THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR226/2016

In the matter between**:**

ESKOM: ROTEK INDUSTRIES SOC LTD **Applicant**

and

GYSBERT MANS **First Respondent**

M. A. LENNOX *N.O.* **Second Respondent**

ARBITRATION FOUNDATION OF SOUTH AFRICA **Third Respondent**

Heard: 21 July 2017 & 14 August 2017

Delivered: 07 September 2017

Summary: **Review application of private arbitration award in terms of the Arbitration Act 42 of 1965 – jurisdictional challenge raised for the first time at the hearing of the matter – employee or independent contractor - fixed term contract – renewal – reasonable expectation – legal principles restated regarding the limited scope of review of private arbitration awards.**

JUDGMENT

MALAN AJ:

<u>Introduction</u>

[1] The matter before this Court concerns an opposed application in terms of which the applicant (*'Eskom'*) seeks an order premised on section 33(1) of the Arbitration Act,[1] (*'the Arbitration Act'*) to have the award issued by the second respondent (*'the Arbitrator'*) under the auspices of the Arbitration Foundation of South Africa (*'AFSA'*) under case number M161 (*'the award'*) reviewed and set aside.

[2] At the commencement of the hearing Mrs Bezuidenhout, who appeared on behalf of the first respondent (*'Mr Mans'*), advised me that Mr Mans no longer persisted with his point *in limine* challenging the timeous filing of the record of the arbitration proceedings by Eskom. Consequently, this issue no longer falls to be determined.

[3] The matter before this Court first came before the Arbitrator following an initial referral by Mr Mans of a dispute to the Metal and Engineering Bargaining Council (*'MEIBC'*) contending that he was an employee of Eskom, that he was dismissed from Eskom's employ and that his dismissal was substantively and procedurally unfair (*'the dispute'*). (I deal later in this judgment with facts relevant to the relationship between Mr Mans and Eskom.) Eskom objected to the jurisdiction of the MEIBC to determine the

[1] Act 42 of 1965.

dispute. Its objection was founded on an arbitration clause – W1 – contained in the Professional Services Contract concluded between the parties. Eskom's argument before the MEIBC was that the arbitration clause provides for an arbitrator to be appointed in terms of the AFSA Rules and consequently this oust the jurisdiction of the MEIBC to determine the dispute. On this basis, Eskom argued further that the dispute must proceed to private arbitration. Eskom's jurisdictional challenge was successful.

[4] It is against this background that Mr Mans proceeded to file a request for arbitration with AFSA on 25 February 2015. The Arbitrator was appointed, a pre-arbitration conference took place under the auspices of AFSA and subsequently pleadings were exchanged setting out the claims by Mr Mans and the defences thereto by Eskom. The matter was set down for arbitration which arbitration took place over several days. It is this arbitration and the award that forms the subject matter of Eskom's review application.

[5] Following the arbitration, the Arbitrator found *inter alia* that: (1) Mr Mans was an employee of Eskom; (2) He had a reasonable expectation that the Professional Services Contract which was concluded with Eskom would be renewed; (3) Eskom's non-renewal of the Professional Services Contract constituted a dismissal; and (4) his dismissal was substantively and procedurally unfair.[2] Based on the aforesaid, the Arbitrator ordered Eskom to pay Mr Mans compensation equivalent to twelve (12) month's remuneration.

[6] Mr Masher, who appeared on behalf of Eskom, commenced his argument by first challenging the jurisdiction of the Arbitrator to determine the dispute between Eskom and Mr Mans. He submitted that determination of this point in Eskom's favour could be dispositive of the review application *in toto*. It is convenient to deal with this point at the outset of this judgment.

[2] Reference is made in the award to 'direct employment' and 'indirect employment'. This terminology is also used in the papers before this Court. I deal with this later in this judgment.

[7] Mr Masher accepted that this point was neither raised in the papers filed of record nor in his heads of argument. Moreover, it was never raised before the Arbitrator. Nonetheless, he submitted that this was a point of law and he was entitled to raise it, for the first time, at the hearing of this matter. In support of this point, he handed up supplementary short heads of argument and relied on the following authorities: *New Kleinfontein Goldmine (Pty) Ltd v NUM obo Gule and others*;[3] *Bombardier Transportation (Pty) Ltd v Mtiya NO and others*;[4] and *National Bargaining Council for the Road Freight Industry & another v Carlbank Mining Contracts (Pty) Ltd and another*.[5]

[8] I accept that a point of law, such as a jurisdictional challenge, can be raised for the first time in argument or *mero motu* by the Court, unless the party raising the point of law was alive to such a challenge at the time of the arbitration, but elected not to raise it at that stage.[6]

[9] I understand the basis of Eskom's jurisdictional challenge to be essentially the following:

9.1. *'The MEIBC's jurisdictional ruling is what founds the Second Respondent's jurisdiction to arbitrate the unfair dismissal dispute.'*[7]

9.2. Because the initial referral of the dispute by Mr Mans' to the MEIBC was out of time (according to Eskom) and Mr Mans did not apply for condonation, the MEIBC lacked jurisdiction to deal with the dispute in the first place.

9.3. Therefore, the ruling by the MEIBC concerning its lack of jurisdiction is a nullity.

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[3] (unreported) Case no.: JR950/13 delivered on 14 October 2016.
[4] (2010) 31 ILJ 2065 (LC).
[5] (2012) 33 ILJ 1808 (LAC).
[6] *See IMATU & others v Johannesburg Metropolitan Municipality and others* [2014] 6 BLLR 545 (LAC); *CUSA v Tao Ying Metal Industries and others* [2009] 1 BLLR 1 (CC).
[7] *See* Supplementary Short Heads of Argument: p 2, para 1.1.8.

9.4. With the ruling by the MEIBC being a nullity, the Arbitrator did not have jurisdiction to arbitrate the dispute.[8]

[10] I am not convinced that the jurisdiction of the Arbitrator is rooted in the ruling by the MEIBC. First, the Professional Services Contract was central to the dispute before the Arbitrator. It contains an arbitration clause – W1 - which provides for an arbitrator to be appointed in terms of the AFSA Rules. This is the very clause which Eskom relied upon to object to the jurisdiction of the MEIBC and also relied upon to argue (before the MEIBC) that the dispute must proceed to private arbitration under the auspices of AFSA. The jurisdictional challenge now raised by Eskom also contradicts the jurisdictional challenge which it raised objecting to the jurisdiction of the MEIBC.

[11] Moreover, on or about 25 February 2015, Mr Mans filed a request for arbitration. Pursuant to the aforesaid, a pre-arbitration conference took place on 2 March 2015. A minute of this pre-arbitration conference was produced.[9] In terms of paragraph 2 of the minute, the parties accepted the appointment of the Arbitrator. Paragraph 3 of the minute reads as follows: *'The parties confirmed that a dispute existed and that a valid arbitration existed as between them.'* In terms of paragraph 4 thereof, the parties agreed that the Commercial Rules of AFSA would apply to the arbitration. Paragraph 5 provides for the exchange of pleadings setting out the claims by Mr Mans and the defences thereto by Eskom.

[12] Consequently, the arbitration before the Arbitrator was clearly rooted in the Professional Services Contract, more particularly the arbitration clause and what followed (as set out in the preceding paragraph) pursuant to Mr Mans' request for arbitration. It was simply not rooted in the ruling by the MEIBC.[10]

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8 *See* Supplementary Short Heads of Argument: p 2, para 1.1.8.

9 Although the minute is unsigned, neither party seems to challenge the veracity of the minute.

10 *See* Supplementary Short Heads of Argument: p 2, para 1.1.8. *See Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA).

[13] For these reasons, I find that the challenge to the jurisdiction of the Arbitrator is not sustainable and must fail.

Synopsis of relevant background

[14] The relationship between Eskom and Mr Mans dates back to 1972 when he first commenced employment with Eskom (as it is now known). In March 1998, Mr Mans resigned and took up employment with a company called Turbine Blading. However, Mr Mans simultaneously continued to render engineering consulting services to Eskom in terms of a series of back to back Professional Services Contracts. These Professional Services Contracts were concluded for a specific or limited duration from time to time. Mr Mans rendered these services to Eskom using a Close Corporation, namely Gys Mans Engineering Consulting CC (*'GMEC'*) as a commercial vehicle to do so. GMEC is also the party to the Professional Services Contracts which Mr Mans concluded with Eskom. During 2010 Turbine Blading closed. Mr Mans continued to render engineering consulting services to Eskom in terms of the Professional Services Contracts and GMEC rendered VAT invoices to Eskom in this regard which Eskom paid.

[15] The last Professional Services Contract between Mr Mans and Eskom was concluded for the period 1 January 2012 to 30 December 2013 and consequently, terminated automatically through the effluxion of time on 30 December 2013.

[16] Despite termination of the Professional Services Contract and in the absence of a new contract, Mr Mans continued, as before, to render engineering consulting services to Eskom during the period January 2014 until June 2014. GMEC continued to render VAT invoices to Eskom which Eskom in turn continued to pay.

[17] I deal later in this judgment in more detail with the nature and extent of the relationship between Mr Mans and Eskom during existence of the Professional Services Contracts.

[18] On 5 June 2014, Mr Lionel Reddy, the Works Engineering Manager for Eskom addressed a letter to Mr Mans advising him *inter alia* as follows:

> *'The professional services contract between Eskom (Rotek and Roshcon) and Gys Mans Engineering Consulting ended on the 30 December 2013.* [sic] *During the past 5 months whilst negotiating a new contract, you had been contracted on a month to month basis.*
>
> *It is with regret that we inform you that the professional services contract between Gys Mans Engineering Consulting and Eskom (Rotek and Roshcon) will not be renewed for another term. Your last working day will be 30 June 2014.*
>
> *…'*

[19] Save for Mr Mans denying that Eskom contracted with him on a month to month contract basis during this period (January 2014 to June 2014), all of the aforesaid appears to be common cause between the parties.

[20] Aggrieved by the aforesaid, Mr Mans referred a dispute to the MEIBC and later to AFSA as mentioned earlier in this judgment.

<u>Grounds of review</u>

[21] I understand the *crux* of Eskom's grounds of review to be the following:

21.1. That the Arbitrator committed a gross irregularity and exceeded his powers in the conduct of the arbitration by incorrectly determining that an employment relationship existed between Eskom and Mr Mans. In this regard Eskom contends that the Arbitrator incorrectly applied the relevant legal principles and failed to apply his mind to material evidence before him.

21.2. That the Arbitrator, by his conduct, created a perception of bias against Eskom.

Relevant legal framework

[22] The award sought to be reviewed in this instance is an award by a private arbitrator pursuant to an agreement between the parties containing an arbitration clause. As such, the legal principles applicable to review applications in terms of sections 145 and 158(1)(g) of the LRA, (as enunciated in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*[11] and some of the other cases since *Sidumo*[12] do not find application in this review*.*

[23] Since it is a review of a private arbitration award, it can only be reviewed on the grounds set out in section 33 of the Arbitration Act.[13]

[24] Section 33(1) of the Arbitration Act reads as follows:

'(1) Where-

(a) any member of an arbitration tribunal has misconducted himself in relation to his 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) an award has been improperly obtained,

[11] 2008 (2) SA 24 (CC); also reported at (2007) 28 ILJ 2405 (CC) and also at [2007] 12 BLLR 1097 (CC).

[12] See: *Health and Other Service Personnel Trade Union of SA and others v Member of the Executive Council for Health, Eastern Cape and others* (2017) 38 ILJ 890 (LAC); *Democratic Nursing Organisation of SA on behalf of Du Toit and another v Western Cape Department of Health and others* (2016) 37 ILJ 1819 (LAC); *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union and others* (2016) 37 ILJ 2593 (LAC); *Head of Department of Education v Mofokeng & others* (2015) 36 ILJ 2802 (LAC); *Gold Fields Mining SA (Pty) Ltd v CCMA* [2014] 1 BLLR 20 (LAC); *Herholdt v Nedbank Ltd* (2013) 34 ILJ 2795 (SCA); *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC); also reported at (2007) 28 ILJ 2405 (CC) and also at [2007] 12 BLLR 1097 (CC).

[13] *NUM obo Employees v Grogan NO and another* (2010) 31 ILJ 1618 (LAC) at 33. Also see *Volkswagen SA (Pty) Ltd v Koorts NO and others* (2011) 32 ILJ 1892 (LAC); *Member of the Executive Council: Department of Health (Eastern Cape) v Van der Walt NO and another* (2011) 32 ILJ 944 (LC); *Clear Channel Independent (Pty) Ltd v Savage NO and another* (2009) 30 ILJ 1593 (LC).

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.'

[25] In so far as Eskom seeks to have the award reviewed and set aside on the basis of the Arbitrator's conduct of the arbitration, the Constitutional Court in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and another*[14] (*per* O'Regan J), writing for the majority, set out the policy basis for the limited scope of intervention in private arbitrations:

> *'Courts should be respectful of the intention of the parties in relation to procedure. In so doing, they should bear in mind the purposes of private arbitration which include the fast and cost-effective resolution of disputes. If courts are too quick to find fault with the manner in which arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of section 33(1), the goals of private arbitration may well be defeated.'*

[26] This cautionary sentiment is reflected in the conclusion reached by Van Dijkhorst AJA in *Stocks Civil Engineering (Pty) Ltd v Rip NO and another*:[15]

> *'A court is entitled on review to determine whether an arbitrator in fact functioned as arbitrator in the way that he upon his appointment impliedly undertook to do, namely by acting honestly, duly considering all the evidence before him and having due regard to the applicable legal principles. If he does this, but reaches the wrong conclusion, so be it. But if he does not and shirks his task, he does not function as an arbitrator and reneges on the agreement under which he was appointed. His award will then be tainted and reviewable.... An error of law or fact may be evidence of the above in given circumstances, but may in others merely be part of the incorrect reasoning leading to an incorrect result. In short, material malfunctioning is reviewable, a wrong result per se not (unless it evidences malfunctioning). If the malfunctioning is in relation to his duties, that would be misconduct by*

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[14] 2009 (4) SA 529 (CC).

[15] (2002) 23 ILJ 358 (LAC).

the arbitrator as it would be a breach of the implied terms of his appointment.'

[27] In short: in the case of a review of a private arbitration award, there exists little scope for a review going to the merits, as a private arbitrator has the right to be wrong.[16]

[28] In so far as Eskom contends that the Arbitrator committed gross irregularities, section 33(1)(b) applies. As to the meaning of 'gross irregularity' in general, the Court in *Commercial Catering and Allied Workers Union and others v Pick 'n Pay Retailers (Pty) Ltd and others.*[17]

> *'… In order for there to be a gross irregularity warranting interference on review, two conditions must be met: firstly, the omission on the part of the arbitrator must involve his or her having misconceived the nature of the enquiry or his or her duties in connection with the enquiry, and thus result in his preventing a fair trial of the matter. Secondly, there must not exist material that would serve to justify the arbitrator's decision, because 'if there was material before the [arbitrator], justifying the action taken, the court would not be entitled to interfere even if an irregularity had been committed'. Put differently, if an arbitrator was caused by inappropriate means to reach one conclusion whereas if he had adopted appropriate means he might have reached another conclusion favourable to the applicant, then the award is reviewable.'*

[29] In *Telcordia Technologies Inc v Telkom SA Ltd*,[18] the Supreme Court of Appeal stated as follows:

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[16] 2007 (3) SA 266 (SCA) at pars 85 – 87. See also *Naidoo v EP Property Projects (Pty) Ltd and others* [2015] JOL 33184 (SCA) at para 33; *Mxalisa and others v Dominium Uranium and another* (2013) 34 ILJ 2052 (LC) at para 31.

[17] (2012) 33 ILJ 279 (LC) at para 8. See also the oft quoted *Goldfields Investment Ltd & another v City Council of Johannesburg and another* 1938 TPD 551.

[18] *Commercial Catering and Allied Workers Union and others v Pick 'n Pay Retailers (Pty) Ltd and others* (2012) 33 ILJ 279 (LC) at para 7. See also *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at para 69 and pars 85 – 87; *Tao Ying Metal Industry (Pty) Ltd v Pooe NO and others* 2007 (5) SA 146 (SCA); (2007) 28 ILJ 1949 (SCA).

'The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry - they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry. To adapt the quoted words of Hoexter JA: it cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by a court.

[86] Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly. Errors of the kind mentioned have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate. To illustrate, an arbitrator in a 'normal' local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd.

[87] In support of this I revert to Doyle v Shenker, a case that dealt with a review on the ground of a gross irregularity in the proceedings. Innes CJ said in a passage that speaks for itself:

> *'Now a mere mistake of law in adjudicating upon a suit which the magistrate has jurisdiction to try cannot be called an irregularity in the proceedings. Otherwise a review would lie in every case in which the decision depends upon a legal issue, and the distinction between procedure by appeal and procedure by review, so carefully drawn by statute and observed in practice, would largely disappear. Yet in this case it is a mistake of law alone which is relied upon as constituting gross irregularity. There is neither allegation nor suggestion that the magistrate, his attention having been drawn to sec. 37, deliberately refused to apply his mind to it, or to consider it. The position, if the section means what the applicant contends, is that the magistrate either honestly misinterpreted or completely overlooked it. In either event it would not, I am afraid, be the first occasion on which a court of law has misread a statutory provision or overlooked one not brought to its notice at the trial. Whichever supposition were the correct one, the result would be (still assuming the correctness of the applicant's interpretation) an unfortunate error of law which, but for the special prohibition of the statute would afford good ground for an appeal. But there would be no gross irregularity in the proceedings, and therefore no justification for a review.'*

<u>Application of the legal principles to the facts</u>

[30] Central to the issues which the Arbitrator was called upon to determine was whether or not there existed an employment relationship between Eskom and Mr Mans. Because the matter concerns a private arbitration between the parties, unlike in the CCMA or Bargaining Councils, the existence of an employment relationship was not a prerequisite for the jurisdiction of the

Arbitrator. As already stated earlier in this judgment, the Arbitrator's jurisdiction is rooted in the agreement between the parties to submit their dispute to private arbitration. Thus, the legal principles applicable to jurisdictional reviews do not find application in this review.

[31] The reasoning in *Telcordia* is clear. It has to be shown that the Arbitrator misconceived the nature of the enquiry to the extent that it deprived a party of a fair trial of the issues.[19]

[32] *In casu*, the Arbitrator was given the duty and the power to decide, essentially, whether, on the facts of this matter as pleaded and testified to in the arbitration, along with the documentary evidence properly before him, there existed an employment relationship between Mr Mans and Eskom and whether Mr Mans had a reasonable expectation that his contract would be renewed. In the course of performing his mandate, he had to evaluate and determine the evidence, rightly or wrongly, and determine the applicable law, rightly or wrongly. If he committed errors of law in this respect, it has nothing to do with exceeding his powers, but are errors committed within the scope of his mandate, and similarly, cannot be used to substantiate a case for review.

[33] It also has to be considered whether, on all the available material properly before him in this matter, the Arbitrator's conclusions may nonetheless be justified, in which event his award would equally not be reviewable.

[34] It is evidence from the award, at least in my mind, that the Arbitrator appreciated and clearly identified the salient issues which he was called upon to determine and the nature of the enquiry he had to embark upon. He deals with the material terms of the Professional Services Contracts, more particularly the last contract for the period 1 January 2012 to 30 December 2013. He considers and analysis the documentary and oral evidence properly before him, which included *inter alia* that Eskom provided Mr Mans with the infrastructure necessary for him to render his services. This

[19] See *UASA v Impala Platinum Ltd and others* (2010) 31 ILJ 1702 (LC) at para 51.

included a laptop computer and printer, office, desk, telephone and protective clothing. Mr Mans had to provide his services personally and was not permitted to delegate his duties and responsibilities to a third party. Eskom also required Mr Mans to work specific hours and to report to the Works Engineering Manager. Mr Mans had to adhere to some of Eskom's Policies and Procedures, such as those concerning Health and Safety. When working away from the office, Eskom provided him with and paid for his accommodation and transport or car hire. From about 2012, Eskom deducted PAYE from the payments made to Mr Mans and issued an IRP5 in respect of Mr Mans. The Arbitrator deals with the ongoing renewals of the contracts and the delay in reaching a decision regarding the renewal of the contract during the first part of 2014.

[35] Following the aforesaid, the Arbitrator concludes that Mr Mans was not 'directly' employed by Eskom. It is not clear what the Arbitrator means by 'directly' employed. The fact that the Arbitrator may have used or misinterpreted the concept of 'direct' employment does not mean that he misconceived the nature of the inquiry or his duties in connection therewith. He 'has the right to be wrong' on this part of the merits of the case. To borrow from the words used in *Telcordia,* it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the inquiry. That is a far cry from saying that this constitutes a misconception of the nature of the inquiry. The aforesaid is supported by the fact that the Arbitrator states later in his award that he has to *'…look beyond GMEC and examine the true nature of the relationship.'*

[36] The Arbitrator proceeds to have due regard to the SARS Practice Note dealing with 'dependant contractors' for purposes of PAYE and concludes that: *'This is not determinative of whether or not an employment relationship exists but certainly instructive.'* It is evident from the aforesaid that the Arbitrator reasons his way through the evidence, as he is duty bound to do, without considering and more importantly, deciding any of the issues in isolation.

[37] Against this background the Arbitrator correctly identifies the relevant case law and deals with the applicable legal principles with reference to the evidence before him.[20] The Arbitrator, in the result, concludes that applying the principle of substance over form Eskom exercised supervision and control over Mr Mans; that he formed an integral part of Eskom; and he was economically dependent on Eskom. On this basis, the Arbitrator finds that *'…at all relevant time* [sic] *Mr Mans was an employee of* [Eskom].*'* [21]

[38] Even if the Arbitrator's interpretation of the material terms and conditions of the Professional Services Contract and the way the parties gave effect to these terms and conditions are wrong, it cannot be said that the wrong interpretation prevented him from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the aforesaid the Arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation could not afford any ground for review by this Court.

[39] As stated by the Court in *Telcordia 'it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly. Errors of the kind mentioned have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate. Otherwise a review would lie in every case in which the decision depends upon a legal issue, and the distinction between procedure by appeal and procedure by review, so carefully drawn by statute and observed in practice, would largely disappear.'*

[20] Award: pp 19 - 21, pars 48 - 51; *Denel v Gerber* (2005) 9 BLLR 849 (LAC); *SITA v CCMA and others* (2008) 28 ILJ 2234 (LAC) as well as s 200A of the LRA.
[21] Award: p 22, pars 55 - 57.

[40] Thus, in my view, it was neither irrational nor unreasonable for the Arbitrator to conclude, after having due regard to the evidence placed before him, that in light of the ongoing renewals by Eskom of the Professional Services Contract over many years, Mr Mans had a reasonable expectation during 2014 that his contract would once again be renewed and his employment relationship with Eskom would continue as it had before. His expectation was not inconsistent with his claim that he was an employee of Eskom, as contended for by Mr Masher. On the contrary, it is in line with such a claim. It follows that Eskom's decision not to renew Mr Mans' contract constituted a dismissal, which dismissal was without a valid reason and in the absence of a fair procedure having preceded such decision.

[41] Eskom also contends that the Arbitrator, by his conduct, created a perception of bias against it. The test, however, in claims of actual or perceived bias arising from both trial court conduct and judicial association is the same: a litigant must show that 'a reasonable, objective and informed person would, on the correct facts, reasonably apprehend bias.[22] In other words, a litigant must show a reasonable apprehension of bias to succeed.

[42] There is a presumption in our law that judicial officers are impartial when adjudicating disputes[23] and, as it was noted by the Constitutional Court in *Irvin A & Johnson*, the threshold a litigant would have to meet to establish a reasonable apprehension of bias is high.[24]

[43] I can see no reason why these legal principles should not equally apply to arbitrators, especially where the parties voluntarily choose the arbitrator and agreed upon by him or her presiding over the dispute between them. Generally, the common law and the Arbitration Act adhere to the philosophy

[22] *Mbana v Shepstone & Wylie (2015)* 36 ILJ 1805 (CC) at para 40. See also *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC); *President of the Republic of SA and others v SA Rugby Football Union* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) (SARFU II) at para 48; *Ndimeni v Meeg Bank Ltd (Bank of Transkei)* 2011 (1) SA 560 (SCA).
[23] *SA Commercial Catering & Allied Workers Union & others v Irvin and Johnson Ltd (Seafoods Division Fish Processing)* [2000] ZACC 10; 2000 (3) SA 705 (CC); (2000) 21 ILJ 1583 (CC); 2000 (8) BCLR 886 (CC) (Irvin & Johnson) at para 12; and SARFU II at para 41.
[24] *Irvin & Johnson* at para 49.

that if parties voluntarily choose arbitration they are bound by their private judge's findings of fact and rulings on law, subject to the arbitrator having the necessary jurisdiction and subject to the arbitrator staying within the terms of reference.[25]

[44] But, compatible with the Constitution, s 33(1) of the Arbitration Act permits a Court to interfere with the award on grounds which are essentially directed at a lack of independence, eg bias and the other grounds already dealt with herein above.

[45] In so far as Eskom's review application is premised on the perception that the Arbitrator was bias, I understand that central to this ground of review are Eskom's complaints that:

45.1. In the award, the Arbitrator first deal with a number of observations concerning Eskom's representative and his conduct during the arbitration, prior to the Arbitrator dealing with the evidence and making his findings; and

45.2. Throughout the arbitration, it appeared from the Arbitrator's conduct that Eskom's representative (and therefore Eskom) were being prejudiced.

[46] First, it cannot be overstated that it is the parties who, by agreement voluntarily chose and appointed the Arbitrator.

[47] The mere recording by the Arbitrator of his observations concerning Eskom's representative cannot in itself justify a reasonable apprehension of bias. Moreover, what transpired between the Arbitrator and Eskom's representative is in any event apparent from the record of the arbitration proceedings and in so far it is not, I see nothing untoward in the Arbitrator placing this on record. These observations also concern the representative and his conduct and not Eskom itself or the evidence.

[25] *Eskom v Hiemstra NO and others* (1999) 20 ILJ 2362 (LC).

[48] Mr Masher further argued that it appeared from the Arbitrator's conduct that Eskom's representative (and therefore Eskom) were being prejudiced. I could find no evidence in the record to support such a conclusion. I am further of the considered view that this is not the conclusion that a reasonable, objective and informed litigant in possession of the correct facts would arrive at.

[49] For these reasons, I am not convinced that Eskom has discharged the *onus* to establish reasonably apprehended bias. Consequently, this ground of review is without merit and must accordingly fail.

Costs

[50] As mentioned at the outset of this judgment, at the commencement of the hearing, the applicant raised points of law for the first time. This resulted in the matter being postponed for a continuation of argument in order to afford the first respondent an opportunity to properly consider and deal with these points. The aforesaid had cost implications as the matter could have been finalised on the day but could not. I see no reason why Eskom should not pay the wasted costs occasioned by this postponement.

[51] In the premises, I make the following order:

Order

1. The application is dismissed.

2. Eskom is ordered to pay the wasted costs occasioned by the postponement of the matter on 21 July 2017.

3. Save for paragraph 2, each party to pay their own costs.

L Malan, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant: Mr D Masher of ENS Africa Inc.

For the respondent: Advocate J M Bezuidenhout instructed by Clifford Levin Inc.