THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 378/11
**Reportable**

In the matter between:

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| **ENVIROSERV WASTE MANAGEMENT (PTY) LTD** | **APPELLANT** |
| and | |
| **WASTEMAN GROUP (PTY) LTD** | **1ST RESPONDENT** |
| **ARBITRATORS COMPRISING THE ARBITRATION APPEAL TRIBUNAL** | **2ND RESPONDENT** |
| **OLIVIER MEYER** | **3RD RESPONDENT** |
| **PETER NOVELLA** | **4TH RESPONDENT** |

**Neutral citation**: *Enviroserv Waste Management v Wasteman Group* (378/11) [2012] ZASCA 41 (29 March 2012)

**Coram:** FARLAM, HEHER, VAN HEERDEN, SNYDERS JJA and PETSE AJA

**Heard:** 13 March 2012

**Delivered:** 29 March 2012

**Updated:**

**Summary:** Arbitration – Act 42 of 1965 s 33(1)(b) – arbitration appeal tribunal exceeding its powers or committing gross irregularity – finding of (unpleaded) tacit agreement proper step in deciding issues before it on appeal.

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## ORDER

**On appeal from:** Western Cape High Court (Cape Town) (Ngewu AJ and Saldanha J sitting as court of first instance):

1. The appeal is upheld with costs.
2. The cross-appeal is dismissed with costs.
3. The costs in both instances are to include the costs of two counsel.
4. The order of the court a quo is set aside and replaced by the following:

'The application is dismissed with costs, including the costs of two counsel.'

## JUDGMENT

HEHER JA (FARLAM, VAN HEERDEN, SNYDERS JJA AND PETSE AJA concurring):

[1] The first respondent ('Wasteman') succeeded in persuading the Western Cape High Court (Ngewu AJ, Saldanha J concurring) that the second respondent, an arbitration appeal tribunal, had decided the most important aspect of the appeal ('Issue B') according to its own finding of a tacit agreement raised neither in the pleadings nor in the grounds of appeal and which the first respondent had been afforded no opportunity to address by evidence or argument. This, so the court concluded, amounted to a gross irregularity and exceeded its powers.

[2] The High Court accordingly made the following order in terms of s 33(1)(b) of the Arbitration Act 42 of 1965:

'i. That the application succeeds.

ii. That the award of the arbitration appeal tribunal is set aside.

iii. That the dispute between the parties, (being first respondent's [Enviroserv's] appeal on issue B and [Wasteman's] cross appeal), is referred to a new arbitration appeal tribunal to be constituted in terms of clause 10 of the arbitration agreement between the parties.

iv. No order as to costs.'

[3] The High Court refused Enviroserv leave to appeal. This Court however granted its

application in terms of s 21(4)(c) of the Supreme Court Act 59 of 1959.

[4] The genesis of the dispute was a shareholders' agreement, to which Enviroserv and Wasteman were parties, concluded at Bellville on 26 September 1994. The parties agreed to set up a company, Vissershok Waste Management Facility (Pty) Ltd, which would carry on the business of managing a landfill site for waste disposal. They were to become equal shareholders, each entitled to appoint two directors. Both these requirements were duly fulfilled.

[5] Clause 12 of the agreement provided that:

'The management of the business of the Company, the administrative and accounting functions, the marketing of the services of the Company, the maintenance of equipment on site and the provision of engineering and chemical services shall initially be carried out and provided by Waste-Tech [Enviroserv] for a 6 (six) month period and for a monthly fee agreed with the directors of the Company, provided that the amount payable to Waste-Tech for such services is a market-related rate. Dedicated staff shall be seconded from Waste-Tech on a full-time basis, supervisory and technical staff shall be seconded from Waste-Tech on a part-time basis and other staff required to conduct the affairs of the Company shall be employed from the general public. The management of the business of the Company and the other functions and services to be carried out by Waste-Tech as provided in this paragraph shall be reviewed after a period of 6 (six) months has elapsed with a view to the directors of the Company deciding who will thereafter manage which aspects of the business of the Company. If agreement accordingly cannot be reached, Waste-Tech and Wasteman shall, to such extent as may reasonably be possible, thereafter jointly provide such management.'

[6] Notwithstanding that the initial period of management had been limited to six months, Enviroserv remained in exclusive control of the day-to-day affairs of the company for more than eight years without objection from Wasteman. Only during 2003, with the advent of new shareholders in Wasteman, were demands made that gave rise to the dispute between the parties.

[7] The agreement required such disputes to be settled by arbitration and Wasteman invoked it. In the arbitration various claims were made. Of particular relevance was the

declaratory relief claimed by Wasteman:[1]

'1. Declaring that the Defendant's [Enviroserv's] rights as set out in Clause 12 of the Agreement to manage the business of the Company and to provide the other functions and services referred to in Clause 12:

(a) are not permanent in the sense of enduring for the life of the Vissershok facility, or at all;

(b) are instead now subject to immediate review, with a view to the directors of the Company deciding who will manage which aspects of the business.

2. Declaring that it is possible for the directors of the Company to decide as to who will manage which aspects of the business.

3. Declaring that if the Directors of the Company are unable, within a reasonable period, to agree as to who will manage which aspects of the business, then joint management of the Company by the First Claimant and the Defendant:

(a) is reasonably possible as contemplated in clause 12 of the agreement;

(b) and should follow.'

[8] The arbitrator characterised the essence of the declaratory claims as follows:

'Issue A1 – The Review Issue

Whether, in reference to clause 12, defendant should be ordered to review the management of the business of Vissershok with a view to deciding which of its directors should manage which aspect of the business.[2]

Issue A2 – The Joint Management Issue

Whether, should such relief not be granted, there should be an order for joint management as provided for in clause 12.

Issue B – Continued Exclusive Management Issue

Whether defendant is entitled to continue with its exclusive management until the expiry of the lease:

(1) On the ground that on a proper construction of clause 12 it was never intended that after continued exclusive control of the management for some 14 years, the "six months only" provision can be invoked by the claimant in order that such exclusive management comes to an end.

(2) On the ground that a tacit term exists in the agreement giving such an exclusive right to the defendant for the duration of the lease.

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[1] Wasteman had other claims that have no relevance in the present appeal.

[2] The relief, so encapsulated, does not accord with Wasteman's statement of claim in the arbitration as set out in para 1(b) of the order sought. There Wasteman does not ask that Enviroserv should be ordered to review the management or that Enviroserv should decide which of *its* directors should manage the business. As the tribunal pointed out in paras 7 and 22 of its award the review relief required the joinder of the company's directors, none of whom was, or could be, made parties to the arbitration.

(3) On the ground that the claimant by its conduct tacitly agreed to such exclusive rights until the end of the lease.'

He made an award in the following terms:

'1. An order that the parties are to review in terms of clause 12 is refused.

2. An order that they are to jointly manage the business of Vissershok is refused.

3. An order that the defendant [Enviroserv] is entitled exclusively to manage the business of Vissershok at the weighbridge or elsewhere is rejected. . . .

6. The question of costs is to be decided later in the light of this award and after the submission of written argument.'

[9] After the making of the award Wasteman apparently drew to the attention of the arbitrator that para 3 of the order did not accord with the relief claimed in claim 1(a). It submitted that this represented a patent error which fell to be rectified as provided for in s 30 of the Arbitration Act. At the conclusion of his award on costs the arbitrator responded to this application as follows:

'This was in fact and in substance what was decided. The ground for this objection is that there was no counter-claim on the part of the defendant. This is so but, first, the essential and acknowledged issue was whether defendant could exercise exclusive management for the duration of the lease and, second, this issue was fully canvassed without any objection that it did not feature as a counter-claim. The award in substance, and read in context, was a declaration that the defendant is not entitled to remain in exclusive control as from the date of the award and it naturally and necessarily follows that such control must cease. The defendant's attitude was that there was no error, patent or otherwise, in the form of the award. To overcome what seemed to me to be no more than an objection to the wording of the award, I suggested that it be altered to read: "The defendant is not entitled exclusively to manage the business at Vissershok at the weighbridge or elsewhere."

Such substitution satisfied Mr Harper on behalf of the claimant. However, Mr Wasserman opposed any alteration of the award for a reason not disclosed by him. In these circumstances I must let the matter rest to be dealt with, if necessary, on appeal.'

[10] Apart from certain procedural costs, the arbitrator directed that there should be no order as to costs.

[11] Enviroserv appealed against the award in respect of Issue B 'relating to the

defendant's continued exclusive management' and the award of costs. It is clear from the grounds of appeal that it limited its contentions to 'a proper interpretation of clause 12 of the shareholders' agreement' and did not seek to impugn findings of the arbitrator against the existence of a tacit term and a tacit agreement relating to continued management by Enviroserv.

[12] Wasteman cross-appealed against the award in respect of Issue A1 and A2. Such cross-appeal was conditional upon the appeal tribunal finding that the arbitrator's interpretation of clause 12 was wrong or that a review was essential as contended by it. Wasteman further cross-appealed in respect of costs on the grounds that it, as the successful party in the arbitration, should be entitled to all its costs.

[13] The arbitration appeal was heard by the tribunal. It made the following appeal award:

'(i) The claimant's appeal and cross-appeal are dismissed with costs;

(ii) The defendant's appeal in respect of issue B is upheld with costs;

(iii) Paragraph 3 of the arbitrator's award which provides that "an order that the defendant is entitled exclusively to manage the business of Vissershok at the Weighbridge or elsewhere is rejected" is set aside;

(iv) Paragraph 3 of the arbitrator's costs award providing that "For the rest, there is to be no order as to costs" is set aside and substituted with the following award:

"3 3.1 The first claimant is to pay the defendant's costs on the High Court party and party scale, such costs to include the costs of two counsel;

3.2 The first claimant is to pay the costs of the arbitration, including the costs of the arbitrator and the venue".

(v) The costs referred to in paragraphs (i) and (ii) hereof are to be paid on the High Court party and party scale, and are to include the costs of two counsel.

(vi) The first claimant is to pay the costs of the appeal arbitration, including the costs of the appeal arbitrators and the venue.'

[14] In its application under s 33(1)(b) of the Arbitration Act[3] to the High Court to set aside the appeal award Wasteman relied on alleged irregularities in the award. The court upheld the contention. It held that the tribunal

'adopted an entirely new approach and determined issues *mero motu* on a basis which had not been raised as part of the appeal. From the notices of appeal and cross-appeal it is clear that the tribunal was not enclothed with jurisdiction to determine the existence or otherwise of the tacit agreement it concluded (sic) in its award. . . The conclusion by the tribunal that there existed a tacit agreement

(i) between the first respondent and the company styled Visserhok Waste Management Facility (Pty) Ltd ("The Company");

(ii) of indefinite duration, but subject to termination on reasonable notice;

(iii) in terms whereof the first respondent would continue to manage the business of the company;

(iv) against payment by the company of a fee, which would be adjustable by agreement between the company and the first respondent; and

(v) which must have come about from some time in the second half of 1999,

was not anticipated by any of the parties.

As a result applicant argued, correctly so, that it fell victim to an unfairness in that it was never given an opportunity before the arbitrator to conduct and more particularly to respond to a case based on the tacit agreement as construed by the tribunal.'

[15] I am unable to agree with the conclusion of the court a quo for the reasons that follow.

[16] The structure of the appeal award is cardinal in deciding what the tribunal decided and why. A court faced with an application under s 33(1)(b) of the Act which requires it to construe an award must at least be sure that it fully grasps the logic employed by the tribunal before it can contemplate the setting aside of the award. This, I think, is a failing

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[3] 'Where –

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

in the reasoning of the court below.

[17] In its award the tribunal adopted the arbitrator's characterisation of the issues (as set out in para 8 above). In relation to Issue B: Exclusive Management, having set out clause 12 of the agreement, the tribunal continued:

5. The first claimant [Wasteman] contends that the right granted to the defendant [Enviroserv] to manage the Company terminated at the end of the envisaged six months' period. If it did not, clause 12 should be interpreted as giving the first claimant a right to insist upon a review of the management issue, a right that can, and should, be specifically enforced. The defendant, whilst not maintaining that the clause entitled it to manage the site exclusively for the duration of the lease, disputes that the arrangement terminated after the first six months. It further strongly resists the suggestion that if a review *right* was conferred by the shareholders' agreement, it is enforceable by the first claimant by way of specific performance.

6. This was a burning issue before the arbitrator who declined to make an award for specific performance but nonetheless granted relief in the following terms:

"An order that the defendant is entitled exclusively to manage the business of Vissershok at the Weighbridge or elsewhere is rejected."

7. In the view we take of the matter, the refusal to compel the parties to review the management of the Company was correct, not only because it would have meant giving an unenforceable award but also because (whatever review obligation was imposed on the parties by clause 12) the directors of the Company did at a later stage review the conduct of the Company's business.

8. Much of the debate on the review and exclusive management issues centred on the true meaning to be extracted from clause 12. It is trite that all agreements must be interpreted against their background circumstances. This is particularly true of agreements that are ambiguous. Since it cannot be said that on its face clause 12 indisputably proclaims its meaning, it is helpful to look at the climate in which it came to be agreed.

9. When the joint venture was concluded, the defendant had already for twenty years conducted a hazardous waste disposal facility at the same Vissershok site. Upon its expiry the lease for the site was renegotiated and the defendant, utilising its infrastructure and expertise, continued its operation of the site as a joint venture with the first claimant.

10. For much of what we know of the early history of the venture, we are indebted to Mr Andre Swanepoel, at the time a director and major shareholder of the first claimant. His evidence makes it clear that the first claimant was the junior partner in the joint venture, junior in the sense that it was a smaller enterprise than the defendant and, unlike the defendant, operated no waste disposal

sites, whether for hazardous waste or otherwise, and had no expertise in this field. The Vissershok operation being a small one at the time, it is fair to infer that it was hardly worth the first claimant's while to set about acquiring the necessary expertise when the site had been run for twenty years by the defendant. Nevertheless, it seems obvious that the first claimant was not prepared to agree to the defendant continuing to operate the site without giving itself an opportunity to observe at first hand how it performed. If the first claimant was at the end of the six months dissatisfied with the defendant's performance, or any aspect of it, it might ask that the arrangement be reviewed. For good measure the shareholders included a deadlock breaking mechanism in clause 12: in case the parties could not agree they were to exercise joint management to the extent that this was possible.

11. It is evident that clause 12 was a start-up provision intended to offer an opportunity to the first claimant to look things through for six months and then decide whether and to what extent it desired or needed to participate in the management. We agree with the defendant that clause 12 was not intended to operate long after the six months trial period had elapsed. Even less was it intended automatically to put an end to the interim management by the defendant at the end of six months: that would have placed a considerable burden on the first claimant who, apart from Swanepoel's input, was not at the time geared for day to day management of the site.'

[18] In the quoted paragraphs the tribunal first summarised its view on why an order for specific performance of the review provision would be inappropriate (para 7) and then proceeded (in paras 8-11) to interpret clause 12 according to its terms and the circumstances surrounding its inclusion in the agreement. From its synopsis of matters relevant to the last-mentioned question it was able to conclude that clause 12 was intended by the parties to have effect for a limited period not much exceeding the initial six months of the agreement; after that the review provision could no longer be invoked. More importantly, the tribunal was able to find that passing of the initial review period and the non-operation of the review provision did not automatically put an end to the interim management of Enviroserv. Thus the tribunal implicitly held that, absent timeous invocation of clause 12 review, Enviroserv was entitled to remain in control of the company's business until the happening of some event (perhaps, termination on reasonable notice) extraneous to clause 12. In carrying out this analysis the tribunal was, entirely properly, adjudicating the appeal based on the proper interpretation of clause 12.

[19] First respondent's counsel would have us interpret the appeal award as a

concurrence with the finding of the arbitrator as to the proper interpretation of clause 12. But that cannot be. As the arbitrator made clear, his award in relation to the rejection of exclusive management by Enviroserv was intended to mean that after the lapse of the initial period without invocation of the review, Enviroserv's right to exclusive management ipso facto came to an end. The tribunal disagreed. That is why it set the award flowing from the interpretation aside.

[20] It will be observed that in addressing the proper interpretation of clause 12 in paras 8 to 11 the appeal award makes no reference to any tacit agreement. Nor have I found it necessary to refer to such thus far.

[21] The appeal award continues:

'12. From Swanepoel's testimony it is also clear that the first claimant was not at the end of the trial period dissatisfied with the defendant's management of the site. There was no "official" review, says Swanepoel. Things were allowed to continue as before because it was "convenient". With at least the tacit approval of both parties, matters continued like this for the next four years without any problems that could not be resolved by the board, consisting, as we have seen, of two appointees of each of the shareholders. The joint venture developed into a profitable business.

13. Things might have continued in this way with the defendant (through seconded employees) operating the Vissershok landfill to the evident satisfaction of the first claimant, were it not for the former's growing dissatisfaction with the terms of the arrangement. The defendant which, in terms of the shareholders' agreement, should within the first six months have agreed a monthly fee with the Company's directors, had neglected to do so and had been providing services free of charge to the Company. This, one supposes, was not burdensome while Vissershok was a small operation, but, it is fair to infer, the defendant began to think that it ought not to continue doing so when the Company was growing and financially beginning to do extremely well. It accordingly sought a new agreement.

14. In seeking to establish the meaning of the new agreement that was negotiated, it is important to understand that the impetus for the change originated with the defendant's and not with the first claimant's dissatisfaction with the existing situation. The defendant was the one that sought change and the only change it wanted was remuneration for its services. Swanepoel's concern during the negotiations centred on the charges proposed by the defendant for its services. He considered them to be unreasonable and thought that fees could be better monitored and kept under control if the agreement was to be one for the rendering of specific services rather than

broadly defined “management services”. So he resisted the idea of a management fee, but that is all. We know from the undisputed evidence of Mr Des Gordon, a director of the Company and of the defendant, that the first claimant was at that time still a smaller enterprise than the defendant. It carted waste material but did not have its own waste disposal sites. Save by employing skilled personnel, it was not in a position to manage any aspect of the day-to-day business of the Company and it did not seek to do so.

15. On 1 March 1999 Swanepoel wrote to the defendant expressing satisfaction at the operation of the Vissershok site:

“After the unfortunate incident involving Geoff Charters (efficiently and ably resolved by Alistair McLean) the Board decided that Vissershok should operate independently in every respect and appropriate management and staff be relocated to Vissershok landfill site.

This proved to be an excellent decision as it enabled staff to concentrate their efforts on their core business with a consequent heightening in motivation and responsibility levels being achieved. Further demonstrated by the excellent profit and operational performances and supported by central and local Authorities, Brick and Clay (site owners), customers, RMS, etc.

I am (and I know I speak on behalf of all parties involved) very proud of the achievements of the Vissershok site and its operational standards.”

Then Swanepoel goes on to identify his concerns:

“We do appreciate your proposal made for a site management contract, however this concept is not acceptable to ourselves.

Having said this, we appreciate and accept that you provide certain services to Vissershok for which you should be compensated. We should therefore identify these services and determine the cost implications thereof.”

16. In a later letter and following on further discussions, Swanepoel proposed that “the fee and future process be reviewed and agreed three months prior to the anniversary date”, and reiterated that “to avoid any confusion, the services should be clearly defined and agreed;” a sentiment that is repeated in a letter dated 29 March 1999 where he complained about the wording of a draft resolution of the Company that had been forwarded to him:

“The fees are not management fees but a contribution towards the indirect costs incurred for systems, procedures and technical support.”

He emphasised that in his previous letter he had “confirmed that the future process also be reviewed prior to the anniversary date.”

17. On 30 March 1999 the defendant through Mr Des Gordon acting, one would think, both for the Company and for the defendant, approved the scheme proposed by Swanepoel: the “fee and future process” would be reviewed and agreed three months prior to the anniversary date.

18. The negotiations were confirmed and adopted by a resolution of the Company dated 25

March 1999 reading as follows:

"RESOLVED

'That the company shall for the period 1 July 1998 to 30 June 2000 pay to Enviroserv a monthly management fee of R35 000 per month (excluding VAT). After 30 June 2000 the fee shall be adjusted by a quantum which shall be agreed by the partners prior to 1 July 2000.'

19. This resolution was followed by another passed on 13 May 1999 and apparently intended to clarify the earlier one:

"It is acknowledged that Vissershok is an independent company with the responsibility of Management vested in the Board of Directors.

For practical purposes the staff is seconded to Vissershok from Enviroserv Holdings Ltd (Enviroserv) and remunerated by Vissershok.

It is further acknowledged that Enviroserv in addition provides technical and certain other support services for the benefit of Vissershok.

It is therefore agreed that Enviroserv be compensated for these services by an amount of R35 000 per month (excluding VAT) effective 1 July 1998 until 30 June 2000.

The Board will review this arrangement timeously."

20. At the end of the two year period service delivery by the defendant was not reviewed. The first claimant, who lacked the resources anyway, remained satisfied with the way the site was being operated. For the next three years it did not challenge the defendant's operation of the site. The system set up by the resolutions of 25 March and 13 May 1999 remained in place. The evidence does not reveal whether there was an oral agreement to continue the system established in 1999, but the conduct of the parties presents a clear instance of a tacit agreement to continue the arrangement for the rendering of (specified) services for an indefinite time at a fee to be adjusted by mutual agreement from time to time. Until Mr Olivier Meyer, (a director nominated to the Company's board by a purchaser of Swanepoel's shareholding) appeared on the scene in 2003 the delivery of services was not re-examined, let alone altered, and they continued to be rendered without demur.

21. What Meyer encountered when he was appointed to the Company's board was not (as the arbitrator correctly found) a contract entitling the defendant to manage the Company's business until the expiry of the lease. What he did encounter was an agreement without a termination date. Such a contract is terminable on reasonable notice. The Company was thus at any time at liberty to terminate the service contract. Although, from the time of Meyer's appointment to the board, the directors nominated by the first claimant desired to terminate the arrangement, the directors nominated by the defendant were disinclined to do so. The deadlock has prevented the giving of an appropriate notice of termination. The first claimant's difficulty is one created by the absence of a mechanism for resolving deadlocks between the directors of the Company. The first claimant

cannot demand that this deficiency be remedied by judicial intervention. It is not permissible for a court or an arbitrator to resolve a deadlock like this by simply declaring at the instance of an aggrieved party that an open-ended agreement has terminated. Our company law provides means for resolving a deadlock in management, but this is not one of them.

22. We have indicated in regard to claim "A" (Issue A1 and A2) that we consider the claim to have been correctly dismissed. The first claimant did not appeal against the dismissal of this, its first claim, but in its cross appeal, conditional upon the reversal of the award on claim "B" (Issue B), it did urge us, in the alternative, to grant an order for specific performance. Apart from anything else, the award sought would have to operate against the directors of the Company (the persons charged with reviewing the operation of the Company) who are not parties to the litigation.'

[22] The tribunal added (in para 23 of its award):

'As we have observed, the deadlock in the board cannot be resolved by ordering the parties to conduct a review of the open-ended contract presently in existence. The first claimant is not in terms of its cross-appeal entitled to an order specific performance so the cross-appeal is dismissed.'

[23] I have set out this part of the appeal award at some length because it shows that the tribunal was, from paragraph 12, no longer concerned with the interpretation issue but had moved on to deal with Issue A1: the Review Issue and Issue A2: the Joint Management Issue. These issues, it will be recalled, only arose as subjects of the conditional cross-appeal if the tribunal disagreed with the arbitrator's interpretation of clause 12, as it had. Paragraphs 12 to 21 are at pains to explain, from a historical perspective, how, as presaged in para 7 of the appeal award, the directors of the company, at a later stage, did review the conduct of its business. It is in this context that what the tribunal described as a 'tacit agreement' and 'an agreement without a termination date' arose, entirely unrelated to its interpretation of clause 12, and directed only to explaining why a further compulsory review, outside the ambit of the clause, was inappropriate.

[24] In the course of argument, counsel for Wasteman enunciated an approach which differed somewhat from that in his heads of argument, where *res judicata* on the finding that a tacit agreement had been reached between the parties (in para 20 of the appeal award) had been raised in the context of the interpretation issue (Issue B) and not related

to the tribunal's judgment on the cross-appeal (Issues A1 and A2) which, so it had been submitted, should not have arisen for decision. The new submission was that the finding of a tacit agreement in relation to the issues in the cross-appeal represented a gross irregularity because such an agreement had not been pleaded, and Wasteman had been afforded no opportunity to meet, such a case. The finding had, in counsel's submission, the effect of an issue estoppel against Wasteman. This, said counsel, was unfair and would result in substantial injustice as the effect would be to exclude any future possibility of Wasteman bringing about a termination of the management agreement between Enviroserv and the company.

[25] I do not agree with the submission that the tribunal, whether in its approach to the interpretation issue or the cross-appeal, exceeded its powers. The finding of a tacit agreement occurred as part of a bona fide survey of the history of the management of the operations of Vissershok since the conclusion of the written agreement in 1994. The question of interpreting clause 12 was not influenced by that finding as I have pointed out. Wasteman's cross-appeal claimed an order reviewing the management provided for in the agreement and substituting for it an order of joint management, in accordance with its pleaded case. The tribunal undertook the survey in order to decide these questions. Its conclusion was that the parties had by their own agreement committed the decision as to who should manage the operations to the company's board of directors. Moreover, the need for the relief sought by Wasteman flowed from the factual and legal consequences of that joint decision (and, in particular from Wasteman's inability to command a majority on the board) and not from the implementation of the written agreement. That conclusion also led to the tribunal's refusal to countenance an order for review or joint management: the company and its directors who were not parties to the arbitration, nevertheless possessed an interest in the claim for such an order, but their non-participation rendered the making of an order for specific performance incompetent.

[26] The evidence that led to the tribunal making the finding of a tacit agreement was placed before the arbitrator for the purpose of enabling it to decide the issues. It was open to the arbitrator (and the tribunal) to make what it would of the evidence within that context. In concluding that the parties had tacitly agreed to the company employing Enviroserv the tribunal was merely interpreting the evidence. Its conclusion was an outcome of the

evidence and not a fault in the process of the arbitration.[4] Therefore, whether its conclusion, and the reliance it placed on the tacit agreement, was right or wrong, it committed no gross irregularity as contemplated in s 33(1)(b) of the Act and the award of the tribunal was not reviewable on that ground either.

[27] If it should transpire that the finding of the tacit agreement has the effect of an issue estoppel in law – which in the light of my conclusion in the preceding paragraph I find it unnecessary to decide – with the adverse consequences for Wasteman which it fears, that will be a consequence of a binding arbitration award, lawfully arrived at, and Wasteman must, if so advised, regulate its affairs, accordingly.

[28] In summary the tribunal did not, as the court a quo found, base its interpretation of clause 12 on an unpleaded tacit agreement, constructed by the tribunal itself, and of which Wasteman had been afforded no notice in the proceedings. That such a term afterwards governed the parties' relationship was an inference drawn from their later conduct and was one of the factors which led it to conclude that the parties had, after the opportunity for review expired, reconsidered the future conduct of the operation, thus rendering an order in terms of Issue A1 inappropriate.

[29] It follows from what I have said that the court a quo should not have found that the tribunal committed any irregularity or acted beyond its jurisdiction.

[30] The court a quo, without stating reasons, ordered that no order for costs would follow its upholding of the review application. Wasteman cross-appeals against that finding on the assumption that it succeeds in resisting the appeal, in which respect it must fail.

[31] In the result the following order is made:

1. The appeal is upheld with costs.
2. The cross-appeal is dismissed with costs.
3. The costs in both instances are to include the costs of two counsel.
4. The order of the court a quo is set aside and replaced by the following:

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[4] To apply the terminology used by Harms JA in *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at 288, para 42.

‘The application is dismissed with costs, including the costs of two counsel.’

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J A Heher
Judge of Appeal

APPEARANCES

| | |
|---|---|
| APPELLANT: | J G Wasserman SC (with him J P Daniels SC) |
| | De Villiers, Evans & Petit, Durban |
| | Matsepes Inc, Bloemfontein |
| FIRST RESPONDENT: | C M Eloff SC (with him I B Currie) |
| | Allan Levin & Associates, Johannesburg |
| | Lovius-Block, Bloemfontein |