REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A5018/2016

(1) REPORTABLE: ~~YES~~/ NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

.... 24-02-2016
SIGNATURE **DATE**

ESKOM HOLDINGS SOC LIMITED	Appellant
and	
KHUM MK INVESTMENTS AND BIE JOINT VENTURE	First Respondent
KHUM MK INVESTMENTS CC & BIE INTERNATIONAL ENGINEERS (PTY) LTD JOINT VENTURE	Second Respondent
JUDGE LI GOLDBLATT	Third Respondent

J U D G M E N T

KATHREE-SETILOANE J:

[1] On 16 April 2009, the appellant, Eskom Soc Limited ("Eskom"), concluded

a Professional Services Contract ("the agreement") with the second respondent, Khum MK Investments CC & BIE International Engineers (Pty) Ltd Joint Venture ("the joint venture"). Clauses Z3 and Z11 of the agreement respectively, stated expressly that "[n]either party hereto may cede and delegate any of its rights and obligations (including liabilities) under this Agreement to any person without the written consent of the other" and that "If the *Consultant* [i.e. the joint venture] constitutes a joint venture, consortium or other unincorporated grouping of two or more persons...(t)he *Consultant* does not alter its composition or legal status without the written consent of the *Employer* [i.e. Eskom]".

[2] When the agreement was concluded, the joint venture was represented by Mr Byron Van Rensburg ("Mr Van Rensburg") and Eskom was represented by Mr Sipho Tjabadi ("Mr Tjabadi"). Mr Tjabadi was appointed and designated the "Employer's Agent" in terms of the agreement with the authority to carry out all the actions of Eskom except for payment, indemnity and insurance.

[3] The agreement was an enabling agreement entitling the joint venture to render Safety, Health, Environmental and Quality inspection services ("SHEQ services") to Eskom on an *ad hoc* basis as and when Eskom required them to be provided on construction and installation sites at mainly generation and/or transmission projects, as well as on power generation, transmission and/or distribution equipment around South Africa. The joint venture would render services in terms of "task orders" issued under

the agreement. A task order is essentially an instruction by Eskom to the joint venture to render the required SHEQ services on particular terms, after a "proposal" by the joint venture to render such services had been accepted by Eskom. The task order would set out *inter alia* the nature of the services that Eskom required, the number and types of resources required to render the services, the budget for the task order and its duration. Eskom issued approximately 57 task orders to the joint venture during the life of the contract which spanned the period of some 4½ years.

[4] On 2 September 2009, XTLS Trading 109 (Pty) Ltd was registered as a shelf company. On 10 February 2010, its name was changed to Khum MK Investments and BIE Joint Venture (Pty) Ltd (the company), which is the first respondent in the appeal. On 30 August 2010, a meeting was held at BIE's new offices. The company contended that it was at this meeting that Eskom had accepted and/or ratified the substitution of the company for the joint venture as the contracting party. The company alleged that from 27 May 2010 *alternatively* 30 August 2010 it, as opposed to the joint venture, rendered the SHEQ services to Eskom as it had been substituted as the contracting party to the agreement.

[5] During 2013, certain disputes arose between Eskom and the company regarding payment of amounts allegedly due to it in terms of the agreement. These disputes are relevant because the arbitration originated from an urgent application which the company launched in this court relating directly to them. The urgent application was subsequently settled on the basis that Eskom would pay the company

R96 million and that all disputes would be referred to urgent arbitration under the auspices of the Arbitration Foundation of South Africa ("AFSA") in terms of an agreement concluded between Eskom and the company (not the joint venture). Eskom paid the company R96 million on 25 October 2013, and terminated the agreement three weeks later on 14 November 2013. By this time, Eskom had paid the company almost R1 billion.

The Arbitration

[6] The third respondent, Judge Goldblatt ("the arbitrator"), was appointed to arbitrate the dispute. The company and the joint venture respectively, were the first and second claimants in the arbitration. The arbitration hearing concerned two separated issues, namely a special plea and the contracting party defence. The special plea was in effect that the joint venture was not a party to the arbitration agreement and, therefore, had no right to join in the arbitration. The arbitrator upheld the special plea. Since there is no challenge to that decision, no more need be said about it.

[7] The principal issue in the arbitration was the resolution of Eskom's contracting party defence which, as pleaded in its statement of defence, was that the company was not the party with whom it had contracted and it, therefore, lacked the *locus standi* to pursue any claims under, in terms of, or in connection with, the agreement. In its replication, the company alleged that Eskom had accepted and/or ratified its substitution as the contracting party in place of the joint venture. It alleged, in the alternative, that Eskom had represented, by conduct, that it had accepted and/or

ratified the company as the contracting party and was, therefore, estopped from denying that the agreement remained with the joint venture ("the estoppel argument").

[8] In its rejoinder, Eskom denied that the substitution took place with its full knowledge and consent. It also rejected the company's reliance on estoppel on the basis that to allow it would validate an otherwise illegal act ("the illegality argument"). The illegality argument was basically that as an organ of state, Eskom is subject to the peremptory procurement process provisions of inter alia s 217[1] of the Constitution, and that although the joint venture had participated in such a process that led to it being awarded the contract, the company had not. Instead, it simply substituted itself in place of the joint venture without Eskom's knowledge or written consent (as required by the agreement) and rendered services pursuant to the agreement in place of the joint venture. Eskom pleaded, in the alternative, that none of its representatives responsible for the alleged representations, on which the company sought to rely, had the authority to accept or ratify the company as the contracting party substituting the joint venture, or to consent, in any way, to the joint venture altering its legal status.

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[1] Section 217 of the Constitution provides:

(1) Where an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

(2) Subsection (1) does not prevent the organs of state or institutions referred to in the subsection from implementing a procurement policy providing for:

(a) categories of preference in the allocation of contracts; and

(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination;

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.'

[9] The contracting party defence of Eskom depended on the resolution of two subsidiary issues, namely the estoppel argument raised by the company and Eskom's counter by way of the illegality argument. The arbitrator upheld the company's plea of estoppel and dismissed Eskom's contracting party defence. He found that Eskom had represented by conduct that it accepted the company as the contracting party and was, therefore, estopped from denying the truth of those representations. In support of this finding, the arbitrator referred to and relied on the fact that Eskom:

(1) accepted and paid invoices and received timesheets that bore the name of the company;

(2) accepted services rendered by the company;

(3) addressed letters to the company that referred to a contract with the company;

(4) made certain statements at the meeting of 30 August 2010 where Eskom is alleged to have accepted and/or ratified the substitution of the contracting party.

[10] The arbitrator found that these representations and various other actions by Eskom were sufficient to preclude it from denying that the company was substituted for the joint venture. He accordingly found that the estoppel had been proved. Aggrieved by the award, Eskom sought to review the arbitration award in terms of s 33(1) (a) and (b) of the Arbitration Act 42 0f 1965[2] ('the Arbitration Act") on the basis that the arbitrator

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[2] Section 33(1) of the Act states in relevant part:

'(1) Where-

(a) any member of an arbitration tribunal has misconducted himself in relation to his had purportedly misconducted himself in relation to his duties as arbitrator and/or had committed a gross irregularity in the conduct of the arbitration proceedings.

The Review Application

[11] The review came before Moshidi J in this Court (the court a quo). The issue in the review was whether the arbitrator had misconducted himself or committed a gross irregularity as envisaged in s 33(1)(a) and (b) of the Arbitration Act. Eskom submitted that despite the overwhelming evidence in Eskom's favour, the arbitrator set his mind against Eskom's defence, closed his mind to that defence, and ignored virtually every factual and legal impediment that prevented the company from succeeding in its claim. It contended that the arbitrator essentially decided the issues without reference to Eskom's case and arrived at a result at which no reasonable arbitrator could have arrived having regard to the evidential material placed before him. In addition, Eskom argued that the reviewable irregularities could be inferred from the arbitrator's plainly expressed view that he considered the contracting party defence to be "unconscionable" and from the fact that he questioned Eskom's witnesses with a view to establishing facts in the company's favour.

[12] On 4 June 2015, the court a quo handed down its judgment, in which it dismissed

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duties as arbitrator or umpire; or

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

(c) … .'

the review application on the basis *inter alia* that the arbitrator had not committed any reviewable irregularities. It is this finding that Eskom challenges on appeal. The appeal is with leave of the Supreme Court of Appeal.

Estoppel

[13] It is established law that a person who bases a plea of estoppel on a representation made to him must establish that a representation was made to him, that he believed in the truth thereof, and that he acted thereon to his prejudice.[3] This representation may consist of conduct. In addition, the estoppel assertor must show that he acted reasonably in relying on the representation. In *Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter,*[4] the SCA held that the test regarding a representation made by conduct is whether the representor should reasonably have expected that the representee might be misled by his conduct and whether, in addition, the representee acted reasonably in construing the representation in the sense in which the representee did so. Put differently, the representation must be such as to lead a reasonable man to believe that he might act safely thereon.[5] The representation must be precise and unambiguous.[6] This would apply both to a representation in words and a representation by conduct. In *Concor* the SCA stated as follows in respect to a representation by conduct:

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3 *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd* 1981 (3) SA 274 (A) at 291D-F.

4 *Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter* 2004 (6) SA 491 (SCA).

5 *MAN Truck & Bus (Pty) Ltd v Dusbus Leasing CC and Others* 2004 (1) SA 454 (W) para 55.

6 *B & B Hardware Distributors (Pty) Ltd v Administrator, Cape* 1989 (1) SA 957 (A) at 964H-I; *Saflec Security Systems (Pty) Ltd v Group Five Building (East Cape) (Pty) Ltd* 1990 (4) SA 626 (E) at 634-5.

'... if a representation by conduct is plainly ambiguous, the representee would not be acting reasonably if he chose to rely on one of the possible meanings without making further enquiries to clarify the position.'[7]

[14] Eskom submitted in the review that the arbitrator was acutely aware of these principles but ignored or deliberately closed his mind to them. The essence of Eskom's submissions on this aspect was that the company's reliance on such inconsistent or ambiguous representations was not only unreasonable, but was also irresponsible. The contention advanced is that the arbitrator's misconduct could be inferred *inter alia* from the fact that he deliberately ignored evidence and argument relating to all the representations that proved that Eskom did not recognise the company as the contracting party but still considered itself to be contractually bound to the joint venture.

[15] The agreement between Eskom and the joint venture was purely an enabling agreement. Pursuant thereto, Eskom would from time to time call for proposals for particular tasks it wanted performed, and issue task orders if satisfied with the proposals. The evidence which Eskom contends that the arbitrator ignored are primarily a host of documentary evidence including proposals submitted in the name of the joint venture spanning the period March 2012 to September 2013; task orders which Eskom issued in the name of the joint venture; several letters which Eskom employees addressed to the joint venture (as opposed to the company) during the period 9 July 2013 to 14 November 2013, when the company was ostensibly rendering services in place of the joint venture. Eskom maintains that these representations are entirely at odds with the suggestion that Eskom had accepted the company as the contracting

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7 *Concor Holdings* para 9

party.

[16] Eskom furthermore argues that the evidence relating to proposals, task orders and letters, is crucial to understanding the misconduct and/or gross irregularity complained of as it shows that, in part, Eskom did not represent that it recognised the company as the contracting party; on the contrary it shows that it continued to recognise the joint venture as its contracting party. It argues that representations by words and conduct which the claimants relied on were inconsistent and ambiguous, and no reasonable arbitrator could ever have found that it was reasonable for the company to have relied on such inconsistent and ambiguous representations, or that such inconsistent and ambiguous representations could have founded an estoppel.

The review application

[17] Eskom contends that in seeking to justify the conclusion that the arbitrator had not misconducted himself or committed a gross irregularity, the court a quo essentially approached the matter in the same manner as the arbitrator in that he relied selectively on the evidence of representations that tended to show that Eskom had accepted the company as the contracting party. The contention advanced is that this misdirection materially affected the court a quo's ability to appreciate the facts from which misconduct or a gross irregularity could be inferred, and had the court a quo not ignored these facts, then it would have been driven to conclude that the award should be set aside in terms of section 33(1) (a) or (b) of the Act.

[18] For Eskom to have succeeded in reviewing the arbitrator's award under section 33(1) (a) and (b) of the Act, it was required to show that the award of the arbitrator was reviewable on the ground that the arbitrator had misconducted himself in relation to his duties as arbitrator, or had committed a gross irregularity in the conduct of the proceedings. In relation to the "misconduct" ground of review, our courts have said that there can be no misconduct unless there has been wrongful or improper conduct on the part of the arbitrator.[8] Where an *arbitrator makes* a *bona fide* mistake of either fact or law (whether gross or slight) it will not warrant interference on review, unless the mistake is of the nature that demonstrates moral turpitude in the sense of dishonesty, partiality or bad faith".[9] Thus any conduct of an arbitrator that falls short of this standard of misconduct will not be considered to be reviewable under s 33(1)(a) of the Act.

[19] For conduct of an arbitrator to amount to "a gross irregularity" as envisaged under s 33(1) (b) of the Act, it must be shown that the arbitrator misconstrued the nature of the inquiry or arrived at an unreasonable result. As held by the SCA in *Andre Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae),*[10] albeit in the context of a review under 145(2) (a) of the Labour Relations Act 66 of 1995:

'A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact as well as the weight and

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[8] *Dickenson & Brown v Fisher's Executors* 1915 AD 166;

[9] *Johan Louw Konstruksie (Edms) Bpk v Mitchell N.O. & Another* 2002 (3) SA 661 (C) para 46.

[10] *Andre Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae) 2013 (6) SA 224 (SCA.)*

relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.

I understand this to mean that an applicant seeking to review the decision of an arbitrator, must establish that the irregularity – this could be a failure to apply one's mind to the evidence or a material error of fact or law – is material to the outcome. In assessing this, the reviewing court must ascertain whether the arbitrator has evaluated all the evidence presented at the arbitration hearing and arrived at a decision which is reasonable.

[20] I now turn to consider the judgment of the court a quo in the review application. After a complete and thorough survey of the evidence which was led by both Eskom and the company at the arbitration hearing, the court a quo held that the allegation against the arbitrator, including that of misconduct, gross irregularity and bias, not understanding his mandate, ignoring Eskom's evidence and treating Eskom's witnesses unfairly are not borne out by the record of the arbitration proceedings. I fully endorse this holding as there is no evidence on record that justifies a different one.

[21] The evidence reveals that Mr Tjabadi was Eskom's agent in the contract with authority to carry out all its actions except for payment, indemnity and insurance. From about May 2010, the company rendered invoices for services rendered to Eskom under the agreement. Prior to this date, all timesheets were submitted in the name of the company and not the joint venture. The company's VAT registration number

appeared on all the invoices. The company had submitted its statutory documentation, namely its broad based black economic empowerment ("BBBEE") certificates and tax clearance certificates to Eskom annually. Neither this evidence, nor the evidence that the company had rendered the services under the agreement, and that Eskom paid the company and not the joint venture or partnership for those services, was placed in dispute by Eskom. Notably, Ms Vishala Panday, of Eskom, was constrained to concede that if a contract file of the contracting party, as in this instance, only contained documentation, SARS clearance certificates and BBBEE verifications of the company, and no documentation relating to the joint venture, the only probable inference to be made was that those were the documents of the contracting party. Ms Panday was employed in middle management by Eskom. Her functions included the development of commercial policies, procedures, procurement control and management of the commercial regulatory universe.

[22] In addition, Mr Van Rensburg, the Managing Director of the company, testified at the arbitration hearing that Mr Tjabadi, the General Manager of Eskom, had suggested that the joint venture be incorporated to become a formal legal entity and that pursuant to his suggestion, the joint venture decided to buy a shelf company and changed its name to that of the company. Mr Van Rensburg testified, in relation to the meeting held on 30 August 2010, that he informed Mr Tjabadi, Ms Dondashe, Ms Manthe and Mr Andrew Botes that: (a) the joint venture was now a company; (b) the partners to the joint venture (MK Investments CC and BIE Engineers (Pty) Ltd) were equal shareholders in the company; (c) the individuals involved and employees were

the same; and (d) the infrastructure of the company was the same as before its incorporation. The minutes of the meeting recorded under the heading "Purpose of meeting", inter alia, that:

"Contractual and Legal Documentation to be communicated through Andrew [Botes] in terms of signing a new contract as the JV is now a (Pty) Ltd."

The minutes also recorded the following comment of Mr Tjabadi relating to the company:

"Congratulate the JV for the effort the company was making in terms of services offered...Tjabadi was impressed to see that the company was focussed on the work at hand, happy with the 'JV marriage' and that the company was proudly South African – that we are local empowered and what Eskom is looking for in the company..."

[23] It is apparent from these minutes coupled with Van Rensburg's unchallenged testimony that, at the latest on 30 August 2010, Eskom through its agent Mr Tjabadi had been aware that the partnership had changed its legal status to a company. Van Rensburg's testimony remained unchallenged as neither Mr Tjabadi, nor any of the other individuals present at the meeting of 30 August 2010, were called by Eskom to testify on its behalf in the arbitration hearing.

[24] Having informed the Eskom representatives at the meeting of 30 August 2010 that the company was formed, Mr Van Rensburg waited for Eskom to produce the

new contract. Other than that this was an internal process, Mr Van Rensburg had no knowledge of what the process entailed. Neither Ms Panday, Mr Quickfall (a senior manager and Corporate Legal Counsel at Eskom with 24 years of service), nor Mr Masango, (Manager: Contracts in the Program Management Office) were aware of what the internal process entailed. Ms Panday testified that the only procedure for such change would be a modification. This entailed the successful tenderer writing to Eskom and notifying it of the change. This would require the approval of Eskom's Board Tender Committee. However, moments later, in response to the question of whether a consultant, who has achieved a BEE partner or shareholding, should have to go through the procurement process again, she said that there was no such requirement and that "the modification process relating to a change of the status of an entity contracting with Eskom was an "internal process" that a contracting party outside of Eskom would be oblivious to. Mr Masango testified that he had not noticed the change of the legal status of the joint venture because no one alerted him to it, but had he known, he would have followed Eskom's "formal process". What this process entailed Mr Masango could not say. His testimony was, however, in direct contradiction to that of Mr Quickfall, who was unaware of any formal process. Mr Quickfall testified as follows at the arbitration hearing:

'Mr Arbitrator, I do not know the process. I cannot point you to a process in Eskom...What I can say is that there is no doubt that we should have followed a process that is authorized by the adjudicating authority or some formal process, supply management process in Eskom.'

In argument, counsel for Eskom conceded that the process to be followed was not one in terms of s 217 of the Constitution but rather one where there was some element of due process. What exactly this means remains unclear on the evidence as well as from argument.

[25] Mr Van Rensburg referred to numerous employees of Eskom as having dealt with the agreement, including Ms Sikani, Mr Govender and the accounts department personnel. None of them were called by Eskom to testify. On 25 October 2015, Eskom paid the company just over R96 million under the contract pursuant to a settlement that was reached in the urgent application during October 2013. However, the employees who authorised these payments were not called to testify on behalf of Eskom. Nor were the employees who processed other invoices for payment called by Eskom to testify on its behalf. Significantly, Mr Masango testified that the payments department would need to deal with the fact that the invoices were in the name of the company and reflected the VAT registration of the company. Yet no one from the payments department was called by Eskom to testify. I consider this to be a crucial omission as one does not simply make payments on a contract worth millions of rands without first checking that the invoices are received from, and the payments are made to, the correct contracting party. Similarly, tasks orders ought to have been made out to the correct party. It is not enough to say that the inconsistent documentation and payments were the result of administrative sloppiness as conceded by counsel for Eskom at the hearing of the appeal. On a consideration of the totality of the evidence, this does not amount to an ambiguity as the evidence makes it abundantly clear that Eskom knew that it was doing business with the joint venture as a company, accepted

invoices in the name of the company and made payment to the company. Eskom's election not to call the employees who authorised and processed the payment to the company justifies the inference that Eskom was aware of the change of status of the joint venture to the company, accepted it and benefitted from it. Accordingly, the court a quo did not err in arriving at this finding.

[26] The court a quo made mention in its judgment of the numerous emails exchanged between the parties that referred to the company as the contracting party. Some of these emails were sent by Ms Sikani and Mr Govender. Ms Sikani was the contracts manager at the time. As testified by Mr Masango, she ought to have been acutely aware of the difference between a partnership and a company and that the agreement was initially concluded with the joint venture, yet Eskom did not call Ms Sikani to testify at the arbitration hearing. Nor did it call Ms Naidoo to testify.

[27] That proposals, task orders and some correspondence reflected the joint venture as a partnership and not a company does not, in my view detract from Eskom's consistent representations over the years that the company (as the joint venture) replaced the partnership (as the joint venture) as the contracting party. This is corroborated by the numerous payments, totalling in the region of R1 billion, which Eskom made to the company without demur. Thus, as rightly found by the court a quo, "the contracting party defence is clearly an afterthought on Eskom's part to evade its legal obligations".

[28] The evidence led at the arbitration reveals that Eskom's conduct fell clearly within the legal principles of estoppel as enunciated more recently by the SCA in *Concur Holdings* in that Eskom's conduct was such as to lead a reasonable man to believe that he might act safely thereon[11]. There is nothing ambiguous or imprecise in Eskom's conduct of accepting timesheets and invoices issued in the name of the company, and then making payment to the company. Thus, in my view, the company acted reasonably in acting upon these and other representations of Eskom, and was not obliged to make any further enquiries to clarify the position. On an evaluation of the evidence as a whole it is clear that Eskom had accepted that the company (as the joint venture) had replaced the partnership (as the joint venture) as the contracting party.

[29] On the unchallenged testimony of Mr Van Rensburg nothing had changed. The shareholders in the company, namely MK Mohlala's close corporation and BIE Engineering (Pty) Ltd were each 50% shareholders in the company. Hence its BBBEE status remained the same in compliance with clauses Z8 (BEE compliance) and Z10 (Skills Transfer) of the agreement. In her testimony, Ms Panday confirmed that the written consent to the alteration of the composition of a consultant is an action of the employer, and that whoever is authorised to execute actions on behalf of the employer can give that written consent. There is nothing in the contract that requires compliance with an undefined procurement process when the consultant becomes BBBEE compliant or changes its legal status. Neither Ms Panday nor Mr Quickfall could refer to any policy of Eskom in this regard.

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[11] *MAN Truck & Bus (Pty) Ltd v Dusbus Leasing CC and Others* 2004 (1) SA 454 (W) para 55.

[30] During the arbitration proceedings, Eskom disclosed what was in the contract file. From this it appeared that at least two other joint ventures on the SHEQ panel had changed their legal status from a joint venture to a company, but were seemingly not required to submit to any further procurement process in terms of s 217 of the Constitution or at all. These were Lechabile Quality Strategies and Bureau Veritas International SA Joint Venture ("Letchabile") and Tata Project Limited and TQA Africa Joint Venture ("Tata"). This information was peculiarly within the knowledge of Eskom, but its witnesses could shed no information on how Lechabile and Tata were accepted as the contracting parties despite their change of status from a joint venture to a company. This much was clear from the testimony of Mr Quickfall. Other than to confirm that in the case Lechabile the tender was submitted by a joint venture and the contract concluded with a company, he could not say why no formal process was followed. In respect to Tata Projects, he had not investigated the position and was unable to assist the arbitrator.

[31] The record of evidence reveals that individuals involved in the company were the same, the employees were the same and the infrastructure of the company was the same. The only thing that changed was that the partnership as a joint venture became the company as the joint venture at the behest, and with the full knowledge, of Eskom. The company as the joint venture in its incorporated form rendered services to Eskom, submitted time sheets, submitted invoices, submitted statutory documents and was paid close to R100 million after it launched the urgent application against Eskom.

So although Eskom and the company, on occasion, referred to the joint venture in its partnership form, that does not detract from the fact that from 27 May 2010 all invoices and timesheets were rendered in the trading name of the company and that the timesheets, in particular, referred to the task orders of Eskom. Thus on an evaluation of the evidence as a whole, Eskom had accepted that the company had replaced the joint venture as the contracting party. The contention that the arbitrator accorded insufficient weight to some documents but not others does not, in my view, render the outcome that he arrived at unreasonable. There is accordingly no merit in the contention that both the arbitrator and the court a quo dealt with the evidence selectively. The court a quo arrived at the decision that Eskom had accepted the company as the contracting party on a consideration of the totality of the evidence, as did the arbitrator.

[32] Eskom's contention that the court a quo treated the review as an appeal, in my view, also lacks substance. In view of Eskom's gratuitous censure of the arbitrator's conduct, in particular that he wilfully ignored every piece of evidence that supported Eskom's case justifying the inference of misconduct and/or a gross irregularity, the court a quo was constrained to carry out a full evaluation of the evidence, presented at the arbitration hearing, in order to demonstrate that the arbitrator did not ignore the evidence and argument that Eskom presented at the arbitration hearing. It painstakingly, in this regard, analysed each piece of evidence considered by the arbitrator in order to demonstrate that the balance of evidence overwhelmingly supported the arbitrator's finding that Eskom had accepted the company as the contracting party and that, as such, in arriving at that decision, he did not, commit a

gross irregularity in the conduct of the proceedings or misconduct himself in relation to his duties as an arbitrator.

[33] That the court a quo may be seen to have exceeded the bounds by making certain factual and credibility findings that do not appear from the arbitration award cannot, to my mind, render a patently reasonable arbitration award such as we have here, where the findings are fully supported by the evidence, unreasonable. As is apparent from its judgment, the court a quo was clearly mindful of the principle that was enunciated by the Appellate Division in *Ellis v Morgan; Ellis v Desai*[12] as far back as 1909 in relation to a review, namely that:

'[A]n irregularity in proceedings does not mean an incorrect judgment. It refers not to the result, but to the method of trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.'

Accordingly, I endorse the finding of the court a quo that:

'...the finding made by the Arbitrator in the award, that as a result of the various correspondence, and various other actions by it, Eskom is estopped from denying the truth of such representations, which were believed by the company and acted upon by the company to its prejudice, was in my view correct <u>and properly arrived at</u>. It cannot be faulted in anyway.'[13]

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[12] *Ellis v Morgan; Ellis v Desai* 1909 566 (A) at 581. See also: *Telcordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA) at 299H-300A.*

[13] Own emphasis.

Conduct of Arbitrator not Improper

[34] As alluded to earlier in the judgment, misconduct for the purpose of s 33(1)(a) of the Act has been held to include acts performed in bad faith, bias or conduct touching upon the moral turpitude of the decision maker.[14] An arbitrator who conducts a hearing in circumstances where there is an actual or reasonable perception of bias commits misconduct as contemplated in s 33(1)(a) of the Act. Such conduct will be inconsistent with the provisions of s 34 of the Constitution, which guarantees a party the right to have any case which can be determined by the application of law decided before an independent and impartial tribunal. The impartiality and independence of an arbitrator is therefore a fundamental prerequisite to the right to a fair hearing.

[35] The test for establishing bias is whether, seen objectively, the presiding officer (arbitrator) is actually biased or whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the presiding officer (arbitrator) had not or will not bring an impartial mind to bear on the adjudication of the case, i.e. a mind open to persuasion by the evidence and submissions of counsel.[15] In arbitration proceedings an arbitrator has a fair amount of leeway to determine whether the proceedings will be conducted in an adversarial or inquisitorial manner, but he or she remains duty-bound to observe the rules of natural justice[16] and to conduct the proceedings in a manner which is free from actual or reasonably perceived bias. An arbitrator, in my view, is expected to take an 'active role' in the hearing subject to not abandoning the principles of natural justice.[17] Whilst at times, this may result in interference with cross-examination, provided it is 'in accordance with the normal

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[14] *Country Fair Foods (Pty) Ltd v Theron NO & others* [2001] 2 BLLR 134 (LC) at 136; *Johan Louw Konstruksie (Edms) Bpk v Mitchell N.O. & Another* 2002 (3) SA 661 (C) para 46.

[15] *President of the Republic of South Africa & others v South African Rugby Football Union & others* 1999 (4) SA 147 (CC) at 177A-B.

[16] *Mutual & Federal Insurance Co Ltd v Commission for Conciliation Mediation & Arbitration & others* [1997] 12 BLLR 1610 (LC).

[17] *Quartermark Investments (Pty) Ltd v Mkhwanazi & Another* [2014] All SA 22 (SCA) para 20.

practice of asking questions to obtain clarity', there can be no objection. The arbitrator may not, however, descend into the arena.[18]

[36] There is no indication from the record of evidence that the arbitrator's conduct during the arbitration proceedings was improper in the sense of acting dishonestly, partially or in bad faith.[19] As correctly found by the court a quo, Eskom's criticism of the arbitrator's conduct, in particular his purported bias towards the company's witnesses was ill-founded. Viewed objectively on the evidence led at the arbitration hearing, the questions which the arbitrator had posed to both Mr Quickfall and Mr Masango did not demonstrate bias, but were in search of "clarity", and were "helpful and relevant". He did not descend into the arena or take sides. I am, therefore, unable to find fault with this finding of the court a quo:

'For all the above reasons, I conclude that the rather strongly worded allegations of misconduct, and in particular that, '*an arbitrator possessed of a misguided sense of injustice…*' were exceedingly exaggerated and unfortunate in the extreme. Quite clearly, the somewhat robust exchanges between the Arbitrator and Eskom's witnesses (limited to Masango), and on the odd occasion with Eskom's counsel, cannot constitute sufficient grounds for interference.'

Illegality Argument

[37] Lastly, and as relates to the illegality argument, the court a quo was correct in concluding that the arbitrator's election not to deal with this issue did not indicate that he misconstrued the nature of the enquiry. In my view, once the arbitrator found that

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[18] *Mutual and Federal Insurance (above).*

[19] *Johan Louw Konstruksie (Edms) Bpk v Mitchell N.O. & Another* 2002 (3) SA 661 (C) para 46.

Eskom had accepted by its conduct that the company was the contracting party, there was no need for him to make a finding on the illegality argument as the company was in law the correct contracting party. The tender was awarded to a joint venture. The entities comprising the joint venture were Khum MK Investments CC and BIE International Engineers (Pty) Limited. The legal structure of the joint venture was a partnership. In assessing the tender, Eskom would have assessed each of these entities, their directors, shareholders, members, key personnel and all other relevant considerations. A joint venture may be a partnership or a limited liability company whose share capital is held by the joint venture parties. In assessing the tenders, Quickfall, Eskom's corporate legal counsel at the time, said that:

'...notice must be taken that it does not matter in which way the bidders want to contract with Eskom as long as the bidder assures Eskom of the contractor's inherent and residual obligations.'

There is no suggestion that these obligations, which would include compliance with clauses Z8 (BBBEE status) and Z9 (skills transfer) of the agreement, were not complied with by the company. To reiterate, there is also nothing in the agreement that requires compliance with an undefined procurement process when the consultant becomes BBBEE compliant or changes its legal status.

[38] To sum up, where a joint venture changes its status from a partnership to a limited liability company, this may change the legal entity, but it does not change the joint venture. The joint venture remains as a collaboration between the same parties,

only in a different legal form. Thus on consideration of the totality of the evidence presented at the arbitration hearing, there was no illegality on the part of Eskom or the joint venture, as the company (as a joint venture) was the correct contracting party having been accepted as such by Eskom. Accordingly, the court a quo was correct in finding that there was no basis for interfering with the arbitrator's award on review.

Punitive Costs Order

[39] In the exercise of its discretion, the court a quo ordered Eskom to pay the company's costs on the scale as between attorney and client. The discretion conferred upon a court of review to award costs must be exercised judicially and upon a consideration of all the relevant facts and circumstances of the case. In the final analysis, it is a matter of what is fair and just as between the parties. The court a quo awarded costs on a punitive scale on the basis that:

'...the application had no merit at all since it was premised on the basis that the Arbitrator's conduct was 'wrongful and improper', or 'dishonest' or mala fide, or 'partial', or and due to 'moral turpitude'. The [company] further argued that there was no basis for such allegations coupled with the fact that Eskom persisted in pursuing such allegations. I agree. This was a lengthy special motion case, characterized by the prolixity of papers and annexures, as stated earlier in the judgment. It was a complex matter involving huge sums of money. The urgency of the matter compelled this Court to prepare judgment even during its long leave.'

On a consideration of these reasons, I am unable to find that the costs order was not made judicially upon a consideration of the facts and circumstances of the case. Special circumstances were shown justifying the order on a punitive scale. There is, accordingly, no basis to interfere with it on appeal. For all of the reasons set out above, the appeal against the decision of the court a quo falls to be dismissed.

[40] In the result, it is ordered that:

'The appeal is dismissed with costs, such costs to include the costs of two counsel.'

F KATHREE-SETILOANE
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

I concur:

L WEPENER
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

I concur:

B MASHILE
JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
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Date of Hearing: 30 November 2016

Date of Judgment: 23 February 2017