



REPORTABLE

CASE NO: SA 20/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

EXPEDITE AVIATION CC

Appellant

and

**TSUMEB MUNICIPAL COUNCIL
MINISTER OF URBAN AND RURAL
DEVELOPMENT**

First Respondent

Second Respondent

Coram: SMUTS JA, FRANK AJA and ANGULA AJA

Heard: 29 October 2020

Delivered: 12 November 2020

Summary: In August 2009, the parties (Expedite/the appellant and the Municipality/first respondent) in this appeal, entered into a partnership agreement in terms of which the first respondent would lease the Tsumeb Airport to the appellant for 50 years. Appellant took possession of the airport in August 2009, managed it and invested large sums in improvements. The Municipality sought to terminate it at the end of April 2016 and the appellant disputed that. The partnership agreement contained an arbitration clause, (clause 18). This clause made provision for any difference or disputes arising at any time to be resolved by

arbitration and it remained binding and effective between the parties notwithstanding that the partnership agreement may otherwise be cancelled or declared of no force and effect for any reason. An agreement was reached between the parties to refer their disputes to arbitration in terms of clause 18.

At an advanced stage in the arbitration process, the Municipality launched an application before the arbitrator seeking a stay of the arbitration pending an application to the High Court to declare the partnership agreement including clause 18 invalid and to put an end to the arbitration. This stay application was heard on 13 October 2017. The arbitrator provided a detailed ruling on that issue on 15 December 2017 and found that the parties had reached an agreement independent of the partnership agreement to arbitrate their disputes.

The Municipality approached the High Court in an application to review and set aside the arbitrator's ruling that there existed a binding agreement and that the arbitrator had jurisdiction to decide whether the partnership agreement was invalid as a consequence of not complying with regulations requiring ministerial consent for such agreement and whether the arbitration clause encompassed the alternative claims of Expedite. The High Court found in favour of the Municipality and declared the partnership agreement including the arbitration clause invalid. It further declared that Expedite had not established an agreement to arbitrate independent of the partnership agreement and it set aside the arbitrator's ruling to that effect. Expedite appealed against the judgment and the Municipality gave notice of a conditional cross appeal.

The issues on appeal are: (1) whether it was open to the Municipality to seek the relief it sought in the High Court – to raise the issue of the arbitrator's jurisdiction at that stage; (2) whether there was an agreement to arbitrate independent of the disputed partnership agreement and (3) whether this latter issue was *res judicata* as between the parties.

Held that, a written agreement to arbitrate was plainly established as required by the Arbitration Act 42 of 1965.

Held that, the Municipality agreed to have disputes between it and Expedite resolved by arbitration, including the dispute as to the legality of the partnership agreement and subsequently participated in that arbitration up to an advanced stage. It elected to do so and cannot escape that election despite the elaborate and contrived web of rationalisation woven by its legal practitioners subsequently.

Held that, the Municipality cannot be allowed to take up two positions inconsistent with one another. The doctrine of election and abandonment finds application.

Held that, it was not open to the Municipality to approach the High Court to seek a declaratory order to the opposite effect of the arbitrator's primary ruling on the basis that the arbitrator was wrong in his approach to the law.

It is held that, the Municipality failed to establish that the arbitrator committed any gross irregularity as contemplated by s 33 of the Arbitration Act 42 of 1965.

The appeal succeeds and the order of the High Court falls to be set aside.

APPEAL JUDGMENT

SMUTS JA (FRANK AJA and ANGULA AJA concurring):

[1] The principal issue to be determined in this appeal is whether there was a valid referral of disputes to arbitration.

[2] The ventilation of this issue has taken an unduly voluminous, protracted and circuitous route to this court.

Factual background

[3] In August 2009, the Tsumeb Municipality (the Municipality), the first respondent in this appeal, and Expedite Aviation CC (Expedite), the appellant, purported to enter into a partnership agreement. (Although the validity of this agreement is in issue, for the sake of brevity and convenience, it is referred to as the partnership agreement in this judgment. This should however not in any way be construed expressing a view as to its validity).

[4] In terms of the partnership agreement, the Municipality leased the Tsumeb Airport to Expedite for 50 years. Expedite took possession of the airport in August 2009 and managed it until the end of April 2016. During those years, Expedite invested large sums in improvements. At the beginning of 2016, the Municipality purported to give notice of termination of the agreement. Expedite claimed that this was a breach and constituted a repudiation and gave notice of cancellation of the agreement and also gave notice of a claim for damages as a result of the Municipality's alleged breach.

[5] The partnership agreement contained an arbitration clause. The relevant portions are embodied in clauses 18(1) and 18(3):

'18.1 If any difference or dispute arises at any time with regard to the interpretation of this agreement, the respective rights and obligations of the parties, the performance of any such obligations or any other matter in dispute between the parties arising from or in connection with this agreement, then the matter in dispute must be resolved by arbitration in accordance with the following provisions:

- 18.1.1 The arbitration proceedings will be held on an informal base, it being the intention that a decision should be reached as expeditiously as possible, subject only to the due observance of the principles of justice.
- 18.1.2 Each party to the dispute is entitled to be represented at such arbitration proceedings by its legal representatives or any other expert or specialist retained by it.
- 18.1.3 The arbitrator must be a person agreed between the parties or if they are unable to agree within a period of three (3) days of either party having given notice to the other proposing an appointee or alternative appointees, then a person nominated by the President for the time being of the Law Society of the Republic of Namibia.
- 18.1.4 The arbitrator shall permit each party to adduce such evidence and argument as the arbitrator may consider to be relevant to the matter in dispute.
- 18.1.5 The decision of the arbitrator shall be final and binding upon all parties and capable of being made an order of court on application by any of them.

18.2 . . .

18.3 The provisions of this clause shall be severable from the remainder of this agreement and shall remain binding and effective as between the parties notwithstanding that this agreement may otherwise be cancelled or declared of no force and effect for any reason.'

[6] The Municipality disputed Expedite's claim of repudiation and damages. The parties through their legal representatives agreed that the disputes between them proceed to arbitration under clause 18. The parties agreed upon the appointment of an arbitrator, a local senior counsel, Mr Reinhard Töttemeyer (the

arbitrator) on 5 June 2017 and agreed to meet the arbitrator on 7 June 2017 to discuss the procedure for the arbitration proceedings.

[7] There is a dispute as to whether the Municipality's legal representative attended that meeting where dates for the exchange of pleadings and the hearing were raised with the arbitrator. Expedite's legal practitioner thereafter on 9 June 2017 provided a draft agreement titled 'Extended Arbitration Agreement: Agenda for arbitration' (which I refer to as the arbitration agreement) to the legal practitioner for the Municipality. Clause 1 of that draft states:

'The parties agreed that what is set out below supplements, but not replaces, the provisions of clause 18 of the agreement of 7 August 2009.'

[8] The draft agreement further confirms the appointment of the arbitrator, sets dates for the exchange of pleadings and other procedural matters and the hearing dates, being the week 21 - 25 August 2017. The draft also provided in clause 6:

'The spirit and essence of the arbitration, that the parties acknowledge they will pursue in these proceedings, shall remain encapsulated in clause 18.1.1 of the source agreement:

"The arbitration proceedings will be held on an informal base, it being the intention that a decision be reached as expeditiously as possible, subject only to the due observance of the principles of justice."

[9] The parties thereafter proceeded to file their voluminous and extensive pleadings in accordance with the timelines provided for in the arbitration agreement. The statement of claim was delivered in June 2017 and the statement of defence and a counterclaim on its due date of 14 July 2017. A replication

followed, as did a rejoinder and a further pleading curiously styled a triplication and there followed an amendment to include an alternative additional claim as well.

[10] In the meantime, Expedite's legal practitioner pointed out in an email to the Municipality's practitioner on 24 July 2017 that the arbitration agreement had not yet been signed on behalf of the Municipality and requested that this be done. That agreement was signed by the Municipality's representative on 26 July 2017. Expedite's representative signed it on 25 August 2017.

[11] The parties also gave discovery in accordance with the arbitration agreement. Expedite complained that the Municipality's discovery was inadequate, leading to an opposed interlocutory application before the arbitrator to compel further and better discovery.

[12] Another interlocutory application was forthcoming on 21 August 2017, this time from the Municipality, seeking a separation of issues from the arbitrator. It was also opposed.

[13] On 11 September 2017 the Municipality launched an application before the arbitrator seeking a stay of the arbitration pending an application to the High Court to declare the partnership agreement including clause 18 invalid and to put an end to the arbitration. This 'stay application' was heard on 13 October 2017. The arbitrator provided a detailed ruling on that issue on 15 December 2017.

The application for stay before the arbitrator

[14] The stay application was initially brought under s 3(2) of the Arbitration Act 42 of 1965 (the Arbitration Act) but was later amended to include a ground that there was sufficient uncertainty concerning the jurisdiction of the arbitrator.

[15] In support of this stay application, the Municipality contended that the partnership agreement including the arbitration clause was invalid on two grounds. In the first instance, it was argued that the Joint Business Venture Regulations promulgated under s 94A of the Local Authorities Act 23 of 1992 (the Local Authorities Act)¹ required the prior written approval of the Minister for the validity of the partnership agreement. The Minister had not, so it is alleged, provided any prior written approval for the partnership agreement. As a consequence, it was argued that the Municipality lacked the contractual capacity to enter into the partnership agreement including the arbitration clause which was then void as a consequence.

[16] It was secondly argued that the Municipality was required to comply with the Tender Regulations promulgated under the Local Authorities Act.² The Municipality contended that it had not done so and, for that reason as well, lacked the capacity to conclude the partnership agreement which was void in its entirety for this reason as well.

[17] A further basis raised in support of the application for stay was that allegations of fraud had been made in Expedite's additional alternative claim dated

¹ Joint Business Venture Regulations: Local Authorities Act, 1992, 114, GG 3864, 27 June 2007.

² Local Authorities Act, 1992 (Act No 23 of 1992): Tender Board Regulations, GN 30, GG 2486, 15 February 2001.

25 July 2017. The Municipality expressed the desire to prove its innocence on fraud allegations publicly in open court and with recourse to an appeal. The purpose of the stay application, being the precursor to the High Court application which followed, was stated by the Municipality's counsel was to put an end to the arbitration.

[18] Expedite opposed the stay application in an unduly discursive answering affidavit. It was contended that an application under s 3(2) of the Arbitration Act did not apply as that section presupposed a valid and enforceable arbitration agreement. Expedite denied the invalidity of the referral and contended that the arbitration agreement signed on behalf of the Municipality not only confirmed the arbitration provisions in the partnership agreement but also constituted an independent agreement, extraneous to the partnership agreement, conferring jurisdiction upon the arbitrator to arbitrate the disputes between the parties.

[19] Expedite further referred to the Municipality's statement of defence delivered on 14 July 2017 where the point was not taken that the arbitrator did not have jurisdiction to arbitrate. Expedite also referred to the defence to the delictual alternative additional claim where the Municipality denied that the 'dispute relating to the claim is covered by the arbitration clause in the agreement'.

[20] Expedite further pointed out that the Municipality had not in multiple pleadings prior to the stay application impugned the validity of the arbitration agreement or the jurisdiction of the arbitrator and had in fact instead participated in the arbitration proceedings and signed and acted in accordance with the arbitration agreement. It was also pointed out that even after the stay application

was launched, the Municipality on 28 September 2017 filed an exception as part of the arbitration proceedings. The relief in that exception specifically sought an award of the arbitrator to uphold the exception and grant leave to the claimant to amend its statement of claim within a specified period.

[21] It was contended that the conduct of the Municipality in the circumstances amounted to a waiver of the right to object to the arbitration proceedings.

[22] Expedite also referred to a meeting called by the arbitrator on 15 August 2017 where the latter expressed concern about a point raised concerning his jurisdiction to arbitrate all issues between the parties with specific reference to the defence to the delictual claim. It was stated that the Municipality's counsel in response conveyed to the arbitrator that it accepted his jurisdiction to arbitrate on all issues. This was confirmed in reply by the Municipality, but with the rider that the agreed extension of the arbitration agreement to cover determination of the validity of the partnership agreement would need to be reduced to writing in a revised arbitration agreement. It was also stated in reply with reference to the waiver point that:

'Not taking the point on jurisdiction does not equal abandoning the right to object to the jurisdiction of the arbitration.'

The arbitrator's ruling

[23] The arbitrator found that there was an agreement to arbitrate *dehors* the partnership agreement in the form of the arbitration agreement. The arbitrator ruled that the arbitration agreement, being in writing, met the definition of agreement in the Arbitration Act, applying the approach of this court set out in

*Merit Investment Eleven (Pty) Ltd v Namsov Fishing Enterprises (Pty) Ltd.*³ The arbitrator referred to the Municipality's statement of defence of 14 July 2017 which extensively took issue with the validity of the partnership agreement. The Municipality's representative thereafter on 25 July 2017 signed the arbitration agreement which the arbitrator found formed an independent agreement to arbitrate the dispute between the parties including the validity or otherwise of the partnership agreement. The arbitrator also referred to the conduct of the parties over a number of months in several pleadings and steps taken which reinforced a submission to arbitrate.

[24] In view of the conclusion that the arbitration agreement, as an independent agreement, conferred jurisdiction to arbitrate, the arbitrator found that application was unfounded and found it unnecessary to express any view on the legality of the partnership agreement.

[25] The arbitrator dismissed the application for stay with costs.

The High Court application

[26] After the arbitrator's ruling on the stay application in mid-December 2017, the Municipality launched an application in the High Court the following month seeking several orders, many of which overlapped. Four declaratory orders were sought. In the first instance, the Municipality applied for a declarator that clauses 18.1 and 18.3 of the partnership agreement were invalid. Secondly, a declaratory order was sought that the arbitration agreement was not an arbitration agreement as defined in the Arbitration Act, alternatively did not refer the disputes between

³ 2017 (2) NR 393 (SC) (*Namsov*).

the parties to arbitration. In the third place, an order was sought declaring that there was no other agreement binding all the parties which referred their disputes to arbitration. The Municipality also applied for an order declaring the partnership agreement as invalid.

[27] The Municipality also applied to review and set aside the arbitrator's ruling in the stay application.

[28] The notice of motion included three paragraphs seeking alternatives to the first three declaratory orders and the review of the arbitrator's ruling.

[29] The Municipality also applied to interdict the arbitrator from determining the disputes concerning the validity of the issues raised in the declarators. Costs orders were also sought including the reversal of the arbitrator's cost award.

[30] It was contended by the Municipality in support of this relief that the arbitrator's finding on the validity of the arbitration agreement as an independent agreement was wrong as the validity of that agreement had not been raised by it in the stay application before the arbitrator.

[31] The Municipality also referred to the delictual claims which included allegations of fraud and expressed the preference to have those issues tried in open court. The point was further taken that if Expedite were to succeed with delictual claims, the Municipality would intend to claim such damages from those

who acted fraudulently or negligently on its behalf. The Municipality contended that it established good cause⁴ for the disputes not to be determined in arbitration.

[32] The Municipality further argued that the partnership was void because the Municipality had not obtained the prior written approval of the Minister to enter into the partnership, contending that this is required in peremptory terms by the Joint Business Venture Regulations.

[33] The Municipality confirmed that the arbitration agreement was signed on its behalf in response to a request by Expedite's practitioner to do so. This occurred on 26 July 2017 and after its statement of defence had been filed in accordance with its terms. The Municipality however contended that when it was signed on behalf of Expedite a month later, it was no longer open to Expedite to do so because of a statement made in earlier correspondence on behalf of Expedite asserting that signatures to the agreement were required for the validity of that agreement. It also contended that the Municipality's signature on the arbitration agreement on 26 July 2017 constituted an offer to contract which lapsed because the parties agreed to revisit the terms of arbitration on 15 August 2017 and that Expedite had also delivered another proposed extended arbitration agreement on 23 August 2017. Certain alternative contentions were also raised. It was also contended that the arbitration agreement did not contain a term extending the referral of the issue of the validity of the agreement to arbitration.

[34] The Municipality also denied that it had waived or abandoned its right to challenge the jurisdiction of the arbitrator.

⁴ As required by s 3(2) of the Arbitration Act.

[35] With reference to the arbitrator's ruling in the stay application, the Municipality contended that the arbitrator erred in finding that the arbitration agreement amounted to a binding agreement and asserted that it was not wholly unfounded that the arbitrator lacked jurisdiction. It further contended that the arbitrator's error amounted to a gross irregularity, because he misconceived the issues for decision and that the ruling should be reviewed and set aside. It was also contended that the arbitrator's ruling was 'wrong' in finding that the arbitration agreement had been accepted by the conduct of the parties and in finding that the agreement incorporated reference to clause 18.1 of the partnership agreement. The arbitrator's approach is also described in the papers as 'facile' and with 'gross irregularity written all over it'.

[36] In seeking its interdict, the Municipality contended that it had a clear right to have its disputes with Expedite determined in a court of law by virtue of Art 12 of the Constitution as opposed to proceeding with the arbitration.

[37] Expedite opposed the High Court application in another discursive and unduly lengthy answering affidavit with several unnecessary and bulky annexures. It took the point that the relief sought in the application was identical to the relief the arbitrator was required to consider and determine and that the Municipality was precluded from doing so by virtue of the doctrine of *res judicata* and/or issue estoppel. It contended that the application was, as a consequence, an abuse.

[38] Expedite further set out the facts concerning the arbitration proceedings – that Expedite invoked clause 18 after giving notice of a breach, the parties

agreeing to arbitrate and to the appointment of the arbitrator and referred to the extensive pleadings filed as well as the interlocutory applications from both sides.

[39] Expedite also referred to the Municipality's statement of defence filed on 14 July 2017 where the point that the arbitrator had no jurisdiction at all to determine the issues pleaded was not taken except to subsequently say that the delictual claims were not covered by the arbitration clause.

[40] Expedite also took the point that certain of the relief overlapped and was tautologous - seeking to declare clause 18.1 and 18.3 void in one prayer as well as declaring the entire partnership agreement invalid in a separate prayer.

[41] It also contended that the review of the arbitrator's ruling was unsustainable in the absence of any evidence of improper or *mala fide* conduct or of gross irregularities on the part of the arbitrator.

[42] Expedite also referred to its undertaking not to rely upon any allegation of fraud against the Municipality which the arbitrator accepted and which resulted in this basis to call for adjudication in an open court falling away and was thus disposed of by the arbitrator, yet raised again in the High Court application.

[43] As for the prayer seeking a declaration that the partnership agreement was void, Expedite pointed out that the Municipality had not in its multiple pleadings averred that the arbitrator could not adjudicate this issue and had instead elected to place this issue before the arbitrator.

The approach of the High Court

[44] The High Court found that the determinative issue before it was whether there was a valid partnership agreement. If that agreement was void, the court reasoned that there could never have been an arbitration clause, whether severable or not.⁵ The court further held that the agreement to arbitrate contended for could not exist independently of a void partnership agreement. The court thus held that any agreement to arbitrate disputes emanating from the partnership agreement made no sense. The court held that the arbitration agreement needed the existence of a 'parent' agreement it would supplement. If the partnership agreement never came into existence, the arbitration agreement would supplement nothing and would have no effect. For that reason, it held that the arbitration agreement did not exist *dehors* the partnership agreement and that the arbitrator accordingly had no jurisdiction to arbitrate.

[45] The court further found that the partnership agreement was void *ab initio* for failing to comply with the statutory requirement of prior written approval of the Minister. As it did not exist, the court held that nothing flowing from it existed either. It further found that the arbitration agreement could only exist if the partnership agreement contained a valid arbitration clause and that without it, the arbitration agreement was 'meaningless'.

[46] The court further found that the arbitrator thus had no jurisdiction to arbitrate the validity of the partnership agreement and by opting to determine the existence of a valid arbitration agreement was not what he was called upon to determine. The court set aside his award for this reason. It was also stated that, as

⁵ Relying on an *obiter* statement contained in *Macfay v United Africa Co. Ltd* [1961] 3 All ER 1169 (PC) at 1172 where the facts were entirely distinguishable *ad id* is to be considered within the context of the case serving before the Privy Council where a distinction was drawn between void and voidable pleadings within the context of the rules of court.

the arbitrator had not decided the issue of the legality of the partnership agreement, for that reason *res judicata* did not apply.

[47] The court below proceeded to issue a declaratory order that the partnership agreement was void *ab initio*, including clauses 18.1 and 18.3. The court also declared that the arbitration agreement did not constitute an arbitration agreement as defined by the Arbitration Act, which referred disputes to arbitration and that there was no other agreement between the parties to arbitrate. The court also set aside the arbitrator's ruling on the stay application and awarded costs to the Municipality but made no order as to costs in respect of the arbitration proceedings.

[48] The court further directed that Expedite, if so advised, is 'within 90 days from date hereof, to institute an appropriate action against (the Municipality) and/or its officials, as it intimated during the arbitration proceedings'.

[49] Expedite appealed against the judgment and the Municipality gave notice to cross appeal the final order (directing that an action can be instituted) and the refusal to make a cost order in respect of the arbitration proceedings. The Municipality also gave notice of a conditional cross appeal in the event of this court finding that the arbitration agreement amounted to an independent agreement to arbitrate. In that event, the Municipality on appeal sought an order that the disputes not be referred to arbitration under s 3(2) of the Arbitration Act and interdicting the continuation of the arbitration.

Submissions on appeal

[50] Mr Barnard, who represented Expedite, pointed out that the Municipality only took the point of the arbitrator lacking jurisdiction after participating extensively in the arbitration for some months, including seeking various 'awards' from the arbitrator. He argued that it was not open to the Municipality to bring the stay application and the application which served before the court below in the circumstances. He referred to *Abrahams & another v RK Komputer SDN BHD & others*⁶ where the court rejected complaints of bias levelled against an arbitrator after an unfavourable outcome, holding that it was not open to a party to bank a point to be drawn upon later by tactical choice.

[51] Mr Barnard also argued that the doctrine of *res judicata* or issue estoppel precluded the bringing of the application in the High Court as the same relief had been sought and refused in the arbitration proceedings. That relief concerned the issue as to whether an agreement to arbitrate in the form of the arbitration agreement was concluded *dehors* the partnership agreement. He submitted that it was untenable (and precluded by *res judicata*) for the Municipality to embark upon proceedings in the High Court seeking the same relief which had been determined (and denied) in the course of the arbitration by the arbitrator's ruling.

[52] As for the court's declaration of invalidity of the partnership agreement, including clauses 18.1 and 18.3. Mr Barnard contended in his written argument that an application of the *Plascon-Evans*⁷ test would have meant that Expedite should have prevailed on this issue and also argue that clause 18 was severable.

⁶ 2009 (4) SA 201 (C) (*Abrahams*).

⁷ As set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635.

[53] Mr Barnard further argued that the validity or otherwise of the partnership agreement was an issue to be determined in the arbitration.

[54] Mr Barnard focused much of his oral argument on his contention that the arbitrator had correctly found that the arbitration agreement existed independently of the partnership agreement and that this court's approach in *Namsov* found application.

[55] It was further argued on behalf of Expedite that the court below erred in reviewing and setting aside the arbitrator's ruling in that there was no factual basis to support a finding of no gross irregularity on his part.

[56] Mr Steyn, who together with Mr Boonzaier, appeared for the Municipality, argued that its principal objective in its application to the High Court was to 'stop the arbitration, leaving it to Expedite to institute its claims against the Municipality in court, if so advised'. The Municipality's cross-appeal against the High Court's order to the latter effect was understandably not pursued in oral argument.

[57] Mr Steyn directed much of his argument in support of the finding of invalidity of the court below in respect of the partnership agreement on the grounds of non-compliance with the Joint Business Venture Regulations. Arising from this invalidity, he further argued that the arbitration clause 18 was invalid. He also argued that the arbitration agreement did not constitute a valid referral to arbitration but merely set out certain procedural rules to govern an arbitration without amounting to an agreement to refer the dispute to arbitration by failing to specify it. He stressed that the basis of any arbitration is to be found in an

agreement to refer a dispute to arbitration. He contended that the arbitrator was wrong in his interpretation of that agreement.

[58] It was further argued on behalf of the Municipality that the arbitrator committed gross irregularities in the course of making his ruling by refusing 'to decide the issue he was asked to decide' in the stay application. The second gross irregularity contended for is, in essence, a repetition of the first – deciding 'an issue which he was not asked to decide' concerning his jurisdiction. In the third instance, Mr Steyn argued that the arbitrator 'caused the Municipality an injustice by applying the wrong test for success in the application to stay the arbitration'.

[59] Mr Steyn argued in the alternative that, should this court hold that the Arbitrator had jurisdiction to arbitrate, then the Municipality had established good cause under s 3(2) of the Arbitration Act for an order that the arbitration agreement should cease to have effect. One of the three grounds in support of this contention, namely the Municipality's preference to have the allegations of fraud and neglect being heard and determined in open court had however fallen away, given Mr Barnard's confirmation that Expedite abandoned any claim based on fraud. (It had in fact fallen away already when the matter was heard before the arbitrator, as is clear from his ruling). The second ground was to enable the Municipality to institute conditional claims in third party proceedings against impugned officials. Thirdly, Expedite's enrichment claims 'should follow its delictual claims to court in the public interest' to avoid multiple actions and the risk of conflicting decisions.

Issues to be determined on appeal

[60] The first question which arises is whether it was open to the Municipality to seek the relief it sought in the High Court – to raise the issue of the arbitrator’s jurisdiction at that stage and the related questions as to whether there was an agreement to arbitrate independent of the disputed partnership agreement and whether this latter issue was *res judicata* as between the parties.

[61] This should have been the first issue posited by the High Court instead of first posing the question as to whether the partnership was valid or not. If there was an agreement to arbitrate independent of the partnership agreement, the validity or otherwise of the partnership agreement would then be an issue to be determined by the arbitrator, and it would have been neither correct nor appropriate for the High Court to determine an issue which the parties had agreed to have decided in arbitration.

Facts relevant to the questions

[62] In the partnership agreement, the parties determined that disputes between them be resolved by arbitration speedily and without further recourse. After more than six years of the operation of this agreement, disputes arose. The Municipality sought to cancel the agreement. Expedite claimed that this was done on short notice and in breach of the agreement and as a consequence constituted a repudiation and invoked the arbitration clause and raised a claim for damages. The parties agreed that the dispute would be referred to arbitration. The Municipality then raised no objection to arbitration and instead agreed upon the appointment of the arbitrator and that the dispute proceed to arbitration.

[63] A meeting was held with the arbitrator on 7 June 2017 and Expedite's legal practitioner soon afterwards supplied a draft arbitration agreement to the Municipality's legal practitioners two days later. It is styled 'Extended Arbitration Agreement'. Its first clause stated that it supplemented clause 18 of the partnership agreement. It confirmed the appointment of the arbitrator. It confirmed the reference (of the dispute) to arbitration was deemed to have been done on 9 June 2017. It expressly reiterated the principle of clause 18.1 concerning the informality of the proceedings and resolving the dispute expeditiously. It also provided the timelines for the exchange of pleadings – the statement of claim by 23 June 2017, the statement of defence by 14 July 2017 and a replication by 21 July 2017.

[64] Formal discovery would not be required and bundles of documents would be exchanged. A date was also set for the arbitration. Certain other procedural matters were also regulated in the draft.

[65] Expedite filed its claim in accordance with the draft.

[66] The Municipality filed its statement of defence on the date designated in the draft, 14 July 2017. In the second and following paragraphs of the statement of defence, the issue of jurisdiction of the arbitrator was raised. The Minister had been cited as a second respondent in Expedite's statement of claim. The Municipality pleaded as follows with reference to the citation of the Minister:

- '2. The first respondent denies that the second respondent is a party to the agreement including the arbitration clause contained therein.

3. Thus, the tribunal has no jurisdiction over the second respondent.
4. Accordingly, the first respondent claims that this paragraph be struck out, together with the reference to the second respondent in the heading of the claimant's statement of claim.'

[67] The statement of defence also expressly took issue with the validity of the partnership agreement, by denying its validity on no less than four separate bases. One of these grounds includes the failure to comply with the Tender Board Regulations, also raised as a ground for invalidity in the application before the High Court. One of the other grounds is a lack of authority because the Minister's approval had not been given in terms of s 30(1)(f) of the Local Authorities Act. Non-compliance with the Joint Business Venture Regulations was however raised at a later point as a further ground of invalidity and voidness of the partnership agreement by the Municipality.

[68] An alternative defence to the plea of voidness of the agreement was pleaded in the following way:

'Alternatively to paragraphs 5-15 above, should the tribunal hold that the agreement is not void as claimed herein, in which the first respondent persisted, then and in such event, the first respondent states'

[69] At the end of the statement of defence the following is stated:

'Wherefore the first respondent claims an award:

- (a) Striking out with costs the following in the claimant's statement of claim . . .
- (b) Dismissing the claimant's claims with costs;
- (c) Ordering costs . . . (on a High Court scale).'

(Emphasis supplied).

[70] The Municipality simultaneously filed a counterclaim seeking an award in wide-ranging terms including Expedite's eviction and including prayer (d), pleaded as follows:

'Should the tribunal hold that the agreement is valid, which the first respondent still denies, ordering'

(Emphasis again added).

[71] Both the jurisdiction of the arbitrator and the validity of the partnership agreement were expressly raised in the statement of defence - both for the arbitrator to determine. There was a denial of jurisdiction over the Minister and the validity of the partnership agreement was denied on several grounds and the Municipality sought an award from the arbitrator to the effect that it was void.

[72] The draft arbitration agreement (provided to the Municipality on 9 June 2017) had not been signed and returned to Expedite's legal practitioners by 24 July 2017 who then requested the Municipality's legal practitioners to do so for record purposes. The latter obliged and returned a signed copy the next day. Expedite's legal practitioner placed his signature to the agreement a month later.

[73] In the meantime the claimant delivered an additional alternative claim on 23 July 2017 and the Municipality provided a further statement of defence to deal with it and denied that a delictual claim was 'covered by the arbitration clause in the agreement'. A replication was delivered and was followed by a rejoinder.

[74] In addition to the several pleadings exchanged, Expedite brought an interlocutory application before the arbitrator seeking further discovery and the Municipality provided an answering affidavit to it on 7 August 2017. When further and better discovery was sought, the Municipality once again opposed and filed an answering affidavit on 23 August 2017 and itself launched its own interlocutory application before the arbitrator for a separation of issues on 21 August 2017 in which it sought to have the various grounds upon which invalidity of the partnership was contended to be determined separately from the remainder of the issues. The application was for an award that the issue of invalidity to be determined separately by the arbitrator.

[75] On 14 August 2017, the Municipality filed a rejoinder which again relied on grounds of invalidity of the partnership agreement, raising a further ground for alleged voidness for the first time, being the failure to comply with the Joint Business Venture Regulations. After raising this, the Municipality in its rejoinder concluded thus:

‘Wherefore the first respondent persists in its claim for an award dismissing the claimant’s claim with costs’ (Emphasis supplied).

[76] On 15 August 2017, a meeting was held with the arbitrator who enquired whether the arbitration agreement had been signed. He also posed the question whether, given the Municipality’s plea of invalidity of the partnership agreement, he would be vested with jurisdiction to conduct the arbitration. It is common cause that the parties both confirmed to the arbitrator that his jurisdiction would extend to determining whether the partnership agreement was valid or not, as was expressly pleaded by the Municipality. The parties agreed that this be incorporated in a

proposal to be prepared by Expedite. Pertinent for present purposes is the response by the Municipality in its replying affidavit in the stay application to Expedite's point that the Municipality had elected to proceed with the arbitration by agreeing to the draft arbitration agreement, not disputing the jurisdiction of the arbitrator at the meeting on 15 August 2017 and participating in manifold ways in the proceedings until 11 September 2017 without disputing the jurisdiction of the arbitrator. Although the Municipality denied that it waived the right to take the point of jurisdiction of the arbitrator, it amplified this by stating:

'Not taking the point on jurisdiction does not equal abandoning the right to object to the jurisdiction of the arbitrator.'

Analysis of facts within the context of the issues to be determined

[77] From these common cause facts, the following becomes clear. The Municipality agreed that the dispute between it and Expedite be referred to arbitration. It then agreed on the appointment of the arbitrator, confirmed in writing in the draft arbitration agreement, which also set out timelines and other procedural matters. In response to the draft arbitration agreement presented to it for its acceptance on 9 June 2017, the Municipality acted in accordance with the terms of that agreement by filing its statement of defence and subsequent pleadings and in responding to and bringing its own interlocutory proceedings before the arbitrator and in each of its pleadings and the interlocutory matters sought awards from the arbitrator in its favour. The Municipality furthermore signed that agreement. It thus constituted an agreement to arbitrate between the parties.

[78] The point repeatedly pressed by Mr Steyn in oral argument that there was no agreement to refer a dispute is demonstrably contrived as the arbitration

agreement incorporated by reference clause 18 of the partnership agreement casting a dispute in very wide language to include 'any other matter in dispute between the parties arising from or in connection with this agreement'. Clause 18.3 furthermore contemplates that clause 18 is severable 'notwithstanding that this agreement may otherwise be cancelled or declared of no force and effect for any reasons'. The Municipality repeatedly and in writing and at the meeting on 15 August 2017 agreed to the issue of validity or voidness being determined in arbitration. Mr Steyn's retort that the pleadings could always be amended and thus could and did not amount to defining the dispute, fails to take into account that the pleadings were long since closed and disputes delineated when the point of jurisdiction was taken. It also fails to take into account the repeated agreement on the part of the Municipality to the arbitrator deciding upon the validity of the partnership agreement.

[79] The attempt by the Municipality to assert that its signature merely amounted to making an offer to Expedite is an utterly contrived attempt to avoid its own acceptance of the terms contained in that draft and is without any basis in fact and negates fundamental contractual principles and is furthermore negated by its own conduct. Its signature to the agreement puts its acceptance beyond any doubt even though it would certainly appear that it had in any event by its conduct accepted the terms contained in the draft.

[80] As was correctly found by the arbitrator, this court's approach in *Namsov* finds direct application. In oral argument Mr Steyn also asserted that this agreement merely comprised of rules and denied that it constituted an agreement to arbitrate as it was only asserted that it amounted to an independent agreement

to arbitrate at a much later stage – in defence to the stay application. The fact that it was only then raised as constituting an agreement to arbitrate independent of the partnership agreement is however not dispositive of whether or not it amounted to an arbitration agreement independent of the partnership agreement. That question is answered by examining the facts – including its terms and the conduct of the parties. The facts properly approached clearly established it as an independent agreement. The fact that it was only raised as an independent agreement to arbitrate at that late stage can in any event be explained by the obvious fact that the Municipality had only at that very late stage denied the arbitrator's jurisdiction to arbitrate, having previously at every juncture participating fully in the arbitration, seeking various awards from the arbitrator and at no point raising his lack of jurisdiction, even after the legality of the partnership agreement was raised on multiple grounds.

[81] A written agreement to arbitrate was thus plainly established, as is required by the Arbitration Act. When questioned by the arbitrator on 24 August 2017 as to how the application for stay was reconcilable with the agreement to refer the validity issue to arbitration reiterated on 15 August 2017, the Municipality's legal representative explained that its attitude 'had hardened since yesterday and since 15 August'. This approach negates the fundamental principle concerning the binding nature of agreements upon parties. As was stressed by this court in *Namibia Wildlife Resorts (Pty) Ltd v Ingplan Consulting Engineers & Project Managers (Namibia) (Pty) Ltd & another*.⁸

⁸ Case No. SA 55/2017 unreported 12 July 2019.

[27] By so agreeing to arbitration, the parties exercised their contractual freedom to define how disputes between them are to be resolved – by arbitration, and not to litigate their disputes. As was made clear by this court:

“. . . (F)reedom of contract is indispensable in weaving the web of rights, duties and obligations which connect members of society at all levels and in all conceivable activities to one another and gives it structure. On an individual level, it is central to the competency of natural persons to regulate their own affairs, to pursue happiness and to realise their full potential as human beings. “Self-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity.” For juristic persons, it is the very essence of their existence and the means through which they engage in transactions towards the realisation of their constituent objectives.”

[28] As was also said by Ngcobo J for the South African Constitutional Court in *Barkhuizen v Napier* and approved by this court:

“Pacta sunt servanda (sic) is a profoundly moral principle, on which the coherence of society relies.”

[29] The general rule is that agreements must be honoured and parties will be held to them unless they offend against public policy which would not arise in an agreement to arbitrate of the kind in question.’

Acquiescence, elections and abandonment

[82] The Municipality’s statement of defence, filed pursuant to that agreement, took issue with the validity of the partnership agreement and specifically asserted that it was void for failing to comply with certain statutory and other requirements. The Municipality at a later stage added a yet further basis for invalidity for failing to comply with the requirement of prior ministerial approval as permitted for in the Joint Business Regulations. At all times in its pleadings in this context, the

Municipality sought an award from the arbitrator; declaring that the partnership agreement was invalid.

[83] This was furthermore confirmed by its representative at the meeting on 15 August 2017.

[84] The Municipality had not only not taken the point that the arbitrator would have no jurisdiction by virtue of its contention that the partnership agreement in its entirety was void, but it had expressly accepted and agreed to the arbitrator determining the point of voidness or invalidity or otherwise of the partnership agreement. It was plainly open to the parties to agree that the arbitrator determine the validity of that agreement.⁹ This is expressly confirmed by the Municipality's statement of defence and rejoinder and what was stated on its behalf at the meeting presided over by the arbitrator of 15 August 2017.

[85] The Municipality's statement to the effect that by not taking the point did not mean that it abandoned the point is entirely misguided and unsound. Clearly those representing the Municipality do not appear to appreciate the doctrine of election and abandonment and where it is implied and so emphatically established by conduct plainly inconsistent with an intention to enforce a right later relied upon.¹⁰ The cumulative effect of the facts including the agreement to arbitrate and what was stated on 15 August 2017 establish an election to agree to the jurisdiction of the arbitrator. Although the applicable legal doctrine may in these circumstances

⁹ As is made clear by Corbett, J in *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk* 1968 (1) SA 7 (C) at 14G-15A. See also *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) para 16.

¹⁰ *Hepner v Rodepoort-Maraiburg Town Council* 1962 (4) SA 772 (A). *Borstlap v Spangenberg en andere* 1974 (3) SA 695 (A).

be best described as that of election, it matters not whether this term is used or waiver or the doctrine of acquiescence. As was stressed by Hoexter JA in *Administrator, Orange Free State & others v Mokopanele & another*¹¹ the nomenclature employed is less important than the fundamental principle that no person can be allowed to take up two positions inconsistent with one another. Having once approbated, a party cannot thereafter reprobate – or more commonly referred to as blowing hot and cold.¹²

[86] This principle finds application in this matter. The Municipality agreed to have disputes between it and Expedite resolved by arbitration, including the dispute as to the legality of the partnership agreement being submitted to arbitration and subsequently participated in that arbitration until a very advanced stage. It elected to do so and cannot escape that election despite the elaborate and contrived web of rationalisation woven by its legal practitioners subsequently.

[87] Like the election not to raise a bias point in *Abrahams* at the time when the alleged basis for bias became apparent and only doing so after an adverse award.¹³

‘. . . it does not avail her now – disgruntled by the result – to fossick in the procedural ashes of the proceedings and to disinter her perception when it suits. An attack based on bias – with its devastating legal consequences of nullity – is not to be banked and drawn upon later by tactical choice. As the Court of Appeal in England has put it,

¹¹ 1990 (3) SA 780 (A) at 787G-788B.

¹² See also *Hlatshwayo v Mare and Deas* 1912 AD 242 at 258-259. *Chamber of Mines of South Africa v National Union of Mineworkers & another* 1987 (1) SA 668 (A) at 690D-G.

¹³ At 210E-G.

“It is not open to [the litigant] to wait and see how her claims . . . turned out before pursuing her complaint of bias . . . [she] wanted to have the best of both worlds. The law will not allow her to do so.”

This is exactly what the first applicant did. The law cannot permit her, on the facts of the case, that tactic.’

[88] Having accepted that the jurisdiction of the arbitrator to determine the question of the validity or otherwise of the partnership agreement, it is not open to the Municipality subsequently to attack the jurisdiction of the arbitrator to determine this or other questions on the grounds of invalidity of that agreement.¹⁴

Res judicata and the review of the arbitrator’s ruling

[89] This is reinforced by the agreement to arbitrate established independently of the partnership agreement with the arbitrator correctly finding that this court’s approach in *Namsov* found application. The arbitrator’s conclusion in that regard furthermore in my view became *res judicata* as between the parties once he had done so. Once the arbitrator has determined a dispute which the parties pleaded before him, as he did in respect of this issue in the stay application, they are bound by that determination in any further litigation or arbitration on that matter. That is after all why parties agree to arbitrate – to bring an end to a dispute and obtain finality.

[90] It was not open to the parties to seek to challenge that ruling by dressing it up as a declarator, as the Municipality sought to do in its application before the

¹⁴ The position is not unlike a defendant submitting to the jurisdiction of a court by conduct where parties who plead on the merits or demand security have been held to have submitted to jurisdiction. See Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel SC (eds) in Herbstein & Van Winsen: *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5 ed) Vol 1 2009 p 65.

court below. Although the arbitrator's ruling was also taken on review, much of the language criticising the ruling is appellate in its nature, by repeatedly asserting that the arbitrator was wrong (even though at time with a resort to intemperate terms to describe the arbitrator's approach).

[91] In argument in this court (and in the court below), the attack upon the arbitrator's ruling shifted to a gross irregularity, given the narrow permissible ambit for challenges to arbitral awards by way of judicial review,¹⁵ with the Municipality describing his conduct as refusing 'to decide what he was asked to decide' and deciding 'an issue which he was not asked to decide' concerning his jurisdiction.

[92] In its defence to the Municipality's stay application (and the contention in it as to the absence of a valid agreement to arbitrate), Expedite raised a defence that an agreement to arbitrate existed independent of the partnership agreement. It is correct that the Municipality did not ask the arbitrator to decide this issue but once it was raised as a defence to the claim of a lack of jurisdiction, as it was plainly open to Expedite to do so, it indeed became incumbent upon the arbitrator to determine that issue which he proceeded to do in his carefully reasoned ruling. Quite how it can be contended that this constitutes an irregularity escapes me. The fact that the ruling was not what was asked for (by a party) is a common fact of life in litigation and arbitration. By the nature of adversarial proceedings, one side is bound to consider that an outcome was not what was sought by it. To characterise this as a gross irregularity on the facts of this case is without any substance and fails to appreciate the ambit of an application to set aside awards or rulings of arbitrators under s 33 of the Arbitration Act.

¹⁵ Contained in s 33 of the Arbitration Act.

[93] In short, the Municipality failed to establish that the arbitrator committed any gross irregularity in any sense contemplated by s 33 of the Arbitration Act. It was not open to the Municipality to approach the High Court, contending that the arbitrator was wrong in his approach to the law by seeking a declaratory order to the opposite effect of his primary ruling. This is not only precluded by *res judicata* but also on fundamental principle. An unsuccessful party in arbitration proceedings is limited to s 33 of the Arbitration Act in respect of the grounds to challenge an arbitrator's award or ruling. This is apart from the fact that the ruling itself would appear to be procedural in nature and not a final award.

Conclusion

[94] Having reached these conclusions, it is not necessary to deal with the High Court's findings on the partnership agreement, except to say that, had the High Court approached the matter as set out, then it would likewise have found it unnecessary to determine the validity of the partnership agreement. That portion of the order of the High Court is accordingly set aside. That is a matter for the arbitrator to determine and I refrain from expressing any view on that issue.

[95] Given these conclusions, it would follow that the appeal succeeds and the order of the High Court falls to be set aside. These conclusions also result in the cross appeals falling away. As for the conditional cross appeal seeking an order that the disputes not be referred to arbitration, it has become clear that the Municipality fell far short of establishing good cause for an order to this effect as is required by s 3(2) of the Arbitration Act. Following the abandonment of any claim based on fraud by Expedite, there was little left in support of a claim based upon

good cause for such an order. This should have been apparent after the hearing of the stay application before the arbitrator when the fraud claims were disavowed, as is confirmed in the arbitrator's ruling.

[96] In the application for stay before the arbitrator, 'the fraud claim' is referred to in the notice and not the alternative basis for delictual liability based on a negligent misrepresentation. In the founding affidavit in the application which served before the High Court there is however also reference to the alternative claim based upon a negligent misstatement and the possibility of pursuing conditional claims against those who made such statements on behalf of the Municipality. No further specificity is provided concerning the nature of such claims and against whom they would be pursued. The main thrust of the claim of good cause related to the importance of airing fraud claims in the public domain. The alternative delictual aspect remained secondary and unspecified, and in the context of the Municipality's denial that the arbitrator had jurisdiction to determine delictual claims. As has been repeatedly stressed by the courts, the onus to show good cause to avoid arbitration (within the meaning of s 3(2) of the Arbitration Act) is one not easily discharged.¹⁶ After the fraud claim as a basis for good cause fell away, the Municipality fell far short of discharging the onus to show good cause to avoid the arbitration.

Costs

¹⁶ *De Lange v Presiding Bishop, Methodist Church of Southern Africa & another* 2015 (1) SA 106 (SCA) para 23 and the cases cited there.

[97] Both counsel in the appeal failed to comply with rule 17(7)(k) of the rules of this court by filing heads of argument which exceeded 40 pages. The subrule provides:

‘(7) Heads of argument filed with the court in terms of these rules must –

(k) not exceed 40 A4 size pages, unless a judge on request directs otherwise.’

[98] When lodging their respective heads of argument, both sets of counsel prefaced their written argument with a request to a judge to direct that their written argument may exceed 40 pages.

[99] This is misguided. The wording of the subrule clearly contemplates that argument filed with the court must not exceed 40 pages unless a direction is given to the contrary by a judge of this court. That means that a direction must be sought and obtained prior to filing. This was not done by either side. Their requests made simultaneously with filing their argument deprive a judge of the opportunity to make a direction, having been faced with a *fait accompli*.

[100] Both sets of heads also fell foul of subrule 17(7) in other respects –

- subparagraph (c) which requires that if more than one authority is cited for a proposition, reasons are to be given for doing so; and
- subparagraph (d) which precludes lengthy quotations from the record or authorities.

[101] If fact, if both arguments were stripped of unduly lengthy quotations from legislation, the record and authorities, each argument would have complied with the 40 page limit.

[102] It is unacceptable that counsel appearing in this court fail to acquaint themselves with and comply with the clearly stipulated requirements for heads of argument. This failure can no longer be tolerated and will in future be addressed by appropriate cost orders, as required by the circumstances.

[103] There was however further breach of the rules of this court with far more deleterious consequences. This was the failure on the part of both sides to comply with rule 11(10) which provides:

‘Parties to an appeal or their legal practitioners, if they are represented, must –

- (a) within 20 days of the noting of the appeal, hold a meeting about the record with the view to eliminating portions of the record which are not relevant for the determination of an issue on appeal; and
- (b) within 10 days of conclusion of that meeting to the registrar a written report about the meeting.’

[104] No report was submitted to the registrar. On enquiry at the hearing, both counsel acknowledged that no meeting prescribed in peremptory terms was held. If ever a record called out for such meeting, it was the record filed in this appeal. It is replete with several bulky annexures which are either repeated or amount to entirely unnecessary annexures. For instance, the pleadings in the arbitration were attached to the founding affidavit together with a ruling by the arbitrator on 25 August 2017. These were however also attached to the answering affidavit. This

repetition amounted to 219 pages alone. The arbitrator's award/ruling of December 2017 running into some 39 pages was also duplicated. Some 65 pages of written argument in the arbitration were also unnecessarily attached, as was an application for discovery and a discovery affidavit, running into a further 62 pages. These items total 385 pages. In addition, the extended arbitration agreement is to be found at no less than 5 different places in the record. Certain correspondence was also duplicated as well as including an unrelated judgment (in a matter in which one of the Municipality's counsel appeared) in support of a statement that he was arguing that matter in court that day which was not disputed. These further items exceed another 55 pages.

[105] It follows that this record of ten volumes includes almost four volumes of patently unnecessary or repetitive matter which would and should have been excluded at a meeting in terms of rule 11(10). The failure to have complied with the rule has been highly prejudicial to the functioning of this court and has also unnecessarily caused considerable extra costs. It warrants an appropriate sanction.

[106] Rule 11(11) expressly contemplates that the failure to comply with rule 11(10) can be visited with an appropriate cost order. It provides:

'A court hearing an appeal may make a special order as to costs against a party or a legal practitioner where –

(a) subrule (10) has not been complied with; or

(b) where costs of litigation in the appeal have unreasonably increased by reason of non-compliance with subrules (8) and (10).'

[107] Oral argument was invited on this topic. The costs of this already protracted litigation have been unreasonably increased by this unexplained failure on the part of the legal practitioners on both sides.

[108] Having considered the oral submissions made and the deleterious consequences of the failure to comply with rule 11(10), the appropriate order in the circumstances is to deprive the successful party of 50 percent of the costs of preparing the record and of its perusal.

Order

[109] It follows that the appeal succeeds and the following order is made:

- (a) The appeal is upheld with costs including the costs of one instructing and one instructed counsel, except to limit the costs of preparing and perusing the record to 50 percent thereof.
- (b) The conditional cross-appeal is dismissed with costs, including the costs of one instructing and one instructed counsel.
- (c) The order of the High Court is set aside and replaced with the following order:

‘The application is dismissed with costs including the costs of one instructing and one instructed counsel.’

SMUTS JA

ANGULA AJA

FRANK AJA (concurring)

[110] I concur with the judgment and order of Smuts JA (the main judgment). I do however wish to add the following observations.

[111] In *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk*¹⁷ the parties submitted a ‘statement of reference’ to the arbitrator which included a reference to the validity or otherwise of a notarial lease in issue in that matter. The point was taken that the agreement containing the arbitration clause was invalid and hence also the arbitration clause. This meant the arbitrator exceeded his powers¹⁸ and that his award thus had to be set aside. The court disagreed and held that as the ‘statement of reference’ included a reference to this issue:

‘This establishes beyond doubt that the parties submitted the issue of validity for decision by the arbitrator and their subsequent conduct in advancing argument – through their counsel – upon this issue to the arbitrator shows that this is precisely

¹⁷ 1968 (1) SA 7 (*Allied*).

¹⁸ Section 33(1)(b) of the Arbitration Act 42 of 1965.

what they intended to do. It is true that the statement of reference flowed from the original submission contained in clause 12 of the second agreement but I am unable to see why this should prevent the statement of reference from being construed as an agreement to submit the validity issue, among others, to the arbitrator.¹⁹

In other words the 'statement of reference' constituted an agreement to arbitrate independent of the arbitration clause contained in the invalid agreement.

For the reasons spelled out in the main judgment I have no doubt that the parties submitted the issue of the validity of the partnership agreement and the question as to whether the non-contractual counterclaims fell within the ambit of the arbitration clause to the arbitrator for decision independently of the arbitration clause in the partnership agreement.

[112] To submit that this was done because the parties at an earlier stage mistakenly believed that the partnership agreement (which contained the arbitration clause) was a valid agreement is of no moment. A similar point was raised in *Allied* and was dealt with as follows:

'It may be that in the present instance the parties included the validity issue in the statement of reference under the mistaken impression that this dispute fell within the ambit of clause 12 of the second agreement but I fail to see how such a mistake of law could affect their agreement to submit the dispute to the arbitrator.'²⁰

[113] The judge *a quo* in his analysis held that the 'Extended Arbitration Agreement' was not intended to supersede the partnership agreement but was

¹⁹ *Allied* at 15A-C.

²⁰ At 15H-16A.

intended to be an extension thereof and was thus invalid as the partnership agreement was invalid. As the partnership agreement was invalid, the arbitration clause contained in it was also invalid. Even if this reasoning is accepted, it does not mean that the finding of the arbitrator that there existed an arbitration agreement independent of the partnership agreement and that this arbitration agreement vested him with jurisdiction could be set aside. The court *a quo* did not have appellate jurisdiction but could only set aside the decision of the arbitrator on the basis of misconduct or gross irregularity. (The issue of misconduct was not raised by the appellant and this is the basis for setting aside the arbitration award thus need not be considered). Mistakes of law or fact are not per se bases for setting aside an arbitration award.²¹ As pointed out in the main judgment, there is no basis for a finding that the arbitrator committed any gross irregularity. Shortly put, the award by the arbitrator could not be appealed as it was *res judicata* between the parties. The only way the award could be avoided was to set it aside pursuant to the provisions of s 33 of the Arbitration Act (misconduct or gross irregularity). However this attempt by the Municipality cannot succeed for the reasons given in the main judgment.

FRANK AJA

²¹ *Dickenson & Brown v Fisher's Executors* 1915 AD 166, *Total Support Management (Pty) Ltd & another v Diversified Health Systems (SA) (Pty) Ltd & another* 2002 (4) SA 661 (SCA) at 670H-672H and *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & another* 2008 (2) SA 448 (SCA) at 454E-G.

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