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

CASE NO: 2023/032374

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

DATE
SIGNATURE

In the application by

ALTECH RADIO HOLDINGS (PTY) LTD	Applicant
and	
AEONOVA360 MANAGEMENT SERVICES (PTY) LTD	First Respondent
RETIRED JUSTICE BR SOUTHWOOD	Second Respondent

Neutral Citation: *Altech Radio Holdings (Pty) Ltd v Aeonova360 Management Services (Pty) Ltd and Another [2]* (Case No. 2023/032374) [2023] ZAGPJHC 631 (5 June 2023)

JUDGMENT

MOORCROFT AJ:

Summary

Arbitration Act, 42 of 1965 - Review –section 33(1)(b) – Setting aside of award or ruling

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

Arbitration Act - Recusal - Termination or setting aside of appointment of arbitrator – *section 13(2)(a)*

Arbitration Foundation of Southern Africa – Commercial Rules – Articles 11 and 14

Order

[1] In this matter I made the following order on 30 May 2023:

1. *The application is dismissed;*
2. *The applicant is ordered to pay the costs, including the costs of two counsel where so employed.*

[2] The reasons for the order follow below.

Introduction

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

[4] This application was originally intended by Altech to be enrolled for hearing with an earlier application in which Altech sought an order setting aside an award by the

arbitrator handed down on 2 December 2023 on the basis of alleged gross irregularities. This did not prove a practical proposition and the matter was then set down for 26 May 2023. The first review application proceeded on 3 and 4 May 2023 before me. I made an order on 11 May 2023 and published a judgment[1] on CaseLines on 15 May 2023.

[5] In this application, the notice of motion dated 5 April 2023 sought an order in terms of Rule 6(12) of the Uniform Rules as well as the following substantive orders:

5.1 An order in terms of Section 13(2)(a) of the Arbitration Act, 42 of 1965, that the appointment of the arbitrator be set aside and that he be removed from office on the ground of bias,

5.2 that an award made on 9 March 2023 that dealt with recusal of the arbitrator be set aside in terms of Section 33(1)(b) of the Act, and

5.3 that the dispute be referred to a new arbitral tribunal in terms of section 33(4) of the Arbitration Act,

5.4 that the cost of the application be paid by any respondent opposing the relief sought, such costs to include the costs of two counsel.

Section 33(1)(b) of the Arbitration Act[2]

[6] In *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another*[3], O'Regan ADCJ said the following in with reference to section 33(1):

> *"The international conventions make clear that the manner of proceeding in arbitration is to be determined by agreement between the parties and,*

1 *Altech Radio Holdings (Pty) Ltd v Aeonova360 Management Services (Pty) Ltd and Another* [2023] ZAGPJHC 475. The case number is 2023/1585. I refer to these proceedings as "the first review" or "the first judgment" depending on the context.

2 See also paras 16 to 19 of the first judgment.

3 *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) para 236.

> *in default of that, by the arbitrator…. Courts should be respectful of the intentions 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 an arbitration has been conducted, and too willing to conclude that the faulty procedure is unfair or constitutes a gross irregularity within the meaning of s 33(1), the goals of private arbitration may well be defeated."*

[7] These sentiments are equally applicable to section 13(2) of the Act.[4]

Section 13(2) of the Arbitration Act

[8] Section 13(2) of the Act reads as follows:

> *"13 (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."*

[9] The phrase *"good cause"* is not defined in the Act but it is common cause that bias, or lack of impartiality, is a ground for setting aside the appointment.[5] The Court is vested with a discretionary power to be exercised with great care.[6]

[10] Butler quotes Mustill & Boyd[7] with approval:

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4 *Umgeni Water v Hollis NO and Another* 2012 (3) SA 475 (KZD) para 22.
5 Butler & Finsen *Arbitration in South Africa – Law and Practice* 1993 at 105 to 106 ["Butler"].
6 *Umgeni Water v Hollis NO and Another* 2012 (3) SA 475 (KZD) paras 11 and 22.

> *"The fact that the Court is given a wide power to remove the arbitrator in cases of misconduct does not mean that the power will be freely exercised. The arbitrator may commit errors – even serious errors – in the course of the reference, and yet remain perfectly able to carry the arbitration to a successful conclusion once his mistakes have been pointed out. Justice requires that in such a case the arbitrator should be left in office, rather than that the parties should suffer the delay and expense of beginning the arbitration afresh. The remedy is therefore likely to be confined to those cases where the arbitration simply cannot be allowed to continue with the particular arbitrator in office – either because he has shown actual or potential bias or because his conduct has given serious grounds for destroying the confidence of one or both parties in his ability to conduct the dispute judicially or competently."*

The reason for the bias that is alleged.

[11] Altech speculates that the reason for the arbitrator's bias was that he was *"injured by the fact of the recusal application."*[8] In heads of argument, Altech's counsel states that it was the arbitrator's conduct following the review proceedings that gave Altech cause for concern.

[12] This is a form of what was labelled as *"reactive bias"* in *Turnbull-Jackson v Hibiscus Coast Municipality and Others:*[9] The facts of that decision were very different, as it seems that the party alleging bias set out intentionally to provoke the decision maker in order to be able to rely on bias. That is not the case here; the similarity lies in the fact that the bias is alleged to have been arisen during the course of the arbitration and that the conduct of a party (however justified or innocent it might be) caused the arbitrator to be biased.

[13] It may of course be that a particular arbitrator takes umbrage at being taken on

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7 Mustill & Boyd *The Law and Practice of Commercial Arbitration in England* 2nd ed 1989 at 530.

8 Founding affidavit para 114, CaseLines 01-42.

9 *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014 (6) SA 592 (CC) para 31. See also *R v Silber* 1952 (2) SA 475 (A).

review or having to deal with a recusal application, but I am also mindful of the fact that the arbitrator in this case is a very experienced retired Judge who spent his career in an environment where appeals and reviews are accepted practice. Judges are taken on appeal and they sit in appeals, as well as applications for leave to appeal made in respect of their own judgments. The Appeal Court[10] has admonished Judges not to regard an application for recusal as a personal affront.

[14] In the letter that gave rise to the application for recusal (and dealt with in more detail below) Altech relies also on grounds that preceded the first review, such as

14.1 a ruling by the arbitrator that costs consequent upon his appointment as arbitrator be reserved. Altech was of the view that these costs should have been paid by Aeonova.

14.2 The award by the arbitrator made on 2 December 2022 that led to the first review application.

14.3 The rather vague allegation that the arbitrator has *"adopted, generally and specifically, a position adverse to"* Altech.

The grounds

[15] Altech relies on five grounds on which it contends that it harbours a reasonable apprehension of bias. Four of these grounds were set out in a letter demanding the recusal of the arbitrator dated 6 March 2023, and the fifth arises from the conduct of the arbitrator in dealing with Altech's demand.

[16] Altech's counsel submitted that the fifth ground may be dispositive of the recusal application and said that by effectively deciding not to recuse himself before Altech had an opportunity to be heard on the issue of recusal, the arbitrator committed a gross irregularity and instituted in Altech a reasonable apprehension that he was biased

[10] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) 13 I-J, referring to *S v Bam* 1972 (4) SA 41 (E) 43G-44A.

against it.

[17] The fifth ground was therefore the main ground and I deal with that first. I deal with the related question of whether a recusal application must be brought on notice supported by affidavit evidence, under a separate heading immediately after dealing with this fifth ground.

The fifth ground: The events of 6-9 March 2023 - the arbitrator closed his mind to the applicant's request for his recusal before Altech had a chance to have a hearing and to present argument on this issue

[18] In its heads of argument Altech focused on this fifth ground and argued that the appointment of the arbitrator ought to be set aside on this narrow ground, but confirmed that it was not abandoning the first four grounds referred to above.

[19] On 6 March 2023 Altech's attorneys wrote to the arbitrator with a *"formal request"* that the arbitrator recuse himself as arbitrator or alternatively that he disclose Altech's position to the AFSA Secretariat as required by article 14.3 and article 14.4 of the AFSA Commercial Rules.

[20] Altech refers in the letter to the pending review proceedings as well as to an urgent application seeking a stay in the arbitration pending the determination of the review.[11] It is then stated that Altech had given careful and thoughtful consideration to events that have transpired since the launch of the review proceedings in January of 2023, and in particular to the arbitrator's letters to the Deputy Judge President and to the parties of 13 and 15 February 2023. It is then stated that: *"In the event that the pending urgent High Court application for a stay does not succeed, we ask for the opportunity to have our legal team address you on the request for the recusal at the commencement of the hearing on 9 March 2023."* [12]

[21] When the letter was written the arbitration was scheduled to proceed on the 9th

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11 I was informed that the application for a stay was struck from the roll.
12 In other words, three days hence.

before the arbitrator for a hearing on Altech's intended amendment to its statement of defence.

[22] The letter then lists the four complaints. I will deal with the complaints in more detail under a separate heading below.

[23] Two days later, on 8 March 2023 Altech served an application supported by affidavit on the arbitrator. In the notice of motion Altech sought a ruling that the arbitrator recuse himself in terms of article 14.3 of the AFSA Commercial Rules, and in the alternative that the arbitrator postpone the arbitration pending a determination by the AFSA Secretariat in terms of article 14.2.3 and/or 14.4 of the AFSA Commercial Rules.

[24] The notice was accompanied by an affidavit by the same deponent who subsequently deposed to the founding affidavit in the current application and is essentially based on the letter of 6 March 2023, which the deponent now stated under oath *"accurately summarises the grounds for the concern held by"* Altech. In this way the grounds in the letter became the grounds in the recusal application, and the letter now had the status of evidence given under oath.

[25] The application was served on the day before the scheduled hearing and the respondent did not attempt to file an answering affidavit.

[26] When the application was served on the 8th of March 2023, the arbitrator had not yet responded to the parties in respect of the letter requiring his recusal. He now responded as follows:[13]

> *"Dear Mrs Cryer and Mr Thomson*
>
> *I acknowledge receipt of your email and letter dated 8 March 2023.*
>
> *I was about to reply to your letter when I received Altech's application for my recusal.*
>
> *If I had decided to recuse myself, I would have informed you of my decision immediately.*
>
> *The events have obviously overtaken us.*

[13] CaseLines 02-396.

Yours faithfully"

[27] Unfortunately one does not know (and can never possibly know) what the arbitrator's reply in the second paragraph of his email would have said. The arbitrator was criticised in argument for not putting up an explanatory affidavit but in my view any explanation by the arbitrator as to his unexpressed and uncommunicated thoughts prior to receiving the application on the 8th be of highly questionable weight.

[28] Like all documents the email quoted above must be interpreted by reading the whole document and not only selected extracts, by reading it objectively, and by reading it contextually with the intention to understand its true meaning.[14]

[29] The context was as follows:

29.1 It was written by the arbitrator, a retired Judge to the legal representatives of the parties. It was written by and for the consumption of professional people trained and skilled in law.

29.2 The email informs the parties that had he decided to recuse himself, he would have informed the parties of this decision immediately.

29.3 It must be presumed that the arbitrator knew that, had he formed this view the matter would still have to be dealt with in terms of the provisions of section 13(1) of the Arbitration Act.

29.4 The email does not say that the *"application"* (if indeed it was a proper application, a topic dealt with below) is dismissed.

29.5 It does add that *"events have overtaken us"* and this can only be a reference to the application served on him earlier that day.

29.6 In the context of the application served a few hours earlier, the email does not say that the application was moot as it had already been

[14] These comments apply equally to the other correspondence by the arbitrator to the parties, and to the arbitrator's letter of 23 January 2023 to the Deputy Judge President.

decided.

[30] It is necessary to see how the application was dealt with the following day, the 9th. It is to the transcript[15] of the hearing on 9 March 2023 that one must turn. The transcript is a common cause document.

[31] The arbitrator opened proceedings by stating that the purpose of the hearing was to hear the application by Altech to amend its statement of defence but that Altech had delivered a letter on 6 March 2023 followed by a formal application for his recusal. He added that it was logical to deal with it first as the recusal application would determine whether he should continue to hear anything else.

[32] It was argued on behalf of Aeonova that the application for recusal was not properly before the arbitrator as it had been made on 20 hours' notice and no case was made out on the papers for the matter to be dealt with as an urgent application. Aeonova's counsel argued that the recusal application be struck.

[33] The arbitrator overruled Aeonova's counsel and said that all the relevant facts were in the founding affidavit before him. He added that he had prepared a bundle of documents comprising 132 pages that he had considered relevant. This bundle of documents then served as the basis for the hearing that followed.

[34] There was a discussion about whether Aeonova should or was entitled to file an answering affidavit and Altech's counsel was of the opinion that Aeonova was entitled to file an answering affidavit and said that Altech had no objection to the recusal application being postponed provided the application for amendment was also postponed. This alternative was not acceptable to Aeonova. This stance was not surprising as it would have achieved the same result as was intended by the urgent application for a stay that was struck off the role a few days before.

[35] After a discussion and adjournment, the recusal application was continued with.

[36] Altech's counsel placed on record that Altech was not proceeding with paragraph

[15] There are two copies of the transcript in the record, the first commencing at 02-473 and the second at 02-628. The second of these contain manuscript corrections of the transcript by the arbitrator. These are of an editorial nature.

7.1.1 of the letter of 6 March 2023 as the allegation was inaccurate. I deal with this topic under a separate heading below.

[37] Altech's counsel then added a fifth ground for recusal to the four grounds in the letter of 6 March 2023 and the application of 8 March 2023, namely that the arbitrator had dealt with and dismissed the application for recusal without hearing argument as provided for and guaranteed in the AFSA Rules.

[38] The recusal application was then fully argued and the arbitrator entered into a debate with applicant's counsel that was protracted and detailed. After dealing with the first four grounds for recusal Altech's counsel addressed argument on the fifth, the arbitrator's response on 8 March 2023 after receipt of the recusal application already dealt with above.

[39] The arbitrator made it clear[16] that: *"I have decided I wasn't going to recuse myself just on the basis of the letter."* As already pointed out above, he never dismissed the application for recusal.

[40] After hearing Aeonova's counsel and then Altech's counsel in reply an adjournment was taken and thereafter the arbitrator gave his ruling.[17] The arbitrator made a long and detailed *ex tempore* ruling. The ruling was given with reference to the bundle prepared by the arbitrator himself. The difference between a carefully planned written award and the arbitrator's award or ruling given *ex tempore* is best illustrated by comparison with his award dated 4 April 2023 pertaining to the application for leave to amend brought by Altech, and that also form part of the papers in this application. The difference is stark.

[41] The arbitrator dealt with case law, in particular with the landmark judgment of the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[18] before turning to the facts before him.

[42] He stressed that he was appointed by the consent of the parties and that prior to his appointment he had no knowledge of the parties. He derived all his initial knowledge

16 CaseLines 02-533.
17 The ruling commences at CaseLines 02-586.
18 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC).

of the parties and their disputes from reading the record.

[43] When he was appointed he signed a declaration in terms of Rule 14.1.2 of the AFSA Commercial Rules. Article 14.1 provides as follows:

> *"14.1.1 A prospective arbitrator shall, before his appointment by the Secretariat, in writing disclose to the Secretariat any facts and circumstances of which he is aware and which might reasonably give rise to justified doubts as to his independence or impartiality in the eyes of the parties. An arbitrator already appointed shall, if any facts or circumstances of which he is aware thereafter arise, which might reasonably give rise to justified doubts as to his independence or impartiality in the eyes of the parties, in writing disclose the same to the Secretariat."*
>
> *14.1.2 Where 14.1.1 is not applicable, an arbitrator shall, on assuming his duties, sign and furnish to the Secretariat a declaration to the effect that he is not aware of any circumstances which might reasonably give rise to justified doubts as to his independence or impartiality to act as arbitrator in the matter, and that he will forthwith disclose such circumstances to the Secretariat if they should arise at any time before the arbitration is concluded.*

[44] The arbitrator analysed the documentation and analysed the grounds for recusal in the letter of 6 March 2023. After an exhaustive analysis he dismissed the application for his recusal. The hearing took about five hours.

[45] I am of the view that the arbitrator did not dismiss the recusal application without hearing argument and that there is no evidence that he pre-judged the demand for this recusal without hearing argument but by pretending that he was listening to argument. There is a vast difference between dismissing an application and a decision not to recuse oneself upon reading what one of the two parties had to say on the subject.

[46] The arbitrator's email of 6 March 2023 and the events set out in the transcript stand in sharp contrast to the allegations in the founding affidavit to the effect that *"…*

whilst the Arbitrator may have only indicated in is 8 March email that he would rule against Altech's application, this was made abundantly clear at the beginning stages of the recusal hearing."[19] These are the averments that Altech came to Court on but are not borne out by the common cause facts, namely the wording of the email and the proceedings on 9 March 2023.[20]

[47] The arbitrator did not say in his email that he would rule against Altech at a hearing and he dealt with the recusal application in preference to the amendment set down for the day, even though the application had been brought on very short notice and Aeonova was potentially prejudiced thereby.

[48] The deponent to the founding affidavit accused the arbitrator of arriving at the hearing on 9 March 2023 with a pre-written judgment[21] and then conducting a charade.[22] He makes these serious and derogatory allegations under oath without offering any evidence of a pre-written judgment or a charade that carried on for five hours as if it was a real hearing.

[49] He refers to the arbitrator arriving at the hearing armed with a bundle of documents and relevant case law. While it is normally true that the parties (usually or often the applicant) would prepare bundles, this is a practice and not a rule, and the arbitrator can hardly be faulted for arriving prepared with the relevant documents. There was no objection to the bundle of documents by Altech's legal team and they seemed to appreciate the trouble the arbitrator had gone to. One is in fact left wondering what would have happened on the day if the arbitrator did not have the foresight to prepare a bundle.

[50] It is also by no means uncommon for a judge or arbitrator to prepare for a hearing by reading relevant case law and taking copies of court cases into the hearing. The arbitrator should be commended for his diligence rather than criticised for doing so.

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19 Founding affidavit para 108, CaseLines 01-40.

20 The application must be approached on the basis set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634 and *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) 235E – G, *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1976 (2) SA 930 (A) 938A – B, and various other authorities.

21 Founding affidavit paras 11.5, 111 and 145, CaseLines 01-10, 01-41, and 01-51.

22 Founding affidavit para 11.8, Caselines 01-10.

Does the AFSA Rules require a formal recusal application with evidence or is a letter sufficient?

[51] The question whether the AFSA Rules required a formal application on affidavit for a recusal application, was debated during argument but Altech came to court on the basis that in terms of the AFSA Rules *"it was necessary for a formal application to be made for the arbitrator to recuse himself in circumstances which would require a judicial officer to recuse himself."*[23] The parties were therefore *ad idem* on this point even though there was some ambivalence on the part of Altech's counsel.

[52] Insofar as Altech regarded the letter as a formal, stand-alone application, this view is in conflict with the founding affidavit.

[53] An arbitrator enjoys considerable discretion in determining the procedure to be followed and this is reflected in the AFSA Rules.[24] The arbitrator may for instance rule that the application may be made in a letter. He did not make such a ruling before the 8th and the need to consider whether such a ruling should be made fell away when the application was served on the morning of the 8th .

[54] It may also happen that events during an arbitration justify an application made *"from the bar."* Each case is different and must be evaluated on its own facts. However, as a general principle an application for recusal is a fact-based enquiry and one would usually expect evidence to be placed before the arbitrator in an affidavit or *viva voce*. This is the procedure that was followed in the first recusal application when Altech sought the recusal of the first[25] arbitrator. The first arbitrator directed Altech to launch a formal application.

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23 Founding affidavit para 53, CaseLines 01-24.

24 Rule 11.1.

25 The arbitrator cited in this application is a substitute arbitrator who was appointed by the Arbitration Foundation of Southern Africa (AFSA) in accordance with article 14.5 of AFSA's Commercial Rules, after being nominated by the parties. The appointment became necessary when an initially unforeseen potential conflict of interest arose that the first arbitrator reported when he became aware of it and that then required, in the view of an AFSA panel, that a substitute arbitrator be appointed.

The four grounds in the initial application before the arbitrator

First ground: the arbitrator inappropriately engaged by way of correspondence with the merits of the first review application notwithstanding that he had elected to abide by the decision

[55] I dealt with the correspondence of 23 January and 13 February 2023 in the first judgment[26] but in a different context, namely Altech's argument that the correspondence constitute proof that arbitrator relied on events that took place subsequent to argument in the hearing that led to his award of 2 December 2022 to justify his award, even though Altech's counsel had no opportunity to present argument in respect of these events.

[56] There is no bias apparent from these letters. The letter of 23 January 2023 was written to the Deputy Judge President to seek an early allocation on the court roll. In terms of Rule 11.1 of the AFSA Rules the arbitrator has a duty to both parties in an arbitration to deal with matters expeditiously, and when read objectively the letter was calculated to achieve that purpose.

[57] The deponent to the founding affidavit states that the letter was more than just an attempt to have the matter heard expeditiously, but that the arbitrator *"wished to wade deep into the merits of the review proceedings – both for the benefit of the DJP and the judge hearing the review application."* There are a number of problems with this statement:

57.1 The letter is not evidence of the truth of the factual allegations in the letter and its contents are not confirmed under oath. It was never tendered as evidence by the arbitrator or by Aeonova.

57.2 The letter only formed part of the papers in the first review application and now in this application because Altech chose to include it in the papers. It would otherwise not have been considered in the review application and could not have been intended to influence any Judge allocated to the matter. It has evidentiary value only in the sense that it is

[26] Paras 48 to 53.

> offered by Altech as evidence of bias, and it must therefore be evaluated only in that context. It explains why the arbitrator was of the view that an early allocation was justified.

[58] Reference is also made to a letter of 13 February 2023 where the arbitrator debated matters of law and the future conduct of the arbitration with the parties legal advisors. The arbitrator expressed certain views on how the matter will develop, views that might be right or might be wrong, but no bias is apparent from the letter. The letter must, after all, be read as a whole and in the context of ongoing arbitration proceedings. The arbitrator was certainly entitled, for instance, to enquire from Altech why it was of the view that his involvement would be *"inappropriate, impermissible and prejudicial."*

[59] The arbitrator's letter of 15 February 2023 to the applicant is in similar vein. The arbitrator engages with Altech's attorneys on case law and he deals with Altech's view that the arbitration should be suspended. He deals with the objective of a timeous conclusion to the proceedings and recorded that it had been agreed by both parties that evidence be concluded during 2022. It was now early in 2023 and the arbitrator could not be criticised for his concerns. He indicated that he did not want to suspend or postpone the proceedings and directed that Altech's application to amend its statement of defence be heard on 9 March 2023.

[60] In both these letters the arbitrator set out his views clearly and openly. The parties were placed in a position to deal with his views. The accusation of bias apparent from the letters is baseless.

[61] In the email of 2 March 2023 the arbitrator asked that his letters be placed before the court in the review application. This was an understandable request and there is nothing sinister about it.

[62] The very basis of the allegation of bias that arose *"following the launch of the review proceedings"* is this correspondence. They do not give rise to an inference of bias.

Second ground: the arbitrator dictated to the applicant how it should run its defence in the arbitrator and indicated that he would not be open to any argument other than that prescribed

[63] The argument that the arbitrator was so presumptuous as to dictate to Altech as to how it should run its defences is equally without merit. Altech was at all times represented by counsel and attorneys who were quite able to stand their ground, differ from the arbitrator on the facts and the law, and to present their point of view.

[64] The arbitrator was entitled to debate the future conduct of the arbitration with the parties and if he made incorrect assumptions as to Altech's intentions, those could easily be corrected. In fact, it would seem that Altech's legal team did just that in a letter to Aeonova's legal team on 28 February 2023.[27]

[65] There is no logical link between an arbitrator failing to understand a party's defence, and an inference that he is biased because of his misconception. Misconceptions can be rectified and that is the role of legal representatives.

Third ground: the arbitrator made a series of inappropriate and adverse findings against the applicant's legal representatives

[66] The deponent also criticised the arbitrator for *"impugning the character and conduct of"* Altech's legal representatives. The arbitrator dealt with the factual basis of his comments in his ruling on 9 March 2023 but these have nothing to do with Altech.

[67] The arbitrator was, for instance, critical of one of Altech's attorneys who, he said, undertook to do something and then failed to do it. Whether the criticism is justified or not, is not relevant for the purposes of this application. It does not amount to bias against Altech.

[68] While it is undoubtedly so that the arbitrator engaged in robust debate with Altech's counsel, the debate was no more robust than what occurs in the practice of

[27] CaseLines 02-468.

law. The arbitrator differed from counsel on his submissions but reading the transcript, there is no personal animosity by the arbitrator towards Altech's counsel, nor does the transcript lend itself to such animosity by Altech's counsel. Both were doing a professional job and Altech's allegation of bias has no factual basis.

Fourth ground: the arbitrator was unduly occupied with urgency and in doing so held Altech responsible without reason for delays in the proceedings

[69] It is correct that the arbitrator was at all times concerned that the arbitration was being unduly delayed. One of the perceived benefits of arbitration is the speedy resolution of disputes and it is this benefit that makes commercial arbitration an attractive option.

[70] The principal duties of an arbitrator is to take care, to proceed diligently, and to act impartially.[28] In fact, the failure to proceed diligently is a ground for the setting aside of the appointment of an arbitrator specifically mentioned in section 13(2) of the Arbitration Act.

[71] The arbitrator was concerned about the fact that he had a duty to deal with the matter expeditiously and that this goal was not being met. The arbitration commenced in 2018, five years ago. As long ago as 2 May 2022 (more than a year ago) the first arbitrator remarked[29] that: *"This arbitration has been running for a very long time."* Without deciding who is to blame for this state of affairs, it can hardly be argued that a timeous conclusion to the proceedings is not an obligation that rests on the parties and on the arbitrator. The arbitrator was correctly occupied with urgency, but not unduly so.

[72] Prejudice caused by a delay as a result of a recusal application is quite obviously not a reason not to entertain it.[30] The arbitrator did entertain the recusal application and he did so the day after the delivery of the application and in preference to hearing already scheduled.

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28 Butler 99.
29 CaseLines 02-179.
30 *Premier Foods (Pty) Ltd (Nelspruit) v Commission for Conciliation, Mediation and Arbitration* (2017) 38 ILJ 658(LC) para 25.

The untrue statements made under oath

[73] The letter of 6 March 2023 written by Altech's attorneys contains two untrue and misleading statements:

73.1 It is alleged that the arbitrator wished to supplement his reasons for the award taken on review and that this fact alone indicated that *"even you must feel some discomfort with the Award as it stands."* It was common cause by the 9th that the arbitrator never said this with reference to the pending review, but had made a similar statement with reference to an earlier review application that had been mooted by Altech but never brought.

73.2 It is alleged that the arbitrator had directed *"multiple, lengthy letters directly to the Honourable Deputy Judge President."* There was in reality only one such letter.

[74] The letter of 6 March 2023 was then attached as an annexure to the founding affidavit in the application[31] launched on 8 March 2023. In paragraph 15 of the founding affidavit the deponent confirms the contents of the letter and states that it *"accurately summarises"* the grounds and therefore Altech's instructions to its attorneys. The deponent then goes on to confirm the contents of the affidavit under oath.

[75] An affidavit can not be *"amended"* or *"corrected"* as Altech sought to do at the commencement of the hearing on 9 March,[32] but if a deponent realised that he had made a mistake he may file a further affidavit admitting and explaining his error. Human error is a fact of life and no one is immune. An apology coupled with an explanation honestly made will usually be accepted.

[76] It is however no justification in itself to say that a deponent to an affidavit was not

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31 CaseLines 02-333.

32 Rule 11.2.13 of the AFSA Rules provide that an arbitrator shall have the power *"to permit the amendment of any pleading or other document (other than an affidavit) delivered by a party."*

the author and that someone else drafted the affidavit - It is still the deponent who goes on oath.

[77] In this matter the deponent chose not to give an explanation but instead to rely on his error as a ground for seeking the arbitrator's dismissal.[33] While his error is understandable – quite obviously a mistake was made – the inaccuracies feature in the first ground for recusal relied upon in the letter, and in the fifth ground in this application where the arbitrator is criticised by the deponent for the way the arbitrator dealt with the untrue statements on the 9th of March.

[78] The arbitrator was rightly critical of these aspects of Altech's affidavits. As always, each case must be determined on its own facts but a judge or arbitrator who is critical of an obvious untruth in an affidavit filed in an application for recusal can not be expected without more to recuse himself. Criticism must be seen in context.

Legal principles

[79] The authorities dealing with the recusal of a Judge are of equal application to the setting aside of the appointment of an arbitrator.[34]

[80] A Court should be very slow in removing an arbitrator.[35] The conduct complained of must be of an extreme nature and the application for recusal should be based on substantial grounds contending for a reasonable apprehension of bias.[36] Judges and arbitrators are not immune to irritability and other human failings, and there is no such thing as absolute neutrality.

[81] The professional reputation and experience of the arbitrator is a relevant

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33 Founding affidavit para 113 to 116, CaseLines 01-42

34 *Orange Free State Provincial Administration v Ahier and Another; Parys Municipality v Ahier and Another* 1991 (2) SA 608 (W) 618H to 619B.

35 *Kelly and Another v Lana* [2001] 2 All SA 181 (W), *Umgeni Water v Hollis NO and Another* 2012 (3) SA 475 (KZD), *Umgeni Water v Hollis NO and Another* 2012 (3) SA 475 (KZD) para 11. and *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC).

36 *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC) para 35.

consideration for the objective observer.[37] In this matter the arbitrator is a retired High Court Judge with many years of experience. He has spent a lifetime in litigation with its attendant confrontations and differences of opinion.

[82] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[38] the Constitutional Court dealt with an application for the recusal of Judges on the ground that they were biased against a litigant. The Constitutional Court outlined the correct approach to an application. I summarise:

82.1 The correct approach is the objective approach;

82.2 The onus rests on the applicant for recusal; [39]

82.3 *"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."* The test is two-fold.[40] It requires a reasonable litigant in possession of all the facts with a reasonable apprehension that the judge or arbitrator is biased.[41]

82.4 *"The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges*[42] *to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience."*

82.5 *"It must be assumed that they can disabuse their minds of any irrelevant*

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37 *Halliburton Co v Chubb Bermuda Insurance Ltd* [2021] AC 1083, *AT&T Corporation and Another v Salby Cable Company* [2000] All ER (D) 657 (CA).

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

39 See also *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014 (6) SA 592 (CC) para 31, and *Pillay v Krishna and Another* 1946 AD 946 at 951 to 954.

40 The double reasonableness test: See also *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) paras 14 to 16.

41 *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* 2022 (4) SA 1 (CC).

42 See also article 14.1 of the AFSA Commercial Rules.

personal beliefs or predispositions." There is a presumption of impartiality[43] that arises from the nature of the judicial function.

82.6 *"… an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if 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."*

[83] A court must take heed of the words of Madlanga J in *Turnbull-Jackson v Hibiscus Coast Municipality and Others:*[44]

"[32] This would be the easiest stratagem for the unscrupulous to get rid of unwanted decision-makers: if I insult you enough — whatever enough may be — you are out. This is without substance. It proceeds from an assumption that officials with decision-making power would respond the same way to insults. It ignores the following: the training of the officials; their experience; possibly even their exposure to abuse and insults — from time to time — and the development of coping skills; and other personal attributes, all of which may render them impervious to, or tolerant of, insults. A finding of bias cannot be had for the asking. There must be proof; and it is the person asserting the existence of bias who must tender the proof. The applicant has failed dismally in discharging the onus on the so-called reactive bias." [footnotes omitted]

[84] Recusal applications usually arise from relationships or interests rather than from conduct during litigation or arbitration.[45] It is instructive to refer to the judgment of the Constitutional Court in *S v Basson*:[46]

"[35] ….. As Schreiner JA pointed out in his remarks in the passage from Silber[47] just quoted, it is difficult for a litigant to establish bias simply on the basis of the conduct of a Judge during a trial. Judges are not silent umpires but may and should participate in the trial proceedings by asking questions, ensuring that litigants conduct themselves properly

43 See also para 40 of the Sarfu case and *S v Basson* 2007 (3) SA 582 (CC) paras 30 and 31,
44 *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014 (6) SA 592 (CC).
45 *R v Silber* 1952 (2) SA 475 (A) and *S v Basson* 2007 (3) SA 582 (CC) paras 33 to 36.
46 *S v Basson* 2007 (3) SA 582 (CC) paras 33 to 36
47 *R v Silber* 1952 (2) SA 475 (A).

> *and making rulings on the admissibility of evidence and other matters as the trial progresses. Inevitably litigants will from time to time be aggrieved about both the content of the rulings made by the Judge and the manner in which a Judge may ask questions or intervene. Such grievances need to be construed in the realisation that trials are often emotional and heated as a result of the disputes between the parties. Court considering a claim of bias should be wary of permitting a disgruntled litigant to complain of bias successfully simply because the Judge has ruled against them, or been impatient with the manner in which they conduct their case.*
>
> *[36] On the other hand, it is important to emphasise that Judges should at all times seek to be measured and courteous to those who appear before them. Even where litigants or lawyers conduct themselves inappropriately and judicial censure is required, that should be done in a manner befitting the judicial office. Nothing said in this judgment should be understood as condoning discourteous or inappropriate remarks by judicial officers. Inappropriate behaviour by a Judge is unacceptable and may, in certain circumstances, warrant a complaint to the appropriate authorities, but it will not ordinarily give rise to a reasonable apprehension of bias. It will only do so where it is of such a quality that it becomes clear that it arises not from irritation or impatience with the way in which a case is being litigated, but from what may reasonably be perceived to be bias."*

[85] *In Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service*[48] the presiding Acting Judge in dealing with an application for his recusal based on a strained relationship between him and the attorney acting for the applicant, failed to deal with the sufficiency of the application but dismissed the application for his recusal on the ground that it was *mala fide*. Instead of analysing the evidence and deciding the application on its own merits, he said:[49]

> *"'I do not believe that there was any honest belief in the contention put forward by the respondent and her legal advisors. The applicant has contended in the affidavit resisting the application for recusal that the*

48 *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A).
49 *Ibid* 12 I to 13A.

> *application is scandalous and mala fide. I agree. I find that the application is mala fide, and brought with an ulterior motive. The conduct of those responsible for this application is reprehensible and improper.'"*

[86] He rejected every material averment in the founding affidavit even when the averments were not in dispute. The Appeal Court upheld an appeal against his dismissal of the recusal application and granted an order granting the application for recusal with costs. Hefer JA said that the Judge was intent on concentrating on what he perceived to be the honesty of the applicant[50] (a witness scheduled to give oral evidence later in the proceedings):

> *"I am of the view that the way in which he handled the recusal application disqualified him, irrespective of its merits or demerits…"*

[87] In *Premier Foods (Pty) Ltd (Nelspruit) v Commission*[51] *for Conciliation, Mediation and Arbitration*[52] the recusal of a CCMA Commissioner was sought on the basis that he had allegedly said during the conciliation process already that if the matter proceeded to arbitration, the employer would lose. The Commissioner then reacted to an application for recusal brought by the employer by simply refusing to hear the application and then continuing with the arbitration.

[88] The employer brought a review application, alleging misconduct on the part of the Commissioner. Snyman AJ granted the application. In the course of a detailed judgment he said:

> *[7] In the founding affidavit, the applicant has contended that the second respondent had been inextricably involved in a discussion of the evidence in the conciliation, and following that he told the applicant that continuing with the arbitration would result in them losing.*
>
> *[8] The transcript does not reflect this statement, and for good reason. It is clear for the transcript that the applicant had barely started motivating its recusal application when the second respondent intervened, saying:*

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50 *Ibid* 14E-F.

51 The "CCMA."

52 *Premier Foods (Pty) Ltd (Nelspruit) v Commission for Conciliation, Mediation and Arbitration* (2017) 38 ILJ 658(LC).

> *'I'm going to interrupt you, I'm not going to recuse myself, I don't believe you have any grounds to ask me to recuse myself …'.*

> *The second respondent then in essence compelled the applicant to commence leading evidence by calling its first witness. The applicant was thus not allowed by the second respondent to bring a recusal application, and the third respondent was never required to answer such.*

> *[9] There is no answer from the second respondent to these allegations of the applicant as contained in the founding affidavit. I must say that I am concerned that the second respondent did not address all these issues, which was called for, and especially those concerns relating to the second respondent saying to the applicant that it would lose if the matter continues to arbitration.*

Conclusion

[89] I find that Altech has not proved its averments of bias or that the arbitrator committed a gross irregularity in the proceedings.

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

_____

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their

legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **5 JUNE 2023**.

COUNSEL FOR THE APPLICANT:	S BUDLENDER SC L MINNÉ
INSTRUCTED BY:	THOMSON WILKS ATTORNEYS
COUNSEL FOR THE FIRST RESPONDENT:	J CANE SC L SCHÄFER
INSTRUCTED BY:	A KATHRADA INC
DATE OF ARGUMENT:	26 MAY 2023
DATE OF ORDER:	30 MAY 2023
DATE OF JUDGMENT:	5 JUNE 2023