



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, DURBAN**

Case no: D9748/22

In the matter between:

**TRANSNET NATIONAL PORTS AUTHORITY**

**APPLICANT**

and

**UMHLATUZE GENERAL SALES AND SERVICES (PTY)**

**LTD t/a KZN SALES AND SERVICES**

**FIRST RESPONDENT**

**J.C. KING SC N.O.**

**SECOND RESPONDENT**

**THE ASSOCIATION OF ARBITRATORS (SA)**

**THIRD RESPONDENT**

This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date for hand down is deemed to be 20 November 2024 at 12:00

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**ORDER**

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- 1 The second respondent, JC King SC, be and is hereby removed as an arbitrator in the arbitration between the applicant and the first respondent;
- 2 Each party is liable for its own costs.

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## JUDGMENT

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**Chetty J:**

[1] The applicant, Transnet National Ports Authority ('Transnet'), brings this application for the removal of the second respondent, J C King SC ('King') from his role as the appointed arbitrator in terms of section 13(2) of the Arbitration Act 42 of 1965 which provides recourse, on application by any party to court, to set aside the appointment of or remove an arbitrator from office, on good cause.<sup>1</sup> The basis for Transnet's application is its assertion that King failed to disclose a prior legal dispute that potentially compromised his impartiality, giving rise to a reasonable apprehension of bias. The arbitration proceedings, now at their closing stages, concern a dispute between Transnet and the first respondent, Umhlatuze General Sales and Services (Pty) Ltd ('Umhlatuze').

[2] The current proceedings were instituted to halt the aforementioned arbitration due to Transnet's application for the removal of King as the presiding arbitrator. Transnet argues that King failed to disclose a prior instance where he was appointed as an adjudicator in a matter involving Transnet Pipelines, a business unit of Transnet SOC Ltd, Transnet's parent company. In that prior instance, Transnet Pipelines initiated an interdict to secure King's recusal, alleging 'disparaging remarks' concerning his conduct. In these

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<sup>1</sup> Section 13 of the Arbitration Act reads as follows:

'Termination or setting aside of appointment of arbitrator or umpire—

(1) Subject to the provisions of subsection (2), the appointment of an arbitrator or umpire, unless a contrary intention is expressed in the arbitration agreement, shall not be capable of being terminated except by consent of all the parties to the reference.

(2)(a) The court may at any time on the application of any party to the reference, on good cause shown, set aside the appointment of an arbitrator or umpire or remove him from office.

(b) For the purposes of this subsection, the expression "good cause", includes failure on the part of the arbitrator or umpire to use all reasonable dispatch in entering on and proceeding with the reference and making an award or, in a case where two arbitrators are unable to agree, in giving notice of that fact to the parties or to the umpire.

(3) Where the appointment of an arbitrator or umpire is so set aside, or where an arbitrator or umpire is so removed from office, the court may, apart from any order for costs which may be awarded against such arbitrator or umpire personally, order that such arbitrator or umpire shall not be entitled to any remuneration for his services.'

proceedings, Transnet National Port Authority, as the party to the current arbitration, contends that the failure to disclose the existence of the litigation, despite request to the arbitrator, as well as his conduct in the course of the proceedings, gave it reason to question his impartiality. Transnet seeks the removal of King as arbitrator and an order to recommence the arbitration proceedings *de novo* before a new arbitrator.

[3] The third respondent in these proceedings is the Association of Arbitrators, against whom no relief is sought. It is not in dispute that the arbitrator was appointed at the request of the applicant, by the Association, to adjudicate the dispute between the parties. As will appear from what is set out below, once the arbitrator refused the application for his recusal, the applicant sought to challenge that decision before the Association in terms of its Rules for the Conduct of Arbitrations (2018 Edition), which are applicable to the present dispute.<sup>2</sup> The Association duly appointed a panel which subsequently dismissed the challenge, finding no basis for the complaint that King was biased. In the absence of an agreement by both parties to the arbitration consenting to the removal of the arbitrator, King concluded that he was bound by the Rules to remain ensconced in his position until such time as a Court declared otherwise. As such, he abides by the decision of this Court on the issue of his removal.

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<sup>2</sup> Article 12 Grounds for Challenge:

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.
2. A party may challenge the arbitrator appointed by it only for reasons of which it becomes aware after the appointment has been made.
3. In the event that an arbitrator fails to act or in the event of the *de jure* or *de facto* impossibility of his or her performing his or her functions, the procedure in respect of the challenge of an arbitrator as provided in article 13 shall apply.

#### Article 13 – Challenge Procedure

1. A party that intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances mentioned in articles 11 and 12 became known to that party.
2. The notice of challenge shall be communicated to all other parties, to the arbitrator who is challenged and to the other arbitrators. The notice of challenge shall state the reasons for the challenge.
3. When an arbitrator has been challenged by a party, all parties may agree to the challenge, in which case the arbitrator shall withdraw from his or her office. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.
4. If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the Association.

[4] Umhlatuze opposes Transnet's application for King's removal and the proposed remedies of a *de novo* hearing. King initially elected not to enter the fray and filed a notice to abide by the court's decision. However, upon Transnet amending its relief to include a 'disgorgement order,' requiring King to forfeit any remuneration received for his services rendered after 5 August 2021, King opposed the application. Transnet contends this is the date on which King should have been aware of the circumstances necessitating his recusal and when he ought to have made full disclosure. It argues that had King recused himself at this early stage, the subsequent costs incurred in both the arbitration and the current application would have been avoided.

[5] It is pertinent to point out that following the address by counsel for Transnet and Umhlatuze. I was advised by *Mr Pillay* SC, who appeared for Transnet, that it had agreed to withdraw its relief for the forfeiture of fees under section 13(3) of the Arbitration Act, and that it was agreed between the parties that Transnet would have no further claims against him. *Mr Pammenter* SC, who appeared for King, confirmed the agreement and further indicated that no costs would be sought by either party in respect of the present proceedings. What remained for determination by this court is the initial relief of whether the arbitrator ought to be removed. King's opposition to the first part of the relief – his removal – must be seen through his words in his opposing affidavit:

'no case has been made out which justifies my removal as arbitrator so there are no grounds to have me forfeit my remuneration. I wish to make it clear that I deal with this issue in the context only of demonstrating that the remuneration relief is incompetent.'

[6] Once Transnet withdrew its claim for the recovery of fees, King's position reverted, by necessary implication, to his initial position of abiding by the court's decision regarding his removal. He, however, raised various legal arguments, including the contention that the current proceedings by Transnet are not competent under the 2018 edition of the Arbitration Association's Rules. *Mr Naidoo* SC, on behalf of Umhlatuze, also advanced a similar argument. It was contended that, since the parties contractually bound themselves to resolve all disputes, including those at hand, through adjudication and arbitration if needed, the appeal panel's dismissal was the final word on Transnet's challenge and

effectively concludes the matter. Since these arguments were presented during the hearing, the court is obligated to address them.

[7] Transnet's application was brought on an urgent basis, citing the Arbitration Association's dismissal of its challenge and the scheduled resumption of the arbitration before King on 27 September 2022. According to Transnet, its request on 16 September 2022 for a postponement was denied. Consequently, Transnet initiated the current application, requesting an interim order to suspend the arbitration until the issue of the arbitrator's removal was definitively resolved. An interim interdict was granted by Kruger J on 22 September 2022. Transnet presented a transcript of the urgent proceedings from 26 September 2022, highlighting certain remarks made by the court regarding the arbitrator's refusal to recuse himself. However, I find those remarks are not definitive in determining the merits of the case before me. This is because the opposing papers filed by the first respondent were not considered when the matter was argued nor when the interim order was granted. Consequently, I find the views expressed by the court on 26 September 2022 not relevant to the matter at hand.

[8] The arbitration process between Transnet and Umhlatuze initiated in June 2021. The first pre-arbitration meeting took place on 8 July 2021. By that time, the parties had already agreed that King would serve as the arbitrator. The arbitration hearing was initially scheduled for November 2021, with anticipated continuation into January 2022. Transnet maintained the position that separating the issues of merits and quantum was not feasible. Shortly before the scheduled second pre-arbitration meeting, another division of Transnet SOC Limited, Transnet Pipelines, was engaged in an arbitration with a company called Spill Tech. On 2 August 2021, Transnet Pipelines initiated an urgent application in the Gauteng High Court<sup>3</sup> to prevent King from continuing with that arbitration. The application sought to determine whether King had the jurisdiction to preside over the dispute, or whether the courts held the proper jurisdiction.<sup>4</sup> Transnet

<sup>3</sup> *Transnet SOC Limited operating as Transnet Pipelines v Spill Tech (Gauteng) Pty Ltd, Spill Tech (Pty) Ltd and Julian King SC (21/36961)*.

<sup>4</sup> The dispute between Transnet and Spill Tech was whether a claim for loss of profit arising from a contract, fell to be adjudicated by arbitration or litigation. Transnet challenged the jurisdiction of Adv King to

Pipelines sought King's recusal based on assertions made in their founding affidavit, stating that:

'Mr King jumped the gun and decided a very important issue without giving the parties an opportunity to properly state their cases (let alone address necessary legal arguments) on whether the dispute falls under the contract and whether he has authority to determine it. *His approach has been unfortunate and flawed at best, and dismissive and callous at worst.* He appears to have predetermined that Transnet was trying to delay matters and is adamant that the adjudication must proceed before even understanding Transnet's concerns. He has left Transnet no choice but to approach the court or he is going to proceed and decide on the issue that he may not even have authority to decide and potentially order Transnet to pay over R117 million to Spill Tech.'<sup>5</sup> (Emphasis added.)

[9] According to Transnet Pipelines, its request was not intended to elicit a ruling on an interlocutory point but was a courtesy extended despite their disagreement with Spill Tech's stance that the matter warranted adjudication. King, in his ruling, stated: 'if I am interdicted from doing so by order of court, I will obey the order, but, until that happens, I must do my job'. In response to his ruling, Transnet's attorneys addressed a letter informing King that they had lost confidence in his ability due to his conduct, and they did not support his appointment as arbitrator.<sup>6</sup> Despite this, King refused to withdraw his decision regarding his jurisdiction, stating: 'I intend to do my job unless I am interdicted from doing so. Transnet must do as it thinks best,' and adding, 'my function is simply to decide disputes before me. I'm not here to 'assist the parties to resolve the disputes'. Transnet criticised King's ruling on his jurisdiction as being—  
'questionable at best, and downright unfair at worst...there is no need for Transnet to wait for Mr King to complete his charade before challenging the unfair manner in which he decided that he has jurisdiction to determine the claim'.

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adjudicate the matter to which he responded with a decision confirming his jurisdiction and in which he 'decided that he had jurisdiction to decide the dispute and intended to do so unless interdicted by a court of law'.

<sup>5</sup> Para 15 of the founding affidavit, case no.21/36961.

<sup>6</sup> Ibid at para 72.

[10] Such acerbic language directed at a senior legal practitioner in a founding affidavit is indeed concerning.<sup>7</sup> Transnet's criticisms in the Spill Tech matter indicated a perceived bias on King's part, prompting their application for his removal. King, in response to Transnet's application in the Spill Tech matter, addressed a letter to both the Registrar of the High Court, Gauteng, and the involved parties. His letter stated:

'The purpose of this letter is to record, in regard to both parts A and B of this application, that I abide the court's decision.

This matter is to be heard on the 12 August 2021, and I would be grateful if you would ensure that this letter is placed in the court file before then and its contents brought to the attention of the Judge presiding.

I record also, purely for the information of the Court, that I deny the disparaging remarks made in the applicant's papers about my alleged unfair / improper conduct in the adjudication which is the subject of this application.'

[11] On 11 August 2021, King delivered his decision in the matter between Transnet and Spill Tech, ruling in favour of Transnet. The following day, the urgent application seeking his removal as arbitrator was removed from the roll, rendering it moot in light of his prior ruling. Transnet argues that King should have disclosed the litigation in the Spill Tech matter, where they had sought his removal, at the earliest opportunity (5 August 2021) or during the pre-arbitration meetings with Umhlatuze, particularly the second meeting on 8 September 2021.

[12] On 29 October 2021, Transnet formally requested a postponement of the scheduled arbitration hearings set for 29 November to 3 December 2021. Their request was based on challenges in preparing their primary witness, Mr Lekoa, who had since left Transnet's employ, and difficulties in accessing essential documents required to prepare their witness. Umhlatuze initially opposed the postponement but later withdrew their opposition to avoid unnecessary costs. They opted to abide by the arbitrator's decision and requested, in a letter dated 2 November 2021, that any postponement be accompanied by an order holding Transnet liable for any resulting wasted costs. Transnet

<sup>7</sup> I personally consider such language, irrespective of the party to whom reference is being made, to be disrespectful. Regrettably, the use of such language to describe one's opponent seems to have gained traction in recent times. It is conduct that should be deprecated.

accepted liability for any wasted costs occasioned. Subsequently, the arbitrator inquired about the necessity of the postponement and raised the issue of separating the merits from the quantum.

[13] King's tone in his response led Transnet to inquire whether he had formed a *prima facie* view that they were being disingenuous in their request. Umhlathuze's attorneys then re-entered the fray, and while recognising that Transnet tendered any wasted costs occasioned, which was the cause of its initial opposition, it seemingly sought to align its position with that taken up by the arbitrator. It is for this reason that Transnet's attorney subsequently contended that Umhlathuze appeared to take up the invitation of the arbitrator to oppose the application for a postponement, albeit that no formal notice of opposition to the application for a postponement had been filed. In the same breath, the applicant's attorney took issue with the arbitrator delving into the separation of the merits and quantum when this was not an issue on which he had been asked to decide.<sup>8</sup> The seeds of discontent, at a glance, had already been sowed at this stage.

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<sup>8</sup> It is perhaps noteworthy to reflect on the dictum in *Fischer & Another v Ramahlele & others* 2014 (4) SA 614 (SCA) paras 13-15 where the following is stated:

'Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the Court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "it is impermissible for a party to rely on a constitutional complaint that was not pleaded". There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the Court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the Court to determine that dispute and that dispute alone.

It is not for the Court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship

between the parties. That is for them to decide and not the Court. If they wish to stand by the issues they have formulated, the Court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.

This last point is of great importance because it calls for judicial restraint. As already mentioned Gamble J "required" the parties to argue as a preliminary issue what he described as two issues of legality. Although he added that the parties were amenable to these proposals, counsel who appeared in this Court and in

[14] On 11 November 2021, King then delivered a twenty-six-page ruling, dismissing Transnet's application for a postponement and ordering them to bear the costs. Furthermore, he directed the separation of the calculation and measurement of damages, postponing this determination for a later date. As stated earlier, the latter aspect was not an issue on which King had been asked to decide. The arbitration was therefore to proceed on 29 November 2021. Upon receipt of the ruling, Transnet's attorney raised the following concerns on 22 November 2021:

'2. Our client wishes to place on record that we do not agree with your award, and we believe it was made outside of the ambit of your authority. The award on separation of issues was not predicated on any application for such, and creates the prospect of witnesses on the merits being called to testify on the merits, adverse findings been made and then having to be called to testify on quantum. . .

3. All of that aside, our client has raised grave concerns as to your impartiality in the matter and we are asked, respectfully, to make the following inquiries: -

(a) has the arbitrator ever acted for, or been involved, in any matter involving the defendant or any of the defendant's principals?

(b) has the arbitrator ever held a brief on behalf of MDA Attorneys, or any of the principal attorneys involved in that firm, or has the arbitrator acted as an arbitrator in any matter involving MDA Attorneys, and

(c) has the arbitrator ever acted against Transnet SOC Ltd?'

[15] King's responded stating that he had never been briefed by MDA Attorneys; that he is currently appointed to adjudicate a construction dispute between Transnet and another company, which is currently being held in abeyance pending settlement

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the court below, confirmed that the judge's own description, that he "required" the points to be argued, was accurate. They were not asked for their submissions on whether this was an appropriate approach to the matter or even, which was more pertinent, whether either question was in issue in the case. Nor were they asked whether their clients agreed to broaden the issues to encompass these points. The authority on which the judge relied in adopting this approach was not in point. That was a case where the Court, *on the application of one of the parties*, held that he could dispense with the hearing of oral evidence, notwithstanding the case having been referred for the hearing of such evidence, because the questions raised on the papers could be determined without hearing such evidence and the evidence could not affect the resolution of those issues. It is a far cry from that for a court to raise issues that do not emerge from the papers and have not been canvassed in the affidavits and require that those be argued instead of hearing oral evidence and deciding the issues raised by the parties.'

discussions. He further indicated that to the best of his recollection, he acted in the 1980's against Transnet in a personal injury matter, on behalf of a friend. In or about 2015, he recalls having acted against Transnet in a matter concerning the pipeline from Durban to Johannesburg. He denied any suggestion of his impartiality.

[16] Transnet contends that had King informed them that he was a respondent in a matter where Transnet SOC sought to interdict his involvement in an arbitration, they would have immediately sought his removal. They further argue that this, combined with his perceived 'bad attitude' and 'hostility' towards them in the current arbitration, makes him unsuitable to continue. Transnet contends that King's failure to disclose the Spill Tech litigation, especially given his later stance that Transnet SOC should have been aware of it as a single corporate entity, lacks reasonable explanation. They emphasise that at this point, the arbitration proceedings had not commenced, and neither Transnet nor Umhlathuze had incurred any additional costs.

[17] The arbitration commenced on 24 January 2022. During an exchange with counsel for Transnet, King inquired whether Transnet would consider itself bound by submissions made in a separate adjudication. This prompted Transnet's attorney to request specific details about the case King was referencing. According to Transnet, neither its counsel nor its attorney had any knowledge of the Spill Tech matter, which was litigated in the Gauteng High Court. Additionally, the Spill Tech matter involved Transnet Pipelines; a distinct entity from Transnet National Ports Authority, the applicant in the current proceedings.

[18] It was only on 28 January 2022, in response to Transnet's direct inquiry, that King revealed the details of case no: 36961/21 in the Gauteng High Court. He explained that this case involved Transnet seeking an interdict to prevent his continuation in an adjudication under a contract between Transnet and Spill Tech. King, however, omitted any mention of the allegations questioning his impartiality or the remarks Transnet attributed to him, which he labelled as 'disparaging'<sup>9</sup>.

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<sup>9</sup> Concise Oxford English Dictionary: (v) represents little worth; scorn.

[19] Transnet acknowledges that while impartiality is a matter of perception, it argues that King's actions, including his refusal to grant a postponement and his overall attitude towards them, particularly in light of the allegations levelled against him in the Spill Tech matter, raise serious concerns about his impartiality. They highlight his failure to disclose that Transnet had previously initiated legal proceedings against him, alleging impropriety in his conduct. Transnet asserts that the merits of the Spill Tech matter are not relevant to the current application. What is of concern is the nature of the allegations; the manner in which they were levelled; and King's response thereto, which Transnet submits is relevant to its contention that his failure to disclose this fact impacts his ability to bring an impartial disposition to the current arbitration. Transnet further posits that King's decision to rule in their favour, a day before the matter could be heard, was of no consequence. In this regard, Transnet submits that it is significant that King found the allegations in the Spill Tech matter offensive, using the term 'disparaging' to describe them. This conclusion is understandable considering the litigant's use of terms such as 'flawed, callous, dismissive, and unsuited' to describe an arbitrator's conduct.

[20] Accordingly, it was contended that any right-minded litigant, having levelled such remarks against an arbitrator and having regard to his response thereto, would likely apprehend prejudice in a subsequent hearing before the same arbitrator, especially one occurring just months later. What raises significant concern, in my view, is King's failure to voluntarily disclose this prior litigation, and his evasiveness even after direct inquiry. Transnet cited instances during the arbitration, including King's refusal to admit certain documents based on hearsay, even in the absence of objections from Umhlatuze, as evidence of his bias. However, I am of the view that the determination of 'good cause' for removing King as the arbitrator rests on the undisputed facts of the case. It is unnecessary to subject the proceedings to a granular examination of the language used. Rather, an objective and holistic view of the entire process is required to assess whether a fair hearing is attainable.

[21] The concluding event leading to the present application occurred on 14 February 2022. After being furnished with the necessary information and documents from the Spill

Tech matter, Transnet's attorney formally requested King to recuse himself. They challenged his continued authority as arbitrator, invoking Article 13 of the Association of Arbitrators' Rules.

[22] At the hearing before me, Transnet's counsel made the point that on receipt of the recusal application, King inquired with Umhlatuze whether they agreed with the challenge, in which event he would be obliged to withdraw. However, the wording of the email from King dated 14 February 2022 suggests an attempt, which Transnet no doubt perceived, that King was urging Umhlatuze to oppose the application.<sup>10</sup> This again nourishes Transnet's overall perception that King was not approaching the matter in an impartial manner.

[23] Umhlatuze presented a detailed rationale for opposing the recusal application. In broad, it contends that the challenge to King's authority is contrived for the purpose of obstructing the arbitration process. They submit that a *de novo* arbitration would unfairly prejudice Umhlatuze, who has diligently pursued resolution for their claims dating back to 2017. Furthermore, Umhlatuze highlighted the financial disparity, noting that while they faced significant costs for a matter originating in 2017, Transnet's legal expenses were conveniently covered by public funds. Addressing the Spill Tech interdict, Umhlatuze clarified that the application was not based on allegations of bias against King, but rather challenged his jurisdiction in a matter they argued was outside the agreed-upon scope and not subject to arbitration. They contend that the Spill Tech matter had been resolved with King ruling in favour of Transnet. Lastly, Umhlatuze maintained that King's response to the inquiry about prior involvement with the first respondent or their attorneys was satisfactory and did not require any reference to the Spill Tech case. Based on these points, Umhlatuze opposed King's recusal as arbitrator.

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<sup>10</sup> The email from the arbitrator ('JK4') dated 14 February 2022 reads in part as follows: 'Article 13.1 provides that if the defendant agrees to the challenge I must withdraw. Thus, it seems the first question to be asked is what position the defendant takes on that subject? If the defendant does not so agree, then, as I understand the article, it falls upon me to consider whether I should withdraw. In that event, the defendant wishes to make on the subject, so that I have the fullest picture before me. Deadlines must be met, and I request the defendant to deal with the matter urgently.'

[24] On 8 March 2022, King delivered his decision on Transnet's application for his recusal. In dismissing the application, he stated that he '*did not ever consider that the circumstances of the Spill Tech case were such as to require disclosure under Article 11*'. He maintained that the application in the Spill Tech matter did not concern misconduct but rather his authority to adjudicate. Addressing the language used in Transnet Pipelines' founding affidavit, which he deemed 'disparaging' at the time, the following was stated:<sup>11</sup>

'Transnet Pipelines also voiced objections to the way in which I had gone about the adjudication process, contending that I was simply wrong in my approach. The claimant has referred to the strong and colourful language used by Transnet Pipelines in criticising my methodology, but it must be pointed out that Transnet Pipelines did not accuse me of bias. It simply said that I was wrong.

Both then and now, I considered the accusations made by Transnet Pipelines to be clearly the sort of rhetoric that one might expect of a party seeking desperately to bolster its case. One cannot practice for 45 years as a litigation lawyer (as I have) without dealing with such criticism. Apart from anything else, that is what appeals and reviews are all about.'

[25] King concluded that a reasonable person, after reading his decision in the Spill Tech case, could not objectively and reasonably find him biased against Transnet Pipelines. *Mr Pillay* for Transnet stressed that it was the process and not the outcome which was of significance in the matter. Insofar as the contention that he suppressed information relating to the Spill Tech case, King concedes that he was aware of the circumstances of the case, but as far as he was concerned, it was not a matter that even remotely suggested an obligation to disclose it. In support of his contention, he drew on *S v Radebe*<sup>12</sup>, citing Lord Denning's observation that:

'The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit.'

<sup>11</sup> Annexure 'AA1' to the First respondent answering affidavit, paras 4.7-4.8

<sup>12</sup> *S v Radebe* 1973 (1) SA 796 (A) 811-812.

[26] King averts to the fact he raised the Spill Tech matter with the applicant's counsel in jest, suggesting the opposite of someone harbouring a bias. He accordingly dismissed the application to challenge his authority as arbitrator. Following his decision, Transnet referred the matter to the third respondent, the Association of Arbitrators, for review in accordance with the Rules. A three-person panel, which included a retired judge, dismissed the appeal. In advancing their case before the third respondent, Transnet submitted that Article 11 imposes a duty on the arbitrator, *without delay*, to disclose any circumstances which may lead to justifiable doubt about his or her impartiality. It was further submitted that this imposes an immediate and automatic duty on the arbitrator, not one that requires a litigant to have to unearth, or uncover, such circumstances.

[27] The third respondent acknowledged that the duty of disclosure rests with the arbitrator. In assessing Transnet's complaint, the panel noted that partiality arises when an arbitrator exhibits favouritism toward one party. The third respondent placed reliance on the decision in *Umgeni Water v Hollis N.O and Another*<sup>13</sup> noting that the onus of proving the arbitrator's lack of impartiality falls on Transnet. Furthermore, the third respondent formed the view that since Transnet was a party to the Spill Tech litigation, it follows that it was aware of it when its attorney wrote to the arbitrator in January 2021. I, however, struggle to see how this conclusion was reached particularly in light of Transnet Ports Authority and its attorney stating under oath that they were not aware of the Spill Tech litigation until King's disclosure. There is nothing on the papers to gainsay this version. The third respondent went on to dismiss the remaining complaints of Transnet pertaining to examples of alleged bias, as could be gleaned from a reference to the evidence at the arbitration. It relied on *Umgeni Water*<sup>14</sup> as authority for a "certain tolerance for the hurly-burly" inherent in litigation and trial hearings. They concluded that King's 'at times robust approach is not, without more, necessarily indicative of bias or partiality.' The panel determined that a reasonable, right-minded lay litigant would not have cause to suspect prejudice or bias. Consequently, the challenge against King's decision not to recuse himself was dismissed, with costs awarded against Transnet.

<sup>13</sup> *Umgeni Water v Hollis NO and Another* [2012] ZAKZDHC 10; 2012 (3) SA 475 (KZD) (*Umgeni Water*).

<sup>14</sup> *Ibid* at para 42.

[28] Having exhausted all internal remedies available to it, and in light of the arbitrator remaining ensconced in his position, the applicant turned to this Court on an urgent basis to interdict King from continuing with the proceedings in respect of which he was contractually obliged to adjudicate. It bears noting that while the parties contractually agreed to submit the resolution of their dispute to arbitration, it was not contended by Umhlatuze that the applicant was precluded from relying on s13(2) of the Act to remove the arbitrator, despite resorting to a procedure in terms of the Rules to challenge the decision of the arbitrator and the eventual dismissal of the challenge by the three-member appeal tribunal.

[29] King, in his opposing affidavit, echoed the notion that Transnet's true motivation for the recusal application and their request for the arbitration to start *de novo* was to strategize and revise their approach against Umhlatuze. On either score, Umhlatuze contends that neither the non-disclosure of the Spill Tech matter nor King's decision to deny a postponement, meet the criteria for removing an arbitrator. The same, they submit, applies to King's decision to refuse a postponement sought by the applicant. In defence of King, Umhlatuze argues that such a decision falls within the arbitrator's discretion, even if the parties had a pre-existing agreement. Transnet, however, grounds its application for King's removal on their statutory right conferred by s 13(2) of the Arbitration Act. They assert that the court may exercise its 'residual jurisdiction' to address this matter based on 'good cause' as outlined in s 3(2). Support for this view is found in *Hyde Construction CC v The Deuchar Family Trust and Another*<sup>15</sup>, where the removal of the arbitrator by the high court was confirmed on appeal.<sup>16</sup> The following was said:

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<sup>15</sup> *Hyde Construction CC v Deuchar Family Trust and Another* 2015 (5) SA 388 (WCC) at paras 67-69 (*Hyde Construction*).

<sup>16</sup> The removal of the arbitrator was sought in circumstances where counsel for one of the parties had appeared against the arbitrator, who was the plaintiff in the matter. His claim was dismissed with costs. Several years after the judgment, and after the commencement of the arbitration, the arbitrator applied for leave to appeal in which he made scathing remarks concerning the propriety of counsel's conduct in the matter. Having learnt of this, the party represented by the counsel to whom the remarks were attributed, applied for the arbitrator's removal. The arbitrator, despite request, refused to step down, after which urgent proceedings were launched for the stay of the proceedings pending the arbitrator's removal, which was

'These reasons, I hasten to add in fairness to Du Toit, are not concerned with his honesty and integrity but only with the manifest inappropriateness of his continuing to function as the arbitrator after expressing such strong criticism of the DFT's counsel in relation to litigation in which he (Du Toit) was a litigant.'<sup>17</sup>

[30] King, however, disputes Transnet's right to invoke s 13(2) of the Arbitration Act. He argues that since the parties contractually agreed to abide by the Association's Rules, and the appeal panel has already dismissed the challenge, Transnet has no further recourse. He asserts that mere disagreement with the panel's decision does not constitute 'good cause' for his removal under s 13(2). Relying on the dictum in *Lufuno Mphaphuli and Associates v Andrews and Another*<sup>18</sup> King posits that once parties have committed to resolve their disputes through arbitration<sup>19</sup>, they cannot pursue further challenges in court. Even if this court were deemed competent to hear this matter, he maintains that Transnet has not established 'good cause' to justify his removal.

[31] In circumstances where a court is asked to remove an arbitrator after the Association's appeal panel has already ruled on the matter, King contends that the question that must arise is whether the parties agreed to the process which led to the findings, and did they agree to be bound by the outcome. I, however, find the attempt to correlate *Lufuno* with the present matter unconvincing. *Lufuno* dealt with the integrity of the arbitration process and the limited scope for court intervention in a contractually agreed-upon process. Therein lies the point of divergence: Transnet's contention is not with King's qualifications, competence, or procedural adherence to the Rules. Rather, Transnet's grievance relates to King's perceived partiality, as exemplified by his failure to disclose the Spill Tech matter when he should have, coupled with his conduct during the

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eventually brought under s13(2) of the Act as the litigating party considered the deposit to pursue an internal appeal to the Association of Arbitrator's to be prohibitive. The high court set aside the arbitrator's appointment as well as directing that he was not entitled to any remuneration in the circumstances. The decision was upheld on appeal to the full court.

<sup>17</sup> *Hyde Construction* above at para 76.

<sup>18</sup> *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) (*Lufuno*).

<sup>19</sup> In *Russell v Russell* (1880) 14 Ch D 471, 474, Sir George Jessel MR said of arbitration:

"As a rule, persons enter into these contracts with the express view of keeping their quarrels from the public eyes, and of avoiding that discussion in public, which must be a painful one, and which might be an injury even to the successful party to the litigation, and most surely would be to the unsuccessful."

course of proceedings, which conveyed, according to Transnet, the impression of a reasonable apprehension of bias on the part of the arbitrator.

[32] The argument that s 13(2) cannot be resorted to, following a challenge under Article 13, is not persuasive in my view. I say so for the following reasons. King alludes to the introductory remarks, which appear before the Table of Contents to the Rules. The relevant paragraph, seized upon by him in support of his contention that the court has no jurisdiction in the present matter, reads as follows:

‘By electing to use and apply these Rules the arbitral tribunal and the parties agree to submit to the authority of the Association for the purposes of the Association exercising its functions in terms of the Rules and the parties agree to pay on demand any fees and disbursements as may be levied by the Association in its sole discretion.’

[33] Transnet contends that the tribunal is an oversight committee, and it is not part of the arbitration process. Support for this proposition, in my view, can be found in Article 1, item 5 of the Standard Procedure Rules for the Conduct of Arbitrations (7th Edition), which provides—

‘These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of a law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail’

[34] To the extent that the Rules govern the parties and bind them to the decision of the arbitrator, there can be little doubt. However, in the case of a challenge to the authority of an arbitrator where there are doubts as to his or her impartiality, a specific mechanism is designed for this purpose. A decision that emanates from such a referral is not the same as an award of the arbitrator. The contention on behalf of King is that once a party resorts to the internal challenge provisions, it is deemed to be bound by the decision. This in some way is suggestive of a waiver of a party’s rights under s13(2). There is nothing in the Rules from which one may infer that the parties intended the decision of the arbitral panel to be binding on them, or that they contemplated the

exclusion of s 13(2) to any decision of the panel. I am inclined to agree with the reasoning in *Hyde Construction*<sup>20</sup>. Of particular relevance are the following passages:

"Waiver is not presumed, and the onus rests on the party alleging it (here, Hyde). Clear proof is required of an intention to waive. The conduct from which waiver is inferred must be unequivocal, ie consistent with no other hypothesis (*Road Accident Fund v Mothupi* supra para 19). This brings me to a consideration of the word 'varied' in rule 2.

'Varied' as used in rule 2 appears to envisage a provision of the rules which is inconsistent with a provision of the Act, because it is only in the case of inconsistency that the rules could be expected to exclude rather than operate alongside the Act. So if it is contended that a particular rule has 'varied' the Act, one must examine the rule in question to ascertain whether its operation is inconsistent with the Act. Formulated with reference to the principles of waiver, the question is whether rule 9 unequivocally manifests an intention to oust s 13(2) and that such an interpretation is consistent with no other hypothesis.

Rule 9 does not state that it operates to the exclusion of s 13(2). It affords to a party the right to bring an application to the Association to appoint a committee to consider the removal of an arbitrator on specified grounds. It is probable that those grounds are as wide as those which a court could take into consideration in an application in terms of s 13(2) but this does not give rise to a necessary inference that the rule 9 procedure was mandatory and exclusive rather than permissive. As I have said, the matter with which rule 9 deals, namely the removal of an arbitrator, is not concerned in any direct way with the arbitral dispute and matters truly interlocutory to the determination of the dispute, and therefore the natural inference that the parties intended to exclude the court's jurisdiction is not present. If a party fails to lodge the rule 9 application or the relevant fee within the time limits laid down in the rule, his right to challenge the arbitrator's appointment in terms of rule 9 falls away. Non constant that he loses his right to approach the court in terms of s 13(2).' (Emphasis added.)

[35] Therefore, I am not persuaded by the argument that Transnet's use of the internal challenge procedures constitutes a waiver of their right to approach the court under s 13(2) following the arbitral panel's decision. If any party were bound by that decision, it would logically be the appointed arbitrator, as a member of the Association, not Transnet. The benchmark for removing an arbitrator due to concerns about impartiality or bias is met if a reasonable person could perceive a possibility of prejudice. Transnet contends

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<sup>20</sup> *Hyde Construction* above fn 15 at paras 65-67.

that the arbitrator intentionally withheld information about the interdict sought against him in the Spill Tech matter, despite their earlier concerns regarding his perceived partiality stemming from his conduct and rulings in the present arbitration. While Transnet initially suggested actual bias, *Mr Pillay*, who appeared on its behalf, later conceded that demonstrating a reasonable apprehension of bias was sufficient.

[36] King was asked on 22 November 2021 whether he had ‘ever acted for or been involved in any matter involving the defendant or any of the defendant’s principals’ and whether he had “ever acted against Transnet SOC Limited?’. He denied having acted for Umhlathuze or having been briefed by their attorneys. As regards Transnet SOC Limited, King cited two matters from around 1980 and 1989, in his 45 years of practice. What is striking in my view is that he makes no mention of the interdict sought against him from continuing with an arbitration, which arose just 5 months earlier.<sup>21</sup>

[37] I accept that the Spill Tech interdict did not fall squarely within the ambit of the enquiry whether he had acted ‘against Transnet SOC’, but it can hardly be said when responding to the enquiry that King would not have considered the most recent litigation in which Transnet SOC Ltd had sought an interdict directly against him. It was only when King made what appeared to be an inadvertent remark to counsel for the applicant on 24 January 2022 regarding whether Transnet would be bound by submissions it had made in another arbitration, that a further enquiry directed to the arbitrator, trenchantly enquiry from him to provide details of the case he was referring to.

[38] It is evident from Transnet’s attorney’s letter to the arbitrator on 27 January 2022 that Transnet already had misgivings about the arbitrator’s impartiality. It is only when the enquiry is put in blunt terms to the arbitrator, did he respond with details of the interdict sought against him by Transnet SOC in the Spill Tech matter. Although the matter was removed from the Roll on 12 August 2021, the arbitrator wrote to the Court recording that he denied the disparaging remarks made in Transnet’s papers about his alleged unfair and improper conduct in an arbitration. While it is true that Transnet did not allege actual

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<sup>21</sup> Case No. 21/36961 was issued out of the Gauteng High Court on 2 August 2021.

bias or impartiality against the arbitrator<sup>22</sup>, by his own admission he considered the statements attributed to him (within days of having received notice of the application) to be 'disparaging'. This categorisation of Transnet Pipelines' accusations was made a time when the matter was fresh in King's mind. By this stage, the first pre-arbitration meeting had already been held, with another meeting scheduled for September 2021. In his ruling dated 8 March 2022 on the application for his recusal, he downplayed the seriousness of the accusations, choosing to describe them as 'strong and colourful'.

[39] *Mr Pillay* for the applicant submitted that on a proper interpretation of Article 11.1, it refers to disclosure of 'any circumstances' likely to give rise to doubts as to an arbitrator's impartiality. This firstly arises when someone is approached to arbitrate a dispute. Article 11.1 however also encompasses an on-going or continuing obligation to make disclosure, without delay, 'from the time of his or her appointment and throughout the arbitral proceedings'.

[40] Transnet submits that the events which have unfolded in the arbitration before King, before and after his eventual disclosure of the Spill Tech matter, strengthen its conviction of a real likelihood of bias on his part. It is therefore not just a perception of bias on which Transnet relies, but it also points to actual instances in the arbitration which only serve to entrench the perception of impartiality. In this regard, Transnet contends that King has shown 'open hostility' to it and their legal representatives, accusing them of being 'arrogant'. The first respondent however contends that the instances of the arbitrator's conduct being referred to are intended to provide supporting evidence of a manifestation of bias towards Transnet, which originated in the Spill Tech matter. King submits that none of the examples cited by Transnet, either alone or collectively, provide the necessary support for the contention of a perceived bias. They accordingly do not meet the test for recusal.

[41] Against this backdrop, Transnet cites as an example of King's partiality, him actively cajoling Umhlatuze as to its approach in opposing applications brought by

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<sup>22</sup> Transnet appeared to vacillate on this point

Transnet. For example, in an email dated 20 September 2022, after Transnet amended its relief to seek a refund of remuneration paid to King, the latter remarks that although he intends to abide by the decision of the court, the papers filed by Transnet do not contain his decision in the Spill Tech matter nor any of the papers which served before the Association of Arbitrators. The opportunity was not lost, and King elected himself to place before the court all of the information that he requested Umhlathuze to include in its papers. It is against this standard that King's conduct must be objectively assessed. In yet another email dated 24 September 2022, he remarked that Transnet knew of the existence of the Spill Tech matter for six months, without taking any action. He further intimates that the existence of the Spill Tech matter could not have been as suppressed as Transnet now suggests. He states, 'All it had to do was to make enquiries within its own organisation (*and it should not hide behind the existence of divisions within one company . . .*)' (Emphasis added.)

[42] This view aligns with the narrative of Umhlathuze and the decision of the Association of Arbitrators that Transnet Ports Authority should have known of the existence of the Spill Tech litigation, despite the protestation of the National Port Authority that Transnet is an employer to several thousand employees, and it only came to know of the matter after disclosure by King. The tone of the email above is suggestive of a stratagem that the applicant is seeking refuge behind a corporate veil, and that in reality it either had or could easily have had access to the information subsequently disclosed by the arbitrator. In this context, Transnet submits that any right-minded person is likely to appreciate a real likelihood of bias on the part of the arbitrator. For that reason, any decision that eventuates in which the arbitrator is left to adjudicate will be bereft of any legitimacy. In *Metropolitan Properties Co. (F.G.C.), Ltd. v Lannon and Others*<sup>23</sup>, Lord Denning reflected on the spectre of bias, stating:

'The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand.'

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<sup>23</sup> *Metropolitan Properties Co. (F.G.C.), Ltd. v Lannon and Others* (1968) 3 All E.R. 304 at 310.

[43] Transnet sought to persuade me to have regard to the views expressed by Kruger J, at the stage of the granting of interim relief, as an indicator of how the arbitrator's conduct could be viewed by right-minded persons. For reasons which I have already set out, I am of the view that this argument finds no traction. The foundation of a fair and just legal system is the impartial adjudication of disputes. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias.<sup>24</sup>

[44] The Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*<sup>25</sup> set out the test for recusal of a judicial officer.<sup>26</sup>

'It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel...At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if

<sup>24</sup> *Basson v Hugo & others* (968/16) [2017] ZASCA 192 at para 25-26:

'As was held in *Sarfu* (supra para 48), an impartial Judge (or other presiding officer) is a fundamental prerequisite for a fair trial and a presiding officer should not hesitate to recuse herself or himself where a litigant has reasonable grounds to apprehend that the presiding officer, for whatever reason, was not or will not be impartial. Impartiality, the Constitutional Court has said, 'is the keystone of a civilised system of adjudication'; and an absolute requirement in every judicial proceeding and proceedings before other tribunals (see also *South African Commercial Catering & Allied Workers Union & others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* [2000] ZACC 10; 2000 (3) SA 705 (CC) para 13). The reason is that:

'A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before courts and other tribunals. . . . Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes' (*Sarfu supra para 35; Saccawu supra para 13*).

The rule against bias is thus firmly anchored to public confidence in the legal system and extends to non-judicial decision-makers such as tribunals. And the rule reflects the fundamental principle of our Constitution that courts and tribunals must not only be independent and impartial but must be seen to be such; and the requirement of impartiality is also implicit, if not explicit in s 34 of the Constitution (*Bernert v ABSA Bank Ltd* 2011 (3) SA 92 (CC) paras 28 and 31).'

<sup>25</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 at para 48.

<sup>26</sup> See also *Sager v Smith* 2001 (3) SA 1004 (SCA) at para [17] which affirmed the 'double requirement of reasonable', in that objectively, not only that the person apprehending the bias must be a reasonable person, but also that the complaint must be reasonable.

there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial' (Emphasis added.)

[45] Those standards, in my view, would apply equally to an adjudicator or an arbitrator. In *Ndlovu v Minister of Home Affairs and Another*<sup>27</sup> Wallis J, having regard to the test set out in *SARFU*, recorded his view on the matter as follows:

'The correct approach to an application for a recusal is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not brought or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and the submissions of counsel. Two factors are of fundamental importance in this regard. The first is the presumption of impartiality arising from the judge's oath of office requiring him or her to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law and their ability, by virtue of their training and experience, to put on one side any irrelevant matter or predisposition that they may have in regard to a case. The second is the double-requirement of reasonableness in that both the person who apprehends bias and the apprehension itself must be reasonable.'

[46] The critical issue in my view is whether there was a duty on King, having become aware of the nature of the allegations against him by Transnet in the Spill Tech matter, to have as soon as possible thereafter, disclosed the existence of that litigation, as well as his response thereto. King dismisses any suggestion that he had to make disclosure or that he suppressed the information because (as Transnet contends) he knew or should have known that it would give rise to a reasonable suspicion of bias, and if known, Transnet would have sought his immediate removal. King's attitude is that while he was always aware of the Spill Tech matter he never considered 'even remotely' that it was a matter that warranted disclosure. Although he delivered his decision in favour of Transnet, that decision was the subject of further challenge by Spill Tech. This Court has not been advised of the grounds of that challenge. Transnet does not agree that the ruling can be interpreted as a nod to King's impartiality.

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<sup>27</sup> *Ndlovu v Minister of Home Affairs and Another* [2010] ZAKZDHC 79 at para 21.

[47] Our Courts have expressed themselves clearly on the test for recusal. As stated earlier, despite the majority in *Lufuno* making it clear that section 34 of the Constitution does not directly apply to private arbitrations, it is implicit that any such dispute resolution mechanism is underpinned by the process being fairly conducted. For those reasons, the Constitutional Court held<sup>28</sup> that the values of the Constitution would not be best served by enhancing the powers of the courts to set aside private arbitration awards. As stated earlier, my point of departure from *Lufuno* and the present case is that Transnet is not seeking to aside the decision of the arbitral panel. That relief is nowhere found in the papers. Transnet contends that the decision by the panel was part of its 'oversight role' into whether one of the Association's members (King) 'mis-stepped' – was he obliged to make disclosure of the Spill Tech matter. The secondary enquiry was his conduct in the arbitration such as to convey the impression of partiality. It exonerated him.

[48] It must be noted that in advancing his argument on behalf of Transnet, *Mr Pillay* at no stage sought to cast any aspersions on the professional competence of Advocate King SC or to attribute any deliberate conduct to him. Counsel accepted, as does the court, that the enquiry is an objective one, namely how would a fair-minded and informed observer, having considered the facts, conclude whether there was a real possibility that the arbitration tribunal was biased.<sup>29</sup>

[49] *Halliburton Co v Chubb Bermuda Insurance Ltd and Others*<sup>30</sup>, a decision of the UK Supreme Court, is the leading English authority as to when an arbitrator should make disclosure of circumstances which may give rise to justifiable doubts as to his impartiality. The issue was whether, and to what extent, an arbitrator may accept multiple arbitration references, without making a disclosure to the parties. The facts briefly concern an arbitration arising from the rejection of a claim under an insurance policy where a fire had broken out on a drilling rig in the Gulf of Mexico. Halliburton was the provider of certain cementing services to BP which had leased the rig. Transocean was the owner of the rig

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<sup>28</sup> See *Lufuno* at para 235

<sup>29</sup> *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, para 103; *Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 WLR 2416

<sup>30</sup> *Halliburton Co v Chubb Bermuda Insurance Ltd and Others* [2021] 2 All ER 1175.

and provided the crew. Both Transocean and Halliburton entered into a liability policy with Chubb. A fire broke out on the rig resulting in numerous claims. Halliburton settled the claims at trial but sought to claim from Chubb, as did Transocean. The matter was referred to arbitration and the parties were unable to agree on the adjudicator. Eventually, after a High Court hearing, Mr R was appointed as arbitrator. Subsequently and without Halliburton's knowledge, R accepted an appointment as an arbitrator in two matters arising from the same incident giving rise to the claim involving Halliburton and Chubb. On discovering this, Halliburton applied to court to remove R as arbitrator, which was refused. On appeal, the Court of Appeal found that while R ought to have made disclosure of his appointments, an objective observer would not in the circumstances conclude that there was a real possibility that R was biased. A further appeal to the UK Supreme Court dismissed the challenge, confirming that a fair-minded and informed observer would not conclude that circumstances existed that gave rise to justifiable doubts about R's impartiality. The Supreme Court affirmed that the duty of impartiality is a core principle of arbitration law and the test is whether the fair-minded and informed observer would conclude there is a real possibility of bias.

[50] Importantly in the context of the present matter, the Supreme Court observed that the duty of disclosure is not simply good arbitral practice, but is a legal duty in English law. It is a component of the arbitrator's statutory obligations of fairness and impartiality. The Court observed that:

'One way in which an arbitrator can avoid the appearance of bias is by disclosing matters which could arguably be said to give rise to a real possibility of bias. Such disclosure allows the parties to consider the disclosed circumstances, obtain necessary advice, and decide whether there is a problem with the involvement of the arbitrator in the reference and, if so, whether to object or otherwise to act to mitigate or remove the problem.'<sup>31</sup>

[51] Reference was made to *Davidson v Scottish Ministers*<sup>32</sup> which held that:

'[T]he best safeguard against a challenge after the event, when the decision is known to be adverse to the litigant, lies in the opportunity of making a disclosure before the hearing starts.

<sup>31</sup> *Halliburton Co v Chubb Bermuda Insurance Ltd and Others* [2021] 2 All ER 1175 at para 70.

<sup>32</sup> *Davidson v Scottish Ministers* (No 2) [2004] UKHL 34; 2005 1 SC (HL) at para 54.

That is the proper time for testing the tribunal's impartiality. Fairness requires that the quality of impartiality is there from the beginning, and a proper disclosure at the beginning is in itself a badge of impartiality.'

[52] The point emphasised by Transnet's counsel before me is that the duty rested on King to have made disclosure of the Spill Tech matter as soon as it came to his attention in August 2021. The second pre-arbitration meeting was scheduled for September 2021, which would have presented the opportunity to make this disclosure, if not earlier. Had he done so, counsel submitted that Transnet would have done the necessary investigation and having regard to the contents of the affidavits in the Spill Tech matter, would have sought the arbitrator's removal. Put differently, it was not for King to decide whether the disclosure would give rise to a reasonable suspicion of bias, or as he says in his opposing affidavit "a matter which even remotely suggested an obligation to disclose it".<sup>33</sup> As pointed out in *Halliburton*<sup>34</sup> an arbitrator may fail to make disclosure for entirely honourable reasons, such as forgetfulness, oversight, or a failure properly to recognise how matters would appear to the objective observer. But as Lord Bingham of Cornhill stated in *Davidson*: '[h]owever understandable the reasons for it, the fact of non-disclosure in a case which calls for it must inevitably colour the thinking of the observer'. Unless there is disclosure by the arbitrator, a party such as Transnet may have been unaware of a matter which could, and did, give rise to justifiable doubt about an arbitrator's impartiality, leading to a call for his removal.

[53] The issue therefore is whether King's failure to disclose relevant matters is a factor for a fair-minded and informed observer to take into account in assessing whether there is a real possibility of bias, having regard to the facts and circumstances at the time when the duty arose. It bears noting that Transnet's concerns about King's impartiality were piqued fairly early on when he refused an application for a postponement, despite a tender of costs and despite there being no initial opposition from Umhlatuze. Subsequent to that, further enquiries were directed, eventually eliciting the disclosure of the Spill Tech

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<sup>33</sup> *Haliburton* at para 107: "An arbitrator can disclose only what he or she knows and is, as a generality, not required to search for facts or circumstances to disclose".

<sup>34</sup> *Ibid* para 73.

matter. The duty of disclosure is rooted in the duty of impartiality but is also an implied (if not express) term of the arbitrator's appointment. To that end, it may be contended, and I would agree, that an essential corollary of the implied requirement of an arbitrator to act fairly, should include the legal duty to make disclosure.

[54] I agree with *Mr Naidoo* SC who appeared on behalf of Umhlathuze that an arbitrator is not expected to recuse himself at the 'ghost' of a suggestion that he or she is biased or impartial.<sup>35</sup> The authorities to which I have referred to earlier correctly point to a double standard of reasonableness that must be overcome by a complainant. I have had careful regard to the submissions of the applicant and to those of the respondents, and I am of the respectful view that Adv. King breached the duty on him to have made disclosure as soon as he had become aware of it. The application for his removal, according to counsel for Transnet, was brought after careful consideration of all the circumstances. The duty of disclosure is rooted in the duty of impartiality but is also an implied (if not express) term of the arbitrator's appointment. The Rules of the Association make that apparent. I, therefore, disagree with the conclusion reached by both King (in his application for recusal) and the arbitral panel (which found that the eventual disclosure of the Spill Tech was not a factor that would give rise to a reasonable suspicion of bias). For reasons set out above, as King breached the duty to disclose, I am satisfied that the facts of the matter warrant the granting of an order for his removal as arbitrator in the dispute between the applicant and the first respondent.

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<sup>35</sup> In *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, the Court of Appeal (Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott V-C) addressed the circumstances in which judicial office holders may be required to disqualify themselves from hearing a case. The court stated (para 25) that it would be dangerous and futile to attempt to define or list the factors which may or may not give rise to what we now describe as a real possibility of bias; "[e]verything will depend on the facts, which may include the nature of the issue to be decided". The court stated (para 21):

"If objection is then made, it will be the duty of the judge to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance."

The court went on (para 22) to cite with approval dicta of Mason J in the High Court of Australia in *In re JRL, Ex p CJL* (1986) 161 CLR 342, 352:

"Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

[55] There is a further reason why that order should be granted. In light of the missives exchanged between the applicant's legal representatives and those of Umhlatuze, as well as towards the arbitrator who has been accused of acting in a manner that raises the likelihood of impartiality and bias, I believe that too much water has passed under the bridge for the parties (or for the applicant, at least) to have confidence that King will render an unbiased verdict. Arbitration, at its core, is based on the voluntary appointment and submission to an adjudicator, someone whom the parties have confidence in to rule fairly and impartially with regard to their dispute. That confidence, in my assessment, has been severely dented, even though the applicant attributes no actual bias towards the arbitrator, nor attacks his competency. An adjudicator is human and fallible. It cannot be that someone in that position is entirely unaffected by the public scrutiny, in minute detail, of his conduct in proceedings which are intended to be private and away from the glare of the public. Ultimately, the parties must be in a position to respect the outcome of the decision, whatever it may be. I cannot see the applicant doing so in the event that King was to remain in the process and issue an award against it.<sup>36</sup> The onus on the applicant can be met without having to achieve the standard of showing actual bias. All that is necessary is a reasonable apprehension of bias, which standard I am satisfied it has met in the present application. Despite the arbitrator's protestations of his impartiality, it is not what he thinks, but rather what a reasonable, informed person would apprehend.

[56] Umhlatuze's opposition to the application for King's removal and that the matter commences *de novo* before a new arbitrator was based, in my view, on mitigating any further hardship in trying to achieve satisfaction for a long outstanding judgment in its favour. This led to it contending that Transnet, very late in the arbitration proceedings, sought to challenge the arbitrator's impartiality. Umhlatuze states that the proceedings

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<sup>36</sup> See *Hyde Construction* at para 76 where the following was said"

'The grounds for Du Toit's removal is the aspect on which the least need be said. I have nothing to add to the reasons given by Blignault J for his conclusion that Du Toit should be removed. These reasons, I hasten to add in fairness to Du Toit, are not concerned with his honesty and integrity but only with the manifest inappropriateness of his continuing to function as the arbitrator after expressing such strong criticism of the DFT's counsel in relation to litigation in which he (Du Toit) was a litigant.'

were on the cusp of completion when the challenge was mounted. I am not persuaded that the decision by Transnet to mount its urgent application can be equated to the timing of the 'shoe-pinching' in *Take & Save Trading CC v Standard Bank of SA Ltd*<sup>37</sup>. It afforded King sufficient opportunity to consider his position, bearing in mind that it was King and not Transnet who failed to make the disclosure.

[57] Moreover, the argument that Transnet, as a corporate entity, ought to have had collective knowledge of the litigation which any one of its business units is engaged, at any particular time, is in my view, is without merit. The attorney representing the National Ports Authority, based in Durban, can hardly be expected to have knowledge of an urgent application launched by a different business unit, Transnet Pipelines, in the Gauteng High Court, or that the deponent to the founding affidavit made caustic remarks about the arbitrator. In the absence of any proof by Umhlatuze, such argument must fail.

[58] Umhlatuze's counsel submitted that even if I were disposed to granting an order for the removal of the arbitrator, I should not order the proceedings to commence *de novo*. The point advanced by *Mr Naidoo* is that the decision of Transnet to raise the issue of bias on the part of the arbitrator emerged when the matter was nearing completion – and well after the applicant had closed its case. On that basis, it was contended that the applicant cannot complain that it did not have a proper opportunity to present its case. Accordingly, no good reason exists as to why the proceedings should commence *de novo* which would entail significant expenses to essentially present, for the second time, evidence that had already been ventilated. To that end, it was contended by Umhlatuze that a more sensible approach would be to order that the proceedings continue from where they had stopped, but before a different arbitrator. While this process may entail significant cost savings for the parties, I am of the view that there is no merit in having the process (albeit that it is close to completion) continue before a new arbitrator. I believe that the option of proceeding before a new arbitrator would be burdened by various pitfalls. It would require that the new arbitrator may have to make credibility findings

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<sup>37</sup> *Take & Save Trading CC and Others v The Standard Bank of SA Ltd* [2004] ZASCA 1; 2004 (4) SA 1 (SCA).

without the benefit of hearing and observing witnesses in person. The new arbitrator may find that he or she is reluctantly hamstrung and bound by rulings in respect of evidence that was made by the previous arbitrator. Transnet contended that the preferred option would be to have the process start afresh before a new arbitrator. I am of the view that a fair and just result would be best served by having a fresh perspective cast on the dispute between the parties, with the proceedings commencing *de novo* before a new arbitrator.

[59] In light of the above conclusions, the last issue is that of costs. This application was launched on the back of a decision by the arbitrator not to recuse or remove himself from the proceedings. His ruling was challenged by Transnet before the Association's arbitral panel. That decision upheld the arbitrator's ruling. Transnet launched its application and sought costs against any party opposing the relief sought. Transnet has been successful in securing the relief of removing the arbitrator and for the arbitration to commence *de novo* before a newly appointed arbitrator. Umhlatuze aligned itself with the grounds of opposition advanced by the arbitrator, who entered the fray only when Transnet amended its relief to seek recovery for any salary it paid to him. Once Transnet indicated that it was no longer pursuing the amended relief against the arbitrator, the latter withdrew from the contest, and by agreement, no order of costs was sought against him. Umhlatuze then took up the cudgels to resist any attempt to remove the arbitrator. It contends that it was acting in defence of a decision by the arbitrator and a subsequent decision by the arbitral panel. It should, in those circumstances, not be penalised for doing so.

[60] I am mindful that the application for recusal of the arbitrator came almost on the last day on which the arbitration was to proceed. This litigation has significantly delayed Umhlatuze's claim to receive payment in respect of a judgment. It however was not the author of the issue which triggered the litigation, although it joined forces with the arbitrator. *Mr Naidoo* submitted that Transnet should bear its costs, with counsel for the applicant contending that Umhlatuze pay the applicant's costs. Alternatively, Umhlatuze contended that I should defer the decision of costs in this application and make an order that the party successful at the arbitration should also be entitled to the costs of this

application. While there may be a degree of attraction in the last-mentioned approach, I am of the view that this is not a matter where costs should follow the result.

[61] The court enjoys a discretion in relation to the orders it makes regarding costs. It seems to me that this is indeed a matter where it would be unfair to mulct Umhlatuze with the costs of these proceedings. This finding is premised on two primary considerations: first, the delay exhibited by Transnet in launching its application, and second, Umhlatuze's protracted efforts over several years to achieve payment of its claim pursuant to a judgment granted in its favour. I am not persuaded that these costs should in any way be intertwined with the new arbitration proceedings. These proceedings stand distinct from the anticipated arbitration, thus the submission that they are of an interlocutory nature cannot be sustained. Accordingly, in the exercise of my discretion, I determine that each party shall bear its own costs

[62] In the result, I make the following order:

- 1 The second respondent, JC King SC, be and is hereby removed as an arbitrator in the arbitration between the applicant and the first respondent;
- 2 Each party is liable for its own costs.

  
M R CHETTY  
Judge of the High Court  
KwaZulu-Natal Division, Durban

## Appearances

|                            |                                                                                                                                                                                                                                                              |
|----------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| For the Applicant:         | I Pillay SC & F Khuzwayo                                                                                                                                                                                                                                     |
| Instructed by:             | At Mpungose & Dlamini Inc.                                                                                                                                                                                                                                   |
| Address:                   | 12 Montrose Park Boulevard<br>Victoria Country Club Estate<br>170 Peter Brown Drive, Montrose<br>Pietermaritzburg                                                                                                                                            |
| Ref:                       | ATM/Claudette/M0000120                                                                                                                                                                                                                                       |
| Tel:                       | 033 815 1511 (Mr Mpungose)                                                                                                                                                                                                                                   |
| Email:                     | <a href="mailto:agrippa@armd.co.za">agrippa@armd.co.za</a><br><a href="mailto:claudetee@atmd.co.za">claudetee@atmd.co.za</a><br><a href="mailto:pillayi@me.com">pillayi@me.com</a><br><a href="mailto:khuzwayofezeka@gmail.com">khuzwayofezeka@gmail.com</a> |
| C/O                        | Messrs Tomlinson Mguni James (Durban)<br>Suite 201, Ridge 6<br>20 Ncondo Place<br>Umhlanga Rocks                                                                                                                                                             |
| Ref:                       | Alvina Nadasen                                                                                                                                                                                                                                               |
| Tel:                       | 031 566 2207                                                                                                                                                                                                                                                 |
| For the first respondent:  | M Naidoo SC & S Govender                                                                                                                                                                                                                                     |
| Instructed by:             | Hattingh Massey Bennett Inc                                                                                                                                                                                                                                  |
| Address:                   | Suite 6, Gillitts Office Park<br>2 Rodger Place<br>Durban                                                                                                                                                                                                    |
| Email:                     | <a href="mailto:mkerr@mdalaw.co.za">mkerr@mdalaw.co.za</a>                                                                                                                                                                                                   |
| For the Second respondent: | C J Pammenter SC                                                                                                                                                                                                                                             |
| Instructed by:             | Van Wyk Law Inc                                                                                                                                                                                                                                              |
| Address:                   | 4 Glendale Avenue<br>Westville                                                                                                                                                                                                                               |
| Email:                     | <a href="mailto:leif@vaninc.co.za">leif@vaninc.co.za</a><br><a href="mailto:john@umhlangachambers.co.za">john@umhlangachambers.co.za</a>                                                                                                                     |
| Tel:                       | 031 301 1414                                                                                                                                                                                                                                                 |
| Ref:                       | L Lunde/KIN1/0001                                                                                                                                                                                                                                            |
| Date reserved:             | 16 August 2024                                                                                                                                                                                                                                               |
| Date of delivery:          | 20 November 2024                                                                                                                                                                                                                                             |