IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CIV) NO.09/2015

In the matter between

M & C CONSTRUCTION INTERNATIONAL (PTY) LTD — **APPELLANT**

and

LESOTHO HOUSING AND LAND CORPORATION — **RESPONDENT**

CORAM	:	FARLAM, AP
		CLEAVER, AJA
		DR MUSONDA, AJA
HEARD	:	12 APRIL 2016
DELIVERED	:	29 APRIL 2016

SUMMARY

Arbitration – distinction between statutory arbitrations and private arbitrations – courts slow to set aside awards in private arbitrations.

JUDGMENT

FARLAM, AP

[1] This is an appeal from a judgment delivered by Molete J, sitting in the High Court, in which he (1) set aside an arbitration award made in favour of the appellant, M & C Construction International (Pty) Ltd, and referred the dispute back to another arbitrator to be appointed by agreement between the parties or, if they failed to agree within 30 days of the court's order, by the court, and (2) awarded costs to the respondent, the Lesotho Housing and Land Development Corporation.

[2] The disputes between the parties which they referred to arbitration arose out of a contract between them for the

design and construction by the appellant for the respondent, as employer, of a water reticulation scheme for the residential development of a housing project at Ha Lepolesa in the Maseru district. The parties agreed that the Hon C.B. Cillie, a retired judge of the Orange Free State High Court in South Africa, would be the arbitrator. The items which had to be considered were (1) unpaid claims (2) *mora* interest at 18.25% per annum on unpaid amounts and (3) what were called 'loss of opportunity damages' amounting to a further 15% per annum.

[3] On 7 January 2013 the arbitrator made his award in favour of the appellant in an amount of M11,569, 100.00, with interest at 18.25% per annum from 5 October 2012 to date of payment.

[4] On 4 February 2013 the arbitrator furnished the parties with the reasons for his award. The amount awarded was made up as follows:

(i)	Unpaid claims	M3,472,965.49
(ii)	Mora interest	M2,365,132.82
(iii)	Loss of opportunity damages	M2,319,726.19

Sub total	M8,157,824.50
VAT	M1,142,095.43
With VAT to 4 June 2011	M9,299.919.93
Interest from 4 June 2011	
at 18.25%	M2,269,180.46
Award to 4 October 2011	M11,569,100.39

[5] In the reasons he furnished to the parties the arbitrator dealt with the 'loss of opportunity' damages (which as can be seen from the breakdown of the claims amounted to 28% of the total awarded without VAT as at 4 July 2011) as follows:

'4. Loss of opportunity:

4.1 In its statement of claims the claimant asks, inter alia, for an award of damages of a rather novel nature. In his evidence Mr Sykes on behalf of the claimant explained that this claim is based on the fact that the claimant had to take securities to raise money to develop certain projects. It is claimed as amounts of money that were lost due to the fact that the claimant lost the opportunity to develop these projects because it did not have the capital available to do so due to defendant's failure to pay timeously. Sykes testified that if these periodical payments were made timeously, it could have earned a return of at least 35% if utilized in developing office accommodation of which there was at the time a shortage in Lesotho.

4.2 The defendant contends that this falls clearly under special damages. The claimant therefore had to prove that at the time of entering into the agreement it was in the contemplation of the parties that should the defendant fail to make timeous payments, the claimant would suffer such damages being loss of opportunity. It is submitted that the evidence of Mr Sykes on behalf of the claimant was not susceptible of such contemplation.

4.3 Mr Edeling, on behalf of the claimant firstly submits that Rule 22 of the High Court in Lesotho precludes this argument. He points out that the defendant in his plea admitted par 96 of the claimant's statement of claim which reads as follows:

> *"96. All the claims and types of loss or damage claimed flow naturally and generally from the kinds of breach of the LHLDC obligations in question, alternatively the parties contemplated at the time of the conclusion of the contract that if there should be a breach by LHLDC of its obligations, such types of loss or damage would probably result from such breach, and the contract was entered into on the basis thereof."*

According to Mr Edeling, the defendant in his plea did not specifically deny this allegation set out above. He submits that defendant preferred to deal with par 93 to 337 of the claimant's statement of claim in a brief manner limiting it to a denial of liability on the merits. He points out that in his opening address he emphasised that claimant conducts the trial on the basis that par 96 which deals with loss of opportunity, is admitted.

4.4 I do not find it necessary to decide on this argument as Mr Edeling's alternative submission seems to me to be sound. He says that since Corbett JA's judgment in

> *Holmdene Brickworks v Roberts Construction Company 1977 (3) SA 670 (A)*

the test whether damages are to be regarded as special damages changed to a flexible one in which factors such as reasonable foreseeability play a part. He referred me to legal writing and judgments indicating that reasonable foreseeability these days governs most cases where damages are claimed and that loss of opportunity is regarded as a form of direct loss in England and India. I find my own view in accordance with this.

4.5 Fact of the matter is that the claimant has for years done business as a construction company and project developer, inter alia, in Lesotho. This was fully set out in its CV submitted as part of the tender. From an early stage of the developing dispute, claimant called upon defendant to make payment [lest] "substantial damages including…loss of profits and opportunity" will be suffered. Defendant never challenged that or asked for clarification of the nature of the damages allegedly suffered.

4.6 In the construction and development industry it is well-known that a contractor relies on payments being made timeously as the availability of funds is critical for the running of their business. The claimant's witness, Sykes, explains that claimant could earn a return in excess of 35% p.a. on an available development project if it had the funds available to do so. He stated that claimant had available land suitable for development as office accommodation and intended to do so as the market related rentals for office accommodation in Lesotho are high because of limited supply.

4.7 In the result I concluded that a claim of 15% for loss of opportunity was justified and proved.'

[6] After the reasons for the award had been furnished the respondent brought an application in terms of section 33 (2) of the Arbitration Act 12 of 1980 for the award to be remitted to the arbitrator for reconsideration and for him to make a fresh award. (In what follows I shall refer to the Arbitration Act as in 'the Act'.) Subsequently the parties agreed that the matter be remitted. This agreement appears not to have been made an order of court although the arbitrator thought that it was. In the agreement, which was headed 'Agreed Consent Order', the respondent was referred to as 'the applicant', arbitrator as 'the first respondent' and the appellant as the second respondent'.

The agreement contains the following:

'*1. Certain matters, (which relate to the arbitration between the Applicant and the Second Respondent which was heard by the First Respondent and in respect of which the First Respondent made the awards and annexures "HL6" and "HL7" to the Applicant's Founding Affidavit) are hereby remitted to the First Respondent for reconsideration in terms of Section 33 (2) of the Arbitration Act of Lesotho (Act 12 of 1980).*

2. The matters so referred are the following contentions and questions in law and evidence of the Applicant, which are not admitted by the second Respondent, namely:

2.1. When was the Respondent entitled to in terms of the Contract between the parties commence with the construction work?

2.2. What was the effect of the Second Respondent's breach of the Contract i.e. to commence construction work prior to the approval of the plans, or entering into a formal agreement with the Applicant on the date of the commencement of the construction works agreed to between the parties?

2.3. Was the basic principle of Contract Law, that the innocent party shall place the defaulting party in mora, applicable to the Applicant's alleged failure to produce a formal Contract? If not, why not?

2.4. As the Second Respondent did not place the Applicant in mora in respect of Applicant's obligation referred to in sub-paragraph 3 above, why was the Second Respondent entitled to ignore the terms of the agreement between the parties as was found by the first Respondent and set out in the Letter of Acceptance dated the 11th of October 2006 by the Applicant?

2.5. As the First Respondent held in paragraph 35 of the award that the Schedule (Appendix 11 to the Tender – annexure "HL 11"), on what basis was the Second Respondent entitled to interim payments on any other basis as agreed on?

2.6. Bearing in mind that neither the commencement date nor the amount payable or the date that such amount would become payable had been proved by the Second Respondent, why was the Second Respondent entitled to any interest?

2.7. During the arbitration Mr Horoto and Tlali, on behalf of the Applicant testified that the parties reached an agreement on 9 March 2010 in terms whereof all disputes regarding the repair works to the system were settled between the parties in an amount of M1,327,867.54 which was paid by the Applicant. On what basis was this evidence not accepted by the first Respondent?

2.8. It is common cause that WASA did not approve of the revised Certificates N0. 5 to 9. On what is the Second Respondent entitled to any payments in regard to these Certificates?

2.9. Bearing in mind that Second Respondent did not furnish the Arbitrator with any financial statements or proof of Contracts lost for the period 2006 to 2009 and therefore provided no documentary proof of any net loss of profit nor net loss of development opportunity, on what basis would the Second Respondent be entitled to any award for loss of opportunity or loss of profit and how could such a loss be calculated?

3. The First Respondent is directed, after affording the legal representatives to the parties the opportunity to make further written and oral submissions on the matters listed above, to reconsider these matters and to consider whether to revise or amend the award or to issue a fresh award after reconsideration as aforesaid.

4. The First Respondent may make a separate award as to the costs of these proceedings and the consideration proceedings, after due consideration of the further submissions referred to in 3 above.

5. The First Respondent is directed to give procedural directions as to the date and venue of the

reconsiderations hearing, in consultation with the legal representative of the Applicant and the Second Respondent.'

[7] After hearing full argument by counsel for the appellant and the respondent on 30 July 2013 the arbitrator handed down on 27 August 2013 what he called 'Judgment on Application for Reconsideration'.

[8] In this document he set out the specific aspects on which the matter was remitted to him (viz paras 2.1 to 2.9 of the parties' agreement). He said that it was necessary to do so 'because the argument of counsel occasionally tendered to wander outside the ambit of the aforementioned order.'

[9] Paras 5 to 9 of the document read as follows:

'5. *A debate developed during argument as to under what circumstances an arbitrator would be entitled (obliged?) to reconsider his award. Mr Edeling relying on McKenzie's well-known work, p166, submitted that the basis on which an arbitrator can amend his prior award, is limited. Mr Kemp replied that that authority applies only in cases where the Court has to consider an application for remittal. The Court then has to heed that as set out by McKenze. However, once the matter was*

remitted, the arbitrator is to reconsider it on the basis is of the order of remittal only. The aspects mentioned by McKenzie then fall away, so Mr Kemp's argument went.

6. *Be that as it may, I reconsidered the whole of my award in terms of the aspects set out in the order of remittal. In doing so I duly considered all the arguments ably advanced by Mr Kemp. Having done that I remain unconvinced that I erred in any respect of the reward. Except for one, I do not regard it as necessary to deal with any of the points raised in the arguments presented to me. It is sufficient to say that I adhere to the given reasons for the award.*

7. *There is only one aspect on which I wish to say a bit more. That concerns the question of loss of opportunity. I must say that initially I had some reservations as to this part of the claim. As mentioned in the reasons for the award, this is quite a novel type of claim. Mr Kemp forcefully argued that this part of the claim should have been disallowed. He almost convinced me to do so in reconsidering the matter. The gist of his argument related to the lack of documentary evidence supporting the alleged loss. However, having had another look at the evidence of the claimant on this aspect and considering the development of the law in this field as set out in my reasons, I am satisfied that the claim for loss of opportunity was rightly allowed.*

8. *The Defendant was unsuccessful in the reconsideration of the award. There is no reason why he should not be ordered to pay the costs of the proceedings. The reason for the order as to costs of the arbitrator as set out in para 5 of the reasons for the award do not apply to the present proceedings. There is therefor also no reason why the defendant should not be ordered to pay the costs of the arbitration in the present proceedings.*

9. <u>Conclusion:</u>

9.1 Upon reconsideration of the issues listed in the order of remittal, I am satisfied that the award should not be altered or amended.

9.2 The defendant is to pay the costs of the reconsideration proceedings, including the costs of the arbitrator on the scale as agreed between the parties.'

[10] The appellant thereafter applied to the High Court for the award to be made an order of court under section 32 (1) of the Act and a counter-application for the award to be set aside in terms of section 34 of the Act was made by the respondent. (The material sections of the Act are set out in para [17] below.)

[11] In its founding affidavit the respondent relied for its contention that the award should be set aside on the following conduct of the arbitrator:

> '*misconduct (in the technical sense) and/or gross irregularity and/or exceeding of his powers in terms of the provisions of section 34 of the Arbitration Act*'.

It stressed, however, that its attack on the award was not based on any impropriety deliberately perpetrated or intended by the arbitrator. 'In short, his integrity

and his honesty and his personal good faith are not impugned herein.'

[12] The respondent referred in the affidavit to what it called the 'End Award, (which incorporates the Initial Award)'. It contended that it was invalid on several grounds. The first ground of invalidity arose, so it was contended, 'on an outcome basis – it is irrational and all exercises of public power must meet this minimum standard of validity.'

[13] The second ground was based on the allegation that the award 'was made in a process which, on analysis, suffered every defect enumerated in section 34 (1) (a)-(b) of the Act.' In particular it was contended that the arbitrator failed to perform his arbitral mandate because he failed to consider the issues afresh and failed to give reasons on the nine aspects set out in the parties' remittal agreement. The respondent also contended that the arbitrator failed to comply with his mandate, which was to apply Lesotho Law in resolving the disputes between the parties, because, so it was alleged, he exceeded his

mandate by following cases from India and Australia on the 'loss of opportunity' claim.

[14] The third ground was the alleged unfairness of the hearing. It was contended in this regard that the hearing was not fair because the arbitrator did not apply his mind to issues material to the determination of the disputes between the parties.

[15] The learned judge in the court a quo said (in para [17] of his judgment) that the amount awarded by the arbitrator 'consisted mainly of the loss of opportunity claim'. This was, of course, incorrect: it was 28% of the amount awarded. Referring to the nine aspects set out in the parties' agreement to remit the matter to the arbitrator for reconsideration he said (at para [21]) '[I] will assume that the arbitrator was correct in those. I will only confine myself to the "loss of opportunity" award.'

He said later in his judgment (para [40] – [41]):

> *'In the case before me, the inquiry essentially is whether the arbitrator was justified to award loss of opportunity and*

interest over and above the mora interest and whether he could make such a conclusion with the fact; materials and documents that were before him.

The older cases in South Africa are rather strict and do not persuade me.

[It is clear that the propositions with which he does not agree are the following, which he quotes:]

'It is only where a mistake is so gross or manifest that it would be evidence of misconduct or partiality that a court can be moved to vacate an award"

Dickenson & Brown v Fishers Executors [1915 AD 166 at 178]

Or that "even a gross mistake, unless it establishes mala fides or partiality, would be insufficient to warrant interference unless it establishes mala fides or partiality".

Donner v Ehrlich [1928 WLD 159 at 161]

[16] Dealing with the 'loss of opportunity' claim, the judge said (at para [54]) that the arbitrator had been correct in accepting that this part of the claim was 'novel'. He continued:

'[55] In fact so novel was the Award that the Claimant could only refer to England and India as the two countries where it may be applicable and considered a direct loss. There were no authorities provided as to the full meaning and extent of the concept even in those jurisdictions, and under what circumstances such damages could be awarded.

[56] The omission to give full reasons for his second Award deprives this Court of a reason to depart from the position in our law. He could have perhaps shown that there was reason and justification to deviate from the mora criterion. Indeed this was probably the understanding of the parties when they opted for a Judge to do the arbitration. It was assumed that should he seek to move away from what is normal, acceptable or expected in our law, he would at least do so in a fully reasoned and persuasive judgment.

….

[58] I should mention that it is not the first time I encounter a claim of this nature i.e. damages for "lost opportunity". I am however hesitant to impose the adoption of the concept on our law in Lesotho on the basis of what I consider to be insufficient evidence and motivation in this case. There should be justification for us to adopt the practice in India or England. I do not find it.'

[17] Before the issues that arise for consideration in this appeal are discussed, it will be appropriate to set out the relevant sections of the Act, viz sections 29, 32 (1), 33 (1) and (2) and 34 (1).

'29 Award to be binding-

Unless the arbitration agreement provides otherwise, an award shall, subject to the provisions of this Act, be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms.

32 Award may be made an order of court –

(1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.

33 Remittal of award-

(1) The parties to a reference may within six weeks after the publication of the award to them, by any writing signed by them remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the parties may specify in the said writing.

(2) The court may, on the application of any party to the reference after due notice to the other party or parties made within six weeks after the publication of the award to the parties, on good cause shown, remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the court may direct.

[34] Setting aside of award –

(1) Where –

(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire: or

(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

(c) an award has been improperly obtained,

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.'

[18] The approach to be adopted by the court when asked to set aside an award by an arbitrator in a private arbitration was explained by the South African Appellate Division in **Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd 1994 (1) SA 162 (A) at 169** as follows:

'Before considering these grounds, it is as well to emphasise that the basis upon which a Court will set aside an arbitrator's award is a very narrow one. The submission itself declared that the arbitrator's determination 'shall be final and binding on the parties'.

And s 28 of the Arbitration Act, provides that an arbitrator's award shall

"be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms."

It is only in those cases which fall within the provisions of s 33(1) of the Arbitration Act, that a Court is empowered to intervene. If an arbitrator exceeds his powers by making a determination outside the terms of the submission, that would be a case falling under s 33(1) (b). As to misconduct, it is clear that the word does not extend to bona fide mistakes the arbitrator may make whether as to fact or law. It is only where a mistake is so gross or manifest that it would be evidence of

> *misconduct or partiality that a Court might be moved to vacate an award:* ***Dickenson & Brown v Fisher's Executors 1915 AD 166 at 174-81.*** It was held in ***Donner v Ehrlich 1928 WLD 159 at 161*** *that even a gross mistake, unless it establishes mala fides or partiality, would be insufficient to warrant interference unless it establishes mala fides or partiality."*

See also **Telcordia Technologies Inc v Telkom SA Ltd** 2007 (3) SA 266 (SCA).

[19] In South Africa it has been pointed out that while a court will be slow to set aside an award in a private consensual arbitration the approach will be different in a case where the award being challenged was made by a statutory tribunal performing a public power and protecting a constitutional right (the right to fair labour practices) see **Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another 2009 (4) SA 529** (CC) at para [234] (per O'Regan ADCJ, with whom Langa CJ, Mokgoro, Van der Westhizen and Yacoob JJ concurred). In that paragraph of her judgment O'Regan ADCJ referred to the case of **Sidumo v Rustenburg Platinum Mines Ltd 2008 (2) SA 24 (CC)** and stated that the **Sidumo** case could not, 'without more, be of great assistance in determining the proper constitutional approach to the interpretation of

section 33 of the [South African] Arbitration Act [section 34 of the Lesotho Act] in the context of private arbitration.'

[20] Earlier in her judgment O'Regan ADCJ held (at para [214]) that section 34 of the South African Constitution (which provides, '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') has no direct application to private arbitration.' Kroon AJ (with whom Nkabinde J and Jafta AJ concurred) did not agree with this conclusion.

[21] The provision of the Lesotho Constitution corresponding to section 34 of the South African Constitution is section 12 (8), which reads as follows:

> *'(8) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within reasonable time.'*

[22] This wording makes it clear, beyond any argument, that the judgment of O'Regan ADCJ on this point correctly states the legal position in Lesotho and that it does not apply to private arbitrations.

[23] At para [30] of his judgment in the court *a quo* Molete J, I said that he was *'inclined to agree with the position as summarized in* ***Sidumo and Another v Rutensburg Platinum Mines Ltd and Others****, that where the arbitrator fails to have regard to a matter which is material to the dispute, the proceedings are unfair, and may in appropriate circumstances be set aside because such failure may constitute gross irregularity in the proceedings.'*

[24] I agree with the approach set out in the majority judgment in Lufuno that courts must be slow to set aside private arbitration awards and that cases dealing with statutory arbitrations where the arbitrators perform public functions and exercise public power are an unreliable guide to the interpretation of section 34 of our Arbitration Act. In my view the correct approach is that set out in the passage from the **Amalgamated Clothing** case quoted above. It follows that the views regarding the

present applicability of what the judge called 'the older cases in South Africa', **viz Dickenson & Brown v Fisher's Executors 1915 AD 166** and **Donner v Ehrlich 1928 WLD 159**, are not correct and that his apparent agreement with the legal position in the **Sidumo** case as being applicable in this matter cannot be accepted.

[25] I turn now to consider the matters referred to in agreement between the parties to remit the award to the arbitrator for reconsideration in terms of section 33 of the Act.

[26] The matters referred are set out in paragraph 2 of the agreement, in which it is expressly stated that the appellant does not admit them.

[27] The judge said, it will be recalled, that he would assume that the arbitrator was correct in relation to those aspects covered in the agreement other than the 'loss of opportunity' award.

[28] Apart from the submissions made in respect of the 'loss of opportunity' issue, which I shall deal with below, the respondent's criticisms of the award in my view, at best for the respondent, amounted to assertions that he had made mistakes in reaching his conclusions. In view of the respondent's concession that its attack on the award was not based on any impropriety deliberately perpetuated or intended by the arbitrator and his honesty and his personal good faith are not impugned it must be accepted that whatever mistakes he may have made were *bona fide* mistakes. It was not shown that they were so gross or manifest as to be evidence of misconduct or partiality. In other words the tests for the setting aside of an award contained in such cases as **Dickenson & Brown v Fishers Executors**, *supra,* and **Donner v Ehrlich**, *supra*, have not been satisfied.

[29] Indeed counsel for the respondent in his oral argument before this Court submitted that the 'real issue' in this appeal involves a comparison between the remittal agreement and the second or final award. In this regard he contended that the arbitrator had not complied with his mandate, which was to reconsider the matters set out in paragraph 2 of the agreement and to give reasoned

answers to the questions posed therein. I do not agree with this submission. As counsel for the appellant pointed out, it was made clear at the commencement of paragraph 2 that the matters listed in paragraph 2.1 to 2.9 were *'the… contentions and questions in law and evidence of the [respondent], which are not admitted by the [appellant]'.*

[30] The arbitrator's mandate, which is contained in paragraph 3, was, *'after affording the legal representatives of the parties the opportunity to make further written and oral submissions on the matters listed…, to reconsider these matters and to consider whether to revise or amend the award or to issue a fresh award, after reconsideration as aforesaid.'*

[31] The arbitrator says in his response to the parties' agreement that the parties' legal representatives argued before him and that he reconsidered the whole of his award in terms of the aspects set out in what he called 'the order of remittal.' He concluded this paragraph of his response by saying that he adhered to the given reasons for the award. There is no reason to reject what he says.

It follows that it cannot be found that he did not comply with his mandate.

[32] As far as the claim for loss of opportunity damages is concerned, the judge set aside this part of the award because the arbitrator failed to give full reasons in his award so that the judge was 'hesitant to impose the adoption of the concept on our law in Lesotho on the basis of what [he considered] to be insufficient evidence and motivation in this case' because he could not find justification for the adoption of the practice in India or England.

[33] As I have already held the arbitrator was not obliged to give a fully reasoned and persuasive judgment to satisfy the judge that a claim of this nature should be upheld in Lesotho law either on the law or the facts. What he had to do was to consider whether the principle contended for by the respondent was part of the law of Lesotho and, if he thought it was, to consider further whether the evidence led before him justified the application of that principle in the case before him. In considering what the law of Lesotho is on the point he was

entitled to have regard to persuasive authority, from other countries. If he came to the conclusion that the principle is part of the law of Lesotho and that the evidence for its application in the case before him had been led he was entitled to give effect to that view of the case in his award. That would not make it part of the law in Lesotho, but it would be a binding part of his award – even if his view of the legal position was incorrect or if the evidence was not sufficient to justify the application of the principle in the case.

[34] The claim is, as it happens, not as novel as it appears to have been thought by those concerned in the arbitration and the court below. The novelty arises from the use of the name *'loss of opportunity'* damages. It is clear law that a creditor who has not received due payment of a monetary debt owed under a contract is entitled to be placed in the position he would have occupied if due payment had been made. As it was put in **Bellairs v Hodnett and Another 1978 (1) SA 1109 (AD) at 1146H – 1147C,** '(t)he court acts on the assumption that, had due payment been made, the capital sum would have been productively employed by the creditor during the period of *mora* and the interest consequently represents the

damages flowing naturally from the breach of contract. The practice of awarding such interest at the legal rate of 6 per cent obviates the need to prove in every case what the capital sum would naturally and probably would have earned had it thus been productively employed. A party wishing to recover a higher rate of interest would, in the absence of any alteration in this practice, have to establish by way of evidence as to current rates of interest on investment, etc (such as was adduced in, for instance, [**Enteka Verspreiders (Edms) Bpk v Ellis en Geldenhuys (Edms) Bpk, en Ander Sake** 1975 (4) SA 792 (0)] that the loss naturally and probably suffered by him through the non-employment of his capital exceeded the accepted legal rate.'

[35] In this case the respondent's case was that if it had received what was due to it on due date it could have invested it in building developments which would have produced a return of 35 per cent per annum. It led evidence to that effect and though this evidence was not supported by its financial statements showing its profits in the past and what the trend was (as the respondents expert witness suggested) the arbitrator was satisfied it had proved its case in that regard. He may have been

wrong in being so satisfied but such a mistake would not justify the setting aside of his award.

[36] It may be that the arbitrator erred in awarding interest at 18.25 per cent per annum plus damages at 15 per cent per annum, instead of interest at 33.25 per annum, because, as was said in **Bellairs v Hodnett**, *supra*, *mora* interest is a form of damages. If the amount awarded on this part of the case had been labelled in this way it is possible that the amount awarded would have had to have been reduced because of the *in duplum* rule. This point was not raised at the arbitration or in this Court or the court below and it cannot, (if correct) provide a basis for setting this part of the award aside. At best for the respondent it was an oversight on the part of the arbitrator, which does not amount to an irregularity, gross or otherwise.

[37] In the circumstances I am satisfied that the appeal must be upheld.

[38] The following order is made

1. The appeal succeeds with costs, including those occasioned by the employment of two counsel.

2. The order made in the court below is set aside and replaced with the following:

‘1. (a) It is declared that the arbitral award made by the sole arbitrator, the Honourable C Cillie, dated 7 January 2013, as amplified by the reasons dated 4 February 2013, be made an order of this Honourable Court as contemplated in Section 32(a) of the Arbitration Act 12 of 1980;

(b) Judgment is granted in favour of the Applicant against the Respondent in terms of the award and the final decision for the following –

2.1 The Respondent is ordered to pay the Applicant the amount of M11,569,100.41 with interest thereon calculated at 18.25% per annum from 5 October 2011 to date of payment;

2.2 The Respondent is ordered to pay the Applicant's costs of the arbitration at the scale and taxed, failing agreement between the parties, in terms of the Minutes of the Pre-Arbitration Meeting held on 1 May 2012;

2.3 The costs of the arbitration to include inter alia the costs of the arbitration venue, recording of the proceedings and the transcription thereof and the costs of the reconsideration proceedings, including the costs of the arbitrator on the scale as agreed between the parties;

2.4 The Respondent is ordered to pay the costs awarded to the Applicant in case number CIV/APN/666/2011 in the sum reflected in the bill of Costs mentioned in the arbitration agreement between the parties;

2.5 The Respondent is ordered to pay the further costs incurred by the Applicant in respect of the respondent's application in case number

CIV/APN/666/2011 for the remittal of the award for the reconsideration by the arbitrator.

2.6 The parties are responsible for all the other costs of the arbitrator on a 50/50 basis, which costs have been settled already.

3. The Respondent is ordered to provide the Applicant with a complete statement of account, supported by all relevant invoices and proof of payment, in respect of all the costs of the arbitration proceedings, including the costs of the arbitrator and the costs of the arbitration venue, accommodation, meals, refreshments, recording and transcription of the record of proceedings, whether such costs have been paid or remain outstanding for purposes of reconciling the accounts and calculating which party is indebted to the other.

4. The Respondent is ordered to pay the Applicant's costs including costs of two counsel.'

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I G FARLAM
ACTING PRESIDENT

I agree:

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R B CLEAVER
ACTING JUSTICE OF APPEAL

I agree:

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DR P MUSONDA
ACTING JUSTICE OF APPEAL

For Appellant : C Edeling and S Mathe, instructed by M.T. Matsau

For Respondent : K J Kemp SC, instructed by Du Preez and Liebetrau