Judge copy

**IN THE HIGH COURT OF SOUTH AFRICA**
**KWAZULU-NATAL LOCAL DIVISION, DURBAN**

**CASE NO: D11215/2022**

In the matter between:

**TANSNAT DURBAN (PTY) LTD** **PLAINTIFF/RESPONDENT**

and

**eTHEKWINI MUNICIPALITY** **FIRST DEFENDANT/EXCIPIENT**

**KWAZULU-NATAL DEPARTMENT OF TRANSPORT** **SECOND DEFENDANT**

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**ORDER**

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**The following order is granted:**

The exception is dismissed with costs, including the costs of senior counsel.

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**JUDGMENT**

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**Z P Nkosi ADJP**

**Introduction**

[1] The excipient is the first defendant ("the Municipality") in the action instituted by the plaintiff ("Tansnat"). I will hereinafter refer to the parties as the Municipality and Tansnat respectively.

[2] The Municipality excepts to Tansnat's particulars of claim ("POC") in terms of Uniform rule 23(1) on the grounds that the POC lack averments which are necessary to sustain a cause of action. It contends so on four grounds, namely:

(a) on facts pleaded by Tansnat, it cannot be said that the Arbitration Award amounts to a "hybrid award" and is therefore a nullity;

(b) alternatively, on the facts pleaded, the Award did not amount to a nullity and at best might have amounted to an Award which was reviewable in terms of s 33(1) of the Arbitration Act[1] ("the Arbitration Act");

(c) further alternatively, even if the Award is a nullity, then this fact does not afford this court jurisdiction to determine the claims which the parties have against one another; and

(d) furthermore, Tansnat's pleaded contentions regarding the PTIG buses, do not affect the entire Award. Therefore, no reason exists for setting aside the entire Award.

[3] The exception is assailed by Tansnat on the basis that there is no merit in any of the aforesaid grounds of exception since the Arbitrator issued an impermissible "hybrid order" as the PTIG issue constituted one of the issues falling within his mandate to determine yet he did not decide it, and instead left it for the court to decide.

**Pleadings in the POC**

[4] Tansnat has pleaded the following:[2]

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[1] Arbitration Act 42 of 1965.

[2] See the Municipality's heads of argument para 5.

(a) the Arbitrator was required by clause 6 of the settlement agreement to evaluate and determine the validity and/or justification of any claims between the parties;

(b) the Arbitrator delivered an Arbitration Award on 30 September 2022;

(c) the determination made in the Award included a finding that the Arbitrator did not have jurisdiction to determine the parties' claims relating to the so-called "PTIG buses";

(d) the finding by the Arbitrator that he did not have jurisdiction to determine the claims relating to the PTIG buses resulted in his having made a hybrid Arbitration Award;

(e) the Award is accordingly a nullity;

(f) the jurisdiction afforded to the Arbitrator was to finally determine all the issues between the parties;

(g) the arbitration is not yet complete;

(h) the Arbitrator decided some issues as a matter of finality but did not decide all the issues as a matter of finality;

(i) there is no room in law for a hybrid Award such as made by the Arbitrator;

(j) the Arbitrator had no jurisdiction to make an Award determining only some of the issues and leaving some issues to be determined by the court; and

(k) the Arbitrator's finding that he lacked jurisdiction to determine the PTIG bus issue destroyed the entire basis for his jurisdiction in respect of all his findings.

**Issue and onus**

[5] The issue that requires determination is whether or not Transat's POC are excipiable. Put differently, does the POC allege facts sufficient to support a cause of action?

[6] For purposes of an exception the court must "assume the correctness of the factual averments made in the relevant pleading, unless they are palpably untrue or so

improbable that they cannot be accepted".[3] However, an excipient should make out a very clear, strong case before he should be allowed to succeed.[4]

[7] The court should not look at a pleading with a magnifying glass of too high-power. "Unless the excipient can satisfy the court that there is a point of law or real embarrassment, the exception should be dismissed."[5]

[8] Regarding onus, as stated in *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd*:[6]

'...in so far as there can be an *onus* on either party on a pure question of law, it rests not upon the plaintiff but upon the excipient. It is the excipient who is alleging that the summons does not disclose a cause of action and he must establish that in all its possible meanings no cause of action is disclosed.'

[9] It should also be noted that exception proceedings are inappropriate for the determination of issues involving an interpretation of a contract.[7] An excipient is restricted to the grounds of exception set out in the notice of exception.[8]

**Common cause/accepted facts**

[10] All of the facts in the POC are, for the purposes of the exception, accepted as true and correct. In this regard the following is accepted:

(a) that the PTIG issue was one of the issues that the Arbitrator had been given a mandate by the parties to determine arising from:

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[3] *Voget and Others v Kleynhans* 2003 (2) SA 148 (C) para 9.
[4] *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1920 CPD 627 at 630; *South African National Parks v Ras* 2002 (2) SA 537 (C) at 541. See also Van Loggerenberg *Erasmus Superior Court Practice* (2023) Revision Service 21 at D1-298.
[5] 4 *Lawsa* 3 ed para 342.
[6] *Amalgamated Footwear & Leather Industries v Jordan & Co Ltd* 1948 (2) SA 891 (C) at 893.
[7] *Jowell v Bramwell-Jones and Others* 1998 (1) SA 836 (W) at 866; *Gardner v Richardt* 1974 (3) SA 768 (C) at 773C-E.
[8] *Erasmus Superior Court Practice* (2022) Revision Service 20 at D1-310G.

(i) the term of the settlement agreement that the Arbitrator would attend to "an evaluation and determination of the validity and/or justification of any claims between the parties";

(ii) the fact that the issue of the PTIG claims were expressly dealt with in pleadings between the parties which further defined the issues; and

(iii) the fact that the PTIG issue was argued before the Arbitrator, who considered it, and then decided that he did not have jurisdiction to determine it by virtue of the provisions of s 109(2) of the Local Government: Municipal Systems Act;[9]

(b) the Arbitrator decided some aspects as a matter of finality but left other aspects over for subsequent determination dependent upon the finding of the court on the PTIG issue. The Arbitrator determined as a matter of finality that:[10]

(i) the Municipality is entitled to its claim for vehicle lease charges and the amounts paid on behalf of Tansnat save for the lease charges and maintenance charges pertaining to the PTIG buses and the claim for interest on overdue amounts;

(ii) the Municipality's claim for lease charges and maintenance charges pertaining to the PTIG buses as well as CIR 6 and 8.2 was stayed pending the final determination of the present proceedings before the court to determine the validity of the decision of the Municipality to acquire the PTIG buses; and

(iii) Tansnat was entitled to its claim for damages for loss of passenger revenue and that it was entitled to an account for all insurance excesses that were paid by Tansnat which the Municipality has recovered together with reasons for non-recovery thereof;

(c) the arbitration is not finalised and can only be finalised (according to the Arbitrator's findings) once the court has first made a determination of the PTIG issue.

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[9] Local Government: Municipal Systems Act 32 of 2000.
[10] Index to pleadings Volume 1 pages 16-17.

**Applicable law (what constitutes a hybrid order?)**

[11] The law is clear that a "hybrid order" is impermissible and that its effect is to visit a nullity on the arbitration proceedings. It was held in the seminal decision of *Britstown Municipality v Beunderman (Pty) Ltd*[11] which dealt with the situation where an arbitrator had failed to decide all of the issues referred to him that there is "no room in law for a hybrid order...which is partially a finding made by an arbitrator and partially a finding made by a Court of law".[12] Also, see the decision in *Reward Ventures 01 CC v Walker and Another*[13] which confirms the application of the prohibition against hybrid orders.

[12] Aligned to the principle set out above, s 28 of the Arbitration Act requires finality hence there is no appeal to the courts. An award is invalid if the arbitrator "fails to decide each and every one of several matters referred to him".[14] The award must therefore resolve all the issues submitted in a manner that achieves finality and certainty unless the questions for determination are themselves lacking in precision e.g. as to what steps are to be taken to achieve a particular result.[15] The principle of finality of awards is firmly established in our law.[16]

[13] The question of what constitutes a hybrid order again recently came before the Supreme Court of Appeal in *Termico (Pty) Ltd v SPX Technologies (Pty) Ltd and Others.*[17] The court confirmed the prohibition against hybrid orders but drew a distinction on the particular facts on the basis that the arbitration was complete, and the court was asked to deal with issues that were not issues in the arbitration.

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[11] *Britstown Municipality v Beunderman (Pty) Ltd* 1967 (3) SA 154 (C).
[12] Ibid at 157
[13] *Reward Ventures 01 CC v Walker and Another* [2013] ZASCA 207.
[14] *Harlin Properties (Pty) Ltd v Rush & Tomkins SA (Pty) Ltd* 1963 (1) SA 187 (D) at 196D.
[15] See *SA Breweries Ltd v Shoprite Holdings Ltd* 2008 (1) SA 203 (SCA) para 22. Also see Peter Ramsden: *The Law of Arbitration: South African and International Arbitration* (2011) at 163.
[16] See *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 174; *Delport v Kopjes Irrigation Settlement Management Board* 1948 (1) SA 258 (O); *RPM Konstruksie (Edms) Bpk v Robinson en 'n ander* 1979 (3) SA 632 (C) at 636; *Blaas v Athanassiou* 1991 (1) SA 723 (W) at 724.
[17] *Termico (Pty) Ltd v SPX Technologies (Pty) Ltd and Others* 2020 (2) SA 295 (SCA).

[14] Insofar as the effect of a hybrid order is concerned, the Supreme Court of Appeal in *Vidavsky v Body Corporate of Sunhill Villas*[18] held as follows:[19]

'...The authorities are clear that want of jurisdiction in judicial or quasi-judicial proceedings has the effect of nullity without the necessity of a formal order setting the proceedings aside... Lack of jurisdiction in arbitration proceedings renders an award invalid...'

**Grounds of exception**

[15] What follows is an evaluation of the Municipality's grounds of exception.

***(a) On the* facts pleaded *by Tansnat it cannot be said that the Award amounts to a hybrid order***

[16] The Municipality contends that on the facts pleaded by Tansnat, the finding by the Arbitrator cannot be said "as a matter of law, to amount to a hybrid order". Furthermore, that the approach adopted by the Arbitrator, namely, to pend the decision regarding the PTIG claims while awaiting the outcome of a decision by the court on that issue "was perfectly legal".[20]

[17] The Municipality raises the above argument on the basis that:

(a) Tansnat has not pleaded that the Arbitrator should have, but did not, determine the PTIG issue. Instead, it has pleaded the fact that the Arbitrator could not determine the PTIG issue which has the consequence that his Award must fail; and

(b) put differently, Tansnat contends that because the Arbitrator, recognising that he could not determine the PTIG issue, made arrangements for the same to be determined by the court, he thus issued an impermissible hybrid award (a contention which stems from the judgment in *Britstown*).[21]

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[18] *Vidavsky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA).
[19] Ibid para 14.
[20] Notice of exception paragraphs 7(a) and (b).
[21] *Britstown Municipality v Beunderman (Pty) Ltd* 1967 (3) SA 154 (C).

[18] The Municipality places reliance for above contention on the more recent decisions of *SA Breweries*[22] and *Termico*[23] which it seems to argue altered the status quo from *Britstown.* It submits that the finding in the latter case was that the arbitrator had left it to the court to determine an issue which he, the arbitrator, was supposed to determine. His Award was, therefore, not final.

[19] The Municipality submits that in *SA Breweries* Scott JA summarised the current law as follows:[24]

'...In summary, what is required is that all issues submitted must be resolved in a manner that achieves finality and certainty. The award or determination may therefore not reserve a decision on an issue before the arbitrator or expert for another to resolve. It must also be capable of implementation. On the other hand, what must be determined are the matters submitted and no more. Depending on the questions, therefore, the determination may not necessarily result in a final resolution of a dispute between the parties. Generally, a court will be slow to find non-compliance with the substantive requirements and an award or determination will "be construed liberally and in accordance with the dictates of common sense" (Mustill & Boyd (supra) at 570). This, I think, must be particularly so when the questions for determination are themselves lacking in precision. A question as to what steps are to be taken to achieve a particular result is perhaps a good example. A court will, therefore, as far as possible construe an award or determination so that it is valid rather than invalid. It will not be astute to look for defects...'

[20] The Municipality also referred, in its submission, to *Termico* in which Ponnan JA stated as follows:[25]

'Neither SPXT nor the court a quo were able to identify an issue that had been referred to the arbitrators but not finally decided by them. What was still to be decided, before SPXT could be ordered to pay Termico, was the value of loan B, which fell to be deducted from the put price, but it is common cause that this issue fell outside of the jurisdiction of the arbitrators. The additional issues that the court a quo recognised as being necessary to grant a monetary judgment in the counter-application, namely the application of the put price to loan B and the meeting to implement

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[22] *SA Breweries Ltd v Shoprite Holdings Ltd* 2008 (1) SA 203 (SCA).
[23] *Termico (Pty) Ltd v SPX Technologies (Pty) Ltd and Others* 2020 (2) SA 295 (SCA).
[24] *SA Breweries* para 22.
[25] *Termico* para 20.

the sale, had not occurred at the time of the arbitration and were not issues before the arbitrators...' (Underlining added by excipient's counsel for emphasis).

[21] Arising from the totality of its argument above, the Municipality submits that the situation in the instant case is analogous to *Termico* in that:

(a) the Arbitrator did not determine an issue which it was common cause he had no power to determine;

(b) this was not a situation where the Arbitrator directed Tansnat to approach the court to determine something that was within his power to determine; and

(c) he simply directed that the court should determine a matter which was not within his power. Thereafter, he would make a final award.

[22] It is submitted by the Municipality that as much as arbitrators are required to finally determine issues placed before them, obviously that must mean matters properly placed before them. It cannot be expected of an arbitrator to determine something over which he has no jurisdiction. The PTIG matter was, therefore, not properly before him. All the Arbitrator did, it is further argued, was to make an interim award or ruling directing how a final award was to be arrived at.

[23] The arguments raised above seems to be smoke and mirrors. Both *Termico* and *SA Breweries* confirm the continued existence of the prohibition against a hybrid order. The law, as decided in *Britstown*, has not been altered at all as the above cases were distinguished on facts and law which applied.

[24] I do not agree on the facts that the situation in the instant case is comparable to that in *Termico*. What was considered in *Termico* was a situation where an issue had not been referred to the arbitrators as part of their mandate to determine while all issues referred to the arbitrators had been decided by them. It was, furthermore, not an issue(s) which they had no power to determine, like in the present case.

[25] *Termico* also does not relate to a statutory deprivation of jurisdiction, as is the case here. The jurisdiction (referred to, at paragraph 20 of the judgment) relates to jurisdiction in the context of what had been included in the mandate given to the arbitrators to decide.

[26] To put this differently, the fact that in this case the Arbitrator concluded that he had no jurisdiction to decide the PTIG issue does not mean that this was not an issue that was placed before him in terms of his mandate. Equally, it does not mean that this was not an issue he was asked to decide. The fact that a statutory provision restricted him in deciding the PTIG issue does not mean that it was not properly placed before him.

[27] The rule against hybrid orders encompasses determinations, made partly by a court and partly by an arbitrator in respect of a matter which was still the subject of a further arbitration that had not finally run its course like is the situation here. The court is asked to decide a question of law which remained undecided by the Arbitrator due to lack of jurisdiction on his part thus leaving the whole PTIG issue alive and unresolved.

[28] No irregularity or misconduct against the Arbitrator is alleged. It is, in my view, a typical case of an impermissible hybrid order which has the effect of nullity of the Arbitration Award.

***(b) Was the Award a nullity?***

[29] The Municipality contends that the order did not automatically amount to a nullity even if it was a hybrid award. At best, it might have amounted to a decision reviewable, at Tansnat's behest, in terms of s 33(1) of the Arbitration Act.

[30] In this regard, the Municipality submitted that Tansnat is not entitled to simply ignore the award and institute proceedings in the High Court. And until such time as the court makes an order setting it aside, the award stands.[26]

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[26] *Rebah Construction CC v Renkie Building Construction CC* 2008 (3) SA 475 (T).

[31] It further submitted that even if Tansnat's contention be held to be correct, that does not have the consequence that the arbitration provision in the settlement agreement has been waived. The disputes should simply be referred to a new arbitrator. Therefore, on the facts pleaded, the action is premature.

[32] The submissions are a misdirection as to the correct legal position. They go directly against the decision of the Supreme Court of Appeal in *Vidavsky*[27] which expressly dealt with the question of whether an arbitration has to be set aside under s 33 of the Arbitration Act where there is a lack of jurisdiction.

[33] A reference to *Rebah Construction* as a case in support of a contention that an arbitration has to be set aside under s 33 of the Arbitration Act first, is not on point. That case dealt with the situation where an arbitrator had exceeded his powers in terms of s 33(1)*(b)* of the Arbitration Act. Section 33 has to do with a situation where an arbitrator has jurisdiction to deal with an issue and has powers to deal with that issue but exceeds those powers.

[34] The provision has no application in the present circumstances where there is no jurisdiction existing and no powers at all to make a hybrid order. A nullity is just that - it does not exist and therefore cannot, as a matter of logic, be required to be set aside.[28]

[35] There is accordingly no bar to the institution of the present proceedings in this court and there is no merit in the Municipality's contention to the contrary that the disputes should simply be referred to a new arbitrator because the parties have agreed that the claim shall be determined by arbitration.

[36] If the Award is a nullity (as I have found) because the Arbitrator did not and could not ever have jurisdiction (as a matter of law as distinct from having a mandate to decide)

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[27] *Vidavsky v Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA).
[28] See *Fassler, Kamstra & Holmes v Stallion Group of Companies (Pty) Ltd* 1992 (3) SA 825 (W); *Van Zijl v Von Haebler* 1993 (3) SA 654 (SE) at 659; *Minister of Rural Development and Land Reform v Normandien Farms (Pty) Ltd and Others, and Another Appeal* 2019 (1) SA 154 (SCA) at 171.

to decide the PTIG issue, such approach as suggested by the Municipality would serve no purpose since the new arbitrator would be faced with the same statutory restriction. What the Municipality proposes is not only illogical but a legal impossibility since another arbitrator would merely perpetuate the problem and not resolve it.

[37] It is in any event a fallacy to suppose that a reference to arbitration deprives a court of its jurisdiction. It was held in *Rhodesian Railways Ltd v Mackintosh*[29] that the effect of a submission to arbitration is not to oust the jurisdiction of the court, but merely to delay it and the court has a discretion to refuse a reference to arbitration.[30]

[38] In this regard, s 165 of the Constitution makes it quite clear that "the judicial authority of the Republic is vested in the courts". Furthermore "no person or organ of state may interfere with the functioning of the courts".[31]

[39] Section 34 of the Constitution also provides that "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum". The reference to another independent or impartial tribunal or forum does not include a private arbitration.[32]

***(c) No case made out for the setting aside of the entire Award***

[40] The Municipality also contends that even if all the facts pleaded by Tansnat are proved to be true (which must be accepted in an exception), no reason exists why the entire Award should be set aside.[33] Put differently, the Municipality contends that the facts pleaded by Tansnat indicated that the PTIG claims were severable from all other claims

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[29] *Rhodesian Railways Ltd v Mackintosh* 1932 AD 359.
[30] *Verhagen v Abramowitz* 1960 (4) SA 947 (C) at 950.
[31] Section 165(3) of the Constitution.
[32] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) paras 214, 217-218.
[33] *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd* 2018 (5) SA 462 (SCA) para 48.

which the parties had against one another and therefore there are no legal grounds for setting aside the entire Award.

[41] A pertinent reading of the POC does not support this contention. It is to be noted, in this regard, that there is no mention anywhere in the POC of the word "severable" and equally no allegation to the effect that any one of the claims were severable from all other claims.

[42] On the contrary, there is an allegation to the exact opposite effect in paragraphs 33(e) and (f) of the POC. This allegation is that the PTIG issue is inextricably linked with the main issue between the parties, namely, whether it is the Municipality who is indebted to Tansnat or vice versa and the quantum of any such indebtedness and without a determination of the PTIG issue it is not possible to determine the main issue between the parties. That inextricability is the very antithesis of the severability.

[43] In addition, the *Palabora Copper*[34] decision, referred to by the Municipality, refers to "a wholly separate issue". The PTIG issue is plainly not a "wholly separate issue" and the only way that the Municipality can contend otherwise (which it cannot do) is to state that the express allegations in the POC to the contrary are not to be believed, which goes against the fundamental and basic test for an exception namely that all the allegations in the POC are accepted as being true and correct.

[44] There is accordingly no merit in grounds (b) and (c) of the exception.

[45] Any new ground of exception, either not pleaded or impermissibly raised in heads of argument, will not be considered. The Municipality has not sought an amendment of its grounds of exception and is thus limited to the grounds of objection contained in its notice of exception, all of which have been considered.

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[34] Ibid para 48.

[46] With all said, the question may well be asked as to what the Arbitrator should have done in the circumstances. The answer is that the Arbitrator, once he had decided that he had no jurisdiction to determine the merits of the PTIG issues, had only one lawfully correct course of conduct; and that was not to decide any of the issues on the merits because he could not decide all of them in accordance with his mandate. Unfortunately, the Arbitrator chose the wrong alternative, namely a hybrid order, which rendered his entire Award a nullity.

**Order**

[47] It is accordingly ordered that the exception is dismissed with costs, including the costs of senior counsel.

[redacted]

Z P NKOSI ADJP

## Case Information

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| **DATE OF THE HEARING** | : | **18 JULY 2023** |
| **DATE JUDGMENT HANDED DOWN** | : | **11 JANUARY 2024** |

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