



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

CASE NO: 2023-032374

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

29/9/2023

DATE



SIGNATURE

In the matter between:

In the application by

ALTECH RADIO HOLDINGS (PTY) LTD

and

AEONOVA360 MANAGEMENT SERVICES (PTY) LTD

RETIRED JUSTICE BR SOUTHWOOD

Applicant

First Respondent

Second Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Application for leave to appeal – section 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013 – reasonable prospect of success or other compelling reason why appeal should be heard

Setting aside arbitral award on ground of gross irregularity - section 33(1)(a) of Arbitration Act, 42 of 1965 – submission of dispute to new arbitral tribunal – section 33(4)

Termination or setting aside of appointment of arbitrator – section 13(2) of Arbitration Act

Order

[1] In this matter I make the following order:

- 1) *The application for leave to appeal is dismissed;*
- 2) *The applicant is ordered to pay the first respondent's costs, including the costs of two counsel where so employed.*

[2] The reasons for the order follow below.

Introduction

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

[4] The applicant brought two applications, both heard by me. In the first application

heard on 11 May 2023¹ the applicant sought an order that an award made by the arbitrator be set aside on the basis of a gross irregularity in terms of section 33(1)(b) of the Arbitration Act, 42 of 1965, and the appointment of a new arbitral tribunal in terms of section 33(4) of the Act.

[5] In the second application² heard on 26 May 2023 Altech sought an order for the setting aside and the removal of the arbitrator in terms of section 13(2)(a) of the Arbitration Act, and setting aside his decision taken on 9 March 2023 in an application for his recusal in terms of section 33(1)(b) of the Act. This is the application for leave to appeal against the decision in the second application.

[6] I dismissed both applications and the applicant seeks leave to appeal against both decisions in terms of section 16(1)(a) of the Superior Courts Act, 10 of 2013. The two applications for leave to appeal were argued sequentially on 18 September 2023. The facts and the legal principles overlap to an extent, and so do the two judgments in the applications for leave to appeal.

[7] I deal with the application under a number of convenient headings below.

The applicable principles in an application for leave to appeal

[8] Section 17(1)(a)(i) and (ii) of the Superior Courts Act provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. Once such an opinion is formed leave may not be refused. Importantly, a Judge hearing an application for leave to appeal is not called upon to decide if his or her

¹ *Altech Radio Holdings (Pty) Ltd v Aeonova360 Management Services (Pty) Ltd and another* [2023] ZAGPJHC 475, 2023 JDR 1421 (GJ). The case number is 2023-001585.

² *Altech Radio Holdings (Pty) Ltd v Aeonova360 Management Services (Pty) Ltd and another* [2023] ZAGPJHC 631, 2023 JDR 1969 (GJ). The case number is 2023-032734.

decision was right or wrong.

[9] In *KwaZulu-Natal Law Society v Sharma*³ Van Zyl J held that the test enunciated in *S v Smith*⁴ still holds good under the Act of 2013. An appellant must convince the court of appeal that the prospects of success are not remote but have a realistic chance of succeeding. A mere possibility of success is not enough. There must be a sound and rational basis for the conclusion that there are reasonable prospect of success on appeal.

[10] In an *obiter dictum* the Land Claims Court in *Mont Chevaux Trust (IT 2012/28) v Tina Goosen*⁵ held that the test for leave to appeal is more stringent under the Superior Courts Act of 2013 than it was under the repealed Supreme Court Act, 59 of 1959. The sentiment in *Mont Chevaux Trust* was echoed in the Supreme Court of Appeal by Shongwe JA in *S v Notshokovu*⁶ and by Schippers AJA in *Member of the Executive Council for Health, Eastern Cape v Mkhitha and another*.⁷

[11] In *Ramakatsa and others v African National Congress and another*⁸ Dlodlo JA placed the authorities in perspective. He said:

“[10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges

³ *KwaZulu-Natal Law Society v Sharma* [2017] JOL 37724 (KZP) para 29. See also *Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae)*; *S v O'Connell and others* 2007 (2) SACR 28 (CC).

⁴ *S v Smith* 2012 (1) SACR 567 (SCA) para 7.

⁵ *Mont Chevaux Trust (IT 2012/28) v Tina Goosen* 2014 JDR 2325 (LCC), [2014] ZALCC 20 para 6.

⁶ *S v Notshokovu* 2016 JDR 1647 (SCA), [2016] ZASCA 112 para 2.

⁷ *Member of the Executive Council for Health, Eastern Cape v Mkhitha and another* [2016] JOL 36940 (SCA) para 16. See also See Van Loggerenberg Erasmus: *Superior Court Practice* A2-55; *The Acting National Director of Public Prosecution v Democratic Alliance* [2016] ZAGPPHC 489, JOL 36123 (GP) para 25; *South African Breweries (Pty) Ltd v Commissioner of the South African Revenue Services* [2017] ZAGPPHC 340 para 5; *Lakaje N.O v MEC: Department of Health* [2019] JOL 45564 (FB) para 5; *Nwafor v Minister of Home Affairs* [2021] JOL 50310 (SCA), 2021 JDR 0948 (SCA) paras 25 and 26; and *Lephoi v Ramakarane* [2023] JOL 59548 (FB) para 4.

⁸ *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA), also reported as *Ramakatsa v ANC* 2021 ZASCA 31.

concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in Caratco⁹, concerning the provisions of s 17(1)(a)(ii) of the SC Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that ‘but here too the merits remain vitally important and are often decisive.’ I am mindful of the decisions at high court level debating whether the use of the word ‘would’ as opposed to ‘could’ possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”¹⁰

The failure of the arbitrator to file affidavits

[12] The arbitrator did not file any affidavits in defence of his awards and rulings, and Altech argues that the failure to do so merit a negative inference and that the Altech’s evidence is uncontested for this reason. I do not agree. Evidence by the arbitrator to explain *ex post facto* what he meant in his letters and awards would in my view be of no

⁹ The reference in footnote 7 is to *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA), [2020] ZASCA 17.

¹⁰ Footnote 9 in the judgment reads as follows: “See *Smith v S* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA); *MEC Health, Eastern Cape v Mkhitha* [2016] ZASCA 176 para 17.”

value. The arbitrator's letters and awards must be read like any other document.¹¹

[13] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,¹² Wallis JA said:

[18] The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document ... having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence....The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used...." [emphasis added]

[14] The purpose of interpretation is to ascertain the *meaning* of the language of the document.¹³

[15] In *Telkom SA SOC Ltd v Commissioner, South African Revenue Service* and in *Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd*¹⁴ the Supreme Court of Appeal held that the interpretation of documents will not vary depending on the characteristics of the document in question. The *Endumeni* principles are of universal application and were applied for instance to the interpretation of a trust deed in *Harvey NO and Others v Crawford NO and Others*¹⁵ and to the interpretation of a will in *Strauss v Strauss and Others*.¹⁶ There are however "differences in context with different documents, including the nature of the document itself."¹⁷

[16] I am not suggesting that the conclusion that affidavit or viva voce evidence by an arbitrator will never be relevant, just as evidence is admitted when it is appropriate to do

¹¹ Judgment paras 28 and 29.

¹² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

¹³ *Ibid* para 20.

¹⁴ *Telkom SA SOC Ltd v Commissioner, South African Revenue Service* 2020 (4) SA 480 (SCA) paras 10 to 17 and *Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* 2020 (4) SA 428 (SCA) paras 16 to 17.

¹⁵ *Harvey NO and Others v Crawford NO and Others* 2019 (2) SA 153 (SCA).

¹⁶ *Strauss v Strauss and Others* [2023] ZAGPJHC 377, 2023 JDR 1302 (GJ), [2023] JOL 58905 (GJ).

¹⁷ *Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* 2020 (4) SA 428 (SCA) para 16.

so on *Endumeni* principles when contracts are to be interpreted. On the facts of this matter no case was made out that such evidence would be relevant and therefore admissible, or that the absence of affidavits by the arbitrator merits a negative inference..

The standard to be applied

[17] A Court should not shirk from its duty to set aside an award if it found that a gross irregularity had been committed or to remove an arbitrator¹⁸ on the ground of bias, but should at all times remain mindful of the paramount importance of party autonomy.¹⁹

A court must not be too quick to find fault or to conclude that a faulty procedure constitutes a gross irregularity, or that an arbitrator's conduct amounts to bias.

Reactive bias

[18] The term '*reactive bias*' as it is used in the judgment is merely a descriptive term used to distinguish an allegation of bias that arises *during* an arbitration from an allegation of bias arising from events *outside* the arbitration, such as prior enmity between arbitrator and one of the parties, a witness, or a legal representative, or other outside interests.²⁰ No legal principle flow from the use of the term in this judgment.

[19] It was never suggested in the papers or in argument that Altech adopted a stratagem to insult the arbitrator and then claim that he could no longer be perceived to

¹⁸ No-one is above the law. See *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others* 2021 (5) SA 327 (CC) para 98.

¹⁹ See the judgment by O'Regan ADCJ in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) para 236. These observations by the Constitutional Court are equally applicable to applications for the setting aside of the appointment of an arbitrator under section 13(2) of the Arbitration Act: *Umgeni Water v Hollis NO and Another* 2012 (3) SA 475 (KZD) para 22. See also *Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd* 2018 (5) SA 462 (SCA) para 8 and *Umgeni* para 42.

²⁰ Judgment para 84 and cases in footnote 45.

be impartial. This is acknowledged in the judgment.²¹

The distinction between the applicant's letter of 6 March 2023 and the application of 8 March 2023

[20] Altech alleges that the Court erred in finding that there was a '*relevant distinction*' between the letter requiring the recusal of the arbitrator dated 6 March 2023 and the application for his recusal delivered on 8 March 2023. The distinction was one made by *Altech* in the founding affidavit and the ground of appeal is not supported by the Altech'[s papers.²²

[21] One of the grounds of appeal is that the Court simultaneously found that the arbitrator did not make a procedure ruling when he informed Altech that he would not recuse himself, but also found that the arbitrator would not recuse himself merely on the basis of the letter (as he told the parties at the hearing on the 9th). These findings are not contradictory as suggested. There was no need for the arbitrator to make a procedure ruling on the 8th because by then he had a formal application in his hands and the formal application was heard on the 9th .

[22] However, had the arbitrator decided on reading a letter from a party that he should, in fact, recuse himself, he would have had to convey this opinion to both parties and section 13(1) of the Arbitration Act would have become relevant. Had the arbitrator finally decided to recuse himself on the strength of the letter he may have been in breach of his duties to Aeonova.²³

²¹ Judgment para 12.

²² Judgment paras 51 to 54.

²³ *Umgeni Water v Hollis NO and Another* 2012 (3) SA 475 (KZD) paras 36 to 40 and section 13(1) of the Arbitration Act.

The failure to adjudicate the fifth ground of recusal

[23] Altech initiated a series of events on 6 March 2023 with a formal request that the arbitrator recuse himself or disclose Altech's position that he should do so to the AFSA Secretariat. Altech then realised that a formal application was required and before any response was received, delivered a formal application for recusal on 8 March 2023. The arbitrator responded on the same day, stating that if he had decided to recuse himself upon receipt of the first email, he would have done so already (which of course implies that he had not decided to recuse himself in response to the email) but that *"events have obviously overtaken us."*

[24] It is instructive to note that Altech argues that it *"understood the response to mean"* that the arbitrator *"would not recuse himself, irrespective of what arguments it wished to advance on the subject."*²⁴

[25] The reasonable reader would not read the response to the letter of 6 March 2023 as a dismissal of an application for recusal, especially when its own view was that a formal application was or might be required, and such an application had been delivered and not yet been responded to. The reasonable reader, if not sure of the import of the 8 March email, would perhaps make enquiries on the 8th and then attend the hearing scheduled for the 9^h in the expectation that any uncertainty might be clarified at the hearing. What the reasonable reader would not do, is irrevocably assume (without making further enquiries on the 8th or attending the hearing on the 9th to see what transpired) that its application had been finally dismissed on the 8^h.

[26] The allegation of bias is made on the strength of what Altech understood. It is clear that Altech's understanding of the response is different from what the response actually says.²⁵ The response refers to the past, to the correspondence of the 6^h; Altech's understanding refers to the future, and was that the arbitrator would not now or in the future recuse himself, and he would not do so irrespective of arguments.

[27] Misunderstandings are of course common, and often quite innocent and understandable. Language is an imprecise tool. A misunderstanding can not be equated

²⁴ Heads of argument in application for leave to appeal para 39.

²⁵ Judgment para 38. Altech quoted and relied upon part of the response but not the whole response.

with bias. It is for this reason that events the next day are important. If the arbitrator were of the view that he had considered and dismissed an application for his recusal, there would have been no need to hear argument on the issue on 9 March 2023. He could merely have referred to his ruling dismissing an application for his recusal as a past event.

[28] The arbitrator however ruled that the application for his recusal be dealt with first, and proceeded to do so.²⁶ The recusal application was fully argued. The arbitrator by his conduct on the 9th refuted the averment that he had decided the recusal application on the strength of the email of the 6th.

[29] In *Umgeni Water v Hollis NO and Another*,²⁷ Van Zyl J said:

“[42] There needs to be a certain tolerance for the hurly-burly to be found in the course of litigation and trial hearings. Where they are arbitration proceedings and the foundational agreement, as here, by prior agreement between the parties requires expedition at the expense of procedural precision, then the ultimate question is not whether one agrees with every unguarded utterance by the arbitrator, or every ruling he made in the course of the proceedings. It is rather whether the proceedings, viewed holistically, may be considered substantially fair.

[43] In the context of the present matter the further question arising is whether, again viewed holistically, the applicant, upon whom the burden of proof rests, has objectively demonstrated on a preponderance of probabilities that the proceedings gave rise to the perception of bias. In other words, whether a reasonable, objectively informed person would, on the facts demonstrated and relied upon by the applicant, reasonably apprehend that the first respondent has not brought, or will not bring, an unbiased mind to bear upon the adjudication of the arbitration. Put differently, that he is not likely to approach such proceedings with a mind open to persuasion by the facts and submissions to be placed before him in due course.”

[44] As pointed out by Wallis J in the Ndlovu²⁸ matter supra in para 21, there are further factors also of importance in the circumstances. These include the so-

²⁶ Judgment paras 30 to 44.

²⁷ *Umgeni Water v Hollis NO and Another* 2012 (3) SA 475 (KZD) paras 42 to 44.

²⁸ *Ndlovu v Minister of Home Affairs and Another* 2011 (2) SA 621 (KZD).

called double requirement of reasonableness. Not only does the applicant need to demonstrate that it reasonably apprehends bias on the part of the first respondent, but it also needs to show that such apprehension itself is reasonable.”

[30] Altech did not demonstrate that it reasonably apprehended bias or that such apprehension itself was reasonable.²⁹

[31] Altech’s answer is however that the proceedings on the 9^h constituted a charade, in other words a travesty or an act of absurdity.³⁰ It is this charade that is claimed to be a gross irregularity.

[32] Altech’s case on the events of the 9th is not that on the 9th the arbitrator committed a gross irregularity even though it might have been done with the best of intentions, or that he was guilty of subconscious bias even though he did not mean to be. Altech’s case is that the arbitrator deliberately and dishonestly pretended to hear an application for his recusal though he was in fact not doing so, and that he then read out a pre-written judgment while pretending that he was giving an *ex tempore* judgment. Such reprehensible conduct (if true) would of course reflect a deliberate repudiation of his declaration³¹ to AFSA and an act of misconduct and of deliberate bias by conducting a charade while pretending to seriously consider the application.

[33] The allegations of a charade are not supported by evidence. Altech nevertheless persists with these serious and derogatory allegations. Altech’s persistence with these gratuitous allegations is deserving of censure.

The remaining grounds for recusal

[34] The remaining grounds for recusal relied upon by Altech relate to -

²⁹ *Umgeni Water v Hollis NO and Another* 2012 (3) SA 475 (KZD) paras 42 to 44.

³⁰ Judgment paras 48 to 49.

³¹ Judgment para 43.

- 34.1 correspondence to the Deputy Judge President and to the parties,³²
- 34.2 the averment that the arbitrator dictated to Altech how it should run its defences,³³
- 34.3 the perceived animosity of the arbitrator to Altech's legal team,³⁴
- 34.4 the arbitrator's perceived pre-occupation with urgency.³⁵

[35] There are no reasonable prospects of success on any of these grounds.

Presumption of impartiality

[36] In heads of argument Altech raises a ground of appeal not raised the notice of appeal and on an issue that was common cause at the hearing but in respect of which Altech now adopts an opposite view. The new ground is that there is a compelling reason why the appeal should be heard,³⁶ namely whether the presumption of impartiality applies to arbitrators and if so, whether the bias alleged is due to a prior relationship or arises during the arbitration as is the case here. The respondent was able to deal with this aspect in heads and in argument, and the matter was fully ventilated without any prejudice to Aeonova arising from the late about-turn by Altech.

[37] When the matter was argued in May 2023 the parties were in agreement that the test for whether there is 'good cause' for the removal of an arbitrator is substantially the same test that applies for the recusal of a judge in court proceedings.³⁷ The question of the presumption was not argued and the word appears in the judgment in the summary

³² Judgment paras 55 to 62.

³³ Judgment paras 63 to 65.

³⁴ Judgment paras 66 to 68.

³⁵ Judgment paras 69 to 72.

³⁶ Section 17(1)(a)(ii) of the Superior Courts Act.

³⁷ Altech heads in May 2023, para 53.

of the decision in the *Sarfu* case.³⁸ If the question of the presumption were to be argued on appeal, the court of appeal would be sitting as a court of first instance in respect of this question.

[38] The *Umgeni* and *Dohne* decisions referred to by the applicant provides guidance. *Umgeni Water v Hollis NO and Another*³⁹ and *Construction (Pty) Limited v Adv Lane SC and another*⁴⁰ differ on the basis that in *Doyne* it was held that the presumption of impartiality applies irrespective of the arbitrator's background and training, whereas in *Umgeni Water* it was held (at least implicitly) that it applies when the arbitrator is legally trained. In the present matter the arbitrator is a former senior advocate and Judge and the distinction between legally trained arbitrators and other arbitrators is of no moment on the facts of the case.

[39] Altech argues that the *Umgeni* decision is “*clearly incorrect*.” It does so on the basis of the decision by the Constitutional Court in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*⁴¹ two years earlier and referred to in the *Umgeni* judgment, but not in the context of the presumption.

[40] In *Lufuno*,⁴² the Constitutional Court held that section 34 of the Constitution does not have direct application to private arbitration. It may have indirect application. Section 34 provides as follows:

“34 Access to courts

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

[41] The Constitutional Court acknowledged that arbitrators are not necessarily independent tribunals, in the sense that the parties may consent to an arbitrator who may

³⁸ Judgment para 82.5 and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) para 48. The decision is often referred to as the *Sarfu* case.

³⁹ *Umgeni Water v Hollis NO and Another* 2012 (3) SA 475 (KZD) paras 34 to 40.

⁴⁰ *Dohne Construction (Pty) Limited v Adv Lane SC and another* 2022 JDR 3706 (GJ) para 21.

⁴¹ *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC)

⁴² *Ibid* para 215.

not be entirely independent.⁴³ This is of course so because of the operation of party autonomy. Also, one of the essential characteristics of arbitration is that arbitration generally⁴⁴ does not take place in public hearings, but privately and confidentially. This characteristic cannot be reconciled with section 34 of the Constitution and arbitration simply does not fit comfortably in the language of section 34. However, the Constitutional Court did not deal with the presumption of impartiality of arbitrators.

[42] There are no conflicting judgments that require resolution by the Supreme Court of Appeal and as Dlodlo JA said the *Ramakatsa*⁴⁵ judgment, the merits of the appeal remain of vital importance in deciding whether leave to appeal should be granted. In terms of section 17(1)(a)(ii) of the Superior Courts Act. For both these reasons leave should not be granted on this ground.

Conclusion

[43] There is in my view no reasonable possibility on any of the grounds of appeal that a court of appeal will come to a different conclusion. 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

⁴³ *Ibid* para 213.

⁴⁴ The parties may decide on a public hearing as they are autonomous, but as a rule this is not the case.

⁴⁵ *Ramakatsa and others v African National Congress and another* [2021] JOL 49993 (SCA).

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 **29 SEPTEMBER 2023**.

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DATE OF ARGUMENT:

18 SEPTEMBER 2023

DATE OF JUDGMENT:

29 SEPTEMBER 2023