

# Scope of an arbitrator's jurisdiction: Conventional Penalties Act

 By [Corné Lewis](#)

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The ambit of the Conventional Penalties Act, No 15 of 1962 (CPA), is to provide for the enforceability of penalty stipulations, including those based on a pre-estimate of damages and forfeit clauses.



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In terms of section 3 of the CPA, if upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, a court may reduce the penalty to such an extent as it may find equitable in the circumstances.

The question that arises is what the position will be if a matter is referred to arbitration and whether an arbitrator is entitled to exercise the same powers as a court to reduce a penalty which he deems excessive as contemplated by section 3 of the CPA.

To date it appears that there are no reported/unreported judgements that deal with this question. The Supreme Court of Appeal held in *Gutsche Family Investments (Pty) Ltd and Others v Mettle Equity Group (Pty) Ltd and Others* [2007] 3 All SA 223 (SCA) that an arbitrator may not decide an issue of his own jurisdiction where same is not provided for specifically and in the clearest terms in an arbitration agreement.

In *Radon Projects (Pty) Limited v NV Properties (Pty) Limited and Another* [2013] JOL 30597 (SCA) the court held that when an arbitrator is confronted with a jurisdictional objection, what is called for is sound judgment by the arbitrator on the course that should be followed based on his view of the strength of the objection and the circumstances that present themselves in the particular case.

## Acts within the scope of his jurisdiction

An arbitrator therefore acts within the scope of his jurisdiction if he decides a matter within the scope of the arbitration agreement between the parties and his agreed terms of reference. An arbitrator may only decide an issue that falls outside of the scope of his original terms of reference should the parties to the dispute agree thereto.

Where parties have agreed that the rules governing arbitrations under the auspices of the Arbitration Foundation of Southern Africa (AFSA) apply, article 11 of the Commercial Rules of AFSA provides that the arbitrator shall have the widest discretion and powers allowed by law to ensure the just, expeditious, economical and final determination of all the disputes raised in the proceedings, including the matter of costs.

Practice Note 23 (Revised) as issued by the Association of Arbitrators of Southern Africa (Association) expresses the view, in respect of the jurisdiction of an arbitrator to decide applications under section 3 of the CPA that an arbitrator, in material respects, acts as a court in adjudicating a dispute referred to him/her.

Arbitrators are entitled to assume that they may deal with applications under section 3 of the CPA as if they were a court. Practice Note 23 does provide some comfort to arbitrators dealing with such a matter, however, as stated by the Association "whether or not a Court would uphold this view remains to be seen".

To prevent uncertainty and to close the door on any review application based on section 3 of the CPA it would be advisable for parties to agree that an arbitrator deciding the dispute be empowered with the jurisdiction to adjudicate whether penalty stipulations in terms of an agreement between the parties are excessive or not.

## ABOUT CORNÉ LEWIS

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