Question 1

When an arbitration agreement provides for a reference to an even number of arbitrators, those arbitrators may at any time appoint an umpire unless the agreement provides otherwise, or the parties will do so. If the aforesaid umpire refuses to act, is incapable of acting, dies or is removed from office, the parties or arbitrators who appointed that umpire may appoint another umpire in his or her place unless the agreement provides otherwise.

The court when approached may also appoint an arbitrator, the procedure is that a party to a reference serves a written notice on the other party, parties or arbitrators, as the case may be, requiring them to appoint an arbitrator, arbitrators or an umpire. If the appointment required to be made in the written notice is not made within seven days after the service of the notice, the party who gave notice may, upon notice to the other party, parties or arbitrators, apply to court to make the necessary appointment and the court may make the required appointment.

The court will assess will A dispute which is capable of proper formulation must exist before the court will appoint an arbitrator. Although the wording of the Arbitration Act may create the impression that the court, if it exercises its discretion to appoint an arbitrator, must appoint a particular person, in practice, the court may order a party to make an appointment from a particular profession designated by the court, or order the party to choose one person from a list of names contained in the court order.

Where an arbitrator or umpire, who has not yet entered on the reference, has been removed by the court, the court may, on the application of a party to the reference, appoint an arbitrator or umpire to act in the place of the arbitrator or umpire so

removed. Where a sole arbitrator or all the arbitrators or an umpire who has entered on the reference is removed by the court and the arbitration agreement does not provide otherwise, the court may, on the application of any party to the reference. The same powers are conferred to arbitrator or umpire appointed by the court. An arbitrator or umpire appointed in place of someone else or an arbitrator appointed after the court has granted an extension of time for the appointment of an arbitrator may make use of the evidence recorded in the arbitration proceedings before his or her appointment and may also recall for further examination any person who has given such evidence.

When arbitrators are unable to agree on a matter of procedure or any interlocutory question they may refer it immediately to the umpire for a decision. the umpire may sit with the arbitrators and hear the evidence given from time to time. Apart from the advantage of enabling the umpire to hear the evidence to facilitate decisions on matters like credibility if required, the umpire is available to decide then and there any matter of procedure or interlocutory question about which the arbitrators disagree and which they refer to the umpire for a decision. If the arbitrators have given written notice advising the parties or the umpire that they cannot agree, or if they have not made an award within the time limit or extended time limit, the umpire must immediately enter on the proceedings in place of the arbitrators. An umpire thus entering on arbitration proceedings has the same powers. unless the umpire is required by the parties to hear their evidence and that of their witnesses. the umpire has the discretion to recall for further examination any person who has given evidence.

The empire has the powers conferred to them that is so distinct from that of the arbitrators If the arbitrators are unable to agree on a matter of procedure or any interlocutory question they may refer it immediately to the umpire for a decision.

Unless there is a contrary provision in the arbitration agreement, the umpire may sit with the arbitrators and hear the evidence given from time to time. Apart from the advantage of enabling the umpire to hear the evidence to facilitate decisions on matters like credibility if required, the umpire is available to decide then and there any matter of procedure or interlocutory question about which the arbitrators disagree and which they refer to the umpire for a decision.

When a written notice advising the parties or the umpire that they cannot agree, or if they have not made an award within the time limit or extended time limit, the umpire must immediately enter on the proceedings in place of the arbitrators. An umpire thus entering on arbitration proceedings has the same powers as the sole arbitrator and may act upon the evidence recorded in the proceedings before the arbitrators, unless the umpire is required by the parties to hear their evidence and that of their witnesses. He may recall witnesses for further examination of their evidence.

Question 2

2.1.

It is trite that the court has discretion, to be exercised judicially upon a consideration with the facts in each case what costs to award. In essence it is a question of fairness to both sides. The ordinary rule is that the successful party is entitled to costs on a scale of which must be determined depending on the nature of the matter and the manner in which the litigation was conducted. An award of attorney and client costs is not lightly granted by the court and the tendency is to do so on rare occasions and if the conduct of the litigants necessitates same.

The Arbitration Act provides that the award of costs in connection with the reference to arbitration and the award is in the discretion of the arbitral tribunal, unless the agreement provides otherwise. This discretion must be exercised judicially upon a consideration of all the facts and is in essence a matter of fairness to both sides. Particular circumstances may require an arbitral tribunal to make an interim costs order in the interests of fairness. Ethical considerations may also enter into the exercise of the discretion. The applicable arbitration rules may also specify factors which the arbitral tribunal may take into account when exercising its discretion on costs. An arbitral tribunal's discretion to award costs may be curtailed by a statutory provision. Where the arbitral tribunal awards costs, it must give directions as to the scale on which those costs must be taxed and may direct to and by whom and in what manner such costs must be paid. Where an arbitral tribunal has the power to award costs and does not to do so, the court may not itself award costs, but will refer the matter back to the tribunal. The tribunal may tax or settle the amount of the costs and has the power to award costs on an attorney and client scale. If no provision with regard to costs is made in an award or if no directions have been given as to the scale

on which such costs must be taxed, any party to the reference may make application to the arbitral tribunal for an appropriate order. This application must be made within 14 days of the publication of the award. The arbitral tribunal must, after hearing any party who may desire to be heard, amend the award by adding such directions as it may think proper with regard to the payment of costs or the scale on which those costs must be taxed. Any provision contained in an agreement to refer future disputes to arbitration to the effect that any party will in any event pay its own costs is void.

Where a party to arbitration proceedings is obliged to apply to court in order to have an award made an order of court, the court will grant an order of costs in its favour, but if a party applies to court unnecessarily to have the award made an order, that party must bear the costs. A party opposing an application to have an award made an order of court must show that the application was unnecessary and, if it fails to discharge the onus, the person applying for the order is entitled to costs. As only the High Court has the power to make an award an order of court, where a party to arbitration proceedings was compelled to apply to court to have the award made an order of court and it was contended by the opposition that costs should be awarded on the magistrates' courts scale, the court awarded costs on the High Court scale even though the dispute was within the jurisdiction of the lower court. An arbitrator cannot award the successful party the costs of making the award an order of court, unless the arbitration agreement provides otherwise. However, an arbitral tribunal may award qualifying fees for an expert witness, but these costs are not recoverable unless they are specifically awarded pursuant to a specific application. Modern arbitration rules increasingly state that the tribunal may take a party's conduct in the arbitration into account, particularly when that conduct has caused delay or additional expense. Although courts may make special costs orders against the parties' lawyers, eg for an

unreasonable failure to recommend mediation, an arbitral tribunal is not empowered by the Act or the arbitration agreement to make orders against third parties, which include the parties' lawyers. Unless there is a contrary provision in the arbitration agreement, the taxing master of the High Court may tax the costs of an arbitration in certain circumstances, namely if the arbitral tribunal has no discretion as to costs or if the tribunal has a discretion and has directed any party to pay costs but does not tax or settle such costs at once, or if the arbitrators or a majority of them cannot agree in their taxation. If an arbitral tribunal has directed any party to pay costs but has not taxed or settled such costs, then, unless there is a contrary provision in the arbitration agreement, the court may, when making the award an order of court, order the costs to be taxed by the taxing master of the High Court and, if the tribunal has given no directions as to the scale on which the costs must be taxed, fix such scale. The parties' designated rules may permit the arbitral tribunal to appoint a professional taxing service to tax the costs in certain circumstances. Any taxation of costs by the taxing master is subject to review by the court. in the case of *De Villiers v Stadsraad van Pretoria* 1968 2 All SA 601 (T); 1968 2 SA 607 (T) 609. Complete finality is only achieved once the costs payable in terms of an award have been taxed or assessed. If the arbitral tribunal fails to do so, the taxing master has the discretion to tax the costs but is not obliged to do so under s 35(3). In the case of SA Law Commission *Report on Domestic Arbitration* 90. S 35(4); *Austen v Joubert* 1910 TPD 1095 1097. The court is empowered in appropriate circumstances to make only the arbitrator's award of costs an order of court where the arbitrator's discretion has been properly exercised: in the case of *Irish & Co Inc* (*now Irish & Menell Rosenberg Inc*) *v Kritzas* 1992 4 All SA 314 (W); 1992 2 SA 623 (W) 634HJ. The power of the court extends to directing the taxing master to tax the costs. Where the arbitral tribunal is authorised to appoint

a professional taxing service, the taxation of costs by such service is arguably subject to review by the court under the common law. The courts apply a different standard for reviewing the arbitral tribunal's award of costs in a private arbitration to that which applies to the award of costs in a statutory arbitration. The arbitral tribunal's discretion to award costs in a statutory arbitration is not an unqualified discretion, but one which must be exercised judicially in accordance with recognised principles. Where there has been an improper exercise of the discretion, that is where the award as to costs is vitiated by irregularity or misdirection or is disquietingly inappropriate, the court will on review set aside the order. The grounds on which the court can set aside the costs award in a private arbitration are confined to the statutory grounds on which the award on the merits can be set aside and are decidedly narrower than the review standard in a statutory arbitration. A costs award in a private arbitration, like the award on the merits, can be remitted to the tribunal on good cause shown, which will typically occur where the tribunal has failed to deal with an issue that was before it. The guiding principle of a private arbitration is finality right or wrong and there is no reason to treat the costs award differently from the award on the merits.

In Australian Conservation Foundation and Others v Forestry Commission it was held that:

“a party against whom an unsustainable claim is prosecuted is not to be forced, at his peril in respect of costs, to abandon every defence he is not sure of maintaining and oppose to his adversary only the barrier of one hopeful argument: he is entitled to raise his earthworks at every reasonable point along the path of assault. At the same time, if he multiplies issues unreasonably, he may suffer in costs. Ultimately the question is one of discretion and judgment.”

2.2.

In this instance if I was an arbitrator I would apportion the costs appropriately, this find in the constitutional courts In Jenkins v SA Boiler Makers, Iron & Steel Workers and Ship Builders Society 1946 WLD 15 at 17-18, Price J said the following: 'It seems to me to be against all principle for the Court's time to be taken up for several days in the hearing of a case in respect of which the merits have been disposed of by the acceptance of an offer, in order to decide questions of costs only. If a plaintiff were to sue for nullity of marriage and alternatively for divorce and were to succeed in his first claim, it would follow that no judgment would be given in respect of the second claim. In such a case I do not think that the Court would decide the costs of the alternative claim on the grounds that the evidence showed that if the plaintiff had not succeeded in the first claim, he would have succeeded in the alternative claim. Such a decision ought to have been based on much broader grounds. In an action for transfer, alternatively for damages if no transfer be passed within a given time, if the defendant were to give transfer before trial, I cannot imagine that a Court allowing the alternative claim to be set down for hearing to see who would have won in order to determine the question of costs on that issue. Academic success in respect of alternative claims in such cases would not necessarily carry costs. I cannot imagine a more futile form of procedure than one which would require Courts of law to sit for hours, days, or perhaps even for weeks, trying dead issues to discover who would have won in order to determine questions of costs, where cases have been settled by the main claims being conceded. If the Court were eventually to say, that it awarded costs to a particular party because on the evidence that party would have won on that issue, would the disappointed party then be entitled to appeal in order to upset the decision as to who would have won the dead issue that has been tries? This must

necessarily follow if Mr. Kuper's application is entitled to succeed. When a case has been disposed of by an offer which concedes the main claim and the costs of the whole case have still to be decided, I think the Court must do its best with the material at its disposal to make a fair allocation of costs, employing such legal principles as are applicable to the situation. This is much preferred to laying down a principle which requires courts to investigate dead issues to see who would have won on such issues. In most such cases litigants would be required to incur far greater costs than those at stake.'

Wherefore the matter of such suggests that the costs should be apportioned as per the award.

2.3.

It trite that a party who makes an offer, which is higher that the award is not entitled to costs and such it is so important so to curtail issues in the early stages. And as such it is so important to ensure that the costs that follow after the offer is made are not paid. As this could have been avoided.

Wherefore it is so imported to note that the party who makes an offer within a reasonable time, must not be charged for the costs incurred after that scene. It is so that proceedings must not be longer if the party acknowledge his entitle to compensate another party.

At common law, a litigating party was after all always free to offer to settle a claim against him or her. The point of the procedure created by Uniform Rule of court 34 is to formalise and institutionalise such an offer within the ambit of the Rules. Rule 34(6) is particularly important in achieving this object. It empowers the plaintiff to accept the offer, without the consent of the defendant, or the leave of the court, at any time within the stated period. It thus enhances certainty and clarity about such offers, and encourages settlement on the proffered basis.

The discussion in Erasmus, Superior Court Practice, B1-239 assumes that the current offer of settlement procedure is the direct successor of the old, and that the principles and cases remain applicable (emphasis supplied). This approach is in my view correct. The plaintiff therefore retains an absolute entitlement to accept the defendant's offer during the stated period."

In Bloom v General Accident and Life Assurance Corporation Ltd1 the court held that subrule (5) appeared to provide for the case where one of several defendants decides to make an offer of settlement to cover the whole of the plaintiff's claim, while rule

34(4)(b) appeared to cover the case where he decides to make an offer of settlement covering only his share of the amount due to the plaintiff for which the court may adjudge him personally liable. The court considered that a defendant making use of the provisions of rule 34(5) or of rule 34(4)(b) was doing so because he hoped to exert pressure upon the plaintiff to accept a settlement on pain of being penalised for costs if he refuses. If a defendant, however, wished to exert pressure upon another defendant in order to precipitate a settlement it would seem that rule 34(4)(a) was appropriate for that purpose, though it made no provision for the payment of any sum into court.

Taking note of the authorities derived in the high courts which are also binding to arbitrators, it states issue that the costs will have to be paid until the date the sealed offer was made.

Question 3

There is a common law power under the common law to intervene in the course of an arbitration prior to an award in order to review an arbitral tribunal's procedural ruling, although this power will ostensibly only be exercised in exceptional circumstances. The irregularity must also be of a sufficiently serious nature that would justify a court, at the award stage, in setting aside the award. The court has justified the availability of this power on the basis that if it could not intervene to correct a fundamental irregularity before the award, considerable wasted costs could be incurred by continuing with the arbitration proceedings and at least one party could suffer serious prejudice. The court will also not hesitate to interdict the arbitral tribunal from proceeding with the arbitration while related court proceedings are pending. The court may also use its statutory power to order that an arbitration agreement should cease to have effect after the commencement of the arbitration, but only for purposes of terminating the arbitration.

In the latter case, the arbitrator refused to allow certain evidence regarding the claimant's alleged failure to mitigate his damages, because on the wording of the terms of the reference, the arbitrator erroneously decided mitigation of damages to be beyond his jurisdiction. The court in effect reviewed a negative jurisdictional finding by the arbitrator where the arbitrator erroneously construed his jurisdiction too narrowly.

Tuesday Industries (*Pty*) *Ltd v Condor Industries* (*Pty*) *Ltd* supra 382E. In *Badenhorst-Schnetler v Nel* supra 639FG the court accepted the need for the existence of exceptional circumstances. It decided that the requirement was met on the facts in that the arbitrator had *bona fide* restricted his jurisdiction in such a way that all further proceedings in the arbitration could result in a miscarriage of justice.

Tuesday Industries (*Pty*) *Ltd v Condor Industries* (*Pty*) *Ltd* supra 382G 383GH; *BadenhorstSchnetler v Nel* supra 637DH; *Wolvaardt v Gerber Botha & Gowar* (*Middelburg*) (*Pty*) *Ltd* 2014 JDR 0309 (ECG) pars 912 13.1 17. See pars post for these grounds.

BadenhorstSchnetler v Nel supra 637IJ. However, the danger of court applications for a review of an arbitral tribunal's procedural ruling being abused as a delaying tactic also has to be considered. See Gaillard and Savage *International Commercial Arbitration* 410413 for a discussion of the competing policy considerations.

InterContinental Finance & Leasing Corporation (*Pty*) *Ltd v Stands 56 & 57 Industria Ltd* 1979 3 All SA 667 (W); 1979 3 SA 740 (W) 754BC; *Sherwood Eleven Thirty Investments CC v Robridge Construction CC* 2001 2 All SA 103 (W); 2001 4 SA 741 (W) 746B 747G.

Rawstorne v Hodgen 2002 3 SA 433(W) pars 1314 26 where the court appears to have ultimately relied on the Arbitration Act 42 of 1965 s 3(2)(c), as opposed to s 3(2)(b), to terminate the arbitration proceedings. Cf *Morlite Industries CC v Moti* 2009 JDR 1370 (GSJ) par 14 where it is stated that confers on the arbitral tribunal a discretion "to intervene in the arbitration proceedings, on good cause shown". This is too broadly stated. The discretion can only be exercised to achieve one of the objectives stated in regarding the arbitration agreement. See par ante.

Butler and Finsen *Arbitration in SA* 174. Compare Gaillard and Savage 740741, who prefer the terms "partial" and "global" awards for "interim" and "final" awards, respectively. The term "interim" in relation to an award is potentially confusing as it can create the impression that the award is of a provisional nature. An order by an

arbitral tribunal for interim measures (see par ante) is not an award, as the interim measure is subject to review by the tribunal and is not final. sv "award" read with; Butler and Finsen 175.

See par post regarding the period for making an award. A typical example of an interim award is one which determines the issue of liability, leaving the issue of quantum to be dealt with in a subsequent award after a further evidentiary hearing, if necessary. See Butler and Finsen 175, where they also distinguish interim awards, in the sense discussed supra, from procedural rulings by an arbitral tribunal. The distinction can be important, in that a court may review a procedural order by an arbitral tribunal before the award, although this power will only be exercised in exceptional circumstances. See par ante. Moreover, only an award qualifies for enforcement under the New York Convention. See par post.

question 4

The Court's Former Statutory Power To Order Security For Costs Against A Company In The Old Companies Act 61 Of 1973 S 13 Has Been Repealed. See Haitas V Port Wild Props 12 (Pty) Ltd 2011 5 SA 562 (GSJ). The Court Nevertheless Has An Inherent Power To Require Security From An Incola Plaintiff, Including A Company, To Discourage Vexatious Proceedings: Boost Sports Africa (Pty) Ltd V SA Breweries Ltd 2014 4 SA 343 (GP) Pars 31 64.

The Court's Discretion To Order Security Must Be Exercised Upon A Consideration Of All Relevant Circumstances, Without Adopting A Predisposition Either In Favour Of Or Against Granting Security. See Shepstone & Wylie V Geyser 1998 3 All SA 349 (SCA); 1998 3 SA 1036 (SCA) 1045GJ; Zietsman V Electronic Media Network Ltd 2008 4 SA 1 (SCA) Pars 1322. Two Factors The Court Has To Consider Are The Merits Of The Dispute And The Financial Circumstances Of The Plaintiff. A Claim Is Vexatious If It Is Unsustainable: Boost Sports Africa (Pty) Ltd V SA Breweries Ltd Supra Pars 81 85 121. Where Requiring Security Would Preclude The Plaintiff From Pursuing A Legitimate Claim And Restrict Its Access To The Courts, This Must Be Balanced Against The Potential Injustice To A Successful Defendant Which Is Unable To Recover Its Costs: Giddey V JC Barnard & Partners 2007 2 BCLR 125 (CC); 2007 5 SA 525 (CC) Par 30; Boost Sports Africa (Pty) Ltd V SA Breweries Ltd Supra Pars 104120. An Order Refusing An Application For Security Is Appealable: Shepstone & Wylie V Geyser Supra 11042FG.

Question 5

Th aurthority hereinder states more tham more to state wher it is more prpoables

When parties decide to resolve that the dispute in question requires that the arbitration hearing, gives both parties an opportunity to fully state their cases. The commissioner then makes a decision on the issue in dispute. The decision, called the arbitration award, is legally binding on both parties. Attempts must generally be made to resolve the dispute through conciliation. If it cannot be resolved by conciliation, the parties can go to arbitration or the labour court, the act specifies which dispute goes to which process.

In an arbitration hearing the party in dispute may appear in person or be represented by a legal practitioner, a director or employee of the party or any member, office-bearer or official of the party's registered trade union or registered employers' organisation. Lawyers are not normally allowed to represent parties in arbitrations over dismissal disputes. They can be used though if the commissioner and the parties consent, or if the commissioner decides that it is unreasonable to expect a party to deal with the dispute without legal representation.

Having heard the parties and their arguments, the commissioner will decide the outcome of the case, by issuing an award. The decision is legally binding on the parties and it ends the dispute. Arbitration awards are sent to the parties within 14 days of the arbitration.

Pre-arbitration conference

by agreement between the parties or when so directed by the director or a senior commissioner, the parties to the proceedings must hold a pre-arbitration conference to-

- Determine facts in dispute, common cause facts, issues to be decided, and relief claimed;
- Exchange documents that will be used in the arbitration;
- Draw up and sign a minute of the pre-arbitration conference.