THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1397/2024

In the matter between:

RADON PROJECTS (PTY) LTD **APPELLANT**

and

N V PROPERTIES (PTY) LTD **FIRST RESPONDENT**

GARY STEPHEN MYBURGH N O **SECOND RESPONDENT**

Case no: 1394/2024

And in the matter between

NV PROPERTIES (PTY) LTD **CROSS-APPELLANT**

and

RADON PROJECTS (PTY) LTD **RESPONDENT**

Neutral citation: *Radon Projects (Pty) Ltd v N V Properties (Pty) Ltd and Another* (1397/2024 and 1394/2024) [2026] ZASCA 155 (18 November 2026)

Coram: GOOSEN and KGOELE JJA and DLODLO, REINDERS and ZILWA AJJA

Heard: 2 September 2026

Delivered: 18 November 2026

Summary: Review of arbitration award – whether arbitrator committed gross irregularity or exceeded powers in form of order – building contract – extension of date for practical completion – determination of financial entitlements due to contractor – employer seeking substitution of award – whether competent.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mdalana-Mayisela J sitting as court of first instance):

1. The appeal is dismissed.
2. The appellant is ordered to pay the costs on appeal.
3. The cross-appeal is dismissed.
4. The first respondent (cross-appellant) is ordered to pay the costs on cross-appeal, including the costs of two counsel.

JUDGMENT

Goosen JA (Kgoele JA and Dlodlo, Reinders and Zilwa AJJA concurring):

[1] The appeal concerns an order of the Gauteng Division of the High Court, Johannesburg (the high court), reviewing and setting aside an arbitration award in a long-running dispute arising from a building contract. NV Properties (Pty) Ltd (NVP) contracted the services of Radon Projects (Pty) Ltd (Radon) to construct a convention centre in East London. The parties concluded a principal building agreement on 2 November 2007 (the contract).[1] The contract provided that the intended date for practical completion of the works was 17 October 2008.

[2] During the contract, Radon submitted claims to the Principal Agent (the PA), appointed under the contract, to revise the practical completion date. Some were granted, and others were not. After the PA certified practical completion,

[1] The Principal Agreement was in terms of the Joint Building Contracts Committee (JBCC) Master Contract, 4th Edition, March 2004.

Radon submitted revised claims. When these were not addressed by the PA, Radon invoked clause 40 of the contract and referred these claims to arbitration. This reference gave rise to litigation between the parties, culminating in this Court's judgment in *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd and Another*.[2] That judgment is not relevant for the present purposes, save to note that this Court held that the arbitrator appointed (here the second respondent) had jurisdiction to consider the claims for revision of the date for practical completion and ancillary financial adjustments that formed the subject of the reference. The present appeal concerns the final award made on those claims.

[3] The date for practical completion was extended by the PA to 9 March 2009. The PA addressed the financial entitlements that accrued to Radon as a result of this extension through entries in interim payment certificates and recovery statements issued after the extensions were granted. The PA certified that practical completion had been achieved on 14 December 2009.

[4] Radon's reference to arbitration encompassed multiple claims, seeking a further extension of the date for practical completion to the date on which practical completion was in fact achieved and, pursuant to the revision, a determination of its financial entitlements in terms of the contract. These took the form of the reversal of penalties levied by NVP, adjustments to the contract price based on the increased preliminary costs and additional labour costs and expenses resulting from the delays, default interest on those amounts, and compensatory interest as provided by the contract.

[5] The arbitrator was appointed on 14 November 2010. The parties agreed to extend the practical completion date. On 15 August 2014, the arbitrator issued an

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[2] *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd and Another* [2013] ZASCA 83; [2013] 3 All SA 615 (SCA); 2013 (6) SA 345 (SCA).

interim award recording the agreement to extend the practical completion date by 103.5 working days to 7 August 2009. By then, Radon had withdrawn twelve of its claims. What remained were three further claims for extension of the date for practical completion and the determination of the financial entitlements due to Radon consequent upon the extension recorded in the award of 15 August 2014, and any further extensions that may be granted.

[6] After the 2014 award, the arbitration proceedings paused. The parties had different views on the form that the final award should take. Radon contended that the arbitrator should determine its financial entitlements and issue a monetary award for that amount. NVP contended that the arbitrator could only issue directives to the PA on how the financial entitlements should be addressed under the contractual payment mechanisms. Both parties made written submissions to the arbitrator motivating their contentions.

[7] On 21 August 2015, the arbitrator wrote to the parties under the subject line ‘Ruling: Financial consequences’. The arbitrator stated that he did not think it proper to make an award ‘which could be construed as creating a debt outside the ambit of the contract’. He agreed with NVP's submission that he could only direct how the financial entitlements should be treated in the final payment certificate to be issued. The arbitrator noted that Radon’s claim sought reversal of penalties, additional time-related costs, escalation, and related claims, rather than payment of a lump sum. Radon was directed to prepare a draft award in line with the arbitrator's position and submit it to NVP for consideration. He stated that, if the parties could not reach an agreement, he would determine the remaining issues and make a further partial award. This award came to be called the 2015 ruling.

[8] On 31 August 2015, at a hearing to deal with an amendment to the pleadings, which is not immediately relevant to the present issue, the arbitrator addressed the 2015 ruling. The transcript records the following:

'There is still one matter outstanding and that is that of [Radon's] financial entitlement arising out of the extension of time which has been granted to date and I had received submissions in that regard …. I've received something from the defendant, and I have in effect made a ruling in that regard as to the form – well I haven't determined finally the form that it should take. I have given guidelines as to (a) the form that the order can't take and (b) the sort of form which it can take and I've asked the parties to engage one another and to attempt to reach agreement … If the parties can't reach agreement, then what I want them to do is for each party to furnish me with a draft order and then to the extent that there is no agreement, I will then make an award in respect of that issue.'

[9] Radon submitted a draft interim award quantifying its claims for each of the additional time-related preliminaries, additional contract price adjustments (CPAP), reversal of penalties, default and compensatory interest. These were calculated up to and including 8 September 2015. The parties and the arbitrator then exchanged in further correspondence. On 10 February 2016, the arbitrator wrote to the parties requesting submissions on certain issues. Principally, these concerned the extent of the arbitrator's jurisdiction, specifically whether he could make an award sounding in money as Radon sought, and whether he could have regard to a subsequent interim payment certificate in which it was alleged that the penalties had been reversed.

[10] On 6 March 2017, the arbitrator issued a further interim award. The arbitrator granted Radon a further four-day extension. The practical completion date was therefore extended to 13 August 2009. The award stated that all penalties imposed up to and including the revised date were reversed. It required the parties to prepare an account reflecting the award's financial consequences and to attempt

to reach agreement on those consequences. If the parties could not reach agreement, the claims would stand over for determination on a future date.

[11] On 18 October 2017, Radon wrote to the arbitrator, indicating that the parties were at an impasse on the outstanding issue of the form of the order to be made. Radon requested that the arbitrator issue an interim award on the crisp issue whether he has the jurisdiction to hand down a final award sounding in money. On 25 November 2017, the arbitrator responded that he did not believe he could address the issue by way of an interim award. He nevertheless set out his views on the question to facilitate the final resolution of the matter. His view was that he did not have the jurisdiction to issue an award sounding in money in light of the extant contract regulating the terms of payment. He again stated that, in the event that parties did not agree on the form of the award, he would determine the issue in due course.

[12] A considerable lapse of time followed, which the record before this Court does not explain. However, it appears that by December 2020 the parties had reached agreement on the quantification of the financial entitlements due to Radon as a consequence of the extension of the date for practical completion. In February 2021, Radon sought directives from the arbitrator regarding a hearing at which it would seek a final award in the agreed amounts flowing from the extension of time. On 20 April 2021, dates for the submission of draft final awards and heads of argument on the remaining issues were agreed. NVP sought to introduce a bundle of documents relating to payment certificates and recovery statements issued after the reference to arbitration. Although the arbitrator received the documents, it was not agreed that NVP could lead evidence concerning its alleged treatment of the financial entitlements due to Radon in those subsequent payment certificates. NVP ultimately accepted that it could not

lead such evidence because it had not pleaded a defence based on the subsequent accounting for financial entitlements due to Radon.

[13] On 7 and 8 July 2021, oral argument was presented to the arbitrator on what was then the only remaining question: the form of the award by which Radon's financial entitlements were to be addressed. The final determination occurred on 2 February 2022, when the arbitrator issued a final award, the relevant portions of which provided that:

'a) [NVP] is ordered to pay [Radon] the amount of R6 442 59,34[3] (being the sum of the amounts awarded in terms of paragraphs 29, 30 and 36 *supra*) plus VAT at the standard rate of 15% - i.e., a total of R7 408 982.40.

b) [NVP] is moreover ordered to pay [Radon] interest at the rate prescribed in terms of the Prescribed Rate of Interest Act reckoned from 28 February 2018 to date of payment.'

[14] It is this order that formed the subject of the review proceedings before the high court. The high court upheld the review. It set aside the arbitrator's award and ordered the appointment of a replacement arbitrator under clause 41 of the JBCC contract. The high court dismissed Radon's counter application to have the award made an order of court and ordered it to pay the costs of the review application. The appeal to this Court is with the high court's leave.

The review challenge

[15] Before outlining the basis of the challenge on review and the high court's findings, it is necessary to record the following. On 21 February 2022, shortly after the arbitration award was issued, Radon launched an application in the East London Circuit Local Division (the East London application) to have the award made an order of court, pursuant to s 31 of the Arbitration Act 42 of 1965 (the

[3] It is common cause that this figure reflects a typographical or clerical error. It should read R6 442 593.39. Radon sought a correction to this effect in its application to have the award made an order of court, to which I shall refer later in this judgment.

Arbitration Act). On 15 March 2022, NVP launched its review before the high court in Gauteng. It appears from the record that Radon requested NVP to agree to 'consolidation' of these applications before the high court. NVP did not agree. It was, however, agreed that the East London application would be held in abeyance pending the finalisation of the review application and any appeals that might flow from such review. Nevertheless, Radon filed a counter-application in the review, seeking an order, in terms of s 31 of the Arbitration Act, that the award be made an order of court. This was met with a plea of *lis alibi pendens* (that the same proceedings are pending before a court). NVP therefore sought a stay of the counter-application in light of the pending East London application. I will return to this hereunder.

[16] NVP challenged the award on two bases. It claimed that the arbitrator committed a gross irregularity by granting Radon a monetary award for amounts due to it, even though, in 2015, the arbitrator had ruled (the 2015 ruling) that such an order was outside his jurisdiction and that he lacked the competence to grant it. It further contended that the arbitrator exceeded his powers by granting a monetary award for payment of claims outside the terms of an extant contract that regulated entitlement to payments. It therefore sought an order setting the award aside and an order replacing the arbitrator. In addition, NVP sought orders to correct and substitute the arbitral award.

[17] The high court found that the 2015 ruling constituted a final and binding ruling on the arbitrator's jurisdiction to grant a monetary order against NVP. It found, however, that the arbitrator had not committed a gross irregularity in the proceedings by making an award for payment. It found that NVP's complaint related to the result of the arbitration, not how the proceedings were conducted. It therefore dismissed the gross irregularity ground of review.

[18] The high court found that the monetary award directing payment of a lump sum by NVP was in conflict with the 2015 ruling regarding the extent of the arbitrator's powers to grant such an award. The high court found that Radon had not claimed payment of a lump sum amount but rather had sought a determination of its entitlement to payment under specified heads. It therefore concluded that the arbitrator had exceeded his powers and set aside the award on that basis.

[19] The high court granted the prayer for appointment of another arbitrator, in terms of s 33(4) of the Arbitration Act. It refused the substitution relief sought by NVP in paragraph 3 of its notice of motion, and dismissed Radon's counter-application. NVP pursues these orders in its cross-appeal. I shall therefore deal with them hereunder in that context.

The appeal

[20] Radon accepts that the high court was correct to dismiss NVP's reliance upon an alleged gross irregularity in the proceedings. It takes issue with the characterisation of the '2015 ruling' as a final and binding ruling on the arbitrator's jurisdiction to make a monetary award, and with the finding that the arbitrator therefore exceeded his powers. NVP, on the other hand, contends that the high court ought also to have found that the arbitrator committed a gross irregularity by granting an order in direct conflict with his prior ruling and outside of his jurisdiction.

[21] The starting point must be the terms of reference and how the parties pleaded their case. This determines the ambit of an arbitrator's powers and usually determines arbitral jurisdiction. In this instance, the arbitration concerned claims for extensions to the date for practical completion that the PA had refused, or was deemed to have refused. Radon sought an award to revise the date and to

determine the contractual financial entitlements which would accrue to it because of the revision. It claimed payment of the amounts.

[22] The arbitrator therefore had to make an award that the PA could have made but for his refusal, or deemed refusal, to do so. This involved deciding whether to extend the period for practical completion and thereby fixing a new date and, based on that extension, determining the quantum of any consequential financial entitlements that would accrue to Radon. These, as set out in Radon's statement of claim, related to the quantum by which the contract price was to be adjusted; any increase in costs allowed for preliminaries; the quantum of penalties imposed for non-compliance with the agreed date for practical completion that ought to have been reversed, and the quantum of interest due to Radon.

[23] Radon claimed payment of quantified amounts in relation to each of these separate heads of consequential financial entitlement. Its claim therefore encompassed a claim for payment of a sum of money alleged to be due to it. NVP pleaded that the contract between the parties was extant. No final payment certificate had yet been issued, and Radon's claims, once quantified, did not entitle it to payment except under the agreed contract payment method. This required an interim or final payment certificate in which Radon's financial entitlements were brought to account. Radon was therefore entitled to claim payment only for the amount certified as due in a payment certificate issued in terms of the contract. NVP's case was therefore that the reference to arbitration did not confer on the arbitrator the power to make an award for payment other than in accordance with the terms of the contract, despite Radon's claim for such relief.

The gross irregularity challenge

[24] This challenge turns on whether the 2015 ruling was a final and binding ruling on the arbitrator's jurisdiction. As the arbitration chronology set out above shows, the 2015 ruling arose after the arbitrator revised the practical completion date by extending the period by 103.5 days. The remaining issue was the quantum of the consequential financial entitlements that accrued to Radon under the contract because of this extension. The 'crisp issue', as it then arose was whether Radon could claim payment of the amount it said was due to it, or whether the agreed or determined quantum was to be brought to account in further interim payment certificates or in the final payment certificate to be issued by the PA. This was the character of the dispute concerning the 'form of award' upon which submissions were made to the arbitrator. The 2015 ruling took a firm view on the form of the order which could be made as a final award. The question is whether this view was final and binding on the parties and the arbitrator.

[25] In my view, indicators point in both directions. On the one hand, the arbitrator used fairly unequivocal language in suggesting what form the final award could not take. Both in the ruling itself and in the subsequent explanation, the arbitrator appears to have been clear that his award could not take the form of an order requiring payment outside the ambit of the contract. What form such an order should take remained in issue. Indicators that he had not yet finally determined the question of whether he could make an order for payment appear from other statements made by the arbitrator and from his further conduct of the proceedings. He made it clear that he had not yet made a final determination and that he was open to persuasion on the issue. Most telling, however, is that, notwithstanding the 2015 ruling, the arbitrator nevertheless countenanced repeated submissions by Radon, including a request for an interim award on the crisp issue, over several years. At no stage did the arbitrator demur or remind Radon that he had already decided the issue. Nor did NVP adopt such a stance.

[26] Seen in this light, it is difficult to conceive of the 2015 ruling as a final, dispositive, and therefore binding determination that the arbitrator's jurisdiction did not extend to making a final award sounding in money. That does not mean the arbitrator did not clearly express his prima facie view on the subject. That much is plain. But expressing a prima facie view is a far cry from a final determination. Accordingly, I am not persuaded that the 2015 ruling was a final determination of whether the arbitrator could make an award requiring NVP to pay the quantified financial entitlements due to Radon.

[27] I can find no fault with the high court's general approach to what constitutes a gross irregularity in the conduct of the proceedings, as contemplated by s 33(1) of the Arbitration Act. The issue is the conduct of the proceedings, not the result. The central question is always whether the arbitrator conducted the proceedings in a manner that prevented a party from having a fair hearing.[4] Despite finding that the 2015 ruling was a final and binding determination of the extent of the arbitrator's jurisdiction, the high court held that the arbitrator's own failure to abide by the final determination did not constitute an irregularity. The reasoning is flawed. In my view, if the 2015 ruling was a final determination, then the arbitrator's failure to adhere to it would constitute an irregularity, rendering the award reviewable on that ground.

[28] As stated, I do not agree with the high court's finding that the 2015 ruling was final and binding. That was the only basis upon which NVP alleged a gross irregularity in the proceedings. Accordingly, no gross irregularity has been

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[4] *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266 (SCA); 2007 (5) BCLR 503 (SCA) (*Telcordia*) paras 70-74; *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2009] ZACC 6; 2009 (4) SA 529 (CC) para 232.

established on the record. The high court's dismissal of the gross irregularity challenge was therefore correct, albeit for wholly different reasons.

The excess of power challenge

[29] The high court addressed the challenge that the arbitrator exceeded his powers, on two bases. The first was that the 2015 ruling was final and binding. It therefore defined the arbitrator's jurisdiction. The payment order therefore fell outside the ambit of the powers conferred on the arbitrator. The second was that Radon had not claimed a lump-sum payment.

[30] This latter finding was incorrect. This much was conceded by NVP. The outline of Radon's pleaded claim, set out above, and Radon's persistent assertion over many years establish that Radon always sought payment of the total amount due to it by virtue of the extension of the date for practical completion. The first basis for concluding that the arbitrator exceeded his powers is also not sustainable for the reasons already advanced in relation to the 2015 ruling.

[31] The real question is whether the arbitrator had the jurisdiction to grant an award sounding in money. If he did, then the review must fail. If not, then the review upon the ground that the arbitrator exceeded his powers must be sustained.

[32] The starting point must be the reference to arbitration. To recap, Radon invoked clause 40 of the JBCC contract to refer multiple disputes to arbitration regarding an extension of the date for practical completion. These claims were either refused by the PA or were deemed to have been refused. Radon claimed a revision of the date for practical completion to the date on which practical completion had in fact been achieved and, pursuant to that revision, a determination of the financial entitlements due to it in terms of the contract. These financial entitlements were claimed under specific terms of the JBCC contract

that would allow Radon to adjust its provision for preliminaries and additional costs, and to recover from NVP penalties levied after the contractually stipulated date for practical completion was not met. Two aspects are of central importance. First, when the reference to arbitration occurred, the contract was still extant. It remains so even now, many years later. No final payment certificate had been drawn or issued by the PA. Second, Radon claimed financial entitlements under the contract arising from the revision of the date for practical completion, i.e., amounts to which Radon would become entitled in accordance with the contract.

[33] The extent of an arbitrator's powers or jurisdiction is determined by the terms of the arbitration agreement and the reference to arbitration. Mr Badenhorst SC, on behalf of Radon, argued that the arbitrator acted within his jurisdictional powers in awarding payment of the amounts due to Radon. He contended that the arbitrator's jurisdictional powers are determined by the pleadings and Radon's statement of claim. Reference was made to *National Assembly v Public Protector and Others (National Assembly)*[5] and *Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others (Gallo Africa)*.[6]

[34] In *National Assembly*, the Constitutional Court considered whether it had jurisdiction to decide the case. That question, it said, is decided with reference to the pleadings. It cited *Gcaba v Minister of Safety and Security*, where it held that the pleadings are consulted to determine 'the legal basis of the claim under which the applicant has chosen to invoke the court's jurisdiction.'[7]

[35] In *Gallo Africa*, this Court considered a local court's jurisdiction to enforce a foreign copyright. The Court decided the jurisdictional challenge on exception.

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[5] *Speaker of the National Assembly v Public Protector and Others* [2022] ZACC 1; 2022 (3) SA 1 (CC).
[6] *Gallo Africa Ltd and Others v Sting Music (Pty) Ltd and Others* [2010] ZASCA 96; 2010 (6) SA 329 (SCA).
[7] *Gcaba v Minister of safety and Security* [2009] ZACC 26, 2020 (1) BCLR 35 (CC), 2010 (1) SA 238 (CC) para 75.

It stated that 'disposal of a jurisdictional challenge on exception entails no more than a factual inquiry, with reference to the particulars of claim, and only the particulars of claim, to establish the nature of the right that is being asserted in support of the claim'.[8] The Court stated that jurisdiction depended on the nature of the proceedings, or the nature of the relief claimed, or both. Both these cases were concerned with the jurisdiction of a court and, in the case of the high court, its common-law jurisdiction involving the ratio for jurisdiction and the question of effectiveness.

[36] Thus, while an arbitration tribunal's jurisdiction is undoubtedly determined with reference to the pleaded cause of action, the agreement to submit to arbitration and its purpose are critical. There is no dispute that what was pleaded as the legal basis for Radon's claim - a revision of the date for practical completion and the consequential financial entitlements that would flow from such revision - fell within the arbitrator's jurisdiction. It was, after all, the very basis for the arbitration reference. But it does not follow that the relief claimed, specifically a monetary award, conferred jurisdiction to make such an award. On the contrary, NVP directly challenged the form of the relief as being beyond the arbitrator's jurisdictional remit.

[37] As stated in *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Health Care (Hos+Med)*:[9]

'The only source of an arbitrator's power is the arbitration agreement between the parties and an arbitrator cannot stray beyond their submission where the parties have expressly defined and limited the issues, as the parties have done in this case to the matters pleaded. Thus the arbitrator … had no jurisdiction to decide a matter not pleaded.'

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[8] *Gallo Africa* para 6.
[9] *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Health Care* [2007] ZASCA 163; [2007] SCA 163 (RSA); [2008] 2 All SA 132 (SCA); 2008 (2) SA 608 (SCA) para 30.

[38] The relief sought in the enumerated prayers is not the legal basis that engages a court's jurisdiction, or that of an arbitrator. A pleaded issue consists of a clear and concise statement of the material facts upon which the claim is based.[10] The orders are consequential upon the 'legal basis of the claim' being upheld. A party may correctly set out the legal basis of a claim that must be decided, but formulate the consequential order in terms that are incompetent or, as in this case, outside the ambit of the powers conferred on the arbitrator. The authorities do not support the suggestion that merely framing a prayer for relief invests the arbitral tribunal with the power to grant the order.

[39] The JBCC contract regulates payment of the agreed or adjusted contract price to Radon. It provides for interim payments to the contractor during the course of the contract and for final payment upon final completion of the construction project. At common law, a contract for the provision of a service or works (*locatio conductio operis*) provides that the contract price becomes due and payable upon completion of the works. The contractor has no claim for payment except upon performance of the obligation which is the subject of the contract. In *Colonial Trust Corporation Ltd of Graaff Reinet v The School Board of Pearston and Others*,[11] it was stated that a contractor is not entitled to payment until the works are completed. But if provision is made in the contract for interim payments or advances, then payment may only be claimed strictly in accordance with those provisions.

[40] The common law position has been adapted for building and engineering works. Such contracts are now generally regulated by standard form contracts as modified from time to time by industry participants. In this case, the applicable

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[10] *Hos+Med* para 35.
[11] *Colonial Trust Corporation Ltd of Graaf Reinet v The School Board of Pearston and Others* 1916 CPD 275.

industry standard contract was the JBCC contract. This contract confers upon the contractor an entitlement to receive payment during the course of the works, subject to a final adjustment upon completion and final delivery of the completed works. The underlying principle was explained by this Court in *Shelagatha Property Investments CC v Kellywood Homes (Pty) Ltd, Shellfaerie Property Holdings CC v Midrand Shopping Centre (Pty) Ltd (Shelagatha)*,[12] in these terms:

'[I]nterim certificate was not intended as compensation for a completed segment of the work. It was a medium for making progress payments which payments represented only an approximate and proportional value of the work done and material on site at a specified date. The purpose of the progress payment was to supply the contractor with working capital as an advance on the contract sum and it was dependent upon the ultimate completion of the work.'

[41] We must therefore look to the JBCC contract to determine when, and under what circumstances, Radon may make a claim for payment as contractor. Clauses 31 through 35 of the JBCC contract regulate payment. In accordance with clause 31(1), the PA must issue an interim payment certificate each month until the final payment certificate is issued. Such certificate may be for a nil or negative amount. The interim certificate must include a reasonable estimate of the value of the work executed; a reasonable estimate of the value of the materials and goods; and the total of amounts previously certified. Adjustments to the certified amounts must be made in relation to contract price adjustment provisions (CPAP)[13] and the amounts due to the employer or contractor set out in the recovery statement which accompanies the payment certificate.

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[12] *Shelagatha Property Investments CC v Kellywood homes (Pty) Ltd, Shellfaerie Property Holdings CC v Midrand Shopping Centre (Pty) Ltd (Shelagatha)*1995 (3) SA 187 (A) at 193I-194A.

[13] CPAP is defined to mean contract price adjustment provisions used for the adjustment of fluctuations in the cost of labour, plant and goods and materials. In this case the CPAP adjustments required determination in the light of the extension of the date for practical completion. Clause 32 governs the adjustment of the contract value. It makes provision, inter alia, for the adjustment of preliminaries amounts stipulated in the contract price. The reference to arbitration include a claim in relation to adjustment of the preliminaries costs.

[42] Recovery of expenses and losses is governed by clause 33. A recovery statement must accompany each interim payment certificate. It includes amounts due to the employer arising from penalties imposed on the contractor, default interest, and expenses and losses incurred by the employer. It also includes the calculation of amounts due to the contractor for compensatory and default interest as may accrue because of a failure to make payment timeously of amounts certified to be due to the contractor, and for damages or advance payments where those are stipulated. Importantly, clause 33 permits the employer to recover amounts due to it either by set-off against amounts that may be due to the contractor in subsequent payment certificates, from security guarantees provided, or as a debt from the contractor. There is no equivalent provision relating to recovery which operates in the contractor's favour. The most obvious reason is that the contractor recovers by way of a subsequent interim payment certificate or, where appropriate, through the final payment certificate, in which required adjustments under the contract may be made.

[43] The right to receive payment is dependent upon certification of an amount due to the contractor. Clause 31.9 provides:

'The employer shall pay to the contractor the amount certified in an interim payment certificate within seven (7) days of the date for issue of the payment certificate. Payment shall be subject to the contractor giving the employer a tax invoice for the amount due.'

[44] Clause 34.10 regulates the right to receive payment under the final payment certificate. In both instances, a failure to make payment attracts compensatory or default interest upon the amounts certified for payment. The JBCC contract therefore treats an interim or final payment certificate as a condition precedent to payment under the contract. It also imposes a reciprocal obligation upon the contractor to furnish to the employer a tax invoice for the amount certified to be due.

[45] In answering the charge that a monetary award was outside the terms of the reference and incompetent given an extant contract regulating payment, counsel contended that an arbitrator may make a monetary award notwithstanding the contract's payment-certificate provisions. He relied, inter alia, on *Prestige & Co Ltd v Brettell (Prestige)*,[14] and *Henry Boot Construction Ltd Colonial Trust Corporation Ltd of Graaff Reinet v The School Board of Pearston and Others v Alstom Combined Cycles Ltd (Henry Boot)*,[15] to support that proposition.

[46] In *Prestige* the architect (performing the equivalent role of the PA in the present matter) had been requested to issue a payment certificate for payment to the contractor of a specified amount. The architect had refused to issue the certificate, and that issue was the subject of the reference to arbitration. Slesser LJ set out the applicable principle as follows:

'Where an arbitrator having jurisdiction has to decide that something ought to have been done by the architect or engineer which was not done, if the terms of reference are wide enough to enable him to deal with the matter, he may by that decision himself supply the deficiency, and do that which ought to have been done, and produce the result which ought to have been produced, if in his view what was not done is the only reason why the result of doing what ought to have been done does not follow.'[16]

[47] The court in *Prestige* held that the reference contemplated not only issuing a certificate, but also directing payment of the specified amount due to the contractor. In my view, the dictum in *Prestige* is by no means unqualified. Whether an award sounding in money may be made depends on whether it falls within the arbitrator's jurisdiction and within the terms of reference. In that

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[14] *Prestige & Co Ltd v Brettell* [1938] 4 All ER 346 (CA).
[15] *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] 3 All ER 932 (CA), [2005] EWCA Civ 814.
[16] *Prestige* at 350A-C.

matter, the contract clause referring to arbitration[17] empowered an arbitrator to 'open up, review and revise any certificate' and to determine any matter as if no certificate had been given. In this case, the contract makes no provision for reviewing or amending a payment certificate. It provides only that adjustments may be made in subsequent payment certificates. Clause 40, which deals with arbitration, does not confer on the arbitrator jurisdiction to order payment outside the contract's terms. Importantly, clause 40.6 provides that referring a dispute to arbitration does not relieve the parties of liability for the due and timely performance of their obligations, which must include the obligation to issue further interim payment certificates or the final payment certificate, as may be required. In any event, payment certificates are not ordinarily open to subsequent revision and amendment in light of the nature of such instruments.[18]

[48] Greer LJ noted separately in *Prestige* that he concurred with grave doubt and hesitation, stating that he concurred only because he considered the House of Lords decision in *Brodie v Cardiff Corporation* binding on him. He recorded that, in his view, because a payment certificate was a condition precedent to payment, the arbitrator should not ignore the provision. In my view, *Prestige* does not establish a generally applicable principle that an arbitrator may make a monetary award despite the contract's provisions. In *Neale v Richardson*[19], decided at the same time as *Prestige*, the court outlined the circumstances in which payment might be ordered despite a payment certificate being a condition precedent to payment. These include fraud or collusion between an employer and an architect, or situations where the architect operates under the employer's influence. The court did not extend the ambit in which a condition precedent might be ignored. It held that:

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[17] Quoted in *Prestige* at 349A.
[18] See *Shelagatha* supra; *Intech Instruments v Transnet Limited t/a South African Port Operations* [2019] ZASCA 79; [2019] 3 ALL SA 357 (SCA) para 46.
[19] *Neale v Richardson* [1938] 1 All ER 753 (CA).

'I cannot see why in principle the defendant should not be entitled to stand upon her contract and say she has undertaken to pay when and only when the architect gives his final certificate.'[20]

[49] In the present matter, no one suggested that the PA failed to do what he was required to do. Before the arbitrator was a claim for an extension of the date for practical completion and, if the date was extended, a determination of the quantum of the financial entitlements that accrued to Radon by reason of the extension. In exercising his jurisdiction, the arbitrator could do no more than the PA would have done had the PA granted the extension of the date for practical completion.

[50] Much was made of the fact that the arbitrator could not direct the PA to do anything because the PA was not a party to the arbitration. It was, so the submission went, only possible to make an award that finally disposed of the dispute by ordering NVP to pay the amounts claimed. The suggestion was that, if the arbitrator were to direct the PA or, for that matter, NVP, as the employer, to ensure payment of the amounts which accrued to Radon *in accordance with the payment mechanisms provided by the contract*, such an award would not be a final award since it would leave the finalisation of the claim to a process outside the arbitration. I fail to see why this should be so. The argument fails to appreciate that the determination of an amount by which the contractor should be compensated because of permitted escalation of preliminary costs or an adjustment of the contract price, or most obviously by reason of the reversal of penalties already deducted from amounts which would otherwise have been paid to the contractor does not leave the resolution of the amounts to another party. Those determined amounts which would have accrued to Radon, as contractor, would simply need to be brought to account in any further interim payment

[20] Ibid at 756H.

certificate or in the final payment certificate and recovery statement. The contract requires this.

[51] By the time of the final arbitration hearing, the quantum of what accrued to Radon from the extension of time had been agreed. The parties did not agree that Radon was due payment of those amounts. NVP had specifically contended in its written submissions and in its amended plea that it had already reversed the penalties in subsequent interim payment certificates. NVP was not permitted to adduce evidence on this aspect or rely on payment certificates issued after the reference to arbitration.

[52] The fact that further certificates were issued after the reference to arbitration and after the 2014 award (and, it appears, after the further extension granted in the 2017 award) highlights the limits of the arbitrator's power to make the award he did. The arbitrator may well have been constrained to ignore what had transpired subsequent to the reference to arbitration, but he could not ignore the terms of the contract. The essence of the dispute, after all, was what Radon was entitled to under the contract. The entitlement to be compensated for necessary adjustments arising from the manner and circumstances in which the contract was executed did not translate into a right to payment except in accordance with the contract's payment provisions.

[53] In my view, the arbitrator misconceived the task he was required to perform. In doing so, he granted payment orders outside the ambit of his jurisdiction. As noted in *Telcordia*, an arbitrator does not have the exclusive right to decide the scope of his jurisdiction because, if he exceeds his powers, the award is reviewable on that ground. That is what occurred here. It follows that the high court was correct to find that the arbitrator had exceeded his powers and to review

and set aside the award on that basis, albeit on grounds other than those found here.

[54] This finding also disposes of Radon's counter-application to correct the obvious clerical error in the award once it is made an order of court. It is therefore unnecessary to traverse the issues concerning NVP's plea of *lis alibi pendens.* However, it is appropriate to record that Radon abandoned its pursuit of an order 'consolidating' the East London application with the counter–application for the same relief. Consolidation of proceedings can, of course, only occur in relation to separate proceedings before the same court. Such relief could only be pursued if the East London application had been transferred to the Gauteng high court.

The cross-appeal

[55] In its cross-appeal, NVP sought orders to substitute certain aspects of the award, even if the award were set aside. The orders sought were that the arbitral award be corrected as follows:

'1. By declaring that consequent upon the revision date for practical completion to 13 August 2009, [Radon] is entitled to be paid the three amounts claimed by it totalling R6 442 593.39 under and in terms of the payment mechanisms provided for in the contract.

2. By further declaring, by virtue of the payment mechanisms provided for in the construction contract, that it is incompetent and beyond the jurisdiction of the [arbitrator] to make an award ordering [NVP] to pay [Radon] the aforesaid three amounts totalling R6 442 593.39 directly as amounts sounding in money, as money can only become due and payable by [NVP] to [Radon] under and in terms of such payment mechanisms and upon the principal agent issuing a positive interim or final certificate to [Radon] thereunder.

3. By directing [NVP] (to the extent that it has not already done so) to cause appropriate entries for the aforesaid three amounts totalling R6 442 593.39 to be made by a specified date in favour of [Radon] in the next interim or final payment certificate and accompanying recovery statement to be issued under the construction contract, so that payment of such amounts takes place by way of the agreed payment mechanisms provided for in the construction contract.

4. By recording that [NVP] has alleged that it has already paid [Radon] the aforesaid three amounts totalling R6 442 593.39 by way of the method set out in [4] above, and further recording that this issue has not been determined by the [arbitrator].
5. By ordering [NVP] and [Radon] to each pay their own costs of suit in respect of the arbitration proceedings, save to the extent that such costs are already the subject of an award.'

[56] The circumstances in which an award may be corrected by a court are limited. The court to which an application is made to have the award made an order of court may, before doing so, correct 'any clerical mistake or any patent error arising from any accidental slip or omission' by the arbitrator.[21] The orders sought do not fall within these categories.

[57] A court that sets aside an award on review, whether because the arbitrator committed a gross irregularity or exceeded their powers, may set aside only those portions of the award that are clearly severable and unaffected by the grounds on which the award is assailed.[22] In this case, NVP does not seek to sever the untainted portion of the award. It seeks a total substitution, the basis of which is to alter the award to one which effectively upholds its defence.

[58] The basis for these substitution orders was said to ensure that the gains achieved by the arbitration process to date, specifically the agreements reached on the issues in dispute, could be preserved. It was suggested that the declarations would ensure the new arbitrator understood what had occurred and what was required. Absent such 'corrective orders', it was argued, Radon would not be paid that which might be due to it. This motivation strikes me as bizarre. The agreement on the quantum of the financial entitlements due to Radon, struck

[21] S 31(2) of the Arbitration Act.
[22] *Palabora Copper (Pty) Ltd v Motloka Transport & Construction (Pty) Ltd* [2018] ZASCA 23, 2018 (5) SA 462 (SCA) para 48, *Termico (Pty) Ltd v SPX Technologies (Pty) Ltd and Others* [2019] ZASCA 109, 2020 (3) SA 295 (SCA) para 12.

before the final arbitration hearing, stands *inter partes*. So too do the two interim awards by which the date for practical completion was extended, and the concomitant award requiring reversal of the penalties imposed upon Radon.

[59] Setting aside the final award on the basis that the orders for payment exceeded the arbitrator's powers does not expunge those interim awards. Nor does it disentitle Radon to be compensated for the agreed amounts. The 'substitution orders', in my view, are the sort of orders which might be entered in an appeal against an arbitration award. But no such appeal was available because clause 40 of the contract does not provide for an appeal, and such an appeal is precluded by the Arbitration Act. A party cannot, under the guise of a review application, seek to pursue an appeal against an arbitration award.

[60] In any event, the substitution orders directly conflict with the order appointing a replacement arbitrator that NVP sought in terms of s 33(4) of the Arbitration Act. If the substitution orders were granted, the new arbitrator would have nothing to decide. The first three paragraphs of the substitution order would finally dispose of the reference to arbitration. The fourth paragraph could not give rise to a continuation of the arbitration proceedings because the determination of that unpleaded defence would fall outside of the terms of the reference to arbitration. All that the rider to paragraph three and paragraph four would achieve is to foreshadow a defence which might arise in relation to a later interim or the final payment certificate.

[61] The most obvious indicator is the envisaged costs order. The arbitrator made a detailed order on the costs of the arbitration, requiring NVP to pay them. NVP seeks an order that imposes on the new arbitrator a costs determination that avoids applying the ordinary rule on the payment of costs. It does so without a jot of evidence to justify such an order.

[62] Before turning to the orders, it is appropriate to comment on the extraordinary length of time this arbitration dispute has taken to reach this stage. Because of the orders I will make, it remains unfinalized. The arbitrator was appointed in 2010. One round of litigation was finalised in this Court in 2013. The fundamental basis of Radon's claims and the lion's share of the extension of time was determined in August 2014. The arbitrator added a further four days in 2017. In 2021 the quantum of the financial entitlements which accrued to Radon by reason of the extension of time was settled, and the award was made at the beginning of 2022.

[63] NVP's motivation for the substituted relief sought in the cross-appeal, albeit misguided in that respect, points to a peculiar state of affairs. In light of the determinations already made over 16 years of arbitration and the firm and binding agreements between the parties, it seems inconceivable that the true dispute cannot be resolved by further agreement. The parties are not compelled to pursue an arbitral process when little, if anything, remains to be determined. The final payment certificate has not yet been issued. The ongoing arbitration in this matter explains this. Arbitration proceedings are often touted as a faster, more efficient way to resolve disputes without recourse to the courts. That is certainly true in most instances. Sadly, not in this case. It is to be hoped that sensible and businesslike engagement between the parties might finally put to rest the process of construction of a convention centre. After all, a convention centre's very purpose is to bring people together for constructive and mutually beneficial engagement.

[64] I therefore make the following orders:

1. The appeal is dismissed.
2. The appellant is ordered to pay the costs on appeal.

3. The cross-appeal is dismissed.
4. The first respondent (cross-appellant) is ordered to pay the costs on cross-appeal, including the costs of two counsel.

G GOOSEN
JUDGE OF APPEAL

Appearances:

For the appellant:	C Badenhorst SC and D Joubert
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Instructed by:	Bax Kaplan Russel Inc., East London
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