IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.
2023-10-19
DATE **SIGNATURE**

Case Number: 2022-006083

In the matter between:

TRANSNET (SOC) LIMITED

Applicant

and

TENOVA MINING AND MINERALS SOUTH

AFRICA (PTY) LTD First Respondent

B R SOUTHWOOD N.O. Second Respondent

(in his capacity as arbitrator in the arbitration proceedings between the Applicant and First Respondent)

This judgment was prepared and authored by the 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 for handing down is deemed to be 19 October 2023.

JUDGMENT

POTTERILL J

Background

[1] The applicant, Transnet (SOC) Limited [Transnet] and the first respondent, Tenova Mining and Minerals South Africa (Pty) Ltd [Tenova] concluded two agreements pursuant to Tenova being granted two tenders and for ease of reference the two agreements are referred to as "the agreement." The crux of the agreement attracting a dispute was Tenova's contractual duty to supply Transnet with 598 valves to be used in a pipeline valued at a cost of approximately R16 million.

[2] Transnet on 18 July 2018 submitted a written request for arbitration to the Arbitration Foundation of South Africa [AFSA] to claim damages from Tenova. The parties agreed to withdraw its arbitration application to AFSA and that AFSA would not administer the arbitration. To this end they concluded an arbitration agreement with the parties directly appointing an arbitrator. This is how the second respondent, the honourable retired Judge Southwood [the Arbitrator] was appointed. He has not opposed the application.

[3] The arbitration agreement recorded in clause 5.2 that if there was any dispute about the appointment of the arbitrator it shall be dealt with by the Association of Arbitrators [AOA] rules. It was also agreed that the arbitration would be un-administered arbitration with clause 6 of the arbitration agreement providing that the arbitration process would be in accordance with the AOA rules. The arbitration agreement had a non-variation clause. The agreement also recorded that the defendant may take exceptions to the plaintiff's statement of claim [SOC] and it would be regulated in terms of Rule 23 of the Uniform Rules of Court "and the rules applied by the courts in deciding exceptions."

The issue

[4] Transnet is in terms of section 13(2)(a) of the Arbitration Act[1] [the Act] seeking an order setting aside the appointment of the Arbitrator and his removal on the grounds of bias or a reasonable perception of bias. From this two issues arise; does Rule 9 of the AOA Rules bar this Court from entertaining the matter; if not, are there grounds for removal based on a perception of bias in the awards granted by the Arbitrator?

The exceptions raised by Tenova

The first exception raised

[5] This exception was raised against the third set of amended SOC of Transnet. The arbitrator upheld the exception and afforded Transnet an opportunity to amend its SOC. I do not expand on this first exception and the award given thereon, despite in the papers it forming part of the grounds for the removal of the arbitrator. This is so, because in oral argument it was submitted that this award does not form part of the reasons to terminate the appointment of the Arbitrator. This award will be referred to as the first award.

The second exception raised

[1] 42 of 1965

[6] Transnet delivered its fourth amended SOC setting out five claims against Tenova. Again Tenova filed an exception against the SOC as setting out no cause of action and it being bad in law.

[7] I find it prudent to first set out the claims of Transnet in the fourth amended SOC:

> Claim 1
>
> Transnet pleaded that Tenova did not perform in terms of the agreement at all because at the date of delivery, unbeknown to Transnet, the valves were not fit for purpose, were not what Transnet purchased from Tenova in terms of the agreement and would constitute unacceptable hazards if placed in the pipeline. In the circumstances Tenova did not perform in terms of the agreement.
>
> Claim 2 (alternative to claim 1)
>
> The valves which were supplied by Tenova were defective in that the valves were manufactured in a way which substantially impaired the utility of the valves for the purpose for which the valves were purchased by Transnet. In terms of clause 13 of the agreement Transnet rejected the valves in writing. In terms of Clauses 13.2 and 13.2.2 of the Agreement, Tenova is liable to Transnet for the replacement costs of the valves including the overseas inland transportation costs, freight and insurance charges and other inland costs.
>
> Claims 3, 4 and 5 are not in issue before this court and need no addressing.

Tenova's exceptions against claims 1 and 2

[8] Tenova stated that it was necessary for Transnet to plead its compliance with clauses 9 and 13 of the agreement and it did not. It could not escape the working of clauses 9 and 13 by relying on non-performance and therefore claim 1 was bad in law and did not set out a cause of action.

[9] As for claim 2 Tenova also excepted on the basis that Transnet had not complied with clauses 9 and 13 which was destructive of Transnet's claim. But, in any event, clause 13 limits the claim to defective valves only.

The Arbitrator's Award on claims 1 and 2 as set out in the 4th SOC

[10] Transnet relied on the following paragraphs of the award as reflecting bias, or a perception of bias on behalf of the Arbitrator:

> *"[47] It is clear that neither Cladall nor Freddy Hirsch purported to lay down a new principle of law that in the event of 'non-performance' all the other clauses in the agreements governing the consequences of supplying defective goods must be ignored. In both cases the court first made findings as to the facts pertaining to the transactions and then decided that on those facts the exemption clauses did not apply. In the present case, where Transnet has not cancelled the two agreements, its right to claim damages (or any other amounts) must be found in the terms of the two agreements.*
>
> *[57] In relevant part, Clause 13 of the Master Agreement (as amended) provides as follows:*
>
> > *'DEFECTIVE GOODS*
> >
> > *Notwithstanding any certificate and/or receipt that may have been issued by or on behalf of Transnet either in the Republic of South Africa or overseas, Goods will be accepted at the place of delivery or at the port of shipment, as specified in the Agreement, only as regards outward condition of packages and Transnet retains the right to reject the Goods supplied, on or after arrival at the place to which they were consigned, or after they have been placed in use in the Republic of South Africa, should they be found to be defective.*
> >
> > *13.1 The Supplier warrants that the goods shall contain al [sic] necessary mechanisms and shall be fit and sufficient for regular*

*use in accordance with the Supplier's specifications but makes no further warranty. The Supplier shall not be liable for damages resulting from specialists or unusual requirements of the purchaser save as accepted in writing by the Supplier. The Supplier shall at its option either compensate the purchaser or replace without charge goods proven to be defective, the extent of which shall be determined by the Supplier. Claims arising out of this warranty will only be recognized if written notice is given to the Supplier within 30 days of any defect or unsuitability becoming apparent, and in any event (**the following words deleted:** 'within 6 months after delivery of the defective or unsuitable goods') 12 months from commissioning or 18 months from delivery, whichever is sooner. No warranties or representation, whether express or implied, other than those recorded herein are given or made by the Supplier in connection with the goods. The warranties herein are given and accepted in lieu of all other warranties, including warranties of fitness for purpose for a particular purpose, and whether oral, expressed, implied or statutory.*

13.2 If such goods are rejected, the Supplier will pay the following costs –

13.2.1 …

13.2.2 for Goods manufactured overseas, the Supplier shall pay all replacement costs including the overseas inland transport cost, freight and insurance charges incurred plus railage or other inland transport costs from the Republic of South Africa ports to the place where the Goods have been rejected by Transnet, including handling charges, storage, landing charges, customs duty and surcharges, if leviable.

13.3 If Transnet requires rejected Goods to be replaced, the Supplier shall, when called upon to do so, arrange prompt replacement of

the Goods, within the prescribed manufacturing lead times for such Goods, as indicated in Annexure A.

13.4 If Goods are found to be defective but the defects are, in the opinion of Transnet, not of such a serious a nature as to warrant total rejection of the Goods, the Supplier shall, when called upon to do so, remedy or make good such defects at his own cost, or Transnet may remedy or make good such defects at the request of the Supplier, and recover from the Supplier all costs or expenses reasonably incurred by it in doing so.

13.5 Should the Supplier fail, when called upon to remedy or make good such defects within a reasonable time or to request Transnet to do so. Transnet may proceed to remedy or make good such defects and thereafter recover from the Supplier all such costs and expenses as aforementioned.

13.6 Any amount recoverable from the Supplier in terms of this clause may, without prejudice to any other legal remedies available to Transnet, and after 30 days written notice be deducted in whole or in part from any monies in the hands of Transnet which are due for payment to the Supplier.' (Tenova's emphasis added.)

Clause 9 of the General Conditions of Purchase also contains warranty. It states:

'9 Warranty

Without prejudice to any other rights of the Purchaser under these conditions, ***the Supplier warrants that:***

- ***all goods delivered will be free from defective materials or workmanship;***

- *this warranty shall survive any inspection, delivery, acceptance or payment by the Purchaser;*
- *the goods will remain free from defects for a period of two year [sic] (unless another period is stated in the Order) from acceptance of the Goods by the Purchaser.*
- ***the warranty/guarantee will be effective twelve (12) Months from date of commissioning or eighteen (18) months from date of delivery, whichever date comes first.'*** *(Emphasis added)*

*[59] As pointed out in the Award ([25]), parties to a contract have the right to regulate**,** limit or expand by arrangement between themselves the consequences of any prospective breach (Thoroughbred Breeders Association v Price Waterhouse 2001 (4) SA 551 (SCA) at 583A: Victoria Falls & Transvaal Power Company Ltd v Langlaagte Mines Ltd 1915 AD 1 at 46). This means that Transnet cannot select from the two clauses the parts that are essential to its claims and ignore the remaining parts that regulate the consequences of the Goods being proved to be defective and the procedure that must be followed. Both clause 13.1 and clause 9 contain provisions that in effect impose a time bar on claims based on the Goods supplied being found or proved to be defective. Clause 13.1 further provides for the procedure to be followed by the Purchaser to ensure that a claim arising out of goods proved to be defective is recognised.*

[61] With regard to the argument that the word 'Goods' in the clauses refers to the Goods purchased: i.e. valves that comply with the specifications, the principal flaw in the argument is the definitions contained in the Master Agreement and the General Conditions of Purchase. Clause 2.5 of the Master Agreement defines 'Goods' as 'the material/products as specified in the Schedule of Requirements at Annexure A hereto'. Since Transnet has not attached the Schedule of Requirements to the Master Agreement or even alleged that it exists, this definition is meaningless. Clause 1 of the General

Conditions of Purchase defines 'the Goods' as 'the articles and things described and to be supplied under this Order'. Whatever their legal force, these clauses show the goods did not have to comply with the specifications in order to be 'Goods'. The second flaw is that there would be no need for provisions to dealt with 'defective Goods' if they had to comply with the specifications to qualify as 'Goods'.

[62] With regard to the second argument relating to the interpretation of clause 13 and the contention that clause 13.1 provides for a specific remedy only applicable in the circumstances outlined in clause 13.1 and that the provisions in clause 13.1 do not affect in any way the right given by the Preamble to clause 13 to reject the Goods if they are found to be defective, the problem is that it contradicts the allegations in the 4th SOC that indicate that clause 13.1 is an essential element of the cause of action. On the strength of Transnet's own allegations it follows that the procedure prescribed in the clause must be followed and that this must happen as stipulated.

[63] A further consideration is that, although the Preamble to clause 13 gives a right to reject the Goods if they are found to be defective, this right is not limited in any way. In its terms it can be exercised at any time from the time that the Goods have arrived at the place to which they were consigned and even after they have been placed in use. This could be many years. Clause 13.1, on the other hand, provides that where Goods have been proved to be defective the Supplier (Tenova) shall at its option either compensate the Purchaser (Transnet) or replace the Goods without charge. The clause also provides for a time bar for a claim arising out of the warranty. (Clause 9 also provides that the warranty that it records will only be effective for a period of time set out in that clause.) Apart from the fact that the Preamble to clause 13 and clause 13.1 are both set out in the same clause, there is a contextual and linguistic link between the two clauses. They both only come into operation when the Goods are found or proved to be defective. The time bar in clause 13.1 must affect the right of Transnet to reject the Goods at any time after they

have arrived at the place to which they were consigned or have been placed in use. Clause 13.1 was specially negotiated and it was agreed that it would replace the existing clause 13.1 which dealt only with Goods that were rejected owing to latent defects becoming apparent during operations or preparations necessary to put the Goods into use. Clause 13.1 deals with much more than that. It was inserted into the printed Master Agreement and although it is not handwritten it must prevail when there is any contradiction between it and the other provisions in the printed Master Agreement. The reason why Clause 13.1, which was specially inserted into the Master Agreement and is called a 'Special Term and Condition' in the Purchase Order (4th SOC 68/19 and 203/19) must prevail was explained in Simmons v Hurwitz 1940 WLD 20 at 24-25:

> *'Where a contract consists of written words superadded to a printed form the written words while "subjects to be governed in point of construction by the language and terms with which they are accompanied are entitled nevertheless, if there should be reasonable doubt upon the sense and meaning of the whole, to have a greater effect given to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formality adapted equally to their case and that of all other contracting parties upon similar occasions and subjects". … But it is of course, a rule of construction applicable to all cases where a printed form of contract is employed. The rule requires the Court to attempt to reconcile the writing with the print; and in the case of a reasonable doubt to allow the written words to prevail as the expression of the intention of the parties. … I am unable to effect any reconciliation of the written with the greater portion of the printed words of clause 25. I must look at the matter as if the parties had drawn their pen through so much of the printed matter as is irreconcilable with the writing – that is the whole of clause 25, with the exception of para. 5'. (See also Badenhorst v van Rensburg 1985 (2) SA 321 (T) at 336I-J; Bull v Executrix Estate Bull and Another 1940 WLD 133 at 136:*

Wessels' Law of Contract in South Africa Vol 1 paras 1981 and 1982.) The Preamble to clause 13 must therefore be read subject to the time bar in clause 13.1. It must also be read subject to the time constraints in clause 9. It is clear that both clause 13.1 and clause 9 were in force (as alleged in the 4th SOC) and that the exclusion of other warranties in clause 13.1 referred to other warranties in the Master Agreement. Clause 10 of the Master Agreement contains such a warranty. But after the amendment of the Master Agreement the parties agreed on the new warranty in the General Conditions of Purchase.'"

Findings by the Appeal Tribunal

[11] Transnet appealed against the second award of the Arbitrator to the Appeal Tribunal. On claim 1 the Appeal Tribunal found that to make a finding on complete non-performance could only be made on trial after hearing expert evidence. Such evidence may well have brought the case squarely within the *Cladall*[2] and *Freddy Hirsch*[3] matters. The Appeal Tribunal found the exception to claim 1 should have been dismissed.

[12] Pertaining to claim 2 the Appeal Tribunal found that the Arbitrator had interpreted clauses 9 and 13 without the aid of any extrinsic evidence. Claim 1 was based on complete non-performance with no reference to clauses 9 and 13.1 of the agreement: i.e. Transnet had not made these clauses part of its claim. The proviso in clause 20 was a question of interpretation which could not be done at exception stage.

[13] In respect of Claim 2 which was based on Clause 13's Preamble, 13.1 and 13.2 the Arbitrator held that because Transnet had not alleged material facts which justify the conclusion that there was factual non-performance it was not necessary to deal with the argument that the goods supplied were not the *"goods"* bargained for,

[2] *Cladall Roofing (Pty) Ltd v SS Profiling (Pty) Ltd* (515/08) [2009] ZASCA 92; [2010] 1 All SA 114 (SCA) (14 September 2009)
[3] *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA)

Clauses 9 and 13.1 did not apply. The Arbitrator did however proceed to interpret the clauses and found the clauses could not apply to defective goods. The Appeal Tribunal found that this issue could not be decided on exception without the aid of extrinsic evidence. Evidence relevant to context could well inform the meaning of the contract and clause 13. It further found that the direction in which the law relating to the interpretation of written contracts had of late moved militated against the interpretation of such contracts at exception stage.

[14] The Appeal Tribunal thus found that the exceptions to claim 1 and 2 was to be dismissed.

The issues to be decided

The Rule 9 issue

[15] I find it prudent to deal with the submissions of Tenova first. The argument went that the mechanism to challenge the appointment of the Arbitrator was in terms of the AOA rules. This was expressly agreed in the Arbitration agreement in clauses 5 and 6 of the Arbitration Agreement which provide as follows:

> *"5.1 The Parties agree to appoint Retired Judge B Southwood ('Southwood') as Arbitrator once AFSA's mandate has been withdrawn.*
>
> *5.2 Any disputes arising out of the appointment of the Arbitrator shall be dealt with in accordance with the Association Rules.*
>
> *6 The Parties agreed that the Arbitration procedure will be in accordance with the Association Rules."*

[16] Rule 9 of the AOA rules reads as follows:

> *"9 Challenge*
>
> *9.1 If any Arbitrator:*
>
> *9.1.1 falls seriously ill, or becomes unable or unfit to act; or*

9.1.2 lacks the necessary independence; or

9.1.3 for any other reason ought not to continue as Arbitrator (e.g. lacks impartiality);

the Chairman of the Association or his nominee from time to time shall, upon application as provided below, subject to Rule 9.7, convene a committee consisting of not less than three members ('the Committee') who may revoke the Arbitrator's appointment and appoint another Arbitrator.

9.2 A party who intends to challenge an Arbitrator in terms of Rule 9.1, shall make written application to the Chairman of the Association within 10 days of him becoming aware of any circumstances referred to in Rule 9.1, which application will set out fully the reasons for the challenge, failing which such party shall forfeit the right to make such challenge. A copy of the application shall simultaneously be served on the other party.

9.3 Within 10 days of the date of receipt by the applicant of notice from the Association as to the relevant fee, the applicant shall lodge with the Association the relevant fee as determined by the executive committee of the Association from time to time.

9.4 Failure to lodge the fee shall render the challenge invalid.

9.5 Any other party to the reference who receives an application referred to in Rule 9.2 and who wishes to oppose such application shall within 10 days of receipt by him of the application submit a written response fully motivating its opposition.

9.6 A copy of the application and any reply shall be served by the respective parties on the Arbitrator who shall be entitled within 10 days of receipt thereof to reply in writing.

9.7 Unless the parties agree to the withdrawal of the Arbitrator, the Committee will decide the challenge.

9.8 Where an Arbitrator is to be replaced and the parties are unable to agree on the replacement arbitrator, the Committee shall decide whether or not to follow the original nominating process or to appoint a replacement arbitrator.

9.9 The Committee shall give directives regarding the costs of the challenge and, if the challenge is successful, the amount of fees and expenses to be paid for the former arbitrator's services, but shall only give directions regarding the costs of the arbitration proceedings if the parties so agree.

9.10 Unless otherwise agreed by the parties or determined by the new Arbitrator, after giving the parties the opportunity to address him, the Arbitrator shall continue with the proceedings as if he had been the Arbitrator from the commencement of the reference."

[17] It was submitted that it was incumbent on a Court to respect the choices made by parties to refer a matter to arbitration.[4] Reliance was also placed on the judgment of Rogers J in *Hyde Construction CC v Deuchar Family Trust and Another* 2015 (5) SA 388 (WCC) at par [69]:

> *"In any event, and if rule 9 were intended to be exclusive, the court a quo was nevertheless in my view justified in exercising its residual jurisdiction to entertain the removal application. Even in relation to the main arbitral dispute, the court has the jurisdiction to determine the dispute on good cause shown (s3(2) of the Act) … a court will not lightly entertain a dispute which the parties have agreed to submit to arbitration. The party seeking to invoke the court's residual jurisdiction must make out a 'very strong' case or provide 'compelling reasons'…"*

Tenova argued that Transnet had not provided any reasons for refusing to abide by the Arbitration Agreement, let alone compelling reasons.

---

[4] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) par [219]

[18] As for Transnet's response that the AOA had no inkling about this arbitration as the parties did not subject them to the oversight of the AOA, or approach the AOA for the appointment of the Arbitrator, it was submitted that a non-administered arbitration does not imply that Rule 9 of the AOA Rules does not apply. A self-administered arbitration does not imply that parties cannot through application of the AOA Rules mandate the AOA to execute certain functions such as a challenge to the Arbitrator.

[19] The reliance by Transnet on the matter of *Hyde* is misplaced as the facts are distinguishable. The distinguishable fact is that the application of the AOA Rules was the doing of the Arbitrator and not as a result of an agreement between the parties. In this matter the parties agreed to the AOA Rules being applicable. As a result, all the remaining remarks of Rogers J were *obiter*. And, no compelling reasons have been set out why Rule 9 was not invoked.

Transnet's argument on the Rule 9 issue

[20] It was submitted that Rule 9 should be read with Rule 8 which provides as follows:

> *"8 <u>Appointment of Arbitrator</u>*
>
> *8.1 Except as provided in Rule 8.2, when any agreement requires the Association to appoint or nominate an Arbitrator the Association may appoint or nominate an Arbitrator.*
>
> *8.2 Should a dispute arise as to whether the Association has authority to make an appointment or nomination of an Arbitrator or should it appear form the application to the Association that the Association may not have the authority to appoint or nominate an Arbitrator, the Association will, in its sole discretion, decide whether or not to make the nomination or appointment.*

8.3 Upon accepting appointment, a prospective Arbitrator shall sign a statement to the effect that there are no grounds known to him which are likely to give rise to justifiable doubts regarding his independence and impartiality, and the Arbitrator must further disclose in writing any facts or circumstances which may be of such a nature as to call into question the Arbitrator's independence or impartiality in the eyes of the parties. A copy of this statement must be transmitted to each party ..

8.3.1 Within 5 days of the receipt of such disclosure, the parties shall state in writing if they intend to challenge the Arbitrator;

8.3.2 The provisions of Rule 9 shall apply to the challenge of an Arbitrator on the basis of circumstances disclosed by the Arbitrator;

8.3.3 A party who fails to challenge an Arbitrator within the period of time specified in Rule 8.3.1 shall not be permitted to challenge the Arbitrator based on the circumstances already disclosed by the Arbitrator.

8.4 Where an Arbitrator, duly appointed or nominated by the Association dies, the Association, may, unless the Parties otherwise agree, appoint another Arbitrator to continue with the arbitration.

8.5 Rule 9.10 applies to a new Arbitrator appointed under Rule 8.4."

From a reading of Rule 8 and 9 it is plain that only when the power to appoint an Arbitrator is given to the AOA it has the power to remove the Arbitrator it so appointed. Axiomatically where the Arbitrator was not appointed by the AOA, the AOA has no power to remove the Arbitrator. The AOA has no *locus standi* in this matter.

[21] It was further submitted that Rule 9 neither replaces nor ousts s13(2) of the Act. Rule 9 is not mandatory, only permissive. A party that does not lodge a Rule 9 application timeously cannot proceed in terms of Rule 9, but it does not imply that that party has eschewed its rights in terms of s13(2) of the Act.

[22] Support for the above submission was found in the *Hyde*-matter where the issue was whether the parties had concluded an arbitration agreement incorporating the rules excluded the operation of s13(2) of the Act. In that matter both the Arbitrators were appointed by the AOA. The Deuchar Family Trust launched an application for the second Arbitrator's removal in terms of s13(2) of the Act. The Court found:

> *"On balance, therefore, I think Blignaut J was right to find that rule 9 was not inconsistent with the parallel operation of the Act and that it did not serve to exclude the operation of s 13(2)."*[5]

Decision on Rule 9

[23] The surrounding circumstances to this arbitration is that the parties did not want to incur fees and costs by involving the AOA or AFSA. The parties agreed to self-administer the arbitration. I thus understand this arbitration not to be administered by the AOA; it is unaware of this arbitration and the arbitration is not under its auspices. The parties did not utilise the AOA rules to appoint the Arbitrator.

[24] The only clause in the agreement that can support Tenova's interpretation that the removal is governed by the AOA rules is clause 6: *"the Arbitration procedure will be in accordance with the Association Rules."* I accept that as first blush there could be scope for such interpretation, but not when the surrounding circumstances are taken into account, when the arbitration agreement is interpreted and upon a reading of Rule 8 and Rule 9 of the AOA rules.

[25] Upon an interpretation of the arbitration agreement between the parties it is clear that it is a self-regulated arbitration with the arbitration to only follow the format or process of the AOA rules. The only rule of the AOA that the parties specifically

[5] Paragraph [68]

invoked was if there was a dispute arising from the appointment of the Arbitrator. The agreement did not invoke Rule 9 to remove the arbitrator. If the intention of clause 6 was to invoke all the rules of the AOA then clause 5.2 would have been redundant. If the AOA rules as a whole was to govern this arbitration, agreeing to this clause pertinently, would have been unnecessary. The only inference is that the only rule of the AOA that was specifically incorporated was the appointment of the Arbitrator.

[26] This conclusion is fortified by a reading of rules 8 and 9 of the AOA where the power to appoint an Arbitrator is in the hands of the AOA, then it has the power to remove the Arbitrator. When the Arbitrator was not appointed by the AOA it would be extraordinary to have the power to remove the Arbitrator, more so when the AOA is not administering the arbitration process. Where the AOA removes an Arbitrator and the parties cannot agree to an appointment of a replacement Arbitrator the committee of the AOA shall decide whether or not to follow the original nominating process or to appoint a replacement Arbitrator.[6] The appointment of the Arbitrator by the AOA is exactly what the parties wanted to avoid. The interpretation of Rules 8 and 9 militates against the interpretation Tenova is supporting.

[27] Rule 9 is permissive and not mandatory. It does not exclude the operation of s13(2) of the Act. I support the Full Court decision of *Hyde* where Rogers J concludes as follows:

> *"[67] 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*

[6] Rule 9.8

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 falls away. Non constat that he loses his right to approach the court in terms of s 13(2).

[28] The argument that this finding was *obiter* because the facts are distinguishable from this matter is unsound. I have already found that the parties' reference to the AOA rules were agreed to by the parties only to use as guide for the arbitration process, not to render it applicable. The fact that in the *Hyde* matter the Arbitrator made the AOA rules applicable in fact supports the contention of Transnet, because even if the Rules where applicable, which it is not, then Transnet could have used the parallel procedure of s13(2) of the Act. In fact, Roger J finds *'… assuming in favour of Hyde that the arbitration agreement between the parties incorporated rule 9 …"*[7], just as Tenova argues, the Court still found that s13(2) could be used as a mechanism to remove the arbitrator.

[29] I also align myself with Rogers J in the *Hyde* matter and find that there is a strong case to invoke this Court's residual jurisdiction. Transnet is not asking this Court to adjudicate the main dispute or a procedural matter ancillary to the main dispute, *"but a more fundamental question as to the proprietary of Du Toit's continued role as the arbitrator."*[8] Another compelling reason is that the parties did not agree that the removal of the Arbitrator must be done in terms of the AOA rules.

Decision on the perception of bias

Arguments on behalf of Transnet

[30] The complaint is that the Arbitrator made findings on expert matters contrary to the express findings of the experts reports attached to the SOC. He interpreted

[7] Paragraph [60]
[8] Paragraph [71]

correspondence without hearing evidence thereon. He found the claims were not competent because he determined that because the valves looked like valves and fitted into the pipeline it was sufficient to amount to compliance with the Agreement and there was not complete non-performance. He thus interpreted the contract on exception. This has all led to the conclusion that he has a final fixed view of the meaning of the Agreement and a final and fixed view on whether the valves were not at all what Transnet bargained for. He made final findings of fact contrary to the express wording of the SOC and thus a final view on the merit of Transnet's claim.

[31] He would not be able to divest himself from the factual findings he made on the valves, being not defective or non-compliant, simply because he had made such a finding.

[32] The application is not based on the incorrect findings as highlighted by the Appeal Tribunal, but the Arbitrator's conclusions and findings giving rise to a perception of bias if the matter is to continue before him. He, contrary to his duty when considering exceptions, did not accept the pleaded case of Transnet on the SOC.

[33] It was submitted that the bias of the Arbitrator is thus manifest in expressing his absolute and final views even before the pleadings had closed. He in so many words said Transnet's claim was hopeless. He did not order that the SOC might be amended but in fact dismissed Transnet's claims 1 and 2.

[34] The fact that the matter now may proceed to trial with witnesses does not alter the situation because it would serve before the same Arbitrator and Transnet cannot take comfort that the Arbitrator will be rid of his views.

The submissions on behalf of Tenova

[35] The argument went that Transnet knew that to adjudicate an exception would give rise to a final award on the pleadings alone. This award on the exception would be final, but appealable and thus the arbitrator could be wrong. If an Appeal Tribunal finds the Arbitrator was wrong and his findings are set aside, the proceedings would be referred back to the same Arbitrator.

[36] Being wrong cannot be equated to bias or a perception of bias. The Arbitrator would be guided by the finding of the Appeal Tribunal in his further awards. The Arbitrator found the allegation of non-performance a conclusion of law and not of fact. The Arbitrator will now be taking the conclusion of the Appeal Tribunal into account and will now regard the allegation of non-performance as a factual issue to be resolved through evidence.

[37] The Arbitrator did not have the benefit of the decisions of *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) and *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) that the Appeal Tribunal relied on because these decisions were made after the Arbitrator had made his award.

[38] The Arbitrator's determinations were only definitive in the exception proceedings on whether the pleadings made out a cause of action, this cannot constitute a *prima facie* view. Evidence will now be presented and he will make a decision on the evidence led. The Arbitrator will thus make a decision on a different basis.

[39] Although a Court does not ordinarily dismiss a claim on exception, but grants the unsuccessful party an opportunity to amend its pleading, there are limits to the rule. In this matter the Arbitrator did so based on Transnet's recurrent failure to

formulate a valid cause of action.

Decision on bias or perception of basis

[40] When a court or Arbitrator is confronted with an exception wherein it is averred that no cause of action is made out in the summons the Court must adopt the approach as set out by Makgoka J in *Living Hands v Ditz* 2013 (2) SA 365 (GSJ) at 374G as follows:

> *"Before I consider the exceptions, an overview of the applicable general principles distilled from case law is necessary:*
>
> *(a) In considering an exception that a pleading does not sustain a cause of action, the court will accept, as true, the allegations pleaded by the plaintiff to assess whether they disclose a cause of action.*
>
> *(b) The object of an exception is not to embarrass one's opponent or to take advantage of a technical flaw, but to dispose of the case or a portion thereof in an expeditious manner, or to protect oneself against an embarrassment which is so serious as to merit the costs even of an exception.*
>
> *(c) The purpose of an exception is to raise a substantive question of law which may have the effect of settling the dispute between the parties. If the exception is not taken for that purpose, an excipient should make out a very clear case before it would be allowed to succeed.*
>
> *(d) An excipient who alleges that a summons does not disclose a cause of action must establish that, upon any construction of the particulars of claim, no cause of action is disclosed.*
>
> *(e) An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.*
>
> *(f) Pleadings must be read as a whole and an exception cannot be taken to a paragraph or a part of a pleading that is not self-contained.*
>
> *(g) Minor blemishes and unradical embarrassments caused by a pleading can and should be cured by further particulars." (footnotes omitted)*

The Courts have also found that exceptions are not to be dealt with in an over-technical manner and a court looks benevolently, instead of over-critically at a pleading. Courts as a general rule will not decide exceptions on fact bound issues. Where an exception is raised on the ground that a pleading lacks averments necessary to sustain a cause of action, the excipient is required to show that upon every interpretation that the pleading in question can reasonably bear, no cause of action is disclosed. *"It is trite that when pleading a cause of action, the pleading must contain every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment (facta probanda). The facta probanda necessary for a complete and properly pleaded cause of action importantly does not comprise every piece of evidence which is necessary to prove each fact (being the facta probantia) but every fact which is necessary to be proved."*[9]

[41] The Appeal Tribunal found that the Arbitrator made a determination without the necessary factual expert evidence on Claim 1. After hearing expert evidence, the matters of *Cladall* and *Freddy Hirsch* may squarely address claim 1. Claim 1 had not invoked clauses 13.1 and 9 of the Agreement for its claim for complete non-performance. The Arbitrator was wrong in concluding that those clauses were invoked. Clause 20 requires interpretation which could not be done at exception stage. In relation to claim 2 the Arbitrator interpreted clauses 13 and 9 without the aid of extrinsic evidence and context could well inform the meaning of the contract. The Arbitrator dismissed these claims.

[42] The question is whether the findings of the Arbitrator can create a perception of bias. The test for bias was set out in by Du Plessis J who held that an Arbitrator may be removed from office if, on the proven facts, *"'reasonably and right-minded persons, applying themselves to the question and obtaining thereon the required information' would conclude, 'viewing the matter realistically and practically and having thought the matter through', that there is a reasonable apprehension that the Arbitrator is biased."*[10] An arbitrator will thus be removed when a reasonable person lay litigant might consider that there exists a possibility of prejudice.[11]

---

[9] *Merb (Pty) Ltd v Matthews* (2020/15069) [2021] ZAGPJHC 693 (16 November 2021)
[10] *Factaprops (Pty) Ltd v Strydom Bouers CC en Andere* 2003 JDR 0770 (T)
[11] *Orange Free State Provincial Administration v Ahier and Another; Parys Municipality v Ahier and Another* 1991 (2) SA 608 (W)

[43] In principle this test was endorsed in *President of the Republic of South Africa and Others v South African Rugby Football Union* 1999 (4) SA 147 (CC) where the test was formulated as: *"… 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."*[12]

[44] When an Arbitrator is confronted with an exception on whether a claim sets out a cause of action or not, deciding it does not set out a cause of action, will not *per se* render the Arbitrator bias. This is so, because that is what a determination on exception is required from the Arbitrator. The mere fact that the Arbitrator is then on appeal found to be wrong in his determination will also not *per se* bring about a perception of bias.

[45] Each case will have to be determined on its own set of facts. It has to be factored in that Transnet had amended it SOC after the first award, in addition to the two previous versions of its SOC before the first exception. Tenova submitted these amendments is the reason why the Arbitrator did not afford Transnet a further amendment to its SOC, but dismissed the claim. But therein lies the rub; this fact renders it prejudicial to Transnet because the Arbitrator has determined that Transnet do not have competent claims and therefore did not afford them an opportunity to amend the SOC of claims 1 and 2. He found as follows:

> *"[97] In view of the findings in the award, it is inexplicable why Transnet, if not only out of a sense of excessive caution, did not allege the necessary facts to show that it is entitled in terms of the relevant contractual provisions to claim the general and special damages claimed. The only reasonable inference is that it cannot do so. In paragraph 60 of the 4th SOC Transnet alleges that it made payment for all the valves ordered and supplied Tenova under the two agreements but it does not allege when the delivery of the*

[12] Paragraph [48]

valves took place. The agreements specify when the delivery was to take place and when payment was to be made. For example, clause 4 of the first agreement's Contract Data (4th SOC 70) provides that the goods are to be delivered on or before 17 June 2010 and clause 3.1 of the General Conditions of Purchase (4th SOC 63) specifies the payment milestones: 90 % of the total purchase order value upon satisfactory acceptance and confirmation of delivery of the Goods to the designated site and 10 % of the total purchase order value on completion, approval and acceptance of all the final documentation and data books. The delivery date for the last amendment was about 30 November 2011 (4th SOC 187 and 189) and the payment milestones did not change. The relevant dates in the second agreement were 20 December 2010 for delivery in terms of the Purchase Order (4th SOC 205 and 216-217) and approximately 31 July 2011 in terms of the last amendment (4th SOC 260 and 262). The payment milestones remained the same as those for the first agreement.

[98] In all the circumstances outlined above it appears to be clear that Transnet is unable to plead facts that show that it is entitled to claim damages or any other amount based on the failure to comply with the warranties by delivering valves that did not comply with the specifications for the material to be used in the manufacture of the valves and were therefore defective. It has no viable alternative to what it has already pleaded. As already mentioned if leave to amend is not given it follows that the claims must be dismissed with costs."

[46] A reasonable objective person informed of this finding will apprehend a bias of the Arbitrator if he is to continue with this matter. The Arbitrator had definitively found that Transnet had no claim for damages or any other claim and no viable alternative to what it had it pleaded. Just on this finding alone I have to agree with Transnet that there is a reasonable apprehension of bias. I accordingly do not find it necessary to address the other facts raised from which bias can be perceived, except to remark that the fact that he made factual findings contrary to expert reports attached to the

SOC will compound this perception as well as interpreting letters from which he concluded there was no cause of action.

Does this application comply with s13(2) of the Act?

[47] Section 13(2) of the Act provides:

> *"(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."*

[48] I am satisfied that a perception of bias being found is good cause for the setting aside of the appointment of the Arbitrator, the Second Respondent, and that he be removed from the Arbitration.

[49] I accordingly make the following order:

49.1 The second respondent's appointment as arbitrator is set aside and the second respondent is removed from his office as Arbitrator in the arbitration proceedings between the applicant and the first respondent;

49.2 The first respondent is ordered to pay the costs of this application.

_____

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 2022-006083

HEARD ON: 15 August 2023

FOR THE APPLICANT: ADV. P. DANIELS SC

ADV. A. GOVENDER

ADV. A. KOHLER

INSTRUCTED BY: Cliffe Dekker Hofmeyr Inc.

FOR THE FIRST RESPONDENT: ADV. B.W. BURMAN SC

ADV. A.T.W. ROWAN

INSTRUCTED BY: Edward Nathan Sonnenbergs Inc.

DATE OF JUDGMENT: 19 October 2023