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## FROM THE EDITOR'S PEN:

### Season's Greetings

Welcome to ***Arbitrarily Speaking!***



The festive season is on our doorstep. Together with many other South African families, our staff, members and readers, as well as their respective families, will soon travel to their different holiday destinations. The Association wishes them all well during their travels and over the festive season, and trusts that they will remain safe at all times too.

In this issue of ***Arbitrarily Speaking!*** we salute our Fellows who have acted as arbitrators during the course of the year that is soon to come to an end.

Disclaimer: The articles published in *Arbitrarily Speaking!* solely represent the views of their authors. The Association of Arbitrators (Southern Africa) NPC and its editor do not necessarily endorse or approve of the authors' views or any advice, or purported advice, given by them. Readers are reminded that it is their own responsibility to obtain appropriate advice on any particular issue concerning them from their own appointed legal representatives.

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## UNCLE OSWALD'S Q&A VACATION

### OUR REVERED UNCLE OSWALD IS ON VACATION

Uncle Oswald has already embarked on his summer vacation. He, no doubt, will be barbequing snoek on the grill and imbibing his usual quota of firewater, consisting of Klipdrift Premium Brandy and Coke, until his return from holiday. Given this terrible inconvenience, he will not be providing readers of this column with any sage advice.

However, kindly send your questions to our General Manager, Rochelle Appleton if you need to obtain Uncle Oswald's astute advice on any of your arbitration, adjudication or mediation queries.



## ARBITRATION EDUCATION STATION

Since its inception, the Association has promoted the greater use of arbitration as a means of resolving disputes. It is able to appoint competent and experienced arbitrators, as well as other specialists, in alternative dispute resolution (ADR). To support these core activities, the Association has a proud history of providing excellent training and tutelage by a team of dedicated specialists.

The Association's courses for 2024 are currently open for enrolment. Prospective students have until 29 February 2024 to enrol. For more information, please click on the following:

[General Information](#)

[Accelerated Fellowship Course for Advocates and Attorneys](#)

[Certificate Course in Arbitration](#)

[Fellowship Admission Course](#)

[Specialisation in Construction Law Course](#)



## TOOLS OF THE TRADE

### CLIMATE CHANGE AND ITS EFFECT ON CONSTRUCTION CONTRACTS AND DISPUTES

Damian James and Marcia Davids of *Damian James Delay & Quantum Experts* discuss the impact of climate change on construction contracts and the inevitable disputes that are likely to arise during the execution of the works as a result thereof. The authors, among other things, urge those involved in the construction industry to also ensure that climate-related risks are managed carefully in their contracts and that they understand where liabilities lie when entering into construction contracts.

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### DUTY TO SUPERVISE PROPERLY

In this article, Association Director and Fellow, Alastair Hay, considers the ambit of the duty of architects, engineers, quantity surveyors and employers' agents – referred to therein as EAs or PAs – to supervise the execution of construction works, as well as the consequences of them failing to do so properly. The author points out that a common misconception exists where there has been a failure to do so properly: EAs/PAs somehow believe that they can deflect any claim by an employer on the basis that the true culprit is the contractor who failed to execute the works in a proper and workmanlike manner. The author, in a scholarly review of appropriate case law, dispels this misconception by showing that an employer has separate claims against the contractor and the EA/PA.

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### A NEED FOR UNIFORM ADJUDICATION RULES

Longstanding Fellow of the Association, Stan Segal, refers to his involvement in the *Ekurhuleni West College v Segal and Another* (1287/2018) [2020] ZASCA 32 (2 April 2020), and after considering why the Ekurhuleni West College (as the employer in the dispute) did not follow the usual route of challenging his determination in subsequent arbitral proceedings, suggests that the adjudication rules in the various suites of construction contracts used in South Africa ought to be unified.

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## TOOLS OF THE TRADE *ctd.*

### PIPPED AT THE POST?

**(The pitfall of instituting a claim in the wrong forum and how this relates to the relevant arbitration clause and underlying agreement)**

Timothy Baker and Claudia Moser discuss certain prominent issues that arose in the judgment of *Weissensee v Stone-Bird Investments (Pty) Ltd and Others* [2022] 4 All SA 905 (GJ). In view of the court's finding that the referral to arbitration under both statutes (i.e. the International Arbitration Act 15 of 2017 and the domestic Arbitration Act 42 of 1965) was bound to fail due to the arbitration agreement being void ab initio, the authors also encourage contracting parties to use very clear wording in their arbitration clause/s that would allow, if the validity of the agreement itself is in dispute, for such dispute to be resolved by arbitration (together with any other disputes arising out of the agreement).

This article is published in its entirety with the kind permission of the authors Timothy Baker, Director: Dispute Resolution (Cliffe Dekker Hofmeyr (CDH)), and Claudia Moser, Associate: Dispute Resolution, CDH. The article is also available on the following link on CDH's website. [Click here](#) for more information.

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### POWERS OF AN ARBITRATOR UNDER SECTION 12B (4)(A) OF THE PETROLEUM PRODUCTS ACT 120 OF 1977

First time contributor, and Associate of the Association, Kalipa Mafungo, considers and provides an interesting analysis of the Constitutional Court's judgment in *Mfoza Service Station (Pty) Ltd v Engen Petroleum Ltd and Another* 2023 (6) SA 29 (CC). In this analysis, the author deals with the question whether the majority judgment of the court is correct in finding that an arbitrator – appointed in terms of section 12B (2) of the Act – is not empowered to issue a monetary award for damages or compensation in favour of an aggrieved party to correct an unfair or unreasonable contractual practice.).

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## AOA BREAKING NEWS

In this section, Association Director and Fellow Chris Binnington, who is also the Chairperson of the AOA's Rules Committee, introduces readers to the new Mediation Rules that were approved by the AOA's Board on 13 July 2023.

The new Mediation Rules have been published on the Association's web page, which can be found [here](#).

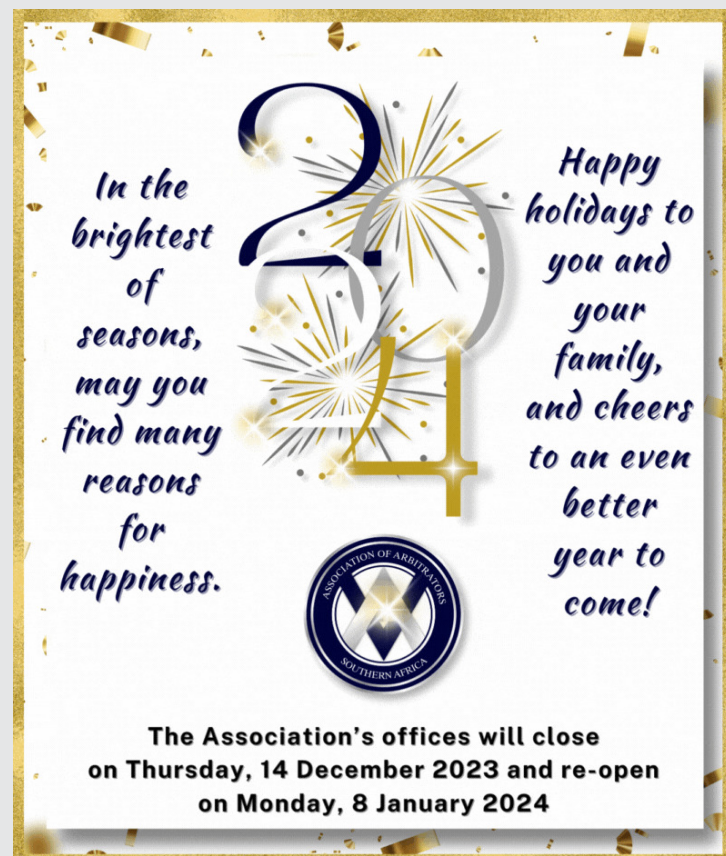
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## A CASE IN POINT: RECENT CASE REPORTS

*Ethekwini Municipality v Coopepativa Muratory & Cementisti – CMC Di Ravenna Societa Cooperativa* (Case No. 181/2022) [2023] ZASCA 95 (12 June 2023). Also now reported at 202 JDR 2053 (SCA). This judgment of the Supreme Court of Appeal is carefully analysed and discussed by Association Fellow and Director, Adv Kiki Bailey SC, under the caption 'The Enforcement of Adjudicators' Decisions by the Courts'.

This regular column features interesting and informative case reports and judgments, and we invite you to add to our growing collection of analyses of important cases.

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# READER'S LETTERS

In ***Arbitrarily Speaking!*** (April 2023 e-periodical Issue 15), Adv Mias Mostert contributed an article entitled '*Exercising a Discretion under Section 20 of the Arbitration Act: A Summary of the Relevant Considerations and Guiding Principles*'. It can be accessed by [clicking here](#).

The following comments (published in their entirety) were received from the honourable Judge Ben Griesel (Ret) FAArb:

'Dear Editor

I refer to the interesting article by Adv Mias Mostert in the latest edition of ***Arbitrarily Speaking!*** (April 2023 e-periodical Issue 15), entitled *Tools of the Trade – Exercising a Discretion under Section 20 of the Arbitration Act: A Summary of the Relevant Considerations and Guiding Principles*.

One of the cases relied on by the author for some of his submissions is the matter of ***Road Accident Fund v Cloete NO*** 2010 (6) SA 120 (SCA). In several paragraphs (and footnotes) in the article, the author refers to dicta from the judgment, treating it as the judgment of 'the SCA'. It is important to note, however, that the passages referred to (e.g., in paras 12, 13 and 23 – 26 of the article) are all from the minority judgment in that case. The judgment of the court, penned by Harms DP, in which the other members of the court concurred, did not find it necessary to deal with any of the principles referred to. Employing Occam's razor in typical Harms style, it was held that the 'question of law' referred to the court by the arbitrator was actually not a question of law, but a 'value judgment' (para 47 of the judgment), with the result 'that the high court had no jurisdiction to consider the arbitrator's stated case' (para 49). The passages from the 'SCA judgment' referred to by the author were, in other words, nothing more than obiter dicta by one of the members of the court. I happen to know this, having been the scribe of the minority judgment in question.

**Judge Ben Griesel (Ret) FAArb**

Cape Town

13 May 2023

## Editor's comment:

Thank you, Judge Griesel. We sincerely appreciate your erudite comments. We kindly request you and encourage other readers to continue sending any comments or criticisms you might have on any topic to [ewd@maisels.co.za](mailto:ewd@maisels.co.za).



## ALL ABOUT THE AOA

In order to grow and diversify the Association's membership, the Association will grant financial assistance for educational courses to members who are financially distressed.

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