence.’

[84] In addition, the arbitrator had, according to the 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.’

[58] Crucially, he held;

‘85. 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* – they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry. To adapt the quoted words of Hoexter JA ‘It cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision...’.

[59] In *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd* 2018 (5) SA 462 (SCA), Wallis JA considered the ground of a gross irregularity where an arbitrator misconceived the nature of the inquiry with reference to the application of the established principles referred to by Harms JA in *Telcordia* as follows:

“[8] This provision was the subject of detailed consideration by this court in *Telcordia*. It suffices to say 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. The party alleging the gross irregularity must establish it. Where an arbitrator engages in the correct enquiry, but errs either on the facts or the law, that is not an irregularity and is not a basis for setting aside an award. If parties choose arbitration, courts endeavour to uphold their choice and do not lightly disturb it. The attack on the award must be measured against these standards.”

[60] In that matter the court had to deal with the situation where a claimant was relieved of the duty to prove that it had suffered patrimonial loss. Wallis JA held as follows:

“[31] ... [I]n principle it is for the claimant to allege (as Motlokwa did), and prove, the fact of loss and the amount thereof. At a trial a failure to do so would have resulted in an order of absolution from the instance. All of this flowed from the principle that breach of contract is not in itself a wrong carrying an award of damages unless the aggrieved party has suffered patrimonial loss.

[42] The effect of the arbitrator’s rulings, especially his striking-out of paras 7.3 and 7.4 of the plea to the counterclaim, was to prevent an exploration of these issues by relieving Motlokwa of any obligation, however light evidentially, to prove that it would have performed the contract and had suffered loss as a result of being prevented from doing so. In the result, the arbitrator did not direct his mind to the central issue in the counterclaim, namely, whether Motlokwa proved that it had suffered loss and, in consequence, damages. All this was done in good faith, but the cumulative effect was to deprive Palabora of a fair trial of these issues. It follows that para D of the award cannot stand.”

[61] The unfairness in the context of that matter arose during the conduct of the proceedings from incorrect rulings on the law. Counsel for Mr Roux contended that *Palabora* was authority for the proposition that an error on onus was that described by Schreiner J in *Goldfields* where a decision maker misconceived the nature of the enquiry before him. However, in the present matter the arbitrators considered the pleaded case and facts found to be proved and applied the common law set out in *Japmoco*. Counsel for the University contended correctly that there was no error in law in the findings by the arbitrators. Moreover, onus being a matter of substantive law was for the arbitrators to apply in accordance with the common law on the facts found to be proved, which they did. The reliance by counsel for Mr Roux on the decision of *Palabora* does not in my view assist him.

[62] Reliance was also placed on the decision of the *Labour Appeal Court in Stocks Civil Engineering (Pty) Ltd v Rip NO* (2002) 23 ILJ 358 (LAC). In my view, it is not necessary to deal in any detail with the decision of Zondo J (as he then was) as the matter related specifically to the application of the provisions on a statutory onus in an unfair dismissal dispute regulated by Section 192 of the Labour Relations Act.

[63] Central to the determination as to whether the Initial Arbitrator and the Appeal Tribunal had committed a gross irregularity in the conduct of the proceedings is the question of fairness as alluded to repeatedly in the authorities referred to above. Moreover, fairness that relates to the conduct of the proceedings as opposed to fairness in a review under the Labour Relations Act. In *Lufuno Mphaphuli*, O' Regan ADCJ remarked as follows:

'198 The twin hallmarks of private arbitration are thus that it is based on consent and that it is private i.e. a non-State process. It must accordingly be distinguished from arbitration proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the Labour Relations Act 66 of 1995 which are neither consensual, in that respondents do not have a choice as to whether to participate in the proceedings, nor

private. Given these differences, the considerations which underly the analysis of the review of such proceedings are not directly applicable to private arbitrations.'

## THE CHALLENGES TO THE AWARDS

- [64] In these proceedings Mr Roux relied principally on the contention that the arbitrators had misconceived the nature of the enquiry before them. In that regard, they contended that the arbitrators had incorrectly held that based on the application of *Japmoco* in respect of the onus in the proof of compensatory benefits, that on their premise that the benefits obtained by the University were "common cause" as, " ...of deur die eiser erken" that (as per *Japmoco*) the claim of the University should have been "disabled"<sup>20</sup>.
- [65] On that score they submitted that ".....*Japmoco* is decisive, and that the University`s claim should be dismissed on the basis of the passage quoted above (with reference to what they contended was common cause,)" When eventually having to accept in argument that it was *not common cause* that the University had received a benefit from Mr Roux`s unlawful expenditure, the challenge reverted to the failure by the arbitrators to have applied the findings on onus in *Japmoco* in the context of an employment relationship where the expenditure was made in the scope of the business of the University. In that regard, the basis of the onus challenge overlapped with that of the alternative, constitutional challenge. It was contended that once Mr Roux had shown that the expenditure was made in the scope of the

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<sup>20</sup> In this regard counsel for Mr Roux placed reliance of the concurring judgment of Nugent JA in which he summarised the position of the majority judgment as follows:

'[29] ... As appears from the judgment of Nienaber JA at paras [22] ff, at least the money that is realised from the right of action in contract against the seller must be taken into account in determining whether and to what extent the respondent suffered loss. It emerged in the evidence that the respondent had received some such payments. How much he received never emerged. That alone, as Nienaber JA indicates, is sufficient to disable his claim.'

The summary, in my view does not assist him as it does not deal fully with the findings of the majority on the question of the onus of proving the compensatory benefits.



business of the University the onus to prove the benefit and its quantification reverted to the University (the notion of a “double switch” in the onus). Mr Roux would however, have had to plead that the expenditure was in the business of the University which counsel for the Mr Roux submitted would have been indicative of “the benefit” to the University in the context of an employment relationship. Mr Roux however never pleaded that the expenditure was made in the scope of the business of the University, and neither could he on the findings of the Appeal Tribunal have sustained his claim that the funds were lawfully spent “ ...in die normale gang van die Rugby Klub en sy uitgawes.” Mr Roux had been content with bald denials of not only his breach of the contract, of having made the unlawful allocations and importantly having denied the expenditure. Moreover, counsel for the University reiterated that none of these claims, despite not having been pleaded and proved was no more than a wholly impermissible attempt at re-arguing the common law and the merits of the arbitrations before this court. I share that view.

### **Was there a gross irregularity in the conduct of the arbitration proceedings?**

[66] The applicant relied on section 33(1)(b) of the Act and was therefore required to establish that there was a gross irregularity ‘in the conduct of the proceedings both in the initial arbitration and that in the appeal that resulted in him not having had a fair trial. There was nothing in the founding affidavit that suggested any irregularity in the conduct of the proceedings either in the initial arbitration nor in the appeal. Reliance was placed on the issue of fairness with regard to that of onus, the determination as to whether it was special or general damages and/or the alternative ground raised of the development of the common law. Moreover, counsel for the University pointed out that in response to the University’s denial in its answering affidavit of the claim made on behalf of Mr Roux that he had not received a fair trial, the deponent to the replying affidavit stated in response, “it is not whether the hearing was fair but whether there was a gross irregularity”. Despite the incongruity in the statement, it nonetheless demonstrated, as correctly pointed out by counsel

for the University, that Mr Roux himself, did not nor could he complain about the fairness in the conduct of the proceedings by the arbitrators.

[67] It is perhaps appropriate to consider (regrettably somewhat tediously) what actually occurred during the course of the proceedings as evidenced by that part of the record attached to the answering affidavit. The University as the plaintiff led its evidence where after Mr Roux testified. There was certainly nothing on record to indicate that that was anything irregular in the handling of the proceedings by the Initial Arbitrator up to that stage. After Mr Roux testified his counsel sought to lead expert evidence with regard to the quantification of the benefits allegedly obtained by the University as a result of the unlawful conduct of Mr Roux. His counsel informed the Initial Arbitrator that they had qualified two experts but they would seek to call only one because of a significant overlap in what they would testify about. He also informed the arbitrator that they were aware of the objection that had been raised with regard to the expert evidence. Mr Fagan stated that 'it is a pleading objection as we understand it, in other words, the objection is because we have merely denied the allegation of damages and we haven't expanded on that. That precludes us from leading evidence to show what value this Rugby Club initiative and so might have had for the University and the experts are particularly dealing with the Rugby initiative.' This was a clear indication that counsel for Mr Roux was alive to the importance of the issue on onus relating to alleged compensatory benefits. He indicated that the witness would be brief and limited in scope. Because of the time constraints, they wished to lead the evidence. He added that 'what we relinquish through this process, of course, is we relinquish the opportunity of applying to amend pursuant to a ruling that you might make that, you know, that our pleadings don't allow it but we are happy to relinquish that, and on that basis therefor we would ask that our learned friend might want to consider it overnight and discuss it with his team and come back to us tomorrow about it...'. Once again, counsel for Mr Roux accepted that they had not pleaded the basis for leading the expert evidence.

[68] The concern was also raised that the parties would still have to argue the objection. Counsel for the Mr Roux added that if the Initial Arbitrator ruled against them 'we might want to amend'. He also raised a concern that the evidence might not finish over the two days. He stated that "You know what our position is we say that there is benefit and this is a quantification of that". He added that "If you exclude that on the basis of the argument being persuaded by our learned friend's argument in their heads, of course it just falls away. We accept that." Notwithstanding that, the claims in this application? The arbitrator thereupon invited counsel for the University to respond to the proposal. He submitted that the University would not agree to the proposal as the issue of a benefit had not been raised on the pleadings. Neither had the University had the opportunity of requesting particulars to any such allegations if it had been pleaded. They had also not had the benefit of being able to engage their own expert witnesses nor had they prepared for such evidence. He contended that that any evidence by Mr Roux on the question of benefits was not admissible. He also pointed out that the very issue had been raised previously and that there was an indication from the side of Mr Roux`s counsel that the issue would be argued. The University recorded it`s objection and nothing further was persisted about it by the legal representatives on behalf of Mr Roux.

[69] In response, the Initial Arbitrator pointed out that he had hoped to deal practically with the matter and that the evidence should be led and argument on its admissibility could be deferred. If it was found to be inadmissible, it would be excised. Whilst the Initial Arbitrator appeared mindful of the difficulties that counsel for the University would have in cross-examination of the expert witness he was of the view that the proposal by Mr Roux's counsel commended itself. At the same time, he pointed out that he would not force counsel for the University into position where he had to cross-examine without the necessary preparation. The arbitrator states 'so I am in that sense promoting it but I am not finding on it at this, I will if I need to do so". In response counsel for the University submitted that they wished to address the arbitrator on the admissibility of the expert evidence the following morning.

They were not agreeable to the proposal by counsel for Mr Roux in simply leading the evidence at that stage. The discussion by the arbitrator with the parties was concluded on the basis that in the light of the objection raised, it would be argued on the following morning. The parties were thereupon given an opportunity to consider their positions.

[70] The following morning, counsel for the applicant informed the arbitrator that it did not intend to call the expert witnesses. He added 'so we are going to close our case but without abandoning our submission that the debits and credits are all part of the plaintiff's overall onus and damages. So that is the case for the first defendant'. Significantly, counsel for Mr Roux does not contend that the arbitrator should consider the question of onus based on the employment relationship in which the expenditure resulted in benefits, that the expenditure was legitimate and made in the course of the University's business. He had every opportunity of doing so, if that was the case of Mr Roux. He spurned the opportunity. There is in my view, nothing that indicates that the Initial Arbitrator had acted in any way that was unfair to any of the parties in the manner in which he handled the issue. None, was raised by either of the parties on the papers.

[71] During the course of the proceedings before this court, counsel for Mr Roux were repeatedly asked by the court as to what exactly were the procedural irregularities in the conduct of the arbitration proceedings before the Initial Arbitrator. They were unable to point out any, other than, what they contended were the gross irregularities arising from the finding of the Initial Arbitrator on the question of onus in the award and likewise that of the Appeal Tribunal. In argument, counsel for Mr Roux also sought to suggest that it was incumbent on the Initial Arbitrator at the stage that the dispute arose in relation to the leading of the expert evidence to have indicated to the parties his view or finding on the question of onus and to require of the University to lead any evidence it wished on the quantification of the benefits. In this regard, he contended, inasmuch as the Mr Roux had demonstrated that there was a benefit and that the expenditure was in the course of the business of the

University, Mr Roux had met the onus on him. That however, was not the finding that the arbitrators had reached after having considered all of the evidence and in the application of the law in the awards. To have expected of the Initial Arbitrator at that stage to have made a ruling without even having heard motivated argument on the objection raised by the University's counsel would in itself have been tantamount to an irregularity. The proposition by counsel for Mr Roux on that score was simply untenable and ill-considered.

As to the basis for the 'onus challenge' and the application of the common law per *Japmoco*, in the context of an employment relationship where the expenditure is made in the scope of the business of the employer it was contended on behalf of Mr Roux, that the "the imbalance in the employment relationship", and the risk that the University would simply be relieved of its obligation to prove its full damages and that it would be 'impossible' for an employee to prove benefits should have been taken into account by the arbitrator. On the facts of the matter it was certainly not impossible for Mr Roux to have proved benefits, if there were any. Counsel for Mr Roux contended that it would not be in the knowledge of an employee to know what the benefits are of unauthorised or unlawful expenditure. Who, in my view would have been better placed than Mr Roux in the context of this matter to know what benefit (if any) the University derived as a result of his unauthorised and unlawful expenditure of the funds of the University? It was pointed out that the University only obtained knowledge of the unlawful allocations and expenditure a year after Mr Roux's departure from the University when the investigation by KPMG occurred. The contentions by Mr Roux on these considerations is not only without any merit but contrary to what had actually occurred on the facts of this matter.

[72] In concluding the submissions made on the onus challenge, counsel for Mr Roux, in their heads of argument contended that if the position with regard to the onus to quantify the compensating benefits was unclear, the arbitrator's should not have imposed "the full onus" on the Mr Roux. Once again, they contended that it was "common cause" that there were compensating

benefits, but, added that it was not clear who carried the burden of proof in respect of quantification. In such circumstances they contended it was “most unfortunate that neither the Initial Arbitrator nor the Appeal Tribunal facilitated a quantifying exercise but rather simply decided the matter by finding that Mr Roux bore the onus.” That however was not the finding of the arbitrators on the onus in respect of quantification. Quantification simply never arose. Counsel for Mr Roux conflated the arbitration proceedings by having expected the arbitrators to have facilitated a quantifying exercise when the prescripts of *Japmoco* had not been met by Mr Roux.

[73] Before dealing with the special damages challenge I wish to refer to the submission made by counsel on behalf of Mr Roux in their heads of argument that they regarded it as “doubtful” that an employer can claim full damages for the breach of an employment contract by an employee regardless of how trivial the breach or whether the employee acted negligently or intentionally. In the course of argument counsel for Mr Roux correctly “apologised” for the breath of that submission. Although the authorities for a claim of damages for breach of contract in the employment context are sparse there is nothing in our law that prevents such a claim. Moreover, Mr Roux’s breach was neither trivial not had he claimed that he had merely acted negligently. His conducted was well planned, deliberate and executed with impunity.

[74] In respect of the question as to whether the University’s claim was one for general or special damages the Initial Arbitrator was of the view that the University’s claim was presented as one of general damages arising out of the breach by Mr Roux of his contract of employment with the University. The damages suffered by the University was that of general damages that flowed naturally and generally from the kind of breach committed by Mr Roux. In this regard the Initial Arbitrator referred to the decisions *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd* 1977 (3) SA 670 (A) at 687 and *Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal* 2008 (4) SA 111 (SCA) for the proposition that special damages arise from a breach of contract, that are ordinarily regarded in law as being too remote to

be recoverable unless, in the special circumstances attended at the conclusion of the contract, the parties actually or presumptively contemplated that such damages would result from its breach. The Initial Arbitrator was of the view that the damages suffered by the University as a result of the breach by Mr Roux of his employment contract was not of the nature ordinarily regarded as being too remote to be recoverable. Moreover, contrary to the contention by counsel for Mr Roux, the University claimed that there was nothing in the contract between the it and Mr Roux that suggested that the it had abandoned or waived its right to claim damages in favour of the right to exclusively pursue disciplinary proceedings. In this regard it was suggested by counsel for Mr Roux that the remedy available to the University was merely that of resorting to its disciplinary proceedings with the ultimate sanction of dismissal and to the extent that the University sought to have recover damages from Mr Roux it was incumbent on it to have pleaded and proved special damages. The issue of special or general damages was fully argued before the arbitrators and their finding of laws cannot be the subject of redetermination by this court. The claims in the postulate on behalf of Mr Roux that in the context of the employment relationship, where unauthorised expenditure is made by an employee within the scope of the employer business and calculated to benefit the employer constituted a loss that should have been pleaded and proved as special damages by the employer does not in my view, as with the claim on the onus challenge avail Mr Roux for the very same reasons.

Moreover, as already alluded to in *Telcordia*, Harms JA described the nature of the enquiry with reference to the mandate of the arbitrator in the arbitration agreement entered into between the parties. The fact that an arbitrator might have either misinterpreted the agreement, failed to apply South African law correctly or had regard to inadmissible evidence did not mean that he misconceived the nature of the enquiry or his duties in connection therewith". Counsel for the University correctly contended that it was wrong for Mr Roux to suggest that 'if the arbitrators erred in not requiring the University to plead special damages and erred by placing the onus of the applicant to show a

compensating benefit they misconceived the nature of the enquiry. In my view, Mr Roux was given a fair trial and the application of the common law on either that on the onus or the special damages challenge by the arbitrators did not detract from that.

## **DEVELOPING THE COMMON LAW**

[75] This challenge is raised as the alternative to that of the challenges on onus and special damages. It is nonetheless based on the same postulate as that contended for in the founding affidavit referred to earlier (para 10). At the outset when dealing with this challenge, the court is equally bound by the pleadings in the matter and the facts found by the arbitrators to have been proved. The development of the common law must take place on the facts before the court. Mr Roux accepts for the purpose of this challenge that the common law as expressed in *Japmoco* is correct. The question that arises therefore is whether the application of the common law to the pleadings and facts of this particular matter is inconsistent with the provisions of Section 39(2) of the Constitution. That, however, is not a substantive question that this court must determine but rather, whether the fact that the arbitrators had not even considered the development the common law in the matter before them amounted to a gross irregularity in the proceedings. Put differently, did the pleadings and facts raise a Constitutional issue? The Constitutional Court in the oft quoted decision on the development of the common law stated in *Carmichele v Minister of Safety & Security 2001 (4) SA 938 (CC)*;

“74. That said, each case must ultimately depend on its own facts.”

[76] In my view, the challenge by the Mr Roux that the Initial Arbitrator and the Appeal Tribunal had failed to consider the development of the common law as set out *Japmoco* and therefore committed what amounted to a gross irregularity in the proceedings, suffered from the same afflictions as that raised by Mr Roux in respect of the challenges on the onus and that on special damages. The facts found to be proved by the arbitrators and their findings that the Mr Roux had failed to prove any benefit to the University and



more importantly that the unlawful expenditure was neither legitimate nor in the scope of business of the University detracted equally from the underlying premise of Mr Roux`s challenge on this ground. Counsel for the Mr Roux in argument repeatedly referred to what they regarded as the “unchallenged claim of benefits” that accrued to the University as a result of the unlawful expenditure. They also submitted in argument that the Constitutional challenge was not dependant on whether the issue of benefits was common cause or not and neither on the legitimacy of the expenditure. It was based primarily on the claim that the expenditure by Mr Roux as an employee was made in the scope of the business of the University. As counsel put it, “on the projects of the University” and likewise relied principally on the finding of the Appeal Tribunal referred in paragraph 15 above in regard to Mr Roux`s claim that the expenditure was “in die normale gang van die Rugby Klub en sy uitgawes” for support.

[77] The nature of the plea by Mr Roux in the claims before the arbitrators where he simply denied not only the terms of the contract, its breach but also the unlawful allocations and the unlawful expenditure and the application of the common law to the issue of onus likewise detracted from a consideration as to whether a Constitutional issue arose in the matter. In short, neither the pleadings, nor the facts found to be proved by the arbitrators and the application of the common law would in my view, per se, have given rise to a consideration for the development of the common law in this matter.

[78] In the founding affidavit the deponent on behalf of Mr Roux contended that the common law was procedurally unfair because it allowed an employer to claim the entire value of the authorisation, (a) without pleading special damages and b) where the onus rests entirely on the employee to establish the compensating benefit. He contends that it was procedurally unfair because an employee cannot be expected to establish what benefits an employer received from the expenditure of its own funds and, amongst others, claimed that the failure on the part of the arbitrators to even consider whether it was necessary to develop the common law resulted in them having completely

misconceived the nature of the inquiry and that the awards should be reviewed and the matters remitted to the arbitrators.

[79] Counsel for the University correctly contended as much as the issue of the development of the common law had neither been pleaded nor raised in argument before the arbitrators and given that the principle in *Cool Ideas v Hubbard* 2014 (4) 474 (CC) (where the High Court was asked to enforce an order that was contrary to the law) was not applicable in this matter that any inquiry into a suggested constitutional inquiry would have been that for the arbitrators and not this court. The University makes the point that had the issue of the development of the common law been raised and the facts found to be different, but the decision was not to develop the common law, that finding would not have constituted a 'gross irregularity' which could be reviewed under section 33(1)(b). Inasmuch as that was within the jurisdiction of the arbitrators to decide the issue. That decision would have been binding on the parties with reference to the principle by Innes CJ, in *Doyle v Shenker*. The University and, in my view, correctly so, did not contend that the arbitrators were not empowered to have developed the common law nor to do so even if the parties themselves had not sought its development. The University contended though that the facts of this matter did not give rise to a consideration of the development of the common law and neither was the failure of the arbitrators to have done so a reviewable gross irregularity on the pleaded case and facts found by the arbitrators.

[80] In the context of an arbitration, counsel for Mr Roux submitted that the development of the common law would have no precedential effect and correctly pointed out that a vast majority of arbitration awards were private and therefore never become public. But even those that become public would not bind other courts. But that did not mean that the law should not be developed for the purposes of the arbitration in order to properly resolve the individual dispute before the arbitrator. Needless to state that dispute must be determined on the pleaded case and the facts found to be proved.

[81] It is necessary to consider whether the particular circumstances of the matter before the arbitrators should have given rise to a consideration of the development of the common law.

[82] I should point out that in the heads of argument filed on behalf of Mr Roux it was contended that the arbitrators were obliged to consider the development of the common law where ‘there is a plausible claim’ for the development. They submitted that, Mr Roux did not contend that an arbitration award could be set aside on a mere technicality that the arbitrator did not consider a constitutional claim when there was “no plausible constitutional reason to develop the common law”. That would be bizarre and open for abuse. It would lead as they correctly point out that every unsuccessful party would seek to escape an arbitration award for no substantive reason other than merely that the arbitrator had not gone through a formulaic exercise of stating that the common law did not require development. In the course, of argument, the court raised with counsel for Mr Roux as to the correctness of the standard of “plausibility” suggested by Mr Roux of a Constitutional claim. In response he accepted that mere plausibility of a Constitutional claim would be too low a standard and in that regard referred the court to *Carmichele v Minister of Safety & Security* and *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) for guidance as to when a Constitutional claim is implicated that would require of a court or the arbitrators to invoke section 39(2) of the Constitution to develop the common law. In *Carmichele* the issue that arose was of an egregiousness nature and as O’ Regan CJ stated:

[40] It was implicit in the applicant’s case that the common law had to be developed beyond existing precedent. In such a situation there are two stages to the inquiry a court is obliged to undertake. They cannot be hermetically separated from one another. The first stage is to consider whether the existing common law, having regard to the section 39(2) objectives, requires development in accordance with these objectives. This inquiry requires a reconsideration of the common law in the light of section 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the section 39(2) objectives. Possibly because of the way the case was argued before

them, neither the High Court nor the SCA embarked on either stage of the above inquiry.’

[83] In reliance on the minority dissenting judgment of Yacoob J in *Everfresh* where the court was asked to infuse the law of contract with constitutional values<sup>21</sup> and mindful that the court was there dealing with the issue of an application for leave to appeal, reliance was also placed on whether a constitutional issue was implicit in the applicant’s case that the common law had to be developed. Yacoob J, however, made the point that in the context of where a constitutional issue had not been raised before in the High Court or Supreme Court of Appeal there was no bar to considering the legal point provided that the ‘pleaded and established facts allow this without prejudice to the opposing parties<sup>22</sup>. The crucial question was thus whether it would have been unfair to determine the issue in that court on the facts pleaded and accepted by the High Court. In his view, there was no possible prejudice. For the majority Moseneke J in considering whether it was in the interest of justice to consider the grant of leave to appeal considered the nature of the Constitutional issue raised. He noted that *Everfresh’s* case had ‘indeed taken different forms in different forums and sometimes in the same forum’ and also noted a mutation in *Everfresh’s* case. Moseneke J declined to accept the invitation to adapt the common law, despite its importance and possible impact on the law of contract, ‘...inasmuch as the Shoprite would have been prejudiced having been confronted at a very late stage in the proceedings’ with the issue of the development of the common law. Had the matters been raised in good time Shoprite would have had the opportunity to meet them head on by perhaps tendering evidence or advancing new arguments or adapting their contentions. Whilst I am mindful that matter related to a

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<sup>21</sup> [23] The values embraced by an appropriate appreciation of ubuntu are also relevant in the process of determining the spirit, purport and objects of the Constitution. The development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman-Dutch law. The common law of contract regulates the environment within which trade and commerce take place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce. And it may well be that the approach of the majority of people in our country places a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone.

<sup>22</sup> (*Barkhuizen v Napier*)

determination of a Constitutional issue in the context of an application for leave to appeal in the Constitutional Court it does give an indication as when and how a Constitutional issue is implicated.

[84] In this matter the arbitrators were dealing with an employee who in his pleadings baldly denied having breached his contract with the University by having made any unlawful allocations from the University's unrestricted funds and having unlawfully expended the funds. The University carried the onus of proving the breach which it did. The University was required to prove its damages in accordance with the law, which it did and found that such damages were general in nature. Mr Roux contended that in the employment context such benefits should have been pleaded and proved as special damages and relieving the University of that onus raised a Constitutional issue. It was however not pleaded by Mr Roux that the University received any benefits arising from the unlawful allocations and unlawful expenditure. Such a contention would in any event have been wholly inconsistent with his pleaded denial of any expenditure. None, was in fact found to have been proved by the arbitrators. Mr Roux contended that the expenditure was legitimate and in the scope of the University's business. The arbitrators found to the contrary.

[85] The arbitrators found on the application of the common law Mr Roux carried the onus to plead and prove any benefits he contended for. Mr Roux contends a Constitutional issue on the question of onus arose. He contends, firstly that if the employee is unable to prove that the University obtained benefits which he claimed the University did, there was a risk that that the University would obtain a double benefit. That risk arose so he contended, as the employee, he would not know what exactly the benefits were. In context, on the facts of the matter, Mr Roux knew full well what benefits he contended the University obtained. He made the expenditure and did so consciously over a period of ten years. He qualified two expert witnesses on the quantification of the benefits which he elected not to lead. If he was able to quantify the benefits

than he knew what they entailed and could very easily have pleaded and proved such benefits. He contended though that the information with regard to the benefits were in the records of the University and he as the employee had no access to such records. He had sought discovery of the records of the University but was unsuccessful. The University refused furnishing him any, as the request was not based on his pleaded case. He moreover failed to compel the University through the use of the rules. He could hardly complain of not been able to have accessed any records. His counsel contended that an employee other than Mr Roux may not have the resources to obtain such records. That clearly did not arise in the circumstances of Mr Roux. Lastly he contended that the onus should not be on the employee to prove the benefits because there may be an ongoing relationship between the employee and employer. That claim does not strike me as any reason for the shift of the onus in the common law in the context of Mr Roux's position.

[86] Counsel for Mr Roux also contended that the common law made no distinction between employees who may have acted intentionally or negligently. It was not the pleaded case of Mr Roux that he had acted negligently. The common law cannot be developed in the abstract but on the facts of the pleaded case.

[87] Mr Roux contended that there were two reasonable claims which the arbitrators were obliged to consider and in this regard referred to two Constitutional concerns, that of an arbitrary deprivation of property in section 25(1)<sup>23</sup> and unfair labour practice in section 23(1)<sup>24</sup> of the Constitution. For the purposes of this judgment it is not necessary to deal in any detail with these contentions but to point out by way of a broad overview what they were in respect of the challenge.

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<sup>23</sup> 25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

<sup>24</sup>23. (1) Everyone has the right to fair labour practices.

1. Arbitrary deprivation of property.

The applicant contended that the common law as applied by the arbitrators constituted an arbitrary deprivation of property contrary to section 25(1) of the Constitution. They contend money is property<sup>25</sup>. A law that compels a person to pay that money to another is a deprivation<sup>26</sup>. The question turns on whether the common law, which permits the deprivation of Mr Roux's property, is arbitrary. The applicants placed reliance on the decision of *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (CC) that a deprivation is arbitrary if there is not 'sufficient reason' or if it is procedurally unfair. In considering whether there is 'sufficient reason' the Court has to consider a variety of factors, including 'the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.'

The Court must also consider 'the relationship between the purpose for the deprivation and the person whose property is affected' and "the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.'

[88] Counsel on behalf of Mr Roux contended that if an employee in breach of his employment contract restricted the employer's ability to spend its money the employee would be liable for the full amount no matter how the money was spent. The common law as per *Japmoco* required of the employee to positively prove that the funds were beneficial to the employer. However, Mr Roux like any employee who unlawfully spends money (not merely misallocates it within the accounts of the employer, as such money would still

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<sup>25</sup> *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport and Others* [2015] ZACC 15; 2015 (10) BCLR 1158 (CC) at para 16.

<sup>26</sup> *National Credit Regulator v Opperman and Others* [2012] ZACC 29; 2013 (2) BCLR 170 (CC); 2013 (2) SA 1 (CC).

be in the accounts of the employer), it is the employee who knows how the money was spent. All Mr Roux had to do was to plead how the money was spent and prove that it was for the benefit of the University. The employer carried the onus of proving its loss as the University did, and found by the arbitrators on the application of long standing legal authority. If Mr Roux had purchased any assets such as that of the of quoted example of a fork lift for the University, all he had to do was to have pleaded and proved it. There was in my view no inevitable risk of a double benefit to the University simply because Mr Roux adopted an intransigent attitude in his pleadings. Moreover, he could hardly complain that he was at any disadvantage of been able to obtain information of any such benefits he claimed the University obtained. He should and could have pleaded the benefits and fully accessed the rules of court for further any information he needed. On this score Mr Roux also complained that the common law was procedurally unfair for reasons no different than that already raised. In the light of the facts of the matter and Mr Roux`s pleaded defences it would, in my view, not have triggered a consideration by the arbitrators to develop the common law. The facts before the arbitrators did not in my view implicate an arbitrary deprivation of property and, the development of the common law was unsurprisingly not considered by them.

- [89] Counsel for the University correctly pointed out that reliance by Mr Roux on the decision in *National Credit Regulator v Opperman and Others* [2012] ZACC 29; 2013 (2) BCLR 170 (CC); 2013 (2) SA 1 (CC) was misconceived. That matter dealt with the provisions of the National Credit 34 of 2005 that impacted on the rights of a credit provided under an unlawful credit agreement. There the Constitutional Court invoked the provision of Section 25(1) of the Constitution and found the implicated provisions of the National Credit Act to be invalid. The constitutional issue in that matter was clearly implicated on its facts.

## **Unfair Labour Practice**



[90] The arbitrators found that the loss suffered by the University as result of the unauthorised expenditure was general damages as opposed to special damages notwithstanding that the claim arose in the context to an employment contract. Counsel on behalf of Mr Roux submitted that the inasmuch as the common law applied to all employment contracts, that unless the employee could prove that the employer had not suffered a loss the employee would be liable for the full amount of the loss. The contention made by Mr Roux was that the common law allowed for the claim as general damages constituted an unfair labour practice. The basis for such claim was similarly based to that in respect of the arbitrary deprivation of property on the issues of the onus and related to the alleged risk of a double benefit, the inability of an employee to prove a benefit, and that of an ongoing relationship between employer and employee. It needs no repetition that these claims in the context of Mr Roux`s circumstance was without any merit. Reliance was placed *Pretorius and Another v Transport Pension Fund and Another* [2018] ZACC 10; 2018 (7) BCLR 838 (CC); 2019 (2) SA 37 (CC). That matter was distinguishable as it dealt with a financial promise made to employees and was decided on only at the stage of exception. In my view, an unfair labour practice was hardly implicated in the circumstances of Mr Roux. As with the claim of an arbitrary deprivation of property, on the facts of this matter and the pleaded case of Mr Roux I am unable to find that the arbitrators had misconceived the nature of the inquiry by simply having failed to consider the development of the common law which resulted in any gross irregularity.

#### **THE EXTENTION OF THE SIX WEEK PERIODS AND THE CLAIM OF THE APPLICANT'S ACQUIESSENCE AND AWARDS**

[91] In the light of the strength of the University's opposition to the grounds of attack on the findings by the arbitrators against Mr Roux, I do not intend to deal in any detail with the remaining points in limine. In respect of Mr Roux's failure to bring the proceedings under 33(1) within the six week period after

the ruling of the Initial Arbitrator, Mr Roux proffered the reason that the University should have considered the Arbitration Agreement which entitled him to an automatic right of appeal. Counsel for the University pointed out that the proceedings under section 33 (1) arose within the parameters of the Act while the automatic right of appeal arose within the context of the Arbitration Agreement entered between the parties. The University contended that it was simply not good enough for Mr Roux to have adopted an almost dismissive attitude in referring the University to the arbitration agreement as an explanation for his failure to have timeously brought his section 33(1) challenge. However, as indicated during the course of the proceedings and the reasons given by Mr Roux for also not having brought application timeously after the award of the Appeal Tribunal I was sympathetically inclined to condone the lateness of the application. I was mindful that Mr Roux in respect of the late challenge to the Initial Arbitrator's award had in all probability been acting on the advice and assistance of his legal representatives. In respect of the short delay in bringing the award after the appeal tribunals award it appeared that he had been afflicted by Covid and other difficulties surrounding the December vacation period. The University also claimed that Mr Roux had acquiesced in the awards of the arbitrators. In that regard they referred to correspondence between his legal representative and that of the University in which a proposal was made for them to negotiate a payment plan of the award. It appeared from the replying affidavit that the reason why the proposals for a payment plan was made by Mr Roux was because of him having heard that there were threats to sequester him in the event that he was unable to meet the awards. Rather interestingly, that issue also arose albeit in a different context with the abandoned point on limine in regard to the issue of compliance with Rule 41(A).

- [92] If anything the concern about his possible sequestration may in all probability have in part motivated the ill-fated challenges against the awards by the arbitrators. The University, however, did not in argument pursue the issue of

the of the *bona fides* of Mr Roux that it raised in its answering affidavit. I therefore need say no more on it. However, mindful of the authority<sup>27</sup> referred to by counsel for Mr Roux in respect of the issue on acquiescence, I am prepared to accept that Mr Roux had not entirely acquiesced in the awards.

## COSTS

[93] Counsel for Mr Roux accepted that, if unsuccessful, costs should follow the course. I see no reason to depart from that principle in this matter.

## ORDER

[94] In the result the following Order is made:

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<sup>27</sup> Mogoeng CJ explained the principles governing peremption in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration 2017 (1) SA 549 (CC)*:

*“[26] Peremption is a waiver of one’s constitutional right to appeal in a way that leaves no shred of reasonable doubt about the losing party’s self resignation to the unfavourable order that could otherwise be appealed against. [Dabner v South African Railways and Harbours 1920 AD 583 at 594] articulates principles that govern peremption very well in these terms:*

*‘The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it.’*

*The onus to establish peremption would be discharged only when the conduct or communication relied on does “point indubitably and necessarily to the conclusion” that there has been an abandonment of the right to appeal and a resignation to the unfavourable judgment or order.*

...

*[28] The broader policy considerations that would establish peremption are that those litigants who have unreservedly jettisoned their right of appeal must for the sake of finality be held to their choice in the interests of the parties and of justice. But, where the enforcement of that choice would not advance the interests of justice, then that overriding constitutional standard for appealability would have to be accorded its force by purposefully departing from the abundantly clear decision not to appeal. ...”*

1. In the matter under case number 6577/2022:
  - 1.1 An extension is granted in terms of Section 38 of the Arbitration Act as well as that for the setting aside of the awards under section 33 of the Arbitration Act.
  - 1.2 The relief sought in paragraphs 2.1, 2.2 and 2.3 for the review and setting aside of the awards in terms of section 33 of the Arbitration Act is dismissed.
  - 1.3 The applicant is ordered to pay the costs of the application including the costs of two counsel, where so employed.
2. In respect of matter under case number 11368/2015 an order is made in the following terms:

That the Final Arbitration Award and the Award of the Appeal Tribunal annexed to the Founding Affidavit and marked "C" and "D" respectively, is hereby made an order of court and that in terms hereof:

- 1.1 The First Respondent is directed:
  - 1.1.1 to pay the Applicant the sum of R37 116 402.00; and
  - 1.1.2 to pay interest on the amount of R37 116 402.00 at the prescribed rate from date of service of summons commencing action, namely 23 June 2015, until payment in full.
- 1.2 relates to the second respondent.
- 1.3 relates to the second respondent.
- 1.4 The First Respondent is directed to pay the Applicant's costs of suit, such costs to include the costs consequent upon the employment of two counsel;
- 1.5 ...relates to the second respondent.

- 1.6 The First Respondent is directed to pay the Applicant's costs of the appeal, such costs to include the costs consequent upon the employment of two counsel, and the costs of the Arbitration Appeal Tribunal;
  - 1.7 ...relates to the second respondent.
3. Costs of the application including the costs of two counsel where so employed.

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**V C SALDANHA**  
**JUDGE OF THE HIGH COURT**

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**V C SALDANHA**