

# Is it wrong to confuse an arbitrator's failure to give reasons with the conduct of proceedings?

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Construction disputes in South Africa are typically subject to dispute resolution by arbitration. This is usually regulated by the Arbitration Act (the Act). Under the common law and section 28 of the Act, an arbitration award is final and not subject to appeal. The parties can agree to opt out of the common law position and the application of the Act, by agreeing to an appeal process in the dispute resolution clauses contained in their construction contracts. One exceptional circumstance, where the Act allows a party to review and set aside an arbitration award, is when the arbitrator commits any gross irregularity in the conduct of the arbitration proceedings. However, this is not an easy hurdle to clear.

It is well established under South African common law that it is not merely high-handed or arbitrary conduct by an arbitrator which is described as a gross irregularity. The behaviour of an arbitrator which is perfectly well-intentioned and bona fide, though mistaken, may come under that description. The crucial question to ask is whether the arbitrator's conduct prevented a fair trial of the issues. If so, it will amount to a gross irregularity. If the arbitrator merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. Where the point relates only to the merits of the case, "it would be straining the language to describe it as a gross irregularity or a denial of a fair trial". Simply put, it is wrong to confuse the arbitrator's reasoning with the conduct of the proceedings.

This issue was once again raised and developed somewhat further by the Supreme Court of Appeal on 22 September 2017, in *State Information Technology Agency SOC Limited v. ELCB Information Services (Pty) Ltd & Another*. The SCA decided whether an arbitrator's failure to provide reasons for his award (as opposed to simply his reasoning) constituted a gross irregularity.

In this case, the appellant entered into two separate agreements with the first respondent for the procurement of information technology goods and services. A dispute arose and the matter was referred to arbitration. The parties agreed to an arbitration timetable which included a date by which the appellant would object to the arbitrator's jurisdiction and to file its statement of defence. The objection was never raised and the statement of defence was not delivered. Instead, the appellant brought an application for an order declaring both agreements constitutionally invalid, unlawful and unenforceable and that the arbitration proceedings be stayed or postponed pending the final determination of the validity of the agreements. The grounds for the alleged invalidity were that the agreements were in contravention of section 217 of the Constitution, alleging non-compliance with the procurement procedures applicable to state procurement of goods and services in entering into these agreements.

The arbitrator dismissed the application of invalidity with costs on the attorney and client scale. The appellant then chose to stop participating in the arbitration proceedings. The arbitrator accordingly made an award without giving reasons, after having considered the evidence of the first respondent and having heard counsel for the first respondent in the absence of the appellant.

Disputing the award, the appellant launched an application in the High Court seeking an order to review and set aside

the arbitration award and declaring both agreements constitutionally invalid and unenforceable. The first respondent sought a counter-application seeking that the arbitration award be made an order of court. The appellant's application was dismissed and the first respondent's counter-application was granted.

In seeking leave to appeal, one of the grounds cited was the High Court's failure to find that the second respondent, the arbitrator, committed gross irregularities in the conduct of the arbitration proceedings. Once leave was granted, the appellant raised five grounds on which it contended that the arbitrator committed gross irregularities. One of the grounds included the arbitrator's contravention of clause 23.6 of the second agreement by failing to give written reasons. On this issue, the SCA held that "there is no legal prohibition that a written award furnished after the agreed date per se amounts to misconduct and therefore constitutes a gross irregularity".

The SCA was satisfied that the arbitrator gave his written reasons late, after the agreed date (due to illness). This delay, however, could not be described as so inordinate to constitute misconduct, let alone a gross irregularity.

Quoting D Butler and E Finsen, *Arbitration in South Africa Law and Practice* (1993) at 269 para 7.8, the SCA held that "[C]ontrary to the position in several jurisdictions, neither the Arbitration Act nor the common law requires an arbitrator to give reasons for his decision. He is quite entitled to make an award whereby the one party shall pay the other party a certain sum of money, without furnishing any reasons or justification whatsoever."

The SCA held that the Arbitration Act is silent on the consequences of not furnishing or delaying furnishing written reasons. The Arbitration Act defines an award as including an interim award and not a "written reasoned award". A prejudiced party, however, is not without recourse. A court may, upon application, order an arbitrator to furnish a reasoned award.

The SCA in this matter took the opportunity to display its displeasure with the manner in which the appellant conducted itself in the arbitration and later litigation processes. The SCA criticised the "lackadaisical manner" in which the appellant handled the litigation process and stated that, had the second respondent asked for a cost order against functionaries personally for the costs of the arbitration and litigation, it would have granted it with no hesitation. A costly affair which should have been avoided by not instituting the review proceedings and, instead, simply respecting the agreed arbitration timelines.

At law, and under the Act, an arbitrator is not required to furnish reasons for his award. A failure to provide written reasons should not be confused with the conduct of proceedings. However, should the reasons be necessary for either party, the High Court has the discretion to order the arbitrator to furnish the parties with reasons. But be warned – if your motive for those written reasons is to demonstrate a wrong decision by the arbitrator owing to his having made a mistake on a point of law in relation to the merits, this will not amount to "gross irregularity" for the purposes of setting aside the award.