REPUBLIC OF NAMIBIA SPECIAL INTEREST

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2020/00147

In the matter between:

NAMIBIA ROAD PRODUCT AND SERVICES (PTY) LTD **APPLICANT**

and

THE ROADS AUTHORITY OF NAMIBIA **1ST RESPONDENT**

SCHALK BURGER **2ND RESPONDENT**

Neutral citation: *Namibia Road Products and Services (Pty) Ltd v The Roads Authority of Namibia* (HC-MD-CIV-MOT-GEN-2020/00147) [2021] NAHCMD 485 (21 October 2021)

Coram: PARKER AJ

Heard: **14 & 20 April, 24 June, and 30 August 2021**

Delivered: **21 October 2021**

Flynote: Arbitration – The award – Review of –Grounds in cases falling within s 33 (1) of the Arbitration Act 42 of 1965 – Grounds upon which court will set aside award very narrow.

Held, the word 'misconduct' not extending to bona fide mistake by arbitrator as to fact or law.

Held, gross irregularity in the conduct of the arbitration must be an irregularity so serious that it resulted in the aggrieved party not having his or her case fully and fairly determined.

Held, an arbitrator exceeds his or her powers if he or she arrogates to himself or herself powers to which he or she has no right in terms of the arbitration agreement or the Arbitration Act 42 of 1965.

Held, an arbitration award has been improperly obtained as a result of some dishonest or morally reprehensible conduct on the part of a party to the arbitration or that party's witness, because, for instance, they placed before the arbitration tribunal false evidence that is material and it influenced the arbitration tribunal in its decision.

Held, award of a dispute adjudication board (DAB) in terms of the arbitration agreement binding but not final where a Notice of Dissatisfaction of the award has been issued by any party; and the DAB award must be complied with even if disputes were referred to arbitration.

Summary: Contractor applicant entered into contract for works with first defendant employer – Contract based on the Fédération Internationale des Ingénieurs Conseils (FIDIC) as modified by the Particular Conditions of Contract – Disputes between parties referred first to a dispute adjudicating board (DAB) for adjudication in terms of the arbitration agreement – Parties issued Notices of Dissatisfaction with award – Disputes thereafter referred to arbitration – In founding affidavit applicant relying on statements and conclusions thereanent in attempt to establish that arbitrator guilty of all the stipulated prohibited acts prescribed by s 33 (1) of the Arbitration Act 42 of 1965 – Court finding that applicant failed to prove arbitrator guilty of the charges in terms of s 33 (1) of the Act – Consequently, court dismissing applicant's prayer to review and set aside the arbitration award – Court enforcing the DAB monetary award.

ORDER

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1. The application is dismissed to the following extent:
   (a) The relief that the final award of the arbitrator published on 9 March 2020 be set aside is refused.

(b) The relief that first respondent pay the costs of the arbitration proceedings is refused.

(c) The relief that first respondent pay applicant N$ 17 232 584,75 (made up of the amounts in paras 3.1, 3.2 and 3.3 of the notice of motion) is refused.

(d) The relief that 'the remaining issues….' be referred to a new arbitration tribunal is refused.

2. The application succeeds to the following extent:

First respondent shall pay to applicant N$ 4 898 294, plus interest at the rate of 20 per cent per annum calculated from 1 August 2015 to date of full and final payment.

3. There is no order as to costs.

4. The matter is finalized and removed from the roll.

JUDGMENT

PARKER AJ:

Background to the matter

[1] In the present application, applicant, represented by Mr Heathcote SC (with him Mr Schickerling), seeks an order in the following terms:

1. That the final award of the arbitrator published on 9 March 2020 is set aside.

2. That the first respondent is ordered to pay the costs of the arbitration proceedings. Such costs to include the costs of one instructing and two instructed counsel, including the costs of any expert employed by the applicant.

3. That the first respondent shall pay the following amounts to the applicant:

3.1 Payment in the amount of N$11 614 223 (in respect of steel mesh), plus interest at the rate of 20% calculated as from 8 April 2015, to date of payment.

3.2 Payment in the amount of N$428 361,75 (in respect of the items agreed between applicant's expert, Mr. Kruger, and Mr. Van der Merwe (the engineer

of the first respondents), plus interest at the rate of 20% per as from 10 March 2020, to date of payment.

3.3 Payment in the amount of N$5 190 000 (unlawfully subtracted by the engineer for penalties) plus interest at the rate of 20% per annum as from the dates the constituent parts of the amount were subtracted by the engineer, until date of payment.

3.4 Payment in the amount of N$4 898 294 (in respect of the DAB award made on 30 July 2015) plus interest at the rate of 20% per annum calculated from 1 August 2015 to date of payment.

4. That the remaining issues be referred to a new arbitration tribunal (of three) to be appointed by the President of the Law Society of Namibia, and to be determined on a basis as determined by the tribunal.

5. That the costs of this application be paid by the first respondent, including costs of one instructing and two instructed counsel.

[2] First respondent, represented by Mr J G Dickerson SC (with him Mr Patrick SC and Mr Diedericks), has moved to reject the application. The second respondent, Mr Schalk Burger SC (in his capacity as the arbitrator), does not take part in the present proceedings. In all events, no order is sought against the arbitrator.

[3] In the second half of 2012 the first respondent (the employer) entered into a contract with applicant (the contractor) whereby applicant was employed to carry out a construction project, that is, the 'upgrading to Bituminous Standard of MR 120 Okatana-Endola-Onhuno ('the project'). The papers indicate that the General Conditions of Contract ('GCC') applicable to the contract is the conditions of contract for construction for building and engineering works designed by the employer, First Edition 1999, issued by the Fédération Internationale des Ingénieurs-Conseils (FIDIC), and as bound in volume 1 of the tender documents but with additions and amendments as set out in the Particular Conditions of Contract ('PCC'). The employer undertook that the only variations from the GCC are those set out in section 4.2 of the PCC. Any such variation is taken as amplifying or modifying the

clauses of the GCC, but they do not operate as a replacement of the clauses in question, unless otherwise indicated. In effect, the PCC provisions amend the GCC provisions 'and take precedence over the General Conditions of Contract (GCC)'. The relevant provisions of the GCC and the relevant provisions of the PCC – together being the contract – should be read together and intertextually.

Orders prayed for in terms of the relief sought

[4] I shall consider the relief sought in the notice of motion under the following heads:

Item A: Para 1 of the notice of motion;

Item B: Para 2 of the notice of motion;

Item C: Para 3 of the notice of motion:

3.1;

3.2;

3.3; and

Item D: Para 3.4 of the notice of motion;

Item E: Para 4 of the notice of motion; and

Item F: Para 5 of the notice of motion

[5] I shall consider Item D first to get it out of the way.

Item D

[6] In the implementation of the contract respecting the execution of the project, disputes arose between applicant and first respondent. In terms of the contract, the parties referred the disputes to a dispute adjudication board ('DAB') for adjudication.

[7] Upon adjudication of those disputes referred to it by applicant, the DAB granted its award on 30 July 2015. The award reads, in relevant part, thus:

'43.2 Additional payment in respect of wire mesh = N$525,454.00.

43.3 Additional payment in respect of soil cement = N$21,300.00.

43.4 Additional payment in respect of benching = N$1,213,334.00.

43.5 Additional payment in respect of cut and spoil N$3,363,660.00.'

[8] The applicant now seeks an order against first respondent for the payment of the monetary award granted by the DAB, less N$525 454 (para 43.2 of the award); which comes to N$4 898 294; and which amount is due, owing and payable to applicant. What is first respondent's answer to applicant's claim respecting the DAB monetary award? Only this:

> 'Van Straten (the liquidator of applicant) alleges that the RA was required to pay the amounts the DAB found to be due. I have explained that this is not the case.
> Van Straten alleges that the RA impermissibly raised a time-bar. I have explained that NRP made new, greater-quantity same-rate claims for the first time at the final hearing. The RA permissibly raised a time bar. The arbitrator correctly upheld the time-bar – though whether the arbitrator was correct or not is irrelevant to this application.'

[9] Let us test first respondent's answer. A DAB award becomes final and binding unless a party issues within 28 days after the granting of the award a Notice of Dissatisfaction. We know that in the instant matter a Notice of Dissatisfaction was issued by the parties. In that event, the award could be challenged in arbitration. I hold that if a Notice of Dissatisfaction is served, the DAB award is binding, but not final. In practice, the result is that the benefiting party, in this matter the applicant, could seek an interim award from the arbitration tribunal to give effect to the binding DAB award. This position has received support in England in construction and technology projects. In *Peterborough City Council v Enterprise Managed Service* [2014] EWHC 3193 (TCC), the Technology and Construction Court observed that there would be nothing to prevent a court ordering specific performance of the contractual obligation. FIDIC contracts provide that the DAB award shall have legal effect and will bind the parties to the contract. If a DAB award is made it must be complied with. Arbitration tribunals or courts are wont to give effect to the contractual terms and will not allow parties to step aside from their contractual obligation. That is also the position in Namibia; see *Zillion Investment Holding (Pty) Ltd v Salz-Gossow (Pty)* Ltd 2019 (2) NR 594 (SC). The DAB award ought to have been complied with pending the arbitration. (See *Zillion* para 17.)

[10] The raison d'être of the binding nature of a DAB award is predicated upon the object of such adjudication. It is to deal effectively and expeditiously with disputes

that arise in the execution of important national and intentional complex construction and technological projects where it is critical to avoid delays in the acquisition of expensive materials and equipment needed for the execution of such projects, as is the case in the instant matter.

[11] I take note of the fact that first respondent did not challenge the DAB monetary award on the merits, as Mr Heathcote submitted. First defendant raised rather the challenge set out verbatim in para 8 above. The challenge by first respondent goes like this:

In terms of the contract, I (ie first respondent) was contractually obliged to comply with the DAB award made on 30 July 2015. I did not comply with the DAB monetary award. I did not pay then, even though I was obliged to pay so soon after 30 July 2015, since the award is binding, irrespective of whether a Notice of Dissatisfaction was issued. But now, the award became barred after 16 January 2017 when the arbitration agreement was concluded or during the arbitration.

[12] I am afraid, such a convoluted argument offends the court's sense of justice, considering what I have said in paras 8 to 10 above. It follows reasonably irrefragably that first respondent's answer should, with respect, be rejected: First respondent has no good answer – legally speaking – to resist applicant's claim under Item D. Consequently, I incline to grant the order prayed for under Item D (ie para 3.4 of the notice of motion). I now proceed to consider Item A.

Item A

Setting aside of award

[13] The basis on which a court will set aside an arbitrator's award is a very narrow one. It is only in cases which fall within the provisions of s33 (1) of the Arbitration Act 42 of 1965. When a statute, like the Arbitration Act, provides its own review grounds, those grounds are closed in the sense that no other grounds can be relied on. (*Swartbooi and Another v Mbangela NO and Others* 2016 (1) NR 158 (SC)), para 41) Thus, the grounds for setting aside the arbitrator's award are limited to those that s

33 (1) provides. (*Dickenson & Brown v Fisher's Executors* 1945 AD 166 at 174-175) And the applicant bears the onus of establishing that good grounds, that is, one or more of the grounds under s 33 (1) of the Act exists to review and set aside the award. (*Strauss v Namibia Institute of Mining* 2014 (3) NR 782 (HC) para 34)

[14] The point is crucial that the grounds on which an applicant relies to review and set aside an arbitration award must be set out in the founding affidavit as rule 65 of the rules of court demand. They cannot be found in the sanitized pages of counsel's submissions. In any case, submissions by counsel do not constitute evidence. (*Kennedy and Another v Minister of Safety and Security and Others* 2020 (3) NR 731 (HC), para 20) It is therefore to the founding affidavit that I now direct the enquiry. Lest I forget, the applicant should set out the grounds clearly. It is not the burden of the court to search through the nooks and crannies of the founding affidavit in order to identify the grounds. The question that arises is therefore plainly this. What grounds in terms of s 33 (1) of the Act has applicant placed before the court in Mr Alwyn Petrus van Straten's founding affidavit that runs into 43 pages and covers 129 solid paragraphs?

[15] Having carefully trawled through the founding affidavit, this emerges: The grounds on which applicant relies are set out in the statements upon which conclusions are drawn relating to one or more (at the same time) of the stipulated prohibited acts mentioned in s 33 (1) of the Arbitration Act. The result is that applicant relies on all the grounds under the sun of s 33 (1). That being the case, I shall interpret all the paragraphs in s 33 (1). Thereafter, I shall apply the interpretation to the statements in the founding affidavit, which are set out verbatim from paras 33 to 50 below in relation to the individual orders sought.

[16] I should pinch myself from time to time to remind me that the instant matter concerns a review as opposed to an appeal. That being the case, I shall apply the interpretation of s 33 (1) (a), (b) and (c) to the statements relied on by applicant for the relief sought in order to decide whether applicant has satisfied the court that good grounds exist to review and set aside the arbitration award. (See *Christian v Metropolitan Life Namibia Retirement Authority Fund and Others* 2008 (2) NR 753 (SC), para 15.)

[17] Indeed, as I have said previously, applicant bears the onus of persuading the court to review and set aside the arbitration award. In terms of s 33 (1) of the Arbitration Act, the good grounds that applicant must show exist rest squarely on the stipulated prohibited acts mentioned in s 33 (1) (a), (b) and (c). And what is more; grounds connote the reasons why applicant avers the arbitrator is 'guilty' of those acts. (See *S v Gey Van Pittius and Anothe*r 1990 NR 35 (HC) 36F-G.)

[18] In that regard, it is important to reiterate and signalize this crucial point. The clear wording of s 33 (1) confines reviews to the stipulated categories of prohibited acts; and, it is therefore only those categories of prohibited acts that this court is competent to give effect to: See *Swartbooi and Another v Mbangela NO and Others*, loc cit, where the Supreme Court considered the categories of defects stipulated by s 85 of the Labour Act 11 of 2007 to which reviews under that Act are confined. Thus, reviews under s 33 (1) of the Arbitration Act, too, must by a parity of reasoning be confined to the categories of prohibited acts stipulated in s 33 (1). I shall therefore confine the enquiry respecting para 1 of the notice of motion to those categories of prohibited acts only.

[19] It is to the interpretation of paras (a), (b) and (c) of s 33 (1) of the Arbitration Act that I now direct the enquiry. I start with para (a).

<u>Where any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire</u>

[20] The courts have interpreted 'misconduct' more narrowly. In *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 175-176, applied by the court in *Strauss v Namibia Institute of Mining* 2014 (3) NR 782 (LC), para 32, the Appellate Division of the Supreme Court of South Africa, when interpreting a similar provision in South African legislation, stated (per Solomon JA):

'Now I do not propose to attempt to give any definition of the word "misconduct," for it is a word which explains itself. And, if is used, in its ordinary sense, I fail to see how there can be any misconduct unless there has been some wrongful or improper conduct on the part of the person whose behaviour is in question …. Now if the word misconduct is to be construed in its ordinary sense it seems to me impossible to hold that a *bona fide* mistake

either of law or of fact made by an arbitrator can be characterised as misconduct, any more than that a Judge can be said to have misconducted himself if he has given an erroneous decision on a point of law …. Cases may no doubt arise where … "the mistake is so gross or manifest that it could not have been made without some degree of misconduct or partiality on the part of the arbitrator" … But in ordinary circumstances where an arbitrator has given fair consideration to the matter which has been submitted to him for decision, I think it would be impossible to hold that he had been guilty of misconduct merely because he had made a bona fide mistake either of law or of fact.'

[21] In *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun* (Pty) Ltd 1994 (1) SA 162 (A), the Appellate Division of the Supreme Court of South Africa, approving *Donner v Ehrlich* 1928 WLD 159 at 161, held that even a gross mistake whether as to fact or law, unless it establishes mala fides or partiality, would be insufficient to warrant interference by the reviewing court. In *Donner v Ehrlich* at 160-1 'misconduct' was interpreted to mean dishonesty or mala fide conduct on the part of the arbitrator. The *Donner v Ehrlich* interpretation of misconduct was approved by the Supreme Court in *Atlantic Chicken Company (Pty) Ltd v Philip Mwandingi and Another* 2014 (4) NR 915 (SC), para 37, where Damaseb DCJ (writing a unanimous judgment) stated: 'There is a line of authority which holds that arbitrator "misconduct" connotes malice and dishonesty.' The Supreme Court was interpreting a similar provision in s 89 of the Labour Act 11 of 2007; but I see no good reason why that interpretation should not apply to s 33 (1) of the Arbitration Act.

[22] Thus, 'misconduct' is used in its ordinary sense; and so, an arbitrator can only be said to have misconducted himself if there has been 'some wrongful or improper conduct' on his part. (David Butter and Eyvind Finsen *Arbitration in South Africa* (1993) at 293; and the authorities there cited) The learned authors, relying on *Dickenson & Brown v Fisher's Executors* 1915 AD166, at 176, wrote at 293:

'Our courts have consistently taken the view that a *bona fide* mistake by the arbitrator in reaching his conclusion on the merits of the dispute, whether on the law or the facts, and irrespective of whether the mistake appears from the award or not, is not a basis for setting aside an award as misconduct or some other ground.'

[23] Thus, the fact that the arbitrator misdirected himself or herself on the law or fact is not in itself a ground for reviewing and setting aside the arbitrator's award based on misconduct where a charge of bad faith or failure of natural justice or unfairness is not proved.

Where an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings

[24] On gross irregularity, Ueitele J in *Strauss v Namibia Institute of Mining* stated:

'[35] The term 'gross irregularity' has been discussed in a number of reported cases (South African) which I find persuasive. In the case of *Bester v Easigas (Pty) Ltd and Another*, Brand AJ said (at 42I/J-43C):

> "From these authorities it appears, firstly, that the ground of review envisaged by the use of this phrase [ie gross irregularity] relates to the conduct of the proceedings and not the result thereof….
>
> "But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result but to the method of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party form having his case fully and fairly determined."
>
> 'Secondly it appears from these authorities that every irregularity in the proceedings will not constitute a ground for review on the basis under consideration. *In order to justify a review on this basis, the irregularity must have been of such a serious nature that it resulted in the aggrieved party not having his case fully and fairly determined.'*

[Emphasis in original passage]

[25] It has been held that a gross irregularity need not involve malice, bribery or dishonesty; and that not every irregularity committed by an arbitrator meets the standard of gross irregularity; it is essential that the irregularity causes prejudice. The irregularity must be of a kind that results in a negation of a fair trial. (*Atlantic Chicken Company (Pty) Ltd v Philip Mwandingi and Another*, para 38) The matter there was in terms of s 89 of the Labour Act 11 of 2007; but I see no good reason why that interpretation should not be applicable to s 33 (1) of the Arbitration Act.

[26] Thus, the fact that an arbitrator misdirected himself or herself on the law or fact is not in itself a ground for reviewing and setting aside his or her award based on

misconduct or gross irregularity, unless a charge of bad faith or failure of natural justice is established.

Where the arbitrator has exceeded its powers

[27] The arbitrator exceeds his or her powers, if he or she arrogates to himself or herself powers to which he or she has no right in terms of the arbitration agreement or the applicable legislation; in the instant matter, the Arbitration Act. (David Butter and Eyvind Finsen *Arbitration in South Africa Law and Practice,* ibid at 294; and the case there cited) The Legislature says what it means in its choice of words in the relevant part of para (b) of s 33 (1) of the Arbitration Act.

[28] The language there is clear and unambiguous in its literal and grammatical meaning by context: The language of the provisions gives the relevant part of subpara (b) of s 33(1) under consideration sense and meaning by context; and so, the doctrine of ultra vires or any suchlike doctrine should not be added by implication into the language of the part in question of para 33 (1) of the Act. (*Rally for Democracy and Progress v Electoral Commission* 2009 (2) NR 793 (HC) at 797F-G) And what is more, in England and South Africa the ultra vires doctrine is taken to cover all grounds of review which have occurred with the way power is exercised. (Lawrence Baxter *Administrative Law* (1984) at 307-312 *passim*) To bring the discussion home; the ultra vires doctrine can be taken to cover all the grounds for review presented by s 33 (1); but the Legislature in its wisdom chose to prescribe separate and complete grounds in each of paras (a), (b) and (c). It follows reasonably that the clause 'Where an arbitration tribunal has exceeded its powers' bears the meaning I have given above.

Where an award has been improperly obtained

[29] The first crucial point to make is this. In para (c) of s 33 (1), the Legislature uses words which are polar apart from the words used in, for instance, the provisions of rule 44 (1) (a) of the rules of court. Rule 44 provides:

'(1) The court may, in addition to any other powers it may have mero motu or upon the application of any party affected, rescind or vary-

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) ……;

(c) …….'

[30] But in s 33 (1) of the Arbitration Act, the Legislature provides that 'the court may … make an order setting the award aside' where –

'(c) an award has been improperly obtained'.

[31] The Supreme Court has interpreted those provisions of rule 44 (1) of the rules of court in *De Villiers v Axiz Namibi*a 2012 (1) NR 48 (SC). I mention the case only to make the point that the principles there enunciated are inapplicable to the interpretation of s 33 (1) (c) of the Arbitration Act. In my view, the width of the wording of s 33 (1) (c), considered intertextually with the rest of the provisions of s 33 (1) of the Arbitration Act, indicates clearly that an award is improperly obtained as a result of some dishonest or morally reprehensible conduct on the part of a party to the arbitration or that party's witness, because, for instance, they placed before the arbitration tribunal false evidence that is material and it influenced the arbitration tribunal in its decision. (*Van Schalwyk v Vlok* 1914 CPD 999 at 1000)

[32] Applicant puts forth, as I have said previously, a series of statements in the founding affidavit, followed by a conclusion that this or that stipulated prohibited act in terms of s 33 (1) has taken place in applicant's attempt to establish, in that regard, that good grounds exist in terms of s 33 (1) of the Arbitration Act to review and set aside the arbitration award. Taking a cue from the way the relevant statements and the conclusions thereanent are presented in the founding affidavit, I shall set out verbatim those statements and their accompanying conclusions. The statements and their accompanying conclusions are followed by the court's determination as to whether they constitute good grounds to review and set aside the arbitration award in terms of any of paras (a) to (c) of s 33 (1) of the Arbitration Act by recalling the interpretation I have put on those paragraphs, above. That is the manner in which I determine para 1 of the notice of motion under Item A.

[33]

‘32. The RA also pleaded that NRP’s claim for steel mesh was time barred. Dealing with this important issue, the arbitrator asked. “Is this a claim one for “additional payment” in terms of PCC 20. 1? And if so, has notice been given?”

‘33. The arbitrator then held that no notice in terms of PCC20.1 was required from NRP, as it did not seek and extension of time nor “additional payment” because the rate of N$890/kg was included in the schedule of quantities. He did so with reference to authority. Therefore, the NRP could have this dispute resolved without having to give notice of such a claim in terms of clause 20 of FIDIC. The arbitrator held that such a claim could not be time barred as it could be resolved through PCC20.4 which reads.

(“20.4 if a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision …”)

‘34. This was a very important finding by the arbitrator. It resolved the following issue between the parties; PCC20.1 only finds application when a claim is for additional payment or an extension of time. If an item is included in the Bill of Quantities (also referred to as the Schedule of Quantities) at a specific area, then – if a bigger quantity of that item is used as a result of a variation order being given by the employer, or its engineer -, them such a claim is not for additional payment. It is simply a matter of multiplying the quantity used by the rate agreed upon.

‘35. However, despite finding that N.RP,’s claim for steel mesh was not time barred because it was not a claim for “additional payment”, the arbitrator nevertheless dismissed the NRP’s claim. The arbitrator, however, did not dismiss NRP’s claim for steel mesh based on any defence pleaded by the RA. The arbitrator simply, unilaterally and without it being pleaded by the RA, found that “the parties did not contemplate the rate of N$890.00”. But it was contemplated. The contract said so. In doing so the arbitrator committed a gross irregularity in the conduct of the proceedings by holding against NRP on by the pledging by holding against NRP on an issue of steel mesh. The arbitrator said on many occasions he was bound by the pleadings. However, not this time.’

[34] Based on the foregoing statements, applicant concludes that ‘the arbitrator committed a gross irregularity in the conduct of the proceedings by holding against NRP on the issue of steel mesh’. At best the decision complained of may be a ground of appeal, as Mr Dickerson appeared to submit; and at worst there is nothing in the statement that can establish a charge of irregularity in the conduct of the proceedings (see paras 24-26 above). The ‘phrase [ie gross irregularity] relates to

the conduct of the proceedings and not the result'. (*Strauss v Namibia Institute of Mining*, para 35) The charge of a gross irregularity remains unproved; and so, there is no proved ground to review and aside the arbitration award.

[35]

'59. It was indeed common cause between the parties that RA was not entitled to set off or deduct the "established" amount.

'60. Any set off or deduction by the RA would have had the effect that the RA unlawfully, and contrary to the provisions of the Namibian law on insolvency, become a preferred or secured creditor.

'61. And then, the Arbitrator gave a final award;

61.1 Not only time barring the NRP's claim; but also

61.2 Effectively setting off or subtracting RA's "established" but disputed amount.

'62. In coming to this conclusion, the arbitrator dismissed the NRP's claim, directly contradicting his previous findings, and transgressing the insolvency laws of Namibia.'

[36] Applicant does not say what ground of review in terms of s 33 (1) of the Arbitration Act these statements are supposed to establish. In any case, 'transgressing (of) the insolvency laws of Namibia' cannot be a ground to review and set aside the arbitration award in terms of the subsection. The repealed English rule whereby an award could be set aside on the ground of an error of fact or law on the face of the award has never formed part of South Africa Law. (David Butler and Eyvind Finsen *Arbitration in South African Law and Practice* at 293; and the case there relied on) In the result I conclude that these statements do not constitute grounds to review and set aside the arbitration award in terms of 33 (1) of the Arbitration Act. In any event, applicant's complaint relates to decision, award or 'conclusion', and not the method of the proceedings. (See para 24 above)

[37]

'72. The Arbitrator rejected the NRP's plea of fraud because he legally and morally misconducted himself in relation to his duties as arbitrator when he was simply unable – or I reasonably apprehend, not unbiased enough – to identify the fraud which was starring him in the face. Fraud, I am advised, unravels all. Here, with due respect, the arbitrator was blind (to) for the fraud, and indeed tripped over it.'

[38] With respect, I fail to see, and applicant does not point it out, which of the stipulated prohibited acts in s 33 (1) of the Arbitration Act applicant avers the arbitrator is quilty of to justify reviewing and setting aside the arbitration award. At all events, 'legally and morally misconducted himself' – whatever that means – is unknown to the stipulated prohibited acts mentioned in s 33 (1) of the Arbitration Act. In sum, there is no proved ground to review and set aside the arbitration award based on those statements.

[39]

'73. But, matters did not end there. The NRP also specifically pleaded estoppel and waiver – in the alternative to fraud – as a result of the facts stated above. In other words, NRP pleaded that the RA was estopped from relying on the time bar clause in circumstances where the RA's representative applicable once VO1 and VO2 were approved.

'74. Although the Arbitrator knew that the NRP pleaded estoppel and waiver in respect of the issue of time barring, and particularly in respect of VO1 and VO2, he simply refused to deal with those aspects in his interim award. In simply refusing to deal with issues pertinently pleaded by the NRP, he again committed a gross irregularity in the conduct of the proceedings.

'75. When NRP pointed this out to the Arbitrator and asked that the estoppel and fraud should then be considered at a stage after the interim award, he made another dismissive directive on 2 July 2019. He again refused.

'76. In the Directive of 2 July 2019, the Arbitrator acknowledged that estoppel and waiver was specifically pleaded by the NRP.

'77. At that stage the Arbitrator knew that he did not deal with estoppel or waiver in the interim award.

'78. The Arbitrator, nevertheless, refused to deal with estoppel or waiver in the second phase of the Arbitration, or at any further stage.

'79. In short, the Arbitrator was bound to deal with the pleaded issues, but refused to deal with estoppel and waiver at all.

'80. As a result of the Arbitrator's refusal, the NRP could also not lead evidence during the second phase on waiver or estoppel, and was deprived of success, or at least a consideration of the NRP's estoppel or waiver defence. In any event, the estoppel would have plainly succeeded.

'81. As a result of such refusal the arbitrator also exceeded his power. He simply refused to do what he was obliged to do (i.e deal with all issues pleaded), causing the RA to obtain a final award in a grossly irregular manner.'

[40] Based on those statements, applicant concludes that the arbitrator 'committed a gross irregularity in the conduct of the proceedings'. Applicant's averments that the arbitrator did not consider estoppel and waiver is factually incorrect. I accept Mr Dickerson's submission that the arbitrator dealt with those issues. It follows inevitably that any conclusions drawn from such factually incorrect statements must, as a matter of common sense and logic, be in turn wrong. I find that any charge that the arbitrator committed a gross irregularity in the proceedings and exceeded his power is not proved by those statements. The claim is, accordingly, rejected. By a parity of reasoning, similarly, I find that the conclusions drawn from a factually incorrect premise cannot support the claim that the arbitrator exceeded his powers. In any case, considering what I have said in paras 27 and 28 above, those passages cannot support a ground based para (b) of s 33 (1) of the Arbitration Act, that is, that the arbitrator exceeded his powers.

[41]

'82. Moreover, the Arbitrator's conclusion that Mr van der Merwe did not commit a fraud, and by upholding the RA's time bar plea in the circumstances if this case;

82.1 is a perversion of the law;

82.2 gives me a reasonable apprehension that he did not comply with his duties in a manner a reasonable litigant would expect from a dispassionate unbias (unbiased) arbitrator;

82.3 led to the result that NRP did not have a substantively fair trial as envisaged in Article 12 of the Namibian Constitution.

83.5 in the circumstances of this case, Article 12 finds application by virtue of the provisions of Article 5. Although its application does not mean that this court can sit as a court of appeal in respect of a final arbitration award in respect of ordinary misdirection's, this court will and should set aside an arbitration award if it is so substantially wrong that it leads to a perversion of justice, which indeed happened in this case.'

[42] Like the charge that the arbitrator did not deal with the issues of waiver and estoppel, the charge that he did not deal with the issue of fraud is factually incorrect. The charge cannot, therefore, stand to establish that any of the stipulated prohibited acts took place which could be a ground to review and set aside the arbitration award. No ground is proved. The arbitrator dealt with them; and if, the arbitrator

came to a wrong conclusion, as applicant avers, that cannot be a ground of review on any ground. This claim is, accordingly, rejected.

[43]

'84. In as far as is required, I submit that the common law, read with Article 12 and 5 of the Constitution, should be developed to include the court's power to set aside the final award made in this Arbitration. This is so because the legal conclusion of – no fraud and time barring on respect of NRP's claim for and extension of time and concomitant P&G's – as made by the Arbitrator, will lead to an enforcement of an award – if not set aside – which amounts to a perversion of justice. The award is so wrong that justice calls out for it to be set aside.'

[44] If applicant's contention is that the arbitration is 'so wrong', then applicant cannot pursue a remedy under s 33 (1) which concerns reviews. It is trite that appeals and reviews are polar apart and they have deep jurisprudential differences. (Petrus T Damaseb *Court-Managed Civil Procedure of the High Court of Namibia: Law, Procedure and Practice* 1st ed (2020) at 47-50) Accordingly, I accept Mr Dickerson's submission on the point. Any ground based on those statements cannot stand to review and aside the arbitration award.

[45]

'85. I now turn to further gross irregularities which occurred during the proceedings, as well as other grounds on which the final award should be set aside.

'86. Knowing that it was common cause what Mr van der Merwe said at the site meetings, I was convinced that this cunning plan was conveyed to the RA by Mr van der Merwe in letters he wrote the RA during the project. Further, during cross-examinations, Mr van der Merwe acknowledged that the written agreement which the RA entered into with Burmeister and Partners (the Engineering firm who employed Mr van der Merwe) contained clauses which linked Burmeister and Partner's remuneration to the finalization of the project for the amount originally agreed upon.

'87. In other words, if the project was not completed within the original budge, Burmeister and Partners would be penalized in terms of such contract.

'88. Burmeister and Partners also did the original design of the road. Burmeister and Partners recommended the batter slopes to be 1:2 in the design. Let me explain. A slope in an area of ground that runs evenly downwards from the edge of the road towards the virgin

land in which the road was build. The batter is a mixture of gravel, and sand etc. If the batter slope is 1:2, it means that for every meter away from the edge of the road, the slope falls with two meters. Such a slope is very steep. After NRP started working on the road the engineer changed the slope to 1:4 In essence, it acknowledged its own design error. As a result, much more work and batter – as originally tendered for – were required.

‘89. Mr van der Merwe would therefore have had all the incentive required not to pay NRP for the extension of time and concomitant P & G’s, and which was caused as a result of the batter slope changes VO 2. The same applies for (VO1). Staying as close as to the original budget meant more reward for Mr van der Merwe and Burmeister and Partners. NRP had to pay the price.

‘90. When the RA discovered its documents in terms of Rule 35 (of the old Rules, which were made applicable by agreement between the parties), it became clear that the reference that Mr van der Merwe used in correspondence with the RA (on the project) was referenced L .. (followed by numerical numbers). Relevant documents and letters (concerning the project) as well as the all-important written agreement entered into between the RA and Burmeister and Partners were not discovered.

‘91. NRP then brought an application to compel discovery. Twice. I annex the two applications with their affidavits as Annexure **“L”** and **“M”**

‘92. I refer to the applications for discovery and point out that the RA raised incomprehensive defences such as; a document is not in existence but, if it is in existence, it is privileged, alternatively was not relevant. It also said many other incoherent things. Amongst others it said that because the issues were separated, certain documents were not relevant “at this stage” meaning that such documents will become relevant at the second stage. Then, when the arbitration moved on to the second stage, the RA suddenly said that such documents were not relevant at all. That amounted to pure trickery, eventually causing the final award to be improperly obtained by the RA.

‘93. A person (who never featured anywhere before), deposed to a purported answering affidavit on behalf of RA in the Rule 35 interlocutory applications.

‘94. This person was never employed on the project; did not say he read the pleadings; did not say he read the letters, or the contract, or anything which could give him personal knowledge.

‘95. The Arbitrator said he will give an order in respect of applicant’s discovery application. He was obliged to do so in terms of his duties as an arbitrator.

‘99. The arbitrator also misconducted himself in relation to his duties as an arbitrator on this aspect. He had no right to not deal with the application. He had a duty to deal with it. Instead he granted a semi postponement saying that discovery issues can be dealt with as

and when they arise. He also committed a gross irregularity in the conduct of proceedings by not dealing (with) the issue of discovery.

‘100. Saying that NRP must deal with discovery issues as and when they arise is in itself a gross irregularity committed by the arbitrator in the conduct of the proceeding. How would NRP know as and when (an) issues arise? NRP knew the documents were relevant, but it was impossible to know what the contents of the documents were. In other words, the NRP will not know that an issue is busy “arising”, say during cross-examination of Mr van der Merwe, if there is a document (Safely hidden away in Mr van der Merwe’ cupboard) gainsaying or contradicting what Mr van der Merwe is testifying about.

‘101 The Arbitrator expected the humanly impossible from the NRP and its legal team. They had to conduct a hearing without being in possession of the proceedings committed by the arbitrator.

‘102. The Arbitrator was also misled by the RA when it said the documents sought were not relevant at ‘tis stage’ and them later at no stage at all. According to the final award was improperly obtained by the RA.

‘103. The person who said on behalf of the RA –under oath – the documents were irrelevant could not do so. To simply say ‘I have personal knowledge” means absolutely nothing and was utterly misleading.

‘104. To say, as the arbitrator did, that in such circumstances he may not go behind the oath is a fundamental misunderstanding of the law of discovery. The fundamental point, however, is that the arbitrator was obliged to determine the issue of discovery, but refused to do so.

‘105. The failure to make a decision on discovery, as the arbitrator was obliged to do, amounted to a gross irregularity in the conduct of proceedings, and he exceeded his powers by refusing to deal with NRP application in terms of Rule. In any event, in refusing to compel discovery during the second application, the arbitrator also breached NRP’s procedural and substantive rights (whether Article 12 of the Constitution is applicable or not) to a fair hearing. The error, (when the second application for discovery was dismissed) in itself amounted to a gross irregularity in the conduct of the proceedings caused by the arbitrator. The entire trial was but a farce.

‘109. However the arbitrator once again dismissed the NRP’s application for discovery with costs. His main reason? He cannot go behind the oath of a person who knew nothing about the case. That in itself was a gross irregularity committed by the arbitrator in the conduct of the proceedings. I have already dealt with this.’

[46] On the papers, it is abundantly clear that the arbitrator plainly made a decision on applicant’s discovery application, and refused the relief sought by applicant. In

making the decision the arbitrator considered the application by applicant and the reasoning by first respondent, resisting the application. In the circumstances, the question is whether that decision is reviewable, and reviewable based on any of the stipulated prohibited acts prescribed by s 33 (1) of the Arbitration Act. In my view, where the arbitrator has given fair consideration to the matter at hand by listening to both parties, it would be impossible to hold that the arbitrator has been guilty of misconduct, or gross irregularity in the conduct of the proceedings has occurred, or that the award has been improperly obtained. (See paras 20-28 above.)

[47]

'106. In the interim award the arbitrator made another demonstrable blunder thereby committing another gross irregularity in the conduct of the proceedings. It arose as follows;

106.1 There were seven issues to be dealt with by the arbitrator;

106.2 If issue seven had a material effect on issue one or two (or any of the other issues) the arbitrator had to take it in (into) consideration and decide issue 7 first. That, I submit, is stating quite the obvious;

106.3 In short, the arbitrator had to deal with the seven issues in a procedurally coherent manner, making sure that the sequence he chooses, do not lead to a gross irregularity in the conduct of the proceedings;

106.4 The arbitrator decided issues 1 to 7 in numerical sequence. But he obviously had to decide issue 7 first. In issue 7 he found that the engineer unlawfully deducted penalties of N$10 000.00 per day. This amounted to an unlawful deduction of N$5 190 000.00, and this obviously had to be considered when the other six issues were dealt with;

'106.8 The arbitrator therefore made a demonstrable blunder and indeed committed a gross irregularity in the conduct of proceedings, when it never dawned on him that he should not mechanically beside issues one to seven in numerical sequence as if they were entirely separate issues with no interaction, interplay or indeed reprocity.

'107. But, further material gross irregularities were committed by the arbitrator in the conduct of the proceedings.'

[48] I do not think these statements have legal legs to stand on to review and set aside the arbitration award on the ground that gross irregularity in the conduct of the proceedings were committed, within the meaning of s 33 (1) of the Arbitration Act.

One should not confuse the thought process of the arbitrator leading up to the decision of the arbitrator with the conduct of the proceedings. The first occurrence is a cognitive process not an act. Be that as it may, what is relevant is that applicant has not established that by the sequence of consideration of the matter at hand pursued by the arbitrator there occurred 'some high-handed or mistaken action which prevented the aggrieved party from having his case fully and fairly determined' (*Bester v Easigas (Pty) Ltd and Another* 1993 (1) SA 30 (c) 42I/J-43C,applied by the court in *Strauss v Namibia Institute of Mining* loc cit) Neither has applicant established that the sequence of consideration of the matter at hand followed by the arbitrator amounted to the arbitrator misconceiving the nature of his duty under the arbitration agreement. (*Telecordia Technologies Inc v Telekom SA* Ltd 2007 (3) SA 266 (SCA), para 71) I find that the arbitrator dealt with each of the separated issues. It cannot, therefore, be seriously argued that the arbitrator misconceived the whole nature of the enquiry or his duties in connection with it. (*Telecordia* loc cit.)

[49] The inevitable conclusion is that applicant has not by those statements satisfied the court that grounds exist in terms s 33 (1) of the Arbitration Act to review and set aside the arbitration award.

[50]

'115. Everyone knew, including the arbitrator, that a creditor in a liquidation cannot by agreement (entered into with a liquidated party prior to liquidation) agree to be treated as a preferred or secured creditor, and that set off or deduction is prohibited in respect of the amounts due by the RA to the NRP and vice versa, which amounts arose as a result of an alleged breach of the agreement which occurred prior to liquidation.

'116. The arbitrator was obliged to determine the amount outstanding by the RA to the NRP. That was his duty in terms of the pleadings the common cause facts, and the agreements reached between Mr van der Merwe and NRP's expert, Mr Kruger. That is also what each and every creditor expected.

'117. The arbitrator never determined the amount outstanding by the RA to the NRP. He failed in his most important duty. The creditors in the liquidation are up in arms.

'118. In failing to comply with this fundamental duty as arbitrator, he committed a number of gross irregularities in the conduct of the proceedings. Those irregularities operate on different – yet all fundamental – planes. They are;

118.1 As already pointed out the arbitrator directed, that any finding on law or fact he makes in the interim award, will be binding on the parties in the final award;

118.2 This would in any event be the case, even if such a directive was not made. An arbitrator cannot, the one moment determine an issue in one way, and the next moment in a different way. That in itself would amount to a gross irregularity committed in the conduct of proceedings. It would also give legitimate scope for a reasonable apprehension of bias to a party who is treated in such a manner. I hold such view.

118.3 the NRP took the arbitrator's finding that the determination of an amount, (in respect of items mentioned in the Bill of Quantities by a simple calculation , to be not a claim for an additional amount, and that such a claim could not be time barred), to be finding on the parties, and the arbitrator. The NRP could do so because the arbitrator said so;

'119. Yet, and quite astoundingly, the arbitrator changed his finding in the final award.

'120. In the final award the arbitrator threw all caution to the wind when he held that the NRP's claim was time barred by the provisions of clause 20. Even the DAB award outstanding. This finding;

120.1 was in direct contradiction of what he found in the interim award;

120.2 took NRP by utter surprise;'

'121. Apart from not following a previously binding directive, there is not a single authority, internationally or otherwise, to which the RA could refer to during agreement, that a claim for work done by the NRP in respect of items as specifically recorded in the Bill of quantities at an agreed rate is an "additional payment" as envisaged in GCC 20.1.

'122. This finding of the Arbitrator therefore not only constituted a gross irregularity in the conduct of the arbitration proceedings but legitimately also cause me to strengthen my reasonably (reasonable) apprehension of bias and therefore that the arbitrator misconducted himself in relation to his duties as an arbitrator.'

[51] The issue of payment of the mentioned amounts is tied up with the legal issue concerning the cancellation of the contract and the legal consequences arising therefrom and the fact of the liquidation of applicant and its legal consequences. It cannot seriously be argued that the arbitrator did not consider these issues. He did deal with them and by extension the payments related therewith and reached certain conclusions, including his refusal to order payment in favour of RA. Where the arbitrator has given due consideration to the matter at hand in the proceedings it would not be proper for the court to review and set aside the award based on

misconduct or gross irregularity in the conduct of the proceedings in the absence of proved bad faith or failure to act fairly. (See para 23 and para 26 above.) Applicant has not proved bad faith or failure to act fairly on the part of the arbitrator.

[52] The arbitrator heard both parties and dismissed applicant's total claim for welded mesh. The second amount arises from a claim for payment of amounts allegedly agreed by the experts on both sides of the arbitration. The arbitrator heard evidence on the issue. The award does not call upon first defendant to make any payment to applicant. It was said in *Clark v African Guarantee and Indemnity Co Ltd* 1915 CPD 67 at 78:

'If the arbitrator has taken evidence and has fairly considered it, the Court will not set aside the conclusion he had come to upon that evidence, because he has drawn inferences which, though possible, are not acceptable to the court.'

[53] The fact that as respects the DAB award the arbitrator did not pay obeisance to the Supreme Court decision in *Zillion Investment Holding v Salz-Gossow (Pty) Ltd* 2019 (2) NR 594 (SC) and rejected the DAB award cannot be a ground to review and set aside the arbitration award based on misconduct and or gross irregularity in terms of s 33 (1) of the Arbitration Act. The authorities do not support such a claim. (See paras 20-28 above.)

[54] Accordingly, the court rejects applicant's prayer, relying on those statements, that the court should set aside the arbitration award based on misconduct and gross irregularity in terms of s 33 (1) of the Arbitration Act.

[55]

'123. But apart from unexpectedly time baring the NRP's claim, the arbitrator went much further.

'124. This is what the arbitrator did. Contrary to what Namibia's substantive insolvency Law says, he effectively permitted the RA to set-off its "claim" – which formed part of the counterclaim which was withdrawn by the RA.

'125. As a result of this, the creditors in the liquidation are materially prejudiced. The RA has become, for all intents and purposes, a secured creditor, which is contrary to Namibia's insolvency laws. The final award is contrary to public policy and therefore null and void for this reason as well. It can also not allowed to stand because it was obtained by the arbitrator

during the proceedings, and because it is downright repudiated by Article 12 of the Namibian Constitution,'

[56] Applicant's challenge by these statements relates to the application of 'Namibia's substantive insolvency law'. According to applicant, the arbitrator acted contrary to the insolvency law. It must be remembered, the record indicates that the application of the insolvency law was considered searchingly by the arbitrator, including his consideration and rejection of authority applicant sought to rely on, ie *Thomas Construction (Pty) Ltd (in Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (AD) (approved by the court in *Nel v Kalahari Holdings (Pty) Ltd* 1995 NR 244 (HC), per Strydom JP) for the reason that it was distinguishable. It cannot therefore be seriously argued that the arbitrator contravened the insolvency law; if anything he correctly applied it and came to a conclusion. It cannot be said that the arbitrator misconducted himself in relation to his duties as arbitrator or that he committed any gross irregularity in the conduct of the arbitration proceedings, as alleged by applicant. (See *Clark v African Guarantee and Indemnity Co Ltd* loc cit.)

[57] Based on these reasons, I hold that applicant has failed to satisfy the court that any of the grounds prescribed by s 33 (1) exist to review and set aside the arbitration award based those statements.

Item B

[58] It has not been established that the arbitrator failed to apply correctly the principles used by the courts in the awarding of costs; and so, I decline to interfere with the arbitrator's award of costs. (David Butler and Eyvind Finsen *Arbitration in South Africa Law and Practice* at 293)

Item C

[59] It serves no good purpose to rehearse the analysis made and conclusions reached previously regarding the payments under the present head. Suffice it to say that for the foregoing analysis and the conclusions, I hold that applicant has failed to

satisfy the court that first respondent owes those moneys to applicant. The claim is, accordingly, rejected.

Item E

[60] The decision taken under Item A vaporizes the relief sought under the present head. In the circumstances, this Item does not arise. The relief is, accordingly, refused.

Item F

[61] Mr Dickerson submitted that in bringing its application NRP failed to distinguish between the first (interim) award and the final award; and it made allegations of bias without foundation; and, further, it made incorrect allegations about what the arbitrator had decided. In the circumstances, according to counsel, the application is vexatious. Counsel relies on authority in *In re Alluvial Creek Ltd* 1929 CPD 532; *Kamwi v The Government of the Republic of Namibia & Others* (A 31/2013) [2013] NAHCMD 380 (20 December 2013); *Merit Investment Eleven (Pty) Ltd v Namsov Fishing Enterprises (Pty) Ltd* 2017 (2) NR 393 (SC) para 24 and 25; *Permanent Secretary of the Judiciary v Ronald Mosementla Somaeb* SA 14/2018 (SC). Counsel concluded, a costs order on a special scale is warranted, including the costs of three counsel. Applicant on the other hand seeks costs of the application *simpliciter*.

[62] There are five Items, apart from Item F (which concerns costs of the instant application). Applicant has been successful at Item D only. First respondent has succeeded in parrying the claims in Item A, Item B, Item C and Item E. Item A, Item B and Item E are intertwined. The upshot is that applicant has not been successful entirely. First respondent, too, has not succeeded in parrying all the claims.

[63] As respects first respondent's prayer for a special costs order, I should say this. I find that it has not been established sufficiently that the *Serrao* factors (*Namibia Breweries Limited v Serrao* 2007 (1) NR 49 (HC)) exist in the present matter. And I find that the conduct of the present applicant in bringing the application and moving it cannot be said to stand in the same boat with the conduct of the

applicant in *Lindequest Investment Number Fifteen CC v Bank Windhoek Ltd* [2015] NAHCMD 100 (27 April 2015). In *Permanent Secretary of the Judiciary v Ronald Mosementla Somaeb,* although the Supreme Court found that applicant's application was frivolous and vexatious, the court did not make a punitive or special costs order. Applicant in the present matter may have been misguided in bringing the application, but that cannot draw the blood of special or punitive costs order.

[64] Based on these reasons, I incline to make no order as to costs.

Conclusion

[65] In the result, I order in the following terms:

1. The application is dismissed to the following extent:
   (a) The relief that the final award of the arbitrator published on 9 March 2020 be set aside is refused.
   (b) The relief that first respondent pay the costs of the arbitration proceedings is refused.
   (c) The relief that first respondent pay applicant N$ 17 232 584,75 (made up of the amounts in paras 3.1, 3.2 and 3.3 of the notice of motion) is refused.
   (d) The relief that 'the remaining issues….' be referred to a new arbitration tribunal is refused.
2. The application succeeds to the following extent:
   First respondent shall pay to applicant N$ 4 898 294, plus interest at the rate of 20 per cent per annum calculated from 1 August 2015 to date of full and final payment.
3. There is no order as to costs.
4. The matter is finalized and removed from the roll.

C Parker

Acting Judge

APPEARANCES:

APPLICANT:	R HEATHCOTE SC (with him J SCHICKERLING) Instructed by Van der Merwe-Greeff Andima Inc., Windhoek
1st & 2nd RESPONDENT:	J G DICKERSON SC (with him R PATRICK SC and J DIEDERICKS) Instructed by Conradie & Damaseb Legal Practitioners, Windhoek