

## Arbitrator's liability for negligence

The arrogant statement that the arbitrator has the 'right to be wrong' on the merits of the case,<sup>1</sup> does not mean that an arbitrator escapes liability for negligence.

The application of that statement is limited to the exclusion of an aggrieved party's claim for the review and setting aside of the arbitrator's award under section 33(1) of the Arbitration Act 42 of 1965 (the Arbitration Act), merely because the arbitrator erred on the facts or the law. It does not extend to the arbitrator's liability for causing the parties loss by their negligent mistakes on the law or the facts.

It has been held in along the way statements that an arbitrator is immune against liability for their negligent errors on the merits.<sup>2</sup> The rationale of the argument in support of the arbitrator's immunity is this. Judges escape liability for causing the parties damage by their negligent mistakes. The offices of a judge and an arbitrator are sufficiently similar for likewise granting immunity to an arbitrator.

But the offices of a judge and an arbitrator are sufficiently dissimilar for granting immunity to a judge, but not to an arbitrator. Judges derive their authority from the statute by virtue of which the State appoints them. Their function is to uphold the rule of law in the public interest. They are accountable to the State, not to the parties. By contrast, the parties contract the arbitrator to arbitrate their dispute according to the arbitration agreement between the parties. The arbitrator's power and authority is founded on the contract between the parties, on the one hand and on the other, the arbitrator. The arbitrator is accountable to the parties.<sup>3</sup>

The parties appoint the arbitrator in terms of a contract of mandate.<sup>4</sup> It is an implied term of every contract of mandate that the mandatary must execute their obligations in terms thereof honestly and without negligence.<sup>5</sup>

The Arbitration Act is silent on the arbitrator's liability for negligence.

Thus, an arbitrator, who negligently makes the wrong decision on the law or the facts, breaches the implied term of their mandate not to be negligent in the execution thereof; and is therefore liable for damages thereby caused to the parties. This does not mean that the arbitrator is liable for every wrong decision, but only for those that the average arbitrator would not make.<sup>6</sup>

Holding arbitrators liable for causing loss to the parties by their negligent mistakes on the law or the facts would not deter all arbitrators from accepting appointments — only those who do not have the courage to accept responsibility for their negligence. The arbitrator must take out professional indemnity insurance to cover their negligence, and should not shift the risk of their negligent mistakes to the parties.

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<sup>1</sup> *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) 302A

<sup>2</sup> *Hoffman v Meyer* 1956 (2) SA 752 (C) 756A-C; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) [20]

<sup>3</sup> Lord Dyson, *The proper limits of Arbitrators' Immunity. The Master's Lecture, The Worshipful Company of Arbitrators*, 13 March 2018, 2018 Arbitration 196 at 197-198

<sup>4</sup> *Miller v Kirsten* 1917 TPD 489 at 491

<sup>5</sup> *Bloom's Woollens (Pty) Ltd v Taylor* 1961 (3) SA 248 (N) 253C-254D approved on appeal 1962 (2) SA 532 (A) 538E-540G

<sup>6</sup> Cf *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A) 142G-143C

An arbitrator, who contracted out of liability for their negligent mistakes, would be free to err with impunity, caring less about causing loss, if not injustice, to the parties by their negligence. Accordingly, an arbitrator, who insists on contracting out of liability for negligence as a precondition for accepting an appointment, is to be feared more than wild animals and poisonous snakes, and should not be trusted with an arbitration.<sup>7</sup>

In terms of Article 17 of the ADR Forum Arbitration Rules the parties waive their claim against the arbitrator on account of the latter's negligence. This is because the ADR Forum Arbitration Rules is an adoption with minor adaptations of the UNCITRAL Model Arbitration Rules, in order to harmonise the ADR Forum Arbitration Rules with the arbitration rules most foreign investors in Namibia are familiar with.<sup>8</sup> But **the parties may contract out of such waiver** in the contract appointing the arbitrator, as Article 1 paragraph 6 of the revised ADR Forum Arbitration Rules provides.<sup>9</sup>

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<sup>7</sup> Cf Schorer's statement to that effect referred to in *Preller and Others v Jordaan* 1956 (1) SA 483 (A) 500G-H in the context of a judge who decides cases according to their discretion as opposed to legal rules.

<sup>8</sup> Article 16 of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013) UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

<sup>9</sup> Version 13/5/2019 which may be downloaded from [adrforumlaw.com](http://adrforumlaw.com)