



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

CASE NO: 2023/001585

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

15/5/2023
DATE

J Moorcroft
SIGNATURE

In the matter between:

In the application by

ALTECH RADIO HOLDINGS (PTY) LTD

Applicant

and

AEONOVA360 MANAGEMENT SERVICES (PTY) LTD

First Respondent

RETIRED JUSTICE BR SOUTHWOOD

Second Respondent

Neutral Citation: *Altech Radio Holdings (Pty) Ltd v Aeonova360 Management Services (Pty) Ltd and Another* (Case No. 2023/001585) [2023] ZAGPJHC 475 (15 May 2023)

JUDGMENT

MOORCROFT AJ:

Summary

Review – application to set aside arbitration award – section 33 of Arbitration Act, 42 of 1965 – relates to conduct and not outcome

Gross irregularity – audi alteram partem principle – when party deprived a hearing

Arbitration Foundation of Southern Africa – Commercial Rules – Article 11 – gives effect to aim of arbitration as a confidential, speedy, effective and final alternative to litigation before Court

Order

[1] In this matter I made the following order on 11 May 2023:

1. *The application is dismissed;*
2. *The applicant is ordered to pay the costs.*

[2] The reasons for the order follow below.

Introduction

[3] The applicant (“Altech”) and the first respondent (“Aeonova”) are engaged in a domestic¹ arbitration before the second respondent (“the arbitrator”)² in terms of the Commercial Rules of the Arbitration Foundation of Southern Africa (“AFSA”).

¹ The Arbitration Act, 42 of 1965, applies to domestic arbitrations. The International Arbitration Act, 15 of 2017 governs international arbitrations.

² The arbitrator is a substitute arbitrator who was appointed by the Arbitration Foundation of Southern Africa (AFSA) in accordance with Article 14.5 of AFSA’s Commercial Rules, after being nominated by the parties. The appointment became necessary when an initially unforeseen potential conflict of interest arose that the first arbitrator reported when he became aware of it and that then required, in the view of an AFSA panel, that a substitute arbitrator be appointed. Some evidence had already been led by this state and the arbitrator rejected a proposal that the hearing commence afresh and held that he would avail himself of the evidence already recorded, in terms of Article 14.5.2.

[4] Arbitration offers a contract-based, viable and flexible alternative to litigation before the Court. It enables warring parties to settle their disputes in a confidential setting rather than a courtroom open to the public, to tailor the rules of engagement to suit the characteristics of their dispute, to choose one or more arbitrators,³ to choose appropriate procedural rules,⁴ to agree that the decision of the arbitrator would be final or that there would be an appeal procedure⁵, to agree on a timeline that suits the parties rather than busy court rolls, and to decide on the venue.

[5] Arbitration takes places subject to the law and this arbitration is governed by the law of South Africa.

The contract

[6] The contractual relationship between parties that led to the arbitral dispute is governed by three common-cause⁶ documents, the Term Sheet,⁷ the Sub-Contract,⁸ and the Addendum⁹ to the Term Sheet. These documents are collectively referred to as 'the contract'.¹⁰

[7] In the statement of claim¹¹ Aeonova brought seven claims against Altech, together with claims for interest and costs. The first six claims¹² arise out of alleged breaches of contract and the seventh is a claim¹³ for information and a statement and debatement of account. In all but one of the remaining six claims Aeonova claims information from Altech

³ Voet *Commentary on the Pandects* 4.8.1 (translated by Gane).

⁴ Such as, in the present matter, the Commercial Rules of AFSA.

⁵ The default position is that there shall be no appeal. See section 28 of the Arbitration Act, 42 of 1965.

⁶ Altech contended for additional tacit or implied terms that have no bearing on the present litigation.

⁷ CaseLines 07-24, concluded on 14 January 2013.

⁸ CaseLines 07-30, concluded on or around 2 October 2014.

⁹ CaseLines 07-66, concluded on 10 October 2014.

¹⁰ The subject matter of the contract is not of importance for the purposes of this judgment. Altech was awarded a contract by the Gauteng Provincial document and Altech and Aeonova entered into a subcontracting relationship whereby Aeonova was to perform certain obligations and was given the right to perform additional obligations, and was awarded certain exclusive rights and pre-emptive rights.

¹¹ CaseLines 07-97.

¹² The claims are not numbered in the statement of case and I follow the numbering used by the arbitrator in para 30 of the award, CaseLines 07-287.

¹³ Statement of case paras 67 to 72 and 75.1, CaseLines 07-127 to 129

to enable it to properly calculate damages. In the statement of defence¹⁴ Altech in essence deny that Aeonova complied with its contractual obligations.

[8] It was agreed at a pre-arbitration meeting that merits and quantum be dealt with separately. The accounting and debatement claim forms part of the merits. It was also agreed that witness statements be exchanged subject to *viva voce* clarification and cross-examination.

The arbitrator's memorandum

[9] On 23 October 2022 the arbitrator issued a memorandum¹⁵ to the parties and stated that it *“appears that the appropriate time for dealing with the question of an account, if it must be rendered, when it should be rendered and what it should consist of, is at the beginning of the next hearing.”* He requested heads of argument¹⁶ dealing with specific questions, namely -

- 9.1 whether Aeonova was entitled to an account,
- 9.2 if so, the nature and extent of the account and whether it should be supported by vouchers,
- 9.3 when the account must be rendered,
- 9.4 the procedure to be followed to rectify any non-compliance,
- 9.5 the procedure to be followed to determine the reliability and accuracy of the account and if a hearing must take place, when that was to happen,
- 9.6 when the account must be debated if it were not reliable and accurate.

¹⁴ CaseLines 07-137. Altech's special plea of jurisdiction did not feature in the litigation or in the proceedings before the arbitrator.

¹⁵ CaseLines 07-166. The quotation is from para 5.

¹⁶ To be filed by 17 November 2022.

[10] He wrote¹⁷ that *“it may be possible to determine on the documents in the pleadings and the pleadings themselves whether Aeonova is entitled to an account from Altech and what form that account must take.”*

[11] The arbitrator envisaged that the claims for information in the first six claims *“may be dependent on the main claim for the rendering and abatement”,* i.e. claim 7.

The AFSA Rules

[12] The arbitrator acted in terms of article 11 of the AFSA Commercial Rules and he did so *‘with a view to resolving one of the principal issues and thereby expediting these proceedings and reducing costs.’*

[13] Article 11.1 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.”* Without derogating from the generality of article 11.1, article 11.2.5 provides that the arbitrator has the power to make any ruling or give any direction mentioned in these Rules or as he otherwise considers necessary or advisable for the just, expeditious, economical and final determination of all the disputes raised in the pleadings, including the matter of costs, and article 11.3.7 permits the arbitrator to direct that hearing should proceed on documents (including written submissions) only, without the presentation of other evidence. These Rules give effect to the potential advantages of arbitration set out earlier in this judgment.

[14] The decision to direct that the arbitration proceed on documents only is not dependent on agreement by the parties, but the right to present argument is entrenched and can only be waived by consent. Reading this article it is apparent that the right to submit written submissions may in appropriate circumstances be adequate compliance with the *audi alteram partem*¹⁸ rule, but that no party may be deprived of the right to

¹⁷ Para 4 of memorandum, CaseLines 07-167.

¹⁸ ‘Hear the other side.’

present argument.

[15] The Rules therefore arm the arbitrator with wide-ranging powers. With great power comes great responsibility, and the Rules must not be interpreted as a licence for capricious and arbitrary decisions. To the contrary, the arbitrator must perform his duties with a view to arriving at a just, economical, expeditious and final determination of the dispute.

The Arbitration Act, 42 of 1965

[16] Section 33 of the Arbitration Act contains statutory review provisions. The common law grounds of review do not apply and nor do the grounds listed in the Promotion of Administrative Justice Act, 3 of 2000.¹⁹ The applicant relies on section 33(1)(b):

33 Setting aside of award

(1) Where-

...

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

...

the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.

[17] The grounds of review in section 33 are closely linked to the rules of natural justice.²⁰ The concept of *audi alteram partem* is of particular importance in this matter. When the applicant argues that the arbitrator committed a gross irregularity, it does so on the basis that the arbitrator prejudged the issues and that it did not have an opportunity to put its case and lead its witnesses on the separated issue.

¹⁹ See *Benjamin v Sobac South African Building and Construction (Pty) Ltd* 1989 (4) SA 940 (C) 959 I, referring to *Dickenson & Brown v Fisher's Executors* 1915 AD 166. See also *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA)

²⁰ *Nemo iudex in sua causa, audi alteram partem*, and the rule that justice must be seen to be done. See Butler & Finsen *Arbitration in South Africa – Law and Practice* 265. ("Butler")

[18] Dishonesty or moral turpitude is not²¹ a requirement for a finding that an arbitrator committed a gross irregularity. A gross irregularity may be committed with the best of intentions. An error of law²² can constitute a gross irregularity and it seems to me that the true question is not whether the arbitrator made an error of law, but whether the dissatisfied party was prevented from presenting its case.

[19] The Courts should not be over-keen to intervene in arbitration awards. The parties chose to arbitrate and the principles of party autonomy dictate that the powers of review should be used sparingly.²³ For an award to be set aside on the ground of a gross irregularity, the arbitrator must have committed an irregularity of a nature so serious that the applicant was precluded from having its case fully and fairly determined.²⁴ The enquiry is focused on the conduct of the proceedings (i.e. the process) rather than the result (i.e. the outcome.) In *Bester v Easigas (Pty) Ltd and Another*:²⁵ Brand AJ (as he was then) said that:

".... the ground of review envisaged by the use of this phrase relates to the conduct of the proceedings and not the result thereof. This appears clearly from the following dictum of Mason J in Ellis v Morgan; Ellis v Dessai 1909 TS 576 at 581:

'But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result but to the method of a 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.'

(See also, for example, R v Zackey 1945 AD 505 at 509.)

Secondly it appears from these authorities that every irregularity in the proceedings will not constitute a ground for review on the basis under

²¹ Section 33(1)(a) of the Act provides for the setting aside of an award on the basis of misconduct. Dishonesty and moral turpitude are relevant considerations. See *Bester v Easigas (Pty) Ltd and Another* 1993 (1) SA 30 (C)

²² *Goldfields Investments Ltd v City Council of Johannesburg and Another* 1938 TPD. 551 at 560, referring to *Ellis v Morgan; Ellis v Dessai* 1909 TS 576 at 581.

²³ See.

²⁴ Butler 294.

²⁵ *Bester v Easigas (Pty) Ltd and Another* 1993 (1) SA 30 (C) 42E to 43. See also Brand *Judicial Review of Arbitration Awards* Stell LR 2014 2 p 247 and, albeit in the context of Ordinance 24 of 1904, the following dictum by Ward J in *Anshell v Horwitz and Another* 1916 WLD 65 at 67: "...it seems to me that the arbitrator has the control of the proceedings before himself, and unless his conduct of the proceedings is grossly irregular or contrary to natural justice the Court cannot interfere."

consideration. In order to justify a review on this basis, the irregularity must have been of such a serious nature that it resulted in the aggrieved party not having his case fully and fairly determined. (See, for example, Ellis v Morgan (supra); Coetser v Henning and Ente NO 1926 TPD 401 at 404; Goldfields Investment Ltd and Another v City Council of Johannesburg and Another 1938 TPD 551; and cf also S v Moodie 1961 (4) SA 752 (A).)”

[20] In its founding affidavit²⁶ Altech argues that the arbitrator's award prejudices or determines crucial issues between the parties before Altech has had an opportunity to present evidence and argument on those issues. In order to make the award he did make, the arbitrator had to decide merits issues without giving an opportunity to Altech to present its evidence.

[21] Aeonova argues that the application is an appeal wearing the clothes of a review; that it attacks the outcome and not to the process.

Proceedings before the arbitrator

[22] Both parties filed comprehensive heads of argument before the arbitrator. Aeonova argued²⁷ that it was possible to determine the right to an account on the papers. Altech's primary position in its heads²⁸ was that *“it does not concede that it has a duty to account to Aeonova, at this juncture, particularly at all, and in any event, the existence of such a duty and its nature, ambit and scope cannot be determined or directed at this juncture.”*²⁹

[23] Altech accepted as a general proposition that it would have an accounting obligation to Aeonova if, and only if, Aeonova succeeded on the merits. It would therefore be premature to order an accounting before the merits have been determined, and then only insofar as Aeonova succeeded with its claims.

[24] It is not Altech's case that there is evidence that, if presented, would have

²⁶ CaseLines 07-5.

²⁷ CaseLines 07-169.

²⁸ CaseLines 07-197.

²⁹ Para 1.4, CaseLines 07-198.

changed the arbitrator's interpretation of the contractual documents. No such evidence was foreshadowed in the heads of argument. Rather, it was argued that on the pleadings and the common cause documents, the arbitrator committed a gross irregularity by making the award.

[25] The right to an account may arise from contract or from a fiduciary relationship such as a partnership.³⁰ Partners must account to one another and the duty to account is an implied term of a partnership contract.

[26] A contractual duty to account must appear from the terms³¹ of the contract. The mere existence of a debtor-creditor relationship is not sufficient.³²

[27] The contract before the Court (or arbitrator) must therefore be interpreted. This is an outcome based enquiry and not an enquiry into the process followed.

27.1 In this case, the contractual obligation to account appears *inter alia* from the obligation incorporated in clause 2.3 of the Addendum in terms of which Altech was obliged to disclose revenue receipts within three days of issue,³³ and the obligation to provide access to records and the like in clause 2.9.³⁴

27.2 The contract also established a fiduciary relationship. The parties to the contract are described as '*strategic partners*' in the Sub-Contract³⁵ and the essentials of a partnership have been established.³⁶

[28] Both parties relied on the judgment of Holmes JA in *Doyle and Another v Fleet*

³⁰ *De Jager v Olifants Tin "B" Syndicate* 1912 AD 505.

³¹ *BBT Electrical & Plumbing Construction & Maintenance CC v Retmil Financial Services (Pty) Ltd* 2020 JDR 0484 (FB) para 7.

³² *Victor Products (SA) (Pty) Ltd v Lateulere Manufacturing (Pty) Ltd* 1975 (1) SA 961 (W).

³³ CaseLines 07-69 and 70.

³⁴ CaseLines 07-72.

³⁵ CaseLines 07-31. See also recital B and recital C of the Contract, the stated purpose of the Term Sheet, the profit sharing provisions, and various other provisions in the written of argument to the arbitrator.

³⁶ *Pezzutto v Dreyer and Others* 1992 (3) SA 379 (A) 390A-F; *Joubert v Tarry & Co* 1915 TPD 277 at 280 to 281.

*Motors PE (Pty) Ltd.*³⁷ It is necessary therefore to look at this judgment in more detail:

- 28.1 The appellant alleged the existence of a partnership and sued the respondent for an account, the debate thereof, and payment of the amount found to be due.
- 28.2 The respondent denied the existence of the partnership and alleged a business relationship that included a master and servant relationship.
- 28.3 At the commencement of the trial the respondent's counsel intimated that the appellant had indeed been furnished with an account and that his remedy now was to sue for the amount alleged to be due.
- 28.4 The trial Judge ruled on the pleadings that the question was whether the appellant had been furnished with an account and not the sufficiency of the account, and that evidence on sufficiency was irrelevant.
- 28.5 The appellant called a witness to testify to the existence of a partnership.
- 28.6 When the witness was asked to deal with the account received and annexed to further particulars to the plea, respondent's counsel asked the Court to decide the question whether the plaintiff, having admitted that he received a balance sheet and statement, is entitled to any relief on the pleadings as framed.
- 28.7 The trial Judge held that Rule 33(4) was properly invoked, and held that the appellant was indeed not, as argued by the respondent, entitled to any relief. He dismissed the action. The appellant could sue for what he believed was due to him in a new action but the sufficiency of the account that was provided was not in issue.
- 28.8 The appellant appealed.

³⁷ *Doyle and Another v Fleet Motors PE (Pty) Ltd* 1971 (3) SA 760 (A).

28.9 Holmes JA stated³⁸ as a general proposition that -

“1. the plaintiff [seeking an accounting and debatement] should aver -

(a) his right to receive an account, and the basis of such right, whether by contract or by fiduciary relationship or otherwise;

(b) any contractual terms or circumstances having a bearing on the account sought;

(c) the defendant's failure to render an account.

2. On proof of the foregoing, ordinarily the Court would in the first instance order only the rendering of an account within a specified time. The degree or amplitude of the account to be rendered would depend on the circumstances of each case....

3. The Court might find it convenient to prescribe the time and procedure of the debate, with leave to the parties to approach if for further directions if need be.....

4. The Court may, with the consent of both parties, refer the debate to a referee ...

5. If it appears from the pleadings that the plaintiff has already received an account which he avers is insufficient, the Court may enquire into and determine the issue of sufficiency, in order to decide whether to order the rendering of a proper account.

6. Where the issue of sufficiency and the element of debate appear to be correlated, the Court might, in an appropriate case, find it convenient to undertake both enquiries at one hearing, and to order payment of the amount due (if any).

7. In general the Court should not be bound to a rigid procedure, but should enjoy such measure of flexibility as practical justice may require.””

³⁸ *Ibid* 762E-763D.

28.10 He analysed the pleadings and said³⁹ that the plaintiff was entitled to adjudication on the question whether there was a partnership relationship, the terms of partnership agreement, and whether the balance sheet provided was adequate.

28.11 The Appeal Court upheld the appeal and remitted the matter to the Court *a quo*.

[29] The judgment is not authority for the general proposition that the existence of a duty to account is dependent on a prior determination of liability.⁴⁰ In each case of course the specific contract must be proved and must be interpreted to identify rights and obligations. The interpretation of the contract relates to outcome and not the conduct of proceedings.

Analysis of the award dated 2 December 2023

[30] In paragraph 4 of the award⁴¹ the arbitrator postulates that it may be possible to determine on the pleadings and the documents attached to the pleadings whether Aeonova is entitled to an account and what form the account must take.

[31] In paragraph 7 he analyses *Doyle v Fleet Motors*, the leading case relied on by both parties and referred to above. The right to receive an account must be distinguished from questions of the adequacy of the account⁴² and the accuracy⁴³ of the account. These questions can often be decided in stages, depending on the circumstances. The remedy of debatement arises when the account is not accurate, and it arises not from the duty to account but rather from the failure to ensure its accuracy.

[32] The duty of account is a substantive legal duty and is fulfilled when the party obliged

³⁹ *Ibid* 767E.

⁴⁰ The judgment of Ettlinger AJ in *Afrimeric Distributors (Pty) Ltd v E I Rogoff (Pty) Ltd* [1948] 1 All SA 203 (W) 208 is likewise not authority for the proposition.

⁴¹ CaseLines 07-264.

⁴² *Video Parktown North (Pty) Ltd v Paramount Pictures Corporation; Video Parktown North (Pty) Ltd v Shelburne Associates and Others; Video Parktown North (Pty) Ltd v Century Associates and Others* 1986 (2) SA 623 (T) 638E.

⁴³ *Grancy Property Ltd and another v Seena Marena Investment (Pty) Ltd and others* [2014] 3 All SA 123 (SCA), [2014] ZASCA 50.

to account explains his actions and justifies his conduct.⁴⁴

[33] The arbitrator stressed in paragraph 13 that the obligation to account in clauses 2.3 and 2.9 of the addendum are not conditional. He also stated that the limitation of liability clause can only become relevant at the quantum stage and is not an obstacle to the duty to account. He rejected the argument advanced on behalf of Altech that the rendering of an account is dependent upon prior determination of the liability of the party who is required to render an account. He was not referred to any authority in support of the proposition and he did not interpret *Doyle v Fleet Street* to say that it did.

[34] It is this argument that underlies Altech's position that while it does not contest the obligation to account '*in the abstract*,' imposing the obligation before the merits have been determined would be premature.

[35] The arbitrator then examined the pleadings to see what Altech admitted and to apply the principles in *Doyle v Fleet Motors*. He wrote that the nature and extent of the account that must be rendered would depend on the terms of the agreement and what Aeonova was required to do in order to be entitled to payment. "*Thereafter the procedure to be followed if the account was inadequate and/or inaccurate would depend on the arbitrator's view of what would be a reasonable process to remedy these problems.*"⁴⁵

[36] He found Aeonova's arguments to be persuasive, supported by authority, the terms of the contract, and the admissions on the pleadings. He points out *inter alia* that Aeonova was entitled to the disclosure of all revenue receipts within three working days of issue to the client.⁴⁶ The contract also required Altech to provide certain information upon request.⁴⁷

[37] The arbitrator then analysed the five⁴⁸ claims that call for an accounting with reference to the pleadings, the common cause documents including the contract and correspondence. In respect of some of the claims, Aeonova's averments are met by bald

⁴⁴ *Doyle v Board of Executors* 1999 (2) SA 805 (C) 813G.

⁴⁵ Para 14 of award.

⁴⁶ Para 22 of award.

⁴⁷ Para 27 of award.

⁴⁸ Numbered claims 1, 2, 4(a) and (b), 5, and 6.

denials.⁴⁹ In respect of claim 7, the accounting claim, the arbitrator deals with Altech's averment that Aeonova failed to comply with its duties, and held that this was irrelevant to the question whether Altech must account.

[38] He concluded that the *"admitted terms and provisions ... and the allegations in the SOC⁵⁰ that have been admitted by Altech justify a finding that Altech must account to the Aeonova for all the matters that have been referred to in the SOC and considered in this award."*

[39] The arbitrator ordered Altech to provide a full and proper account of the amounts of the statement of claim in respect of claims 1, 2, 4, 5, and 6, such account to include documents that would enable Aeonova to calculate and verify the account, and to include at least the documents described in the award under the headings of the claims as numbered. The award also provided for mechanism for dealing with disputes on the adequacy of the account, the debatement of the accuracy of the account, and a mechanism for resolving any dispute on the amount to be paid to Aeonova. It was foreseen that in the event of a dispute, Aeonova would amend its statement of claim to claim the amount that it contends is due and payment in respect of the claim or claims concerned and the arbitrator would then determine the correctness of the amount claimed.

[40] From a plain reading of the award it is clear that the accounting and debatement will likely take place in stages.

[41] I find that the arbitrator did not prejudge the merits and did not determine the merits in his award. He makes it clear that his award is based solely on the pleadings and the documents annexed to the pleadings that are common cause documents. He made no finding as to whether Aeonova complied with its obligations.

[42] To summarise, upon studying the documentation he formed a view that what can be broadly termed the accounting issues may perhaps be dealt with separately on common cause facts and documents. He called on the parties to submit heads of argument and they did so. They were given the opportunity to analyse the documents and make submissions of law. No evidence that would give a different interpretation to

⁴⁹ Article 6.1.5.1 of the AFSA Rules require a defendant to file a statement of defence setting out material facts and contentions relied upon by him.

⁵⁰ Statement of case.

the documents were foreshadowed in argument. The rules of natural justice were complied with, and in particular the applicant's *audi alteram partem* rights were not infringed. None of the merit issues have been decided, and the arbitrator held that as a matter of law the defence that Aeonova had failed to comply with its contractual duties does not impact on the accounting claim. Liability has thus not been pre-determined.

[43] Altech contends on review that the process puts the cart before the horses, and that the arbitrator prejudged the matter by deciding, without evidence, that Altech was liable to make payment to Aeonova of amounts to be determined in the debatement. Reading the award as a whole this is not so – the arbitrator made it clear in the award that Altech's defence that Aeonova failed to comply with its contractual obligations (and is therefore not entitled to any damages) stands apart from the accounting claim. It is possible therefore that Aeonova may have won the accounting battle but lose the war for damages.

[44] I now turn to two other issues raised, namely peremption and the arbitrator's perceived reliance on the *post facto* concession by Altech that it had repudiated the contract.

The doctrine of peremption

[45] Aeonova argued that Altech perempted the review application in two emails⁵¹ on 13 and 15 December 2022 when it wrote that it was implementing the award. The correspondence also states that the award was premature and that Altech's rights were reserved, and that it had commenced the process of compliance "*without prejudice to its rights.*"

[46] When a litigant unequivocally indicates that it intends to acquiesce in an adverse judgment it can not subsequently change its mind and commence appeal or review

⁵¹ CaseLines 09-47.

proceedings.⁵² The doctrine applies to arbitration proceedings.⁵³

[47] Aeonova has not acquitted itself of the burden of proof in this regard. The emails relied upon do not manifest an unequivocal waiver of rights. They seem to have been written without much thought of possible consequences and there is nothing unequivocal about them.

The subsequent correspondence by the arbitrator

[48] On 24 November 2022, a week before the publication of the award on 2 December 2022 but after argument had been concluded on the 22nd, Altech conceded that it had repudiated the contract and that Aeonova had accepted the repudiation, thus terminating the contract. Altech argues that the arbitrator relied on the concession to justify his award even though this aspect was not argued before the Arbitrator and the award makes no reference to the concession.

[49] The argument is based on letters written by the arbitrator on 23 January 2023⁵⁴ and 13 February 2023.⁵⁵

[50] On 23 January 2023 the arbitrator wrote to the Deputy Judge President⁵⁶ with reference to an application for the certification of the review application as a commercial court case. In paragraph 28 he states that the concession “*related to a crucial allegation by Aeonova in this arbitration and which was the focus of most of the evidence filed and*

⁵² *Dabner v South African Railways & Harbours* 1920 AD 583 at 594; *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A); *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* 2013 (3) SA 315 (SCA); *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* 2017 (1) SA 549 (CC) para 26.

⁵³ *Venmop 275 (Pty) Ltd and Another v Cleverlad Projects (Pty) Ltd and Another* 2016 (1) SA 78 (GJ) para 26.

⁵⁴ CaseLines 10-50. Reference is also made to a letter dated 25 January 2023 (CaseLines 10-48) but this annexure does not correspond with what is stated in the replying affidavit.

⁵⁵ CaseLines 09-208. Reference is also made in the replying affidavit to a letter of 15 February 2023.

⁵⁶ The statement in the answering affidavit that it was unfortunate and regrettable that the arbitrator wrote to the Deputy Judge President is not justified. The letter was written in attempt to expedite an allocation (it is after all the duty of the arbitrator to expedite matters) and was never intended to form part of the court papers until it was included as an annexure to the applicant's replying affidavit.

the cross-examination of Aeonova's three witnesses."

[51] In his letter of 13 February 2023 to the parties the arbitrator referred to the recent history including the dismissal of a *"postponement/discovery"* application by Altech. He expressed the view that the concession had rendered redundant most of the witness statements and the evidence of the witnesses who had already testified on behalf of Aeonova. He added that Altech's counsel was unsure of the witnesses he would need to call *"and that there seemed to be an acceptance that the arbitrator would make an award that Altech must account."* He added that once Altech's counsel had considered the effect of the concession *"it may turn out that there is very little, if any, evidence that Altech wishes to present."*

[52] Reading the letter as a whole and in context, it is a letter discussing the future conduct of the arbitration with both parties. An arbitrator should be encouraged, rather than discouraged to express *prima facie* views to the parties so they can deal with them. After all, *prima facie* views may be wrong, forewarned is forearmed, and parties should be given the opportunity to grapple with those views. Whether *"the arbitrator's assumption of Altech's counsels [sic] state of mind is manifestly incorrect"* as alleged by Altech's deponent is really irrelevant to the submission that the arbitrator relied on the concession in his award without saying so. The Altech legal team was at all times at liberty to point out to the arbitrator that his assumption regarding the state of mind of counsel was wrong.

[53] There is nothing in either of the letters to merit the inference that the arbitrator was *"strongly influenced"* by Altech's concession in writing his award.

Conclusion

[54] For the reasons set out above I make the order in paragraph 1.



J MOORCROFT

**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION**

JOHANNESBURG***Electronically submitted***

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **15 MAY 2023**.

COUNSEL FOR THE APPLICANT:	S BUDLENDER SC L MINNÉ
INSTRUCTED BY:	THOMSON WILKS ATTORNEYS
COUNSEL FOR RESPONDENT:	J CANE SC L SCHÄFER
INSTRUCTED BY:	A KATHRADA INC
DATE OF ARGUMENT:	3 & 4 MAY 2023
DATE OF ORDER:	11 MAY 2023
DATE OF JUDGMENT:	15 MAY 2023