REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 1649/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

14 March 2025
DATE SIGNATURE [redacted]

In the matter between:

AVENG AFRICA (PTY) LIMITED APPLICANT

and

MATHUPHA CAPITAL (PTY) LIMITED RESPONDENT

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to Case Lines. The date and time for hand down is deemed to be 10h00 on 13 March 2025

JUDGMENT

S.VAN NIEUWENHUIZEN, AJ

Introduction

[1] This matter came before me on 27 November 2024 in the opposed motion court. The applicant seeks the following order:

> "1. That the award of the arbitrator published on 11 October 2023 be made an order of court;
>
> 2. That the respondent pay the applicant's costs on an attorney and own client scale;
>
> 3. Further and/or alternative relief."

[2] The applicant took part in an arbitration before Adv C Eloff SC and obtained an award on 11 October 2023, which it now seeks to make an order of court. I should, at this point, already add that this award had to be amended, as will appear later, due to the fact that it made insufficient provision for the outstanding counterclaim(s) of the respondent.

[3] I will for the sake of convenience refer to the applicant as "Aveng" and the respondent merely as "Mathupha".

[4] On 18 January 2022, Aveng caused a provisional sentence summons to be issued, in which it sought payment of an amount of R6.5 million plus interest thereon at the prime lending rate plus 3%, calculated from 28 June 2019 to date of final payment and costs on an attorney and own client scale. This is defined as "the Applicant's claim". Same was based on an acknowledgment of debt and undertaking to pay, concluded between the parties on 5 September 2019 ("the AOD"), a copy of which is annexed to the papers marked "**MMD1**".

[5] Mathupha opposed the proceedings, as a consequence of which the matter was removed from the roll. Aveng's attorney thereafter approached Mathupha's attorneys of record, SWVG, and proposed that the matter be referred to arbitration and also proposed a number of possible arbitrators. This was done in terms of an email annexed to the papers as "**MMD2**".

[6] On 14 July 2022, Mathupha's attorneys agreed to the referral of the matter to arbitration and accepted the proposal to appoint Adv C Eloff SC as an arbitrator. A copy of Mathupha's email agreeing to the arbitration and to the arbitrator is attached to the papers marked "**MMD3"**. By then, Mathupha had already filed its opposing affidavit to the provisional sentence summons.

[7] Clause 7 of the AOD provides, under the rubric "CERTIFICATE OF OUTSTANDING INDEBTEDNESS", as follows:

> "A certificate under the signature of any Director, Manager, or official of Aveng Africa, whose designation and status need not be proved, or Aveng Africa's attorney, as to the amount owing by Mathupha Capital at a stated date shall be:
>
> (i) binding upon Mathupha Capital and *prima facie* proof of the amount of its indebtedness hereunder; and/or
>
> (ii) valid and enforceable as a liquid document against Mathupha Capital for the purposes of obtaining Provincial Sentence or Summary Judgment against Mathupha Capital."

[8] The pre-arbitration minutes, annexed as "**MMD4**", which pre-arbitration was conducted by video conference on 7 November 2022 at 16:30, reflect, at paragraph 3, the fact that the parties confirm their agreement to arbitrate the dispute between them, more fully described below, and also confirming that an arbitral dispute exists and that the arbitrator has jurisdiction in respect of the dispute.

[9] It was further confirmed that the nature of the dispute is as follows:

> "3.4.1 The claimant issued a provisional sentence summons against the respondent for recovery of an amount in terms of a settlement agreement and acknowledgment of debt.
>
> 3.4.2 The respondent disputes its liability on the basis of certain deductions that it alleges ought to be made from the amount claimed by the claimant.
>
> 3.4.3 The parties have agreed to refer the action to arbitration."

[10] Paragraph 4 of these minutes confirms that the High Court Rules will govern the arbitration proceedings and that section 23(a) of the Arbitration Act 42 of 1965 ("the Act") is waived.

[11] In paragraph 6, they agreed a timetable for pleadings and other pre-arbitration processes, the detail of which I need not repeat here, save to state that specific dates were agreed for the claimant's statement of claim, the respondent's statement of defence and the claimant's replication, if any, and any statement of defence to the counterclaim, if any, together with discovery, as well as a date for filing claimant's witness statements and respondent's witness statements and claimant's replying statements.

[12] Full provision was also made for the production of documents and the status of such documents.

[13] The hearing of the arbitration was arranged on four dates, from 12 June 2023, and would take place by video conference.

[14] Ultimately, an award followed, annexed as "**MMD5**".

[15] The award states that, despite various issues pleaded by Mathupha in its statement of defence, its indebtedness arising from the AOD, in the amount of R6.5 million and compound interest thereon at the rate of prime plus 3% per annum from 20 June 2019, plus certain costs, is no longer in dispute.

[16] It further refers to the fact that Mathupha has raised a counterclaim based on Aveng's alleged failure to disclose certain liabilities of the business that it had sold to Mathupha, which counterclaim amounts to R3 694 584.00. Reference is also made to a further counterclaim for an amount of R2 million raised by Mathupha in respect of the so-called Mozambican assets.

[17] The award further reflects that there can be no dispute that the latter R2 million counterclaim is fatally flawed by virtue of the fact that the contemplated agreement in respect of those assets, as referred to in clause 6.1 of the sale agreement, was never concluded. Hence, in the result the award states that Mathupha's counterclaims for payment of the amount of R3 694 584.00 remains to be heard and determined.

[18] Mathupha was not ready to proceed with its counterclaim on the assigned dates, being the first four days of the week in which the award was made, the reasons for its unreadiness relating to the apparent unavailability of a witness with whom its counsel required to consult and which, for some reason, has not happened to date. The Arbitrator stated that, whilst not strictly relevant, he found this reason unconvincing because the person who submitted the detailed witness statement on behalf of Mathupha, and who is plainly its applicable representative in respect of the elements of its counterclaim, being Ms Z Z Moloi, was seemingly at all times available to consult with Mathupha's legal team and to participate in the hearing.

[19] The Arbitrator further found that, having been faced with the reality that there was no reason for the Claimant's claim to be postponed, the Defendant's counsel sought a postponement of the hearing and the determination of the remainder of its counterclaim, being for payment of an amount of R3 694 584.00.

[20] Mathupha had, however, at the commencement of the proceedings in that week, tendered to pay an amount in excess of R3 million to the claimant on a future date, with the rest of the issues in the arbitration to stand to a later date, which tender was not acceptable to Aveng. Since the available dates for the arbitration had substantially run out, the Arbitrator found that he had little choice but to allow the postponement of the hearing of Mathupha's counterclaim and he granted such postponement.

[21] Mathupha's counsel contended that in accordance with the provisions of High Court Rule 22(4) execution of the admitted claim of Aveng should be stayed until the determination of its counterclaim. The Arbitrator ruled, however, based on a long line of authorities which culminated in the decision in *Truter v Degenaar*,[1] that he had a discretion to direct that the execution may be levied on the strength of the Aveng's admitted claim, regardless of the fact that Mathupha's counterclaim would only be heard and determined on a date some months from then.

[22] The award states that he is conscious of the fact that Mathupha, in the instance case, cannot be accused of apathy and dilatory conduct similar to that of the respondent in the *Truter* matter However, Mathupha's inability to proceed with its counterclaim in the instance case was not satisfactorily explained and is not excusable. This single dilatory factor has caused the delay in the final determination of all the issues in the current arbitration. Moreover, Mathupha has, as set out earlier, tendered to pay an amount in excess of R3 million to Aveng, albeit at a later date.

[23] Hence, the Arbitrator was of the view that, in the exercise of his discretion and in fairness, he should allow at least a portion of Aveng's claim to be immediately

[1] 1990 (1) SA 206 (T)

executable,(my underlining) with the remainder thereafter to await the determination of Mathupa's counterclaim for payment of the amount of R3 694 584.00.

[24] Mathupha has conceded that it should be liable for the wasted costs for the first three days of the week and the costs of its postponement application, such costs to be taxed or agreed on the attorney and client scale, including the cost of the Arbitrator.

[25] Ultimately, the Arbitrator concluded that an award is made in the following terms:

> "12.1 The claimant's claim is allowed and determined in its favour in the amount of R6.5 million, plus compound interest thereon at the prime overdraft rate plus 3% pa from 20 June 2019 until date of payment.
>
> 12.2 The defendant is directed to pay the costs of the claimant's claim including the costs of the defendant's postponement application and the wasted costs of 9, 10 and 11 October 2023 on the scale of attorney and client and including the cost of the arbitrator.
>
> 12.3 Of the aggregate of the amounts referred to in paragraphs 12.1 and 12.2 above:
>
> 12.3.1 all thereof, but for an amount of R3 694 584.00 shall be immediately executable;
>
> 12.3.2 execution in respect of the remainder thereof is stayed until the hearing and determination of the defendant's counterclaim in the amount of R3 694 584.00.
>
> 12.4 The hearing and determination of the defendant's counterclaim in the amount of R3 694 584.00 is adjourned until a date to be determined by agreement between the parties and the arbitrator." [2]

[26] This award was made on 11 October 2023. According to Aveng's computations the amount "immediately executable" at that date is R6 546 909,80. A copy of the computation is annexed as "**MMD6**".

[27] In an email of 11 October 2023 Mr Dingiswayo informed Mathupha's attorneys, SWVG, that he requested Aveng to assist with the calculation of the outstanding balance as at that date. This email states that Mr Dingiswayo understands the award to mean that the computation to be "R6.5 million plus compound interest

[2] See Annexure "**MMD5**"

at the prime rate plus 3%", minus R3 694 584.00, and the calculations were attached to the email sent.

[28] On 19 October 2023 Mr Dingiswayo sent an email to SWVG indicating that he received no response to the email of 11 October 2024.inquiring when Mathupha intended to pay the outstanding amount and expressing Aveng's reluctance to enforce the award by taking take further steps against Mathupha. He also pointed out that on their calculations the award is attracting interest just under R4000 per day.

[29] Only on 23 October 2023 did SWVG respond, indicating that it will be consulting its client "shortly" to discuss same.

[30] Up to the date of the application no reply was received from SWVG. It did not challenge the computation of the award and has also not paid any amount to Aveng. Hence an application was made to make the award an order of court under section 31(1) of the Act with costs to be paid on the attorney and client scale as provided for in Clause 7 of the AOD.

[31] Mathupha filed an answering affidavit to the section 31(1) application on 25 March 2024 seeking condonation for the late filing of same and a dismissal of the section 31(1) application together with a costs order. This was filed as an interlocutory notice of motion supported by Ms Jordan Dias. She states that the award cannot be made an order of court as the Arbitrator had varied same *mero motu* on 25 March 2024.

[32] Her affidavit shows that by 21 February 2024 Mathupha required a pre-arbitration meeting given that the arbitration was to proceed on 4, 5, and 6 March 2024 and that on 23 February 2024 it filed an interim expert report pertaining to its counterclaim. Mathupha also wanted to amend its counterclaim and required further discovery from Aveng.

[33] On 1 March 2024 SWVG corresponded with the arbitrator as to the content of the award of 11 October 2023. It sought a rescission, variation or correction of what it styled a patent error in paragraph 3 of the award. to the award in terms of Rule 42(1). By 7 March 2024 SWVG urged the Arbitrator to act urgently given

that the Section 31 application was set-down for 26 March 2024 and the fact that Mathupha might have to file affidavits. The Arbitrator reminded them that he had to apply the *audi alteram partem* rule but nevertheless placed Aveng's attorney's on notice to respond by 8 March 2024, failing which he would deal with Mathupha's request on the basis that it has no objection thereto.

[34] Aveng was dissatisfied with SWVG's request and ultimately SWVG had to respond to Aveng's response. On Friday 22 March 2024 the Arbitrator advised that he would deal with the matter over that weekend. Later that same day Aveng's attorneys informed SWVG that it was not prepared to remove the Section 31(1) matter from the roll. On 25 March 2024, the Arbitrator issued a supplementary award. Mathupha's late answering affidavit provides no real reason why the original award read with the supplementary award could not be made an order of court. At best it explains how the supplementary award came about and demonstrates an intention that it wants to amend its counterclaim.

[35] Aveng filed a further supplementary affidavit on 26 March 2024 in which Mr Dingiswayo explains that he acts on behalf of Aveng, pointing out that the affidavit deals with two issues: Mathupha's condonation application and the impact of the supplementary award on the Aveng's application.

[36] He submitted that this is not a complex matter that should detain the Court and that the arbitration award, made on 11 October 2023, was not honoured by Mathupha, leading to Aveng applying for same to be made an order of court and Mathupha, in turn, asking the Arbitrator to vary the said award. The award was varied and, to that extent, Aveng now sought the varied award to be made an order of court and also stated that Mathupha does not have a reason to oppose the making of the varied award an order of court. In as much as Mathupha never responded hereto I was requested to disallow this affidavit and if I allow same Mathupha argued in its heads of argument it disagrees herewith and requires an opportunity to reply thereto. It had ample opportunity to do so immediately or in the affidavit that it filed in support of a postponement of the Rule 31 proceedings and to the extent that an opportunity is sought to deal therewith it is refused.

[37] With regard to Mathupha's condonation application, he pointed out that in line with the directives of the above Honourable Court, the matter was set down on the unopposed roll because, although Mathupha had filed a notice to oppose, it did not file an answering affidavit. This it filed belatedly on the eve of the hearing for reasons it ought to have known shortly after 11 October 2023. Although this is not elaborated upon it must be a reference to Mathupha's request for the variation of the award. Hence, he submitted, that the late filing of the answering affidavit should not be condoned, even though Mathupha stated that its answering affidavit contains *"facts in support of [its] application for condonation for the late filing of the answering affidavit"* he expresses the view that no such facts can be gleaned from Mathupha's answering affidavit.

[38] I have decided to admit both Aveng's supplementary affidavit as well as the answering affidavit of Mathupha. Once read together it sets the scene for the application of the Rule 42 variation and demonstrates that Mathupha had no intention to appeal the award as varied or invoke section 33 of the Arbitration Act. All it wanted to achieve is the opportunity to prove its counterclaim. Mathupha's answering affidavit also demonstrates that it was satisfied that the original award could remain the same in respect of the Arbitrator's award to the extent that he held that in fairness a part of Aveng's claim should be immediately executable. Paragraph 9.4 of annexure "**JND7**" to this affidavit makes it clear that it required no rescission, variation or correction of that part of the Arbitrator's award which stated that "*It is thus my view that in the exercise of my discretion and in fairness, I should allow at least a portion of the Claimant's claim to be immediately executable*".

[39] Although the ultimate variation still left Mathupha dissatisfied it seems to have taken comfort in its stated intention to amend its counterclaim. On 26 March 2024, the Section 31(1) Application was removed from the roll and an order made to the effect that the wasted costs are reserved.

[40] By the time, the I became seized of the matter the Arbitrator had already heard the application for amendment of Mathupha's counterclaim and refused same. This caused Mathupha to lodge an appeal in terms of the Afsa Rules. The right of Appeal is in dispute on the basis that no appeal procedure is provided for in

the AOD. I am not seized with this dispute but with the application to make the award and supplementary award an order of court.

[41] Mathupha has however filed a notice of motion together with an affidavit from Ms Dias and Ms Moloi, a director of Mathupha, on 19 November 2024 in which it seeks the following relief:

> "1.Granting the Respondent leave to file the supplementary answering affidavit annexed to this notice of motion as annexure X.
>
> 2.Granting the Respondent condonation for the late filing of the supplementary answering affidavit.
>
> 3.The main application in terms of section 31(1) of the Arbitration Act No 42 of 1965 is postponed *sine die*.
>
> 4.The Applicant shall pay the wasted costs occasioned by the postponement in the event of the opposition on the scale of attorney and client, alternatively on the party and party scale, including the cost of counsel on Scale B."

[42] The above relief is sought for the following reasons:

42.1 On 31 July 2024, Mathupha launched an application for leave to amend its counterclaim in terms of Rule 28(4) in the arbitration proceedings. A copy of this amendment is annexed marked "A"; The Arbitrator responded hereto that he will await Aveng's attorney's response to same.

42.2 The application for leave to amend was opposed and argued before the Arbitrator on 7 October 2024;

42.3 The Arbitrator made an award in respect of the application for leave to amend on 15 October 2024 (the award is dated 14 October 2024, but same was only distributed to the parties on 15 October 2024), and a copy thereof is annexed as annexure "B" to Dias' affidavit;

42.4 She further states that it is clear from Mathupha's notice of intention to amend that it sought to introduce a counterclaim based on fraudulent misrepresentation in an amount of R29 654 000;

42.5 Ms Dias indicates that Mathupha filed a notice of appeal on 12 November 2024, a copy of which is annexed as annexure “C”, and a letter to Aveng’s attorneys in which Mathupha suggests nominations for an arbitration appeal tribunal as annexure “D”. It is stated that the appeal has been lodged outside the seven-day period provided for in Article 22 of the Rules of AFSA and, in terms of the pre-arbitration meeting held on 7 November 2022, the parties agreed that the applicable rules to the proceedings would be the High Court Rules, which would govern the arbitration proceedings. In this regard, she annexed the pre-arbitration minutes, annexure “E”;

42.6 On the basis that the award was granted on 15 October 2024, she acknowledges that the appeal should have been lodged by 24 October 2024. The appeal was thus 13 days late and, in the event that Aveng does not condone same, an appeal tribunal cannot be convened until such time as condonation is granted by the Court on application in terms of the High Court Rules, as well as section 38 of the Arbitration Act;

42.7 The appeal has not been filed excessively late and the reasons for the late filing are stated to be the following:

42.7.1 the junior counsel seized with the matter was involved in extensive trial preparation during the week of 14 October 2024 and thereafter conducted a High Court trial during 21 to 25 October 2024;

42.7.2 during this time, Mathupha was considering its position regarding the content of the award and was considering whether to in fact appeal or review the award. To this end, the advice of senior counsel was sought and a consultation was arranged in this regard on 5 November 2024;

42.7.3 the respondent's junior counsel fell ill on 30 October 2024 but attended the consultation with senior counsel on 5 November 2024. Unfortunately, the respondent's junior counsel was hospitalised during the evening of 5 November 2024. Although she was subsequently discharged, she was readmitted on 11 November 2024 and underwent surgery on 15 November 2024. A copy of annexure "F" (the sick note) is attached to the papers;

42.7.4 As a result of receiving advice from senior counsel, the decision was made to proceed with an appeal;

42.7.5 Mathupha was able to produce a notice of appeal on 12 November 2024, despite the above challenges and this application for postponement was drafted as soon as possible after Mathupha's junior counsel was discharged from hospital on 15 November 2024, despite it still being during the period of her convalescence;

42.8 Hence, condonation is sought for the late filing of the application for postponement and leave is sought that the application be heard as one of urgency prior to the hearing of the main application on 25 November 2024.

[43] In Aveng's notice of motion, it seeks an order that the award of the Arbitrator on 11 October 2023 be made an order of court and she repeats that this was amended by the supplementary award on 25 March 2024.

[44] She states that, when correcting the award, the Arbitrator not only changed the word "counterclaim" to "counterclaims" in several places in the award but also inserted words in paragraph 12.4 of the award. Accordingly, the amended award reads as follows:

"12. I make an award in the following terms:

12.1 The claimant's claim is allowed and determined in its favour in the amount of R6 500 000 plus compound interest thereon at the prime overdraft rate plus 3% p.a. from 20 June 2019 until date of payment.

12.2 The defendant is directed to pay the costs of the claimant's claim including the costs of the defendant's postponement application and the wasted costs of 9, 10 and 11 October on the scale of attorney and client, and including the costs of the arbitrator.

12.3 Of the aggregate of the amounts referred to in paragraphs 12.1 to 12.2 above:

12.3.1 all thereof, but for an amount of R3 694 584,00 shall be immediately executable;

12.3.2 the execution in respect of the remainder thereof is stayed until the hearing and determination of the Defendant's counterclaim in the amount of R3 694 584.

12.4 The hearing and determination of the defendant's counterclaim in the amount of R3 694 584 including its counterclaim in respect of the so-called Mozambican assets is adjourned until a date to be determined by agreement between the parties and the Arbitrator."

[45] She states that despite the relief sought by Aveng to be made an order of court, it has attempted to quantify the amount of the award in its affidavits by way of the supplementary affidavit for which it did not seek leave from the Court. She submits that Aveng has attempted to do this as the award is in fact void for vagueness. Even if the award, as amended, is made an order of court, it is alleged that it cannot be executed upon as:

45.1 the amount of compound interest has not been identified and quantified;

45.2 the award does not identify the prime overdraft rate applicable;

45.3 the Applicant has not proven the overdraft rate that is applied to its calculation;

45.4 the calculation of interest is in dispute;

45.5 the costs have not been quantified, taxed or demanded; and

45.6 in the supplementary award the Arbitrator admits that there is more than one counterclaim but only makes provision for an amount of R3 694 584 to be stayed. She alleges that this is arbitrary.

[46] It is also alleged that the Court cannot and should nor make court orders in terms of a debt which is not immediately or easily ascertainable and which will

lead to further litigation. If the applicant attempts to execute for a specified amount that it unilaterally calculated, it will in all probability lead to an urgent application for a stay of such warrant.

[47] As far as the computation of the award as supplemented Mathupha was from the outset invited to take part in same. It failed to do so.

[48] The counterclaim that Mathupha is seeking to introduce is allegedly more than the claim of Aveng and it would not be just and equitable in the circumstances for the above to proceed to make the award an order of court prior to finalisation of Mathupha's appeal and, if the appeal is successful, the determination of Mathupha's counterclaim at arbitration. This flies directly in the face of the Arbitrator's view that Aveng should be entitled to execute immediately on the award read with the supplementary award, a notion which Mathupha did not take issue with when seeking a rescission, variation or correction of same.

[49] Aveng has earlier referred the Court to the AOD dated 5 September 2009 in its chronology of events. It is alleged that the origin of the dispute is, however, based on a sale agreement dated 18 April 2019, upon which the applicant relied in its statement of claim in the arbitration proceedings. She asserts that in clause 30.1 of the sale of business agreement there is an arbitration clause, reading as follows:

> "30. **ARBITRATION**
>
> 30.1 Any disputes arising from or in connection with this Agreement shall, if so required by any Party by giving written notice to that effect to the other, finally be resolved in accordance with the rules of the Arbitration Foundation of Southern Africa (AFSA) by an arbitrator or arbitrators appointed by AFSA, which arbitrator's finding shall, save for manifest error, be final and binding on the Parties and may be made an order of court. There shall a right of appeal as provided for in article 22 of the aforesaid rules."

[50] She points out that a second agreement was entered into titled "settlement recordal" of 6 June 2019. She asserts that the settlement recordal did not novate the terms of the sale of business agreement and thereafter the acknowledgment of debt relied upon by Aveng was entered into on 5 September 2019, which contains a non-novation clause.

[51] She continues by stating that, in order for the Court to have regard to the contents of the agreements, she annexed the sale of business agreement and a copy of the settlement recordal, as “F1” and “F2” respectively, and a copy of the AOD as “F3”. She, therefore, implores the Court to grant Mathupha’s leave to file the supplementary affidavit and to condone the late filing thereof. She further states that Aveng would in all probability wish to respond to the supplementary affidavit.

[52] Mathupha ultimately seeks a postponement of the main application *sine die* in order for the respondent’s appeal to be heard. In this regard, the High Court would be seized with the application for condonation, as condonation would have to be granted by agreement or otherwise, in order for an appeal tribunal to be established. It would not be just or equitable for the award, in its vague and uncertain terms, to be made an order of court in light of the fact that the respondent is seeking to introduce a counterclaim exceeding R29 million, based on fraudulent misrepresentation and, for that reason, she prays for costs in the event of opposition. Ms Moloi made a confirmatory affidavit to that of Ms Dias to the extent that same refers to her.

[53] Aveng answered this affidavit on 22 November 2024 by way of an affidavit attested to by Mr Dingiswayo in which he sets out the grounds of opposition to the postponement. It is alleged that at all times Mathupha has demonstrated an intention to obfuscate and evade its obligation in terms of the underlying sale transaction between the parties that culminated in an acknowledgment of debt on which the arbitration award was based and that Aveng seeks to have made an order of court. It is stated that the application is a continuation of that stratagem and, of the two issues raised in the affidavit, the purported appeal and the attack of the previous arbitration award, one of them concerns facts that would have been known to the respondent for over a year. Nevertheless, it has waited until less than a week before the hearing to take the steps it now takes.

[54] He states that following the conclusion of the sale of business agreement between the parties, in or about April 2019 (“the sale agreement”), the parties reconciled the outstanding amount that was due by Mathupha to Aveng in terms

of the sale transaction. The settlement amount of R6.5 million was recorded in the settlement recordal concluded by the parties in June 2019 ("the settlement recordal").

[55] In terms hereof, Mathupha undertook to pay the settlement amount on 28 June 2019. Mathupha breached this obligation and failed to make payment.

[56] As a result hereof, the Applicant called upon Mathupha to execute the AOD in favour of Aveng and it was afforded an opportunity to pay the debt owed to Aveng in four instalments, the first of which was due on 30 September 2019 and the final instalment due on 31 December 2019.

[57] Despite this indulgence, Mathupha again failed to comply with its obligations and did not make payments as required in terms of the AOD. This led to Aveng commencing proceedings against Mathupha by way of provisional sentence summons based on the AOD.

[58] Mathupha delivered the affidavit (already referred to) resisting provisional sentence. He states that, despite Mathupha's defences being spurious and, at best for it, raising only the prospect of unliquidated counterclaims, out of an abundance of caution Aveng proposed that its claim, based on the AOD, be determined in arbitration.

[59] He emphasises that it is important to note that the cause of action in the provisional sentence summons was the AOD and the AOD did not contain an arbitration clause. It is clear that, by doing this, he steers away from the preceding agreements which contained arbitration clauses and a reference to an appeal process.

[60] He states that the parties agreed to the appointment of the arbitrator under the auspices of AFSA and proceeded to arbitration.

[61] Mathupha had no defence to Aveng's liquidated claim in terms of the AOD and admitted this to be the case in its statement of defence in the arbitration and its only defence was to raise an unliquidated counterclaim which did not found a valid defence to Aveng's claim. This, he says, was confirmed by the Arbitrator

who issued a final and binding award in favour of Aveng for the full amount of Aveng's claim. That is the subject matter of the main application in these proceedings.

[62] He further states that the Arbitrator did afford Mathupha an opportunity to pursue its counterclaim by postponing the execution of a portion of the amount awarded to Aveng. Mathupha again failed to comply with this and did not pay the immediate payable amount in terms of the October 2023 award. As a result, Aveng launched the main application in November 2023 to have that award made an order of court in terms of section 31 of the Act. Mathupha took no steps to challenge the award in terms of section 33 of the Arbitration Act.

[63] Although it filed a notice of intention to oppose the main application in November 2023, it thereafter took no steps to further its opposition until much later.

[64] The main application was enrolled on 26 March 2024. On 1 March 2024, almost five months after the October 2023 award was issued, Mathupha wrote to the Arbitrator expressing the view that there was an error in his award and requesting a correction.

[65] Mathupha's complaint about the October 2023 award was not based on any of the grounds it has now raised in its founding affidavit in the interlocutory application for postponement.

[66] On 8 March 2024, Aveng responded to Mathupha's request, expressing its disagreement and Aveng took the stance that the October 2023 award was correct.

[67] On 25 March 2024, after considering the parties' submissions, the Arbitrator decided to correct his award and issued a supplementary award reflecting the correction.

[68] He further alleges that, on the same day, Mathupha filed an answering affidavit in which it dealt exclusively with the effect of the supplementary award, but not with the remaining merits of the main application.

[69] The next day, being the hearing date, Aveng filed a supplementary affidavit dealing with its version of the effect of the supplementary award. It adopted the view that the supplementary award did nothing more than reduce the immediately payable amount in terms of the award, but it did not otherwise impact the relief sought.

[70] The matter then did not proceed on the day in question. Mathupha's supplementary affidavit sought to amend its counterclaim in the arbitration by replacing it in its entirety with a new counterclaim, baselessly alleging fraud against Aveng.

[71] Aveng objected to the amendment and Mathupha instituted an application for leave to amend. The application to amend the counterclaim was dismissed by the Arbitrator in a final and binding award on 15 October 2024 ("the amendment award"), which is referred to by Mathupha in its founding affidavit.

[72] He states that the facts set out above, together with the related documents, are, for the most part, attached to the affidavit in the main application as well as the founding affidavit and had not been attached again to avoid prolixity.

[73] Under the rubric "general response to this application", he states the following:

73.1 the application is for Mathupha to seek leave to file a supplementary answering affidavit and to postpone the hearing of the main application;

73.2 in regard to the application for leave to file the supplementary answering affidavit, Mathupha has failed to explain why the evidence now tendered was not tendered timeously. In this regard, the belated attack on the October 2023 award comes more than a year after that award was issued and more than eight months after Mathupha applied its mind to the award for purposes of requesting a rescission, variation or a correction;

73.3 the failure applies equally to the postponement application. Mathupha's failure to raise its complaints about the October 2023 award timeously, in its first answering affidavit, if not earlier, has not been explained and is now relied on as a basis for the postponement.

[74] The relevance of the purported appeal to the main application has not been explained at all. There is no explanation as to how an October 2024 award concerning Mathupha's counterclaim (the amendment award) can affect the enforceability of an award issued a year prior in regard to Aveng's main claim (or months after the supplementary award).

[75] The supplementary award concerns the dismissal of the application to amend the counterclaim. This was a counterclaim postponed for later determination after the issuing of the October 2023 award. A purported appeal against this award has no bearing on the October 2023 award as supplemented.

[76] Under the rubric of "purported appeal", he states that there is no right of appeal against the award as it is a final and binding arbitration award.

[77] The arbitration that is the subject matter of the main application is not an arbitration in terms of clause 30 of the sale agreement, as alleged by Mathupha. In this regard, he states that after delivery of Mathupha's affidavit resisting the provisional sentence, Aveng's attorneys proposed that the above matter, subject re Mathupha Capital/Aveng Africa case number 2022/1649 (i.e. the provisional sentence summons proceedings), be referred to arbitration under the auspices of AFSA.

[78] Mathupha's attorneys responded to the proposal agreeing to the referral and to the appointment of the Arbitrator.

78.1 On this basis, on 15 July 2022, Aveng's attorneys sent a request for arbitration to AFSA, a copy of which is annexed as "AA1";

78.2 As required by AFSA, the request was accompanied by the arbitration agreement. That document comprised the exchange of the emails referred to above as well as the provisional sentence summons;

78.3 The request for arbitration was not accompanied by the sale agreement, as being the agreement to arbitrate;

78.4 Mathupha did not object to, or seek to correct, the basis of the agreement to arbitrate as reflected in the request for arbitration;

78.5 As stated above, the other supporting document to the request for arbitration was the provisional summons. The summons pleaded a cause of action based on the AOD (see paragraph 12 of the AOD) and was not based on the sale agreement;

78.6 The AOD does not contain an arbitration clause and does not incorporate clause 30 of the sale agreement (the arbitration clause);

78.7 As the arbitration is not one in terms of the sale agreement, clause 30 does not apply and any appeal procedure referred to in that clause does not apply to the present proceedings.

[79] Furthermore, the parties did not agree to incorporate an appeal in the agreement to arbitrate that was included. In this regard, he submits that none of the emails exchanged between the parties' attorneys contains any agreement that would include an appeal.

[80] In terms of the Act, an arbitration award is final and not subject to appeal unless the arbitration agreement provides otherwise. There is no reference thereto in the emails exchanged between the parties' attorneys and the request for arbitration did not provide otherwise.

[81] He alleges that no appeal was agreed as part of the arbitration agreement.

[82] At the subsequently agreed pre-arbitration meeting to apply the High Court Rules to the proceedings, he states that the High Court Rules are rules of procedure and they do not grant a substantive right of appeal.

[83] He further states that the amendment award or any other award is, therefore, not subject to appeal.

[84] Under the rubric "the attack on October 2023 award", he states that Mathupha's contentions in this regard are largely a matter for legal argument. He records, however, that:

84.1 Mathupha has never taken steps to review the October 2023 award in terms of section 33 of the Act;

84.2 Mathupha queried the award when it requested the correction, but did not raise the matters it seeks to raise now;

84.3 Aveng's interest calculations were attached to its founding affidavit (paragraph 80, p 001-9 and "MMD6", p 001-38) and supplementary affidavit ("MMD11", p 006-12) in the main application (the original calculation and the revised calculation based on the corrected award); and

84.4 In its answering affidavit, Mathupha did not engage at all with the interest calculation. It offered a blanket denial to these paragraphs of the founding affidavit and simply repeated its version concerning the sequence of events culminating in the correction of the award.

[85] He thereafter deals with the various paragraphs *seriatim* and maintains that a valid final and binding arbitration award was published by the Arbitrator on 15 October 2024 and no appeal lies against same. In any event, the reasons referred to in the paragraphs do not explain the belated attack on the 2023 award which the Respondent has been aware of for more than a year.

[86] He also points out that the Arbitrator also effected the corrections at paragraph 4 of the award by inserting a sentence concerning the postponement of the so-called Mozambican asset portion of the counterclaim.

[87] As for the balance, he denies the bulk of the allegations in the *ad seriatim* section, maintaining that the cause of the action in the arbitration was the AOD and the other agreements were referred to as the "background".

[88] He maintains that Mathupha has failed to demonstrate the relevance of the issues concerning the purported appeal to the determination of the main application and has failed to demonstrate that the October 2023 award is not a valid arbitration award.

Legal Argument

[89] Due to counsel for Mathupha requesting that I hear the matter by remote means on MS Teams given that she was still convalescing after an earlier operation, I did so. During the argument of the matter before me, Mr Subel made it clear that Aveng has no intention of filing any further affidavit in reply on the main application and stands by its submissions in the main affidavit and the supplementary affidavit.

[90] In Ms Franck's argument, she maintained that a right of appeal to the amended counterclaim exists and also stated that Mathupha issued an application for leave to supplement its answering affidavit and for a postponement of the section 31 proceedings, as already referred to above. She requested that the late filing of Mathupha's affidavit, dated 25 March 2024 be condoned and that it be granted leave to file their supplementary answering affidavit attached to the interlocutory notice of motion, dated 19 November 2024, and that it be granted condonation for the late filing of same and that the main application be postponed *sine die*. She also requested that Aveng should pay the wasted costs occasioned by the postponement in the event of their opposition on the scale of attorney and client.

[91] She argued that Mathupha did attempt to amend its counterclaim to introduce a cause of action based on fraudulent misrepresentation in the amount of R29 654 000.00.

[92] Mathupha filed a notice of appeal on 12 November 2024. According to her, the appeal has been lodged outside the seven-day period provided for in Article 22 of the rules of AFSA and Aveng has refused to condone the late filing of the appeal and, as such, Mathupha would have to launch a condonation application to the High Court in order to seek condonation for the arbitration tribunal to be convened/ established. She states that the appeal was filed 15 days late and Mathupha believes that it has good grounds for condonation.

[93] The supplementary affidavit was filed to address the pending appeal and it is alleged that Mathupha has a right to appeal in terms of clause 30(1) of the sale of business agreement, which makes provision for the right of appeal in terms of Article 22 of the AFSA Rules. In her heads of argument, she states that, in

terms of the pre-arbitration meeting on 7 November 2022, the parties agreed that the applicable rules to the proceedings would be the High Court Rules which would govern the arbitration proceedings. Altogether, it is suggested that it would not be just and equitable for the Court to make the order an award in lieu of the pending appeal in which Mathupha contends it has a counterclaim that vastly exceeds the quantum of Aveng's claim.

[94] It is further submitted that the wording of the award is vague and ambiguous and that I should decline to make it an order of court as the wording is confusing and the amount that the Applicant would ultimately issue a warrant in respect of would be in dispute.

[95] She further submitted that I have a discretion to permit the filing of further affidavits under Rule 6(5)(e) and hence I should exercise such discretion and that the fundamental consideration is that a matter should be adjudicated upon all the facts relevant to the issues in dispute.

[96] She further argues that it is essentially a question of fairness to both sides as to whether or not further sets of affidavits should be permitted and refers to *Milne NO v Fabric House (Pty) Ltd*,[3] where the court said that:

> "In my view it is neither necessary nor desirable to say more than that the court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and that basically it is a question of fairness to both sides. Thus on the one hand it is right that the plaintiffs should have a speedy remedy of the procedural provisional sentence; and if a third set of affidavits is introduced, where is the line to be drawn? On the other hand justice may require that the defendant be allowed to place such further information before the court. The court will weigh all the facts and choose what it thinks fair to both sides."

[97] She also referred to *Broodie NO v Maposa and Others*,[4] where the court held that:

> "if there is an explanation that negatives any suggestion of mala fides or culpable remissness for the failure to put the evidence before the court at the earlier stage, courts should incline towards allowing the affidavits to be filed".

[98] She further relies on *Zarug v Parvathia NO*,[5] where the court held that:

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3 1957 (3) SA 63 (N)
4 2018 (3) SA 129 (WCC)
5 1962 (3) SA 872 (D), at 874A

"a departure from the general rule had been allowed where there was something unexpected in the applicant's replying affidavits or where new matter was raised therein and also where the Court desired to have fuller information on record".

[99] She also submitted that, in the current matter, the events relating to the introduction of the respondent's proposed amendment and counterclaim as well as the quantum thereof only arose in May 2024 and culminated in an award that was distributed on 15 October 2024. Hence, Mathupha was not in a position to file a supplementary affidavit before that date and the court must be satisfied that no prejudice is caused by the filing of the additional affidavit, which cannot be remedied by the appropriate order as to costs.

[100] She also referred me to Aveng filing a supplementary affidavit in March 2024 without seeking any condonation therefor (which Mathupha disagrees with), and the fact that Aveng has not filed any replying affidavit in the section 31 proceedings. As stated, Mr Subel already advised me, during argument, Aveng has no intention of filing a replying affidavit.

[101] It is further submitted whether to admit the supplementary affidavit, guidance could be sought in case law dealing with new matter in reply. The supplementary affidavit introduces new facts and Mathupha seeks postponement of the section 31 proceedings.

[102] She then submits that the primary object for allowing an amendment is that:

102.1 the court can determine the real issues in dispute between the parties and to obtain a proper ventilation of those issues so that justice may be done;

102.2 the general rule is that an amendment will always be allowed unless an application to amend is made *mala fide*, or unless the amendment would cause an injustice or prejudice to the other side which cannot be compensated by an order for costs;

102.3 the court has the greatest latitude in granting amendments, and it is very necessary that it should have. It is not a game we are playing in which, if some mistake is made, the forfeit is claimed;

102.4 the practice of the courts is to give leave to amend unless the court has been satisfied that the party applying for the amendment is acting *mala fide* or that, by his blunder, he has done some injury to his opponent which could not be compensated by costs or otherwise;

102.5 however negligent or careless the omission of the counterclaim may have been, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side There is no injustice if the other side can be compensated by costs;

102.6 although it has been stated that the granting of an amendment is an indulgence to the party asking for it, the modern tendency of the court lies in favour of an amendment whenever such an amendment facilitates the proper ventilation of the disputes between the parties.

[103] She, therefore, submits that there is no prejudice to Aveng should the proceedings be postponed. I disagree with this submission. It will in such a case have to hold over execution on a substantial amount which the Arbitrator specifically authorised.

[104] Under the rubric “wording of the award”, the following is submitted. A judgment or judicial order has at least two functional components:

104.1 it is a command to the party at whom it is aimed, coupled in an appropriate case with a warrant to the Sheriff to enforce the command;

104.2 it regulates the legal relationship between the parties and settled their mutual rights and obligations to the extent necessary for the grant.

[105] It is further submitted that It is a fundamental principle of our law that a court order must be effective and enforceable and it must be formulated in language that leaves no doubt as to what the order requires to be done. Not only must the order be couched in clear terms, but its purpose must be readily ascertainable from the language used. If an order is ambiguous, unenforceable, ineffective, inappropriate or lacks the element of binding finality to a matter, or at least part of the case, it cannot be said that the court that granted it exercised

its discretion properly. It is submitted that the Arbitrator's award is ambiguous and the court should decline to make it an order. The provision of the supplementary award allegedly added to the ambiguity.

[106] Aveng has attempted, in its supplementary affidavit, for which no condonation has been sought, to quantify the amount of the award. It is submitted that this, in itself, is impermissible as the court cannot give a judgment other than making the award an order of court, The award should not be made an award of court and should not be able to be executed upon as:

106.1 the amount of compound interest has not been identified and quantified;

106.2 the award does not identify the prime overdraft rate applicable;

106.3 Aveng has not proven the overdraft rate that it has applied to its calculations;

106.4 the calculation of interest is in dispute;

106.5 the costs have not been quantified, taxed or demanded; and

106.6 in the supplementary award, the Arbitrator admits that there is more than one counterclaim (prior to the amendment) but only makes provision for an amount of R3 694 584.00 to be stayed and that this is arbitrary.

[107] It is further submitted that, in making the award an order of court, it would not lead to finality as any attempt by Aveng to execute on flawed calculations will most probably be met by an application to be stay such a defective warrant.

[108] It is also submitted that the award (and supplementary award) contains no patent error or clerical mistake arising from an accidental slip or omission that I may correct as intended in section 31 of the Act.

[109] On a conspectus of all the facts I allow the affidavit setting out the grounds for the postponement of the Section 31(1) proceedings. I am, however, unpersuaded that the Rule 31 (1) application should be postponed. If I give effect to the request for a postponement I will effectively be overruling the

Arbitrator on a topic he has already decided and frustrate the immediate execution he had in mind.

[110] Aveng referred me in its heads of argument to the following:

> "That is not to say that a court can never enforce an arbitral award that is at odds with a statutory prohibition. The reason is that constitutional values require courts to 'be careful not to undermine the achievement of the goals of private arbitration by enlarging their powers of scrutiny imprudently'. Courts should respect the parties' choice to have their dispute resolved expeditiously in proceedings outside formal court structures. If a court refuses too freely to enforce an arbitration award, thereby rendering it largely ineffectual, because of a defence that was raised only after the arbitrator gave judgment, that self-evidently erodes the utility of arbitration as an expeditious, out-of-court means of finally resolving the dispute."[6]

[111] I see no ambiguity or uncertainty in the award read with the supplementary award and the criticism that it cannot be made an order of court is in my view a red herring.

[112] There is no prejudice to Mathupha. It had its initial opportunity to prove its counterclaim. The notional appeal against the refusal of the amendment of the counterclaim, only relate to the newly increased counterclaim of some R29 million, which can be decided in due course. There is also no indication that the award read with the supplementary award is subject to any appeal.

[113] If I make the award as read with the supplementary award an order of court and should Mathupha subsequently succeed in establishing a right to appeal and even has success with such appeal, Aveng will have to pay the amount then claimed by Mathupha. There is no allegation that Aveng will be unable to pay same or repay whatever it received in terms of the award read with the supplementary award.

[114] I accordingly make the following order:

114.1 The applicants supplementary affidavit setting out the calculation of its quantum and dated 26 March 2024 is admitted;

[6] See Cool Ideas 1186 CC v Hubbard and Another - 2014 (4) SA 474 (CC) at par 56

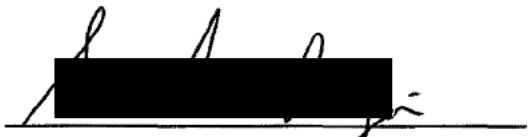
114.2 The respondent's answering affidavits dated 25 March 2024 are admitted;

114.3 The respondent's affidavits setting out the grounds for a postponement of the application are admitted;

114.4 The application for the postponement of the Section 31(1) application is refused;

114.5 The Arbitrator's award of October 2023 as read with the supplementary award of 25 March 2024 is made an order of court;

114.6 The Respondent is to pay the costs of the opposed Rule 31(1) Application including the costs of 26 March 2024 and the costs of the unsuccessful application for its postponement, on the scale of attorney and client, same to include the use of 1 senior and 1 junior counsel.



S. VAN NIEUWENHUIZEN, AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

Date judgment reserved: 27 November 2024

Date judgment delivered: 14 March 2025

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