

Construction & Engineering ALERT

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When can an arbitrator's award be reviewed?

More often than not, arbitration proceedings are final and binding on the parties without a right to appeal the arbitrator's award (this is commonly the case in construction and engineering contracts). If appropriate, an aggrieved party may challenge an award by the process of review. The grounds for review are limited, to avoid any 'back door' appeals. So, when can an award be reviewed?



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The Supreme Court of Appeal (SCA) conveniently summarised the requirements for reviewing an arbitration award for gross irregularity (section 33(1) of the Arbitration Act 42 of 1965) in the recent case of *OCA Testing and Certification South Africa (Pty) Ltd v KCEC Engineering Construction (Pty) Ltd and Another* (1226/2021) [2023] ZASCA 13 (17 February 2023).

Facts

A high-level summary of the facts of the case is outlined below.

KCEC Engineering and Construction (Pty) Ltd (KCEC) entered into three separate agreements with OCA Testing Inspection and Certification South Africa (Pty) Ltd (OCA Testing) for the provision of advisory, technical and mechanical services for non-destructive test services at KCEC's plants in the Northern Cape.

Each of the agreements contained an arbitration clause for the settlement of any disputes arising out of the agreements.

Disputes arose under each of the agreements with respect to the services rendered by OCA Testing, resulting in KCEC not honouring invoices issued under each of the agreements.

OCA Testing then referred a dispute to arbitration in which it sought to recover R2,603,729.44 in respect of services rendered to KCEC between 25 May 2018 and 25 August 2018.

The sum claimed by OCA Testing, although framed as a globular amount, was premised on amounts owing and invoiced under each of the three separate agreements concluded between the parties.

KCEC raised a defence that the amount claimed in respect of the first agreement was not due because OCA Testing had breached that agreement by failing to deliver a certificate of compliance (CoC) timeously.

OCA Testing's claim as a whole was dismissed by the arbitrator who indicated that "*OCA Testing was indeed in breach of its agreement with [KCEC] by failing so to deliver the CoC in terms of the first agreement*".



Cliffe Dekker Hofmeyr

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The award was taken on review to the High Court by OCA Testing based on an allegation of gross irregularity by the arbitrator insofar as the arbitrator's award failed to deal with the validity of OCA Testing's claims arising out of the second and third agreements. The review was unsuccessful as the High Court concluded that the arbitrator's award was given with due consideration to all the claims arising out of each agreement.

However, the SCA found that the arbitrator, who was aware of the fact that the three agreements were not interlinked, dismissed the globular claim on the basis of OCA Testing's breach of the first agreement alone. Accordingly, he failed to consider and determine the balance of OCA Testing's claims arising from the other two agreements.

The SCA upheld the review, and in the process crystallised the principles for the review of an arbitration award on the basis of a gross irregularity as follows:

- Irregularity does not mean an incorrect award.
- The enquiry into whether an award should be reviewed is not concerned with the result of proceedings but rather the method of those proceedings (i.e., whether the aggrieved party was deprived of having their case fully and fairly determined).
- If the arbitrator prevents a fair trial of the issues, there is gross irregularity rendering the award capable of review.
- The arbitrator must engage in the correct enquiry. Misconceiving the nature of the enquiry renders the hearing unfair as the arbitrator fails to perform their mandate. Notwithstanding, the arbitrator's good intentions, if they are mistaken as to the enquiry, their award can be reviewed.

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