

DISPUTE RESOLUTION ALERT

IN THIS ISSUE

ARBITRATION AWARDS: SEVERING THE GOOD FROM THE BAD

Even though the legal principles that govern the circumstances in which a court can set aside an arbitration award are reasonably clear, the court in *Palabora Copper (Pty) Ltd v Motlokwa Transport and Construction (Pty) Ltd* [2018] 2 All SA 660 (SCA) readily accepted that their application in any particular instance may be problematic. In this matter, the court had to determine whether a finding of gross irregularity in the conduct of the arbitration proceedings necessarily results in the entire award being set aside, or whether there is scope for the court to preserve and enforce the 'good' part of the award and set aside the 'bad'.

WHILE THE CLOCK TICKS BY...THE SCA DEALS WITH THE FACTORS WHEN CONSIDERING THE GRANTING OF CONDONATION UNDER THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT

It would be wise to carefully consider all aspects of a matter before challenging an adverse decision made by an organ of state. However, such consideration should occur while being ever mindful of the clock that ticks by in terms of s7(1) of the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA).

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The court had to determine whether a finding of gross irregularity in the conduct of the arbitration proceedings necessarily results in the entire award being set aside.

The courts have accepted that where arbitrators exceed their powers and the exercise of excessive powers does not infect the entire award, the good may be severed from the bad and enforced.



Even though the legal principles that govern the circumstances in which a court can set aside an arbitration award are reasonably clear, the court in *Palabora Copper (Pty) Ltd v Motlokwa Transport and Construction (Pty) Ltd* [2018] 2 All SA 660 (SCA) readily accepted that their application in any particular instance may be problematic. In this matter, the court had to determine whether a finding of gross irregularity in the conduct of the arbitration proceedings necessarily results in the entire award being set aside, or whether there is scope for the court to preserve and enforce the 'good' part of the award and set aside the 'bad'.

Section 33(1)(b) of the Arbitration Act, 1965 provides that where an arbitrator has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded his or her powers, the court may make an order setting the award aside. A party alleging the gross irregularity must establish it. Where an arbitrator engages in the correct enquiry, but errs either on the facts or the law, that is not an irregularity and is not a basis for the setting aside of an award. If parties choose arbitration, courts endeavour to uphold their choice and do not lightly disturb it. Admittedly, s33(1)(b) says nothing about the situation where the irregularity or excess of powers affects only a discrete part of the award.

In *Palabora Copper*, the court found that this calls for a proper interpretation of the court's powers under s33(1)(b) of the Arbitration Act. In doing so, the court undertook a survey of cases in which the courts have accepted that where arbitrators exceed their powers and the exercise of excessive powers does not

infect the entire award, the good may be severed from the bad and enforced. Bearing in mind that s33(1)(b) of the Arbitration Act deals with both exceeding powers and gross irregularity as grounds for setting aside an award, the court found no reason why the same principle could not apply where only part of an award is infected by a gross irregularity.

The court was of the view that this approach reflected a logical and sensible construction of the Arbitration Act. In addition, there did not appear to be any sound reason why an arbitration, that had been properly conducted on certain issues and had properly determined those issues, should be set aside in its entirety, because of an irregularity in relation to a wholly separate issue subject to the court being satisfied the latter issue is wholly separate from the others. However, if it can be proved that the arbitrator's gross irregularity had a distorting effect to the entire conduct of the arbitration proceedings, then the court will set aside the arbitration award in its entirety.



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CONTINUED

The case is a welcome development in the dynamic jurisprudence of domestic arbitrations but perhaps more importantly, it is a reminder of the increasing need for the legislature to address these issues and come up with necessary amendments to the out-of-date Arbitration Act.

The court concluded that this approach further gave effect, as far as possible, to the parties' agreement to have their dispute determined by the arbitrator and was consistent with those cases in which the courts have set aside portions of an award as being beyond the powers of an arbitrator, but made the balance of the award an order of court.

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Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017 – 2018** in the litigation category.



Richard Marcus was named the exclusive South African winner of the **ILO Client Choice Awards 2018** in the Insolvency & Restructuring category.



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WHILE THE CLOCK TICKS BY...THE SCA DEALS WITH THE FACTORS WHEN CONSIDERING THE GRANTING OF CONDONATION UNDER THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT

The Supreme Court of Appeal (SCA) recently dealt with a matter where it once again considered the factors that play a role when a court makes a decision in terms of s9 of the PAJA.

The undoubted merit of a litigant's case may therefore not be enough to result in the extension of the 180-day period, and the delay in challenging an adverse decision may prove to be fatal.



It would be wise to carefully consider all aspects of a matter before challenging an adverse decision made by an organ of state. However, such consideration should occur while being ever mindful of the clock that ticks by in terms of s7(1) of the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA).

The Supreme Court of Appeal (SCA) recently dealt with a matter where it once again considered the factors that play a role when a court makes a decision in terms of s9 of the PAJA, which bestows upon a court the authority to exercise its discretion in extending the 180-day period provided for in s7(1) if the interests of justice so permit.

In the case of *Matoto v Free State Gambling and Liquor Authority and others* (986/2017) [2018] ZASCA 110, Matoto lodged an application in terms of s41 of the Free State Gambling and Liquor Act, No 6 of 2010 (FSGLA) with the Free State Gambling and Liquor Authority (Authority) which application was ultimately refused.

Thereafter, Matoto launched review proceedings out of the Free State Division of the High Court, Bloemfontein (High Court). The High Court ordered that the decision of the Authority be reviewed, and that the application be remitted to the Authority for reconsideration. On 18 March 2015, Matoto was made aware that the Authority refused the application once again. During March and May 2015, Matoto's attorney sent numerous letters to the Authority concerning his intention to institute review proceedings. However, the review proceedings to set aside the

second refusal were only launched on 29 September 2015. By then, the 180-day period envisaged in s7(1) of the PAJA had lapsed and Matoto accordingly sought an order in terms of s9(1) of the PAJA for an extension of the 180-day period. The High Court refused the extension and accordingly dismissed the appeal without considering the merits of the review.

Matoto was subsequently granted leave to appeal to the SCA. Ponnann JA, who penned the judgment, had regard to the jurisprudence surrounding s9 of the PAJA. The SCA ruled that while the prospects of success of a matter may be an important consideration, it is by no means decisive. The SCA stated that in cases of flagrant breaches of the rules and unconscionable delay, especially where there is no reasonable explanation therefor, a court may refuse condonation. As the explanation offered by Matoto was so unacceptable and wanting, the SCA confirmed the order of the High Court and consequently dismissed the appeal.

The undoubted merit of a litigant's case may therefore not be enough to result in the extension of the 180-day period, and the delay in challenging an adverse decision may prove to be fatal.

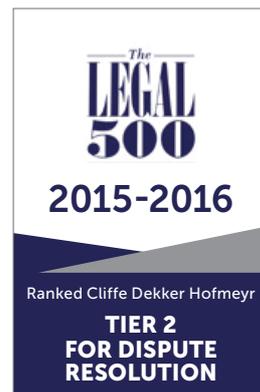
Lionel Egypt and Andrea Trueman



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