

SOUTH AFRICA / JUDGMENT

Eskom Holdings SOC Ltd v Kuyasa Mining (Pty) Ltd and Others (084710/2023) [2024] ZAGPPHC 806 (24 July 2024)

[2024] ZAGPPHC 806**COURT**

North Gauteng High Court, Pretoria

BEFORE

Snyman

CASE / FILE NUMBER

084710/2023

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Source record**FLYNOTES:**

ARBITRATION – Appeal clause – Whether appeal lapsed
– Private arbitration – Notice of appeal not delivered to secretariat of AFSA – Rule not applicable – Institution not involved in arbitration – Notice serving no purpose – Applicant noted a proper appeal as contemplated by clause of coal supply agreement – Notice of appeal filed timeously and served on all parties involved – Such appeal is valid and extant – Respondents are being opportunistic – Appeal has not lapsed.

IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
CASE
Number: 084710 / 2023
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO
OTHER JUDGES: YES/NO
(3) REVISED: YES/NO
Date: 24 July 2024
In
the matter between:-
ESKOM
HOLDINGS SOC LTD

Applicant
And
KUYASA
MINING (PTY) LTD
First Respondent
DELMAS
COAL (PTY) LTD
Second Respondent
ARBITRATION
FOUNDATION OF
Third Respondent
SOUTHERN
AFRICA

JUDGMENT

SNYMAN, AJ

Introduction

[1] The purpose of private arbitration is to resolve disputes in an expeditious, informal and cost-effective manner, by way of a process agreed between the two opposing parties, without having to resort to all the rigours and formalities, as well as the systemic delays, normally associated with litigation in the Courts. As such, resorting back to the Court in the course of such a process should be kept to the minimum. In *Total Support Management (Pty) Ltd and Another v Diversified Health Systems (SA) (Pty) Ltd and Another*[1] the Court said the following:

‘The hallmark of arbitration is that it is an adjudication, flowing from the consent of the parties to the arbitration agreement, who define the powers of adjudication, and are equally free to modify or withdraw that power at any time by way of further agreement ...’

[2] The current matter, emanating from precisely such an agreed private arbitration, does not appear to achieve the above objectives. The parties appear to be unable to focus on simply getting the real dispute finally resolved, with the matter now, for the second time, returning to litigation in this Court,[2] with such litigation emanating from incessant technical point taking. This can never be what is intended with private arbitration.[3]

[3] The above being said, the current matter to be decided concerns an application by the applicant (Eskom) in which it seeks declaratory

relief as against the first and second respondents. The gist of the declaratory relief sought is that it be declared that an appeal noted by the applicant against a private arbitration award in favour of the first and second respondents, be declared not to have lapsed. Associated relief sought by the applicant is that it be directed that the arbitration appeal panel be formally appointed, so that the appeal proceedings can get underway.

- [4] The application is opposed by the first respondent (Kuyasa Mining) and the second respondent (Delmas Coal). The third respondent, the Arbitration Foundation of Southern Africa (AFSA), has not engaged in the matter, and indicated that it would abide by any decision of this Court. For ease of reference, I will refer to the first and second respondents jointly in this judgment as ‘the respondents’.
- [5] I now turn to deciding this application, by first setting out the relevant background facts, which facts were, fortunately, largely common cause and / or undisputed.

The relevant background facts

- [6] This entire matter arose from a coal supply agreement concluded between the applicant and the respondents on 19 September 2011 (the CSA). The CSA contained a private arbitration provision, in terms of which all disputes arising from the CSA would be subjected to private arbitration for resolution thereof. The exact structure and process of such private arbitration will be specifically dealt with later in this judgment.
- [7] Unfortunately, a dispute indeed arose between the applicant and the respondents concerning a renegotiation of the pricing mechanisms under the CSA. This resulted in the respondents terminating the CSA on 8 October 2018, on the basis that the applicant had allegedly repudiated the CSA by failing to agree on a new pricing mechanism. The applicant in turn disputed any such repudiation, and demanded compliance with the CSA. It is these disputes that were ultimately referred to private arbitration under the CSA.[4]
- [8] Turning next to the private arbitration provisions contained in the CSA, those are found in clause 33. There was no dispute as to the validity or the applicability of these provisions. It was also common cause that the disputes between the parties were arbitrable disputes as contemplated by clause 33.2 of the CSA.
- [9] The CSA, in such clause 33, prescribes a four step dispute resolution process. Step one is notice of the dispute to the other party, in which notice the referring party shall inter alia identify the nature and particulars of the dispute, and set out what is required to be done to remedy the same. Step two happens if the remedying provisions in the notice are not complied with, and this step contemplates a meeting between the parties to try and resolve the dispute in an amicable manner. Step three contemplates that if the dispute cannot be amicably resolved, it must be escalated to the CEOs of the parties for a further attempt at resolution. And finally, step four, as set out in clause 33.6, is the business end of the dispute resolution process, and prescribes the process to be followed if the dispute cannot be resolved by virtue of the preceding three steps. It is now appropriate to quote the applicable provisions of clause 33.6.1 as they stand in the CSA. The sub-clauses thereof read as follows:
[5]

‘33.6.1.1: ‘Either Party may refer the Dispute to be finally resolved in accordance with the rules of the Arbitration Foundation of Southern Africa (“AFSA”) or its successor body by an arbitrator appointed by the President of the Johannesburg bar Council or his nominee. “Refer” in this sub-

clause means delivering or transmitting electronically a written notice to the Johannesburg Bar Council requesting the appointment of an arbitrator to determine this Dispute. Referral of the Dispute shall be completed on delivery to the Johannesburg Bar Council of this notice. The Party referring the Dispute shall thereafter deliver or electronically transmit a copy of the referral notice to the other Party.

33.6.1.2: The arbitration will be held in Johannesburg in a private venue as determined by the AFSA Rules or the arbitrator appointed as envisaged in clause 33.6.1.1.

33.6.1.3: The arbitrator will have regard to the desire of the Parties to dispose of such Dispute expeditiously (it being recorded that the Parties shall adhere strictly to the timeframes provided for in the rules and save in the case of an agreement, not be granted an extension of time in respect of any matter whatsoever), economically and confidentially and shall be obliged to provide written reasons for his / her decision, together with the reasons for such decision which shall be delivered in writing to the parties within 21 (twenty one) days after the conclusion of the arbitration hearing.

33.6.1.4: The arbitrator will determine the liability for his / her charges and the costs of the arbitration will be paid accordingly by the Parties.

33.6.1.5: Subject to the provisions of clause 33.6.2, the Parties irrevocably agree that the decision in any such arbitration proceedings will be final and binding on them, will forthwith be put into effect and may be made an order of court of competent jurisdiction.'

[10] Unlike most private arbitration agreements, the CSA makes provision for an appeal. This is found in clause 33.6.2 of the CSA, which provides as follows:

'33.6.2: Either Party has the right to appeal against the decision of the arbitrator appointed in terms of clause 33.6.1.1 provided that this is done within 30 (thirty) days of receipt by the Parties of the arbitrator's award. The appeal shall be heard by three

arbitrators, in accordance with a procedure determined by them, who shall be appointed as follows:

33.6.2.1: The Party appealing will nominate one arbitrator from the ranks of retired High Court Judges or Senior Advocates;

33.6.2.2: The other Party will nominate one arbitrator from the ranks of retired High Court Judges or Senior Advocates; and

33.6.2.3: The two arbitrators so nominated must nominate a third arbitrator from the ranks of retired High Court Judges or Senior Advocates.'

[11] In December 2018, the applicant referred its dispute mentioned above to private arbitration in terms of clause 33.6.1.1 of the CSA. The respondents pursued, in the same proceedings, a counterclaim for damages resulting from breach of the CSA. An arbitrator was appointed by the Chair of the Johannesburg Society of Advocates on 6 December 2018, being Advocate Lindi Nkosi-Thomas SC.

[12] The parties administered the arbitration process themselves. They exchanged pleadings between themselves, and ultimately convened a pre-arbitration conference on 18 February 2019. The pre-arbitration conference was attended by the parties' legal representatives

and the arbitrator, and was minuted. The minutes of the pre-arbitration conference was signed by the legal representatives and the arbitrator on 26 February 2019. Of importance in casu, it was agreed in clause 2 of the minute that the AFSA commercial rules shall apply (clause 2.1) and AFSA shall be appointed to

administer the arbitration (clause 2.2).

[13] It was in the end common cause that from the outset of the arbitration proceedings, the dispute (arbitration) was not referred

or submitted to AFSA for administration, nor was the arbitration conducted under the auspices or supervision of AFSA. It was also

common cause that despite the provisions of clause 2.2 of the pre-arbitration minute of 26 February 2019, AFSA was never appointed

to administer the arbitration. At all times, the arbitration proceedings were managed by the arbitrator herself, and the parties

dealt with it between themselves, until the arbitrator ultimately rendered her award.

[14] The arbitration award by arbitrator Nkosi-Thomas SC was rendered on 27 February 2023. The arbitrator upheld the respondents'

alternative claims in the arbitration and awarded them R696 243 120.42 in damages. The applicant was dissatisfied with the award, because it considered the award fundamentally flawed in various respects, which included factual findings made, and it being contrary to established law.

Consequently, and in terms of clause 33.6.2 of the CSA, the applicant noted an appeal on 2 March 2023. This was done by way a written notice of appeal sent to the respondents and the arbitrator.

It was undisputed that this was done within the time limit prescribed by clause 33.6.2 of the CSA.

It was common cause that this notice of appeal was never delivered to the Secretariat of AFSA, and was thus never lodged with AFSA.

- [15] On 27 March 2023, the applicant, in terms of clause 33.6.2.1 of the CSA, sent a letter to the respondents, nominating Retired Justice Brand or, failing him, Retired Justice Harms or Nugent, to be appointed as its nominated appeal arbitrator. The applicant requested that the respondents now nominate their appeal arbitrator as contemplated by clause 33.6.2.2 of the CSA. It is at this point that matters went awry.
- [16] The respondents did not answer the applicant's letter of 27 March 2023. This resulted in follow-up letters by the applicant on 31 March and 20 April 2023. On 21 April 2023, the respondents finally answered, indicating that they were only prepared to submit their nomination of an appeal arbitrator under article 22.5 of the AFSA rules but were awaiting the directive from the Secretariat of AFSA as to the fees payable, before making its nomination.
- [17] The applicant responded on 4 May 2023, indicating that the nomination process of the appeal arbitrators panel was governed by clause 33.6.2 of the CSA and not the AFSA Rules, so therefore the reference to the AFSA Rules was incorrect. The applicant demanded that the respondents nominate an appeal arbitrator. The respondents were unpersuaded, and in a letter on 11 May 2023, indicated to the applicant that its view was that the appeal must be conducted under the AFSA Rules, and therefore, without the fees being determined by the AFSA Secretariat prior to the appointment of arbitrators, they would not be nominating an appeal arbitrator. The respondents also relied on the pre-arbitration minute of 26 February 2019 in support of their contention.
- [18] What next followed was a number of interactions (including correspondence) between the parties in an attempt to resolve this

impasse relating to the nomination of appeal arbitrators. There are a number of factual disputes emanating from the founding affidavit of the applicant and the answering affidavit of the respondents, as to what actually transpired in the course of this interaction, what was discussed, and what was the position ultimately adopted by the parties. However, and in my view, nothing turns on this, and I do not believe it necessary to decide which version holds true. The case in casu can be properly decided without having to become embroiled in this factual dispute. Suffice it to say, what at least emerges as

undisputed is that the applicant agreed, in order to get the appeal moving forward, to engage AFSA to conduct the appeal under its administration and Rules. This was confirmed in a letter on 22 May 2023 by the applicant to the respondents, in which it was stated that AFSA would be approached to appoint the arbitrators under the AFSA Rules and that the matter could then proceed.

[19] In reaction, and on 25 May 2023, the respondents answered, stating that they nominated either Adv. Maenetje SC or Adv. Mokoena SC, as their appointed appeal arbitrator. It was added in this letter that the applicant should emphasize to the AFSA Secretariat to proceed in terms of articles 22.4.1 and 22.4.2, which involved the determination of fees of the appeal arbitration and thereafter the formal appointment of arbitrators.

[20] As undertaken, and on 30 May 2023, the applicant then sent a letter to the AFSA Secretariat, requesting that the appeal arbitration

proceed under the AFSA Rules. The respondents also followed up with AFSA on 8 June 2023 as to the progress of the matter, and appeared to have been informed by AFSA that as far as it was concerned, that there was no live appeal in this case. In addition, Isabel Terk (Terk), the AFSA Registrar, sent an e-mail to arbitrator Nkosi-Thomas SC on 8 June 2023, stating that 'We are not dealing with the matter as it is clear that the parties have been dealing directly with you. Please respond to the attorneys. We have not registered any appeal in this matter.'

[21] Given AFSA's stance in this matter, the applicant once again sought to engage with the respondents on how to resolve this, so that the appeal could proceed. It appears that the respondents then snatched at the bargain they now perceived, and on 22 June 2023 indicated that they were of the view that the applicant's appeal had lapsed, and payment of the amount awarded in the arbitration award was demanded.

[22] On 27 July 2023 the applicant sent a letter to AFSA, explaining that AFSA had never administered the arbitration, however given the agreement contained in the exchange of correspondence between the parties in the period 22 May to 25 May 2023 referred to above, AFSA would now be appointed to carry out administrative functions in respect of the appeal, in particular in respect of appointing

arbitrators and determining the fees in terms of the AFSA Rules. AFSA was asked to proceed accordingly.

[23] AFSA refused to play ball. In an email by Terk to the applicant on 31 July 2023, Terk indicated that her view was that the CSA required AFSA to administer the arbitration process between the parties from the outset, however AFSA was not involved in the arbitration. Terk referred to some agreement between the parties that AFSA would not be involved. She concluded that 'Having been left out of these proceedings we cannot comment further'. The upshot is that AFSA effectively refused to accept the appeal, because it did not administer the arbitration from the outset.

[24] This response by Terk added fuel to the fire of the respondents' view that the applicant's appeal had lapsed. On 31 July 2023, they reiterated that view by way of a letter to the applicant. As far as the respondents were concerned, a declaratory Court order was needed to the effect that the appeal had not lapsed, in order for the appeal to proceed.

[25] Undeterred, the applicant sought to confirm with retired Justice Band and Advocate Mokoena SC, whether they would be prepared to sit on the appeal panel in this matter, should the applicant obtain declaratory relief from this Court to the effect that its appeal had not lapsed. They both indicated that they would be available to do so, and would abide by any decision the Court made. The current application then followed.

Analysis

[26] Ultimately, what must be decided in this case is straight forward. Did the applicant's appeal against the arbitration award of arbitrator Nkosi-Thomas SC lapse? However, answering this question is not as easy as it may on face value appear. Many different factors, in my view, come into play, all of which have an impact on how this case would ultimately be decided.

[27] It is perhaps best to first determine why it is said the applicant's appeal has lapsed, considering it was common cause that applicant did file a notice of appeal promptly, being some five days after delivery of the arbitration award. It was also common cause that the notice of appeal was served on all the parties involved in the appeal, including the arbitrator. Certainly, that would at least prima facie constitute compliance with clause 33.6.2 of the CSA, as it reads. This means it is up to the respondents to say why they consider the appeal to have lapsed. In this regard, the answer they provide is simple, being that the appeal notice should have been delivered to the Secretariat of AFSA, as contemplated by article 22.2 of the AFSA Rules, which provides that: 'A notice of appeal shall be delivered by the appellant, within 7 calendar days of publication of the award, failing which the interim award or final award shall not be appealable', and 'delivered' in turn being defined in the article definitions as: 'To deliver or send copies to all parties as provided for in these Rules and to file the original to the Registrar ...'.

[28] As a point of departure in deciding this case, it cannot be forgotten what one is dealing with is agreed private arbitration as mechanism to resolve disputes with minimum formality and due expedition. Considering that there are no issues in this case about the terms of reference, jurisdiction, powers and nature of the dispute being susceptible to being arbitrated, it must follow that the arbitration process, or differently put the manner in which the arbitration is to be conducted, is of lesser importance. The only proviso must be that the parties receive a fair hearing of their respective cases. The Court in *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another*[6] authoritatively dealt with this as follows:

'... we must recognise that fairness in arbitration proceedings should not be equated with the process established in the Uniform Rules of Court for the conduct of proceedings before our courts. Secondly, there is no reason why an investigative procedure should not be pursued as long as it is pursued fairly. The international conventions make clear that the manner of proceeding in arbitration is to be determined by agreement between the parties and, in default of that, by the arbitrator. Thirdly, the process to be followed should be discerned in the first place from the terms of the arbitration agreement itself. 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.'

And in *Telcordia Technologies Inc v Telkom SA Ltd*[7] it was said:

'... By agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else. ...'[8]

[29] So, the primary objective to be achieved by private arbitration is that the substance of the dispute be finally determined with minimum formality. An interpretation of the CSA, which contains the private arbitration agreement, that would be irreconcilable with this primary objective, should be avoided. As said in *Du Toit NO v the Road Accident Fund*[9]:

'I am well aware that the aim and purpose of private arbitration, like in this instance, includes the fast and cost-effective resolution of disputes. In my view, robust debate and investigative procedures should be allowed and encouraged, as long as it is pursued in a just and fair manner. Moreover, if courts are too quick to find fault with the manner in which an arbitration has been conducted and too willing to conclude that faulty procedures are unfair or constitutes a gross irregularity, the goals of arbitration may well be defeated.'

[30] The above being said, the principles where it comes to interpreting written instruments / agreements, such as the CSA in casu, are now fairly trite. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[10] the Court held as follows:

'...The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the

background

to the preparation and production of the document.’

[31] The approach established in *Endumeni supra* has been consistently applied since.[11] Because it is in my view of importance to the decision to be made in *casu*, some specific references to the application of the *Endumeni* principles, for the want of a better description, is necessary. In *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*[12] the Court had the following to say:

‘... I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitute the enterprise by recourse to which a coherent and salient interpretation is determined ...’

And in *University of Johannesburg v Auckland Park Theological Seminary and Another*[13] it was held:

‘... The Supreme Court of Appeal has explicitly pointed out in cases subsequent to *Endumeni* that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. A court interpreting a contract has to, from the onset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract ...’

[32] The conundrum that arises in *casu* is solely as a result of the introduction of the AFSA Rules into the interpretation equation, and how these Rules then impact upon the arbitration process prescribed by the CSA. There can be no doubt that the AFSA Rules must be considered as part of the unitary exercise of interpreting the CSA. After all, they are made applicable by reference, considering the use of the phrase ‘... resolved in accordance with the rules of the Arbitration Foundation of Southern Africa (“AFSA”) ...’ in clause 33.6.1.1 of the CSA. In any event, if there was any doubt as to this, it is dispelled by clause 2.1 of the pre-arbitration minute of 26 February 2019, which makes the application of these Rules clear. [14]

[33] The applicant argued that the AFSA Rules do not apply to the appeal process in clause 33.6.2 of the CSA, because all the references to the application of such Rules only relate to the initial arbitration proceedings under clause 33.6.1 of the CSA, with the appeal process being a distinct and separate process where no such references apply. I am unable to agree with this argument of the applicant. First and foremost, resolving any dispute ‘to finality’ as provided for in clause 33.6.1.1 can only mean a singular exercise, starting with a dispute referral and ending with an appeal outcome, and even then, that same dispute is still subject to this Court’s review jurisdiction under section 33(1) of the Arbitration Act. Throughout these multiple stages in the dispute resolution process, it nonetheless remains one dispute, leading to one ultimate outcome, depending how far the challenge is taken. Albeit in the

context of prescription, the Court in *Cape Town Municipality and Another v Allianz Insurance Co Ltd*[15] held:

‘... A creditor prosecutes his claim under that process to final, executable judgment, not only when the process and the judgment constitute the beginning and end of the same action, but also where the process initiates an action, judgment in which finally disposes of some elements of the claim, and where the remaining elements are disposed of in a supplementary action instituted pursuant to and dependent upon that judgment ...’

[34] I am satisfied that the reference to the ‘Dispute to be finally resolved in accordance with the rules of the Arbitration Federation ...’, as found in clause 33.6.1.1 of the CSA encompasses the appeal process as well, should an appeal be pursued, and the appeal under clause 33.6.2 should therefore also be conducted in accordance with the AFSA Rules.

[35] But that is not the end of the enquiry. Does the fact that the arbitration proceedings (including the appeal proceedings) are to be conducted ‘in accordance with’ the AFSA Rules mean that all those rules, per se and without more, must always apply? For the reasons to follow, I am compelled to answer this question in the negative. It is in fact in this context that the distinction between an arbitration conducted under the auspices or administration of AFSA itself on the one hand, and an arbitration that is conducted by the parties themselves by applying the rules of AFSA, becomes critical.

[36] In order to decide the consequence of the aforesaid distinction, what would be required is a consideration of the AFSA Rules themselves. In this context, the very purpose of the activities of AFSA, to which these Rules relate, cannot be ignored. In article 2.1, it is provided that AFSA: ‘... conducts its activities of providing administrative means for the conduct of arbitration proceedings. Its activities include the appointment of a panel of persons who have agreed to act as arbitrators under the aegis of and according to the Rules of the Foundation, the appointment of an arbitrator or arbitrators for resolution of particular disputes, the provision of the venue and the administrative services for conduct of arbitration proceedings under and in accordance with these Rules for fees covering its administrative services and provision of a venue and the fees and expenses of the arbitrator or arbitrators.’. And in article 2.2.1, it is recorded that: ‘The Foundation’s activities in providing the aforesaid arbitration facilities are controlled by a Secretariat, which comprises the persons appointed by AFSA’.

[37] What is clear to me from the aforesaid is that in terms of the AFSA Rules themselves, it is intended that these Rules apply as they stand, in all respects, only where AFSA actually administers the arbitration proceedings. My view in this regard is fortified by further provisions in the AFSA Rules themselves. Importantly, and as to how arbitration proceedings are to be initiated, article 4.1 prescribes that a party wishing to resort to arbitration ‘under the aegis of and according to the Rules of the Foundation’, shall submit a written ‘Request for Arbitration’ to the Secretariat of AFSA through the office of the Registrar. This notice must contain certain prescribed particulars,[16] and the ‘first fee’

payable to AFSA.[17] It is however then still up to AFSA to decide whether to accept the referral or not, in its own discretion.[18]

[38] But where AFSA accepts the referral, it effectively takes over the entire case management of the arbitration proceedings, for the want of a better description, which even includes the management of fees payable. This further includes that AFSA itself serves the referral on the 'defendant' and calls upon it to file a response,[19] which response must in turn be filed with the Secretariat.[20] It is also AFSA itself that appoints the arbitrator,[21] provided both parties have paid a 'first fee' to AFSA,[22] and then notifies the parties of such appointment. [23] AFSA will only authorise the arbitrator to proceed with the arbitration if upfront fees have been paid to it.[24] The Secretariat also supplies the arbitrator with the case file.[25] Upon conclusion of the arbitration, the arbitrator returns the entire case file (including the record of the arbitration) to the

Secretariat.[26] All this, in a nutshell, is what transpires where AFSA 'administers' the arbitration.

[39] The appeals process found in article 22 of the AFSA Rules in my view clearly contemplates proceedings where AFSA administers the appeal itself. This is evident from article 22.4. What is prescribed in this article is an estimate of the fees for the appeal, and calling upon the parties to pay such fees in advance.[27] Once the fees are paid, the Secretariat appoints the appeal arbitrators.[28] This can only effectively happen where AFSA has the arbitration record and case file.

[40] It is true, as touched on above, that article 22.2 prescribes that an appeal notice must be delivered within seven days of delivery of the arbitration award. Article 22.3 then prescribes the format of the notice of appeal, and records: 'The notice of appeal and notice of cross-appeal, if any, shall state whether the whole or part only of the award or interim award is appealed against, and, if only part thereof is appealed, it shall state which part, and shall further specify the findings of fact and rulings of law appealed and the grounds upon which the appeal or cross-appeal is founded'. No appeal notice in such a format was filed by the applicant.

[41] And finally, even where AFSA administers the arbitration, the Rules do not intend to substitute any contrary process specifically agreed to by the parties in the arbitration agreement, considering article 3.3, which reads: 'These Rules ... supplement any specific provisions of an arbitration agreement to arbitrate under the aegis of or according to the Rules of the Foundation, in so far as such specific provisions are silent on matters provided for in these Rules ...'.

[42] So, if the arbitration is conducted under the auspices / administration of AFSA, then obviously all its Rules will apply without more, subject only to what the parties may have otherwise agreed to as recorded in the arbitration agreement itself. But what if the parties administer the arbitration themselves, without engaging AFSA as prescribed by the various articles in the AFSA Rules

referred to above, but nonetheless agree to conduct the arbitration 'in accordance with' the AFSA Rules?

[43] Surely, as a matter of common sense and logic, an arbitration cannot be conducted under the auspices of AFSA (or differently put administered by AFSA), where the referring party does not file a referral with AFSA, no fees are paid to it, it does not manage the case, and it does not appoint and / or brief the arbitrator. Therefore, none of these articles can apply, even though other articles relating to issues such as, inter alia, the powers of an arbitrator, the issuing of awards, calling of witnesses, representation of the parties, and awards of costs,

would.[29]

[44] In simple terms, conducting an arbitration outside the auspices / administration of AFSA, but 'in accordance with' the AFSA Rules, must mean the applying of only those AFSA Rules that may be applicable to the conducting of the arbitration proceedings

itself, subject to the specific processes prescribed in the arbitration agreement.[30] It cannot be the entire AFSA rule book, so to speak, per se. In *Canton Trading 17 (Pty) Ltd v Hattingh NO*[31] the Court held:

'The commercial rules of AFSA, applicable to domestic arbitrations, supplement any specific provisions of an arbitration agreement to arbitrate under the aegis of or according to the rules of the foundation, in so far as such specific provisions are silent on matters provided for in the rules ...'

[45] In *Yunnan Engineering CC and Another v Chater and Others*[32] the Court considered a provision in an arbitration agreement where the parties recorded that the arbitration proceedings would be 'guided by' the AFSA Rules. In my view, this is comparable to an arbitration agreement recording the words that the arbitration would be conducted

'in accordance with' the AFSA Rules. The Court in *Yunnan supra* held:[33]

'... the word 'guide' in The South African Concise Oxford Dictionary as a verb is described as meaning 'show or indicate the way to'. In my view, there are no such peremptory overtones as in the word 'govern'. Had the parties wanted the Rules of AFSA to be peremptory, then they would have used the same word 'govern' as they did with regard to the Arbitration Act. This, however, does not mean that these Rules can be unilaterally ignored by one of the parties. These Rules are a guide. Where there has got to be a departure from such AFSA Rules, such departure must be consensual, otherwise it would be nonsensical for the parties to agree on a guide which will be departed from as and when any of the parties wishes to, and as and when it suits him. In as much as the Rules are a guide, they cannot be ignored unilaterally, and the one who does so, does so at his own peril. Where there has been non-compliance with the said 'guide' being the AFSA Rules, and such non-compliance is not consensual, the approach to be adopted is to look at the extent of non-compliance, in other words how far has the other party strayed away from the Rules and whether such departure is reasonable. ...'

Whilst it is true that in the end, the Court in Yunnan decided that the appeal brought in that case had lapsed in terms of the AFSA Rules, the facts in that case are entirely distinguishable from the facts in casu, especially considering that the appeal in that case was filed materially late.[34]

[46] I also make reference to Mdia's Travel CC v Siyaya Teledata Comm and Couriers CC[35] as another appropriate example. There, the parties agreed to make the AFSA Rules applicable to the arbitration. It was argued in this context that this agreement meant that the parties bound themselves to seek registration of the dispute with the Secretariat of AFSA, and AFSA then had to appoint an arbitrator, arrange a venue where the arbitration proceedings would take place, issue notices and collect fees for such administrative services. It was then argued that because this did not happen, the arbitration proceedings were irregular.[36] It however became apparent that the arbitration agreement itself prescribed how an arbitrator should be appointed and what the experience and qualification of that arbitrator should be.[37] The Court had the following to say:[38]

‘... It appears from the definition of the term "proviso" as aforementioned that the parties retained the power to appoint the arbitrator. That being the case, the parties had, by implication, left it to themselves to issue notices of a hearing exactly as Mr Abrahams did. In the circumstances the supplementation of the arbitration agreement of the parties by application of AFSA rules as referred to in Article 3.3 does not kick-in. It must follow that it was not intended by the parties that AFSA would be responsible to issue arbitration notices for a hearing that would not be conducted by it.’

In casu, and similarly, the CSA prescribed how not only the original arbitrator had to be appointed, but also how the appeal arbitrators

should be appointed. This does not in any manner involve AFSA, but requires appointment by the parties themselves. In my view, and applying the reasoning in Mdia's Travel, it should not be expected that notices are required to be issued to AFSA in casu.

[47] A final reference in this context is to Transnet (SOC) Limited v Tenova Mining and Minerals South Africa (Pty) Ltd and another[39]. In that case, the arbitration agreement provided that it would be conducted ‘in accordance with’ the AOA rules (these rules are similar to the AFSA Rules). The Court considered that in this context, what had happened is that the parties did not want to incur fees and costs by involving the AOA or AFSA, and therefore AOA did not administer the arbitration

but the parties self-administered the same, with AOA not even being aware of the arbitration as it was not under its auspices.[40] The Court concluded as follows in this regard.[41]

‘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 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.’

[48] Which of the AFSA Rules would find application would not only be determined by the text of the CSA, but would also be informed by the manner and context in which the actual arbitration proceedings were conducted. The facts in *casu* serve as a prime example. It was common cause that the parties managed the exchange of pleadings and the conducting of the arbitration process themselves, under the auspices of the arbitrator herself. That being so, it can hardly be now said that the proceedings are irregular and / or invalid because it may not have followed what is prescribed in the AFSA Rules about the referral of the dispute and then administration of the arbitration. Such an approach would fly in the face of one of the primary objectives of private arbitration proceedings, as discussed above, by creating unnecessary formality and technicality when it is not warranted.

[49] The exposition set out above now brings me neatly back to the case in *casu* and the point that the appeal lapsed because the notice of appeal was not delivered to the Secretariat of AFSA. As stated, it is

true that the CSA requires that the arbitration be conducted in accordance with the Rules of AFSA, and that article 22.2, as it

reads, requires delivery of any notice of appeal to AFSA. But would this really apply in this case? In my view, the answer must be a firm ‘no’. The simple reason for this is that it cannot be expected, in the context of all that is discussed above, that a process such as a notice of appeal, be delivered to an institution such as AFSA where such institution is not involved in the arbitration of the case at all. After all, it is one unitary process from original referral to appeal. What can possibly be the point of serving an appeal notice on AFSA in respect of a case it was never involved in and was entirely unaware of? Such an action cannot serve

any purpose, especially considering how the CSA actually prescribes the appeal process in clause 33.6.2. In simple terms, the clause

requires notification of the appeal to the other party, followed by the appealing party’s nomination of its arbitrator, the other party’s own nomination of its arbitrator, and the two nominated arbitrators then nominating a third arbitrator. This appeal arbitration panel then decides the manner in which the appeal arbitration is to be conducted. None of this requires the involvement of AFSA at all, which is simply a continuation of its complete lack of involvement up to this point.

[50] In my view, the applicant ultimately simply agreed to get AFSA on board in the appeal process so as to get the appeal going, because the appeal had stalled as a result of the approach adopted by the respondents. The applicant had first made its view clear that it was not required to conduct the appeal in accordance with article 22 of the AFSA Rules. The respondents were however unrelenting in their insistence that article 22, and especially

article 22.4, must be applied. And that is where things ground to a halt. The applicant decided to follow the line of least resistance, so its appeal can at least proceed to be heard. After all, it was staring down a liability of close on R700 million. It engaged AFSA to administer the appeal. AFSA's own reaction to this approach in fact illustrates the very point I have sought to make in this judgment. AFSA effectively blew the applicant off, refusing to accept the appeal, because it was not involved in administering the case from the outset. I am convinced that this was always going to be AFSA's reaction, even if the original appeal notice by the applicant was delivered to it, considering that the parties conducted the arbitration themselves and without AFSA.

[51] But even if it can be said that the appeal notice should have been given to AFSA, it is clear to me that considering the actual facts in this case and the manner in which all the proceedings had been conducted to date of the appeal, what is being propagated by the respondents is notice for the sake of notice, without the notice serving any purpose. This is overly technical, and flies in the face of what is intended with private arbitration proceedings. It is not lost on me that in the pre-arbitration minute, it is recorded in clause 2.2 that the arbitration would be administered by AFSA, however this never happened, and certainly no-one ever complained. The very objective of clause 33.6.2 of the CSA had been achieved by what had come to pass, on the undisputed facts. That meant that article 22 of the AFSA Rules did not serve any purpose. Thus, cessante ratione legis cessat et ipsa lex.[42] As described in *Laubscher NO v Duplan and Others*[43]: '... the maxim, as already explained, is a tool of statutory interpretation and suggests that once the reason for the law ceases,

the law itself ceases too. ...'. And in *Tamasa Trading 208 CC v Da Cardosa*[44], with reference to the same maxim, it was said:

'Our courts have applied the rule in order to suspend the operation of a statutory provision if the ratio is found not to exist in the specific circumstances. A court should seek to ascertain the ratio of a statutory provision in order to determine whether that ratio, when applied to the particular circumstances, still exists ...'

[52] Accordingly, it is my view that the CSA never contemplated administration of the arbitration proceedings by AFSA. If that was

the case, the agreement would have said so. Instead, the CSA stipulated that the arbitration shall be conducted 'in accordance with' the AFSA rules, which, as I have said, does not require administration of the arbitration by AFSA, and could only have been intended to supplement the arbitration process where the CSA provisions may be lacking, and not to substitute or override such. The conduct of both parties throughout was entirely inconsistent with an arbitration process requiring application of all the AFSA Rules, per se, which is especially evident from the fact that although the parties in the pre-arbitration expressed the wish to have AFSA administered arbitration, this never happened. And finally, considering the appeal was noted and prosecuted in a manner consistent with the text of clause 33.6.2, article 22 of the AFSA Rules served no purpose. It must follow from all of this that the applicant has noted a proper appeal as

contemplated by clause 33.6.2 of the CSA, and such appeal is valid and extant. The applicant's appeal has accordingly not lapsed, and the applicant is entitled to the declaratory relief sought in this regard.

[53] I am convinced that the respondents are simply being opportunistic, and effectively snatched at the bargain presented to them when AFSA adopted the attitude that it did. The respondents saw this as the opportunity to scupper the appeal, on an unwarranted technical ground, which could never have been the intention of the parties in providing for private arbitration to resolve disputes between them. The fact that the respondents were quite willing, and did, nominate their own arbitrator as prescribed in clause 33.6.2.2 of the CSA and only sought to invoke the AFSA Rules on the issue of fees (specifically referring to article 22.4) prior to becoming aware of AFSA's attitude towards the appeal, cements my view in this regard. I view this behaviour as unacceptable. As held in *Cadac (Pty) Ltd v Weber-Stephen Products Co and Others*[45]: '... Litigation is not a game.'

[54] On final issue must be dealt with. Obviously appreciating the unravelling of their case relating to the appeal having lapsed, the respondents made one last ditch effort in argument before me to nonetheless scupper the appeal. This argument was founded on article 22.3 of the AFSA Rules, which requires an exposition of the grounds of appeal and what part of the award is being appealed against, for a valid notice of appeal. On the undisputed facts, the applicant's notice of appeal simply records that it appeals, without any such exposition. The argument presented by the respondents is to the effect that non-compliance with article 22.3 thus renders the notice of appeal invalid and the appeal lapsed. The respondents however have an insurmountable difficulty even seeking to raise this issue. This difficulty is that this case was never pleaded, or even raised in the answering affidavit.

[55] It is trite that a litigant is bound by its case as pleaded.[46] In addition, and because the proceedings in *casu* are motion proceedings, the affidavits not only constitute the pleadings in the case, but also constitute the evidence. This being so, it is not permissible for the respondents to raise a case not pleaded or articulated in the answering affidavit.[47] The following dictum in *Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV and Another v Honig*[48] is apposite in *casu*:

'... in motion proceedings the affidavits serve as both the pleadings and evidence relevant to the issues between the parties, and a party can only be expected to deal with averments raised by the other side and not with allegations possibly anticipated but which are not made. Had the appellants raised the alleged delays and their contention that the court should decline to deal with the matter as a result, the respondent may well have offered a perfectly acceptable explanation. Without the respondent having been called upon to do so, it would not be proper to decide the application against him by having regard to an issue that he was not called upon to meet. ...'

[56] But even worse still, the respondents' pleaded case in the answering affidavit disavows any reliance on article 22.3, and specifically limits their challenge only to the issue of the appeal notice not being delivered to the AFSA Secretariat.[49] In fact, the respondents say: 'Eskom invoked and followed the AFSA Commercial Rules in all respects of the appeal except for this crucial aspect: it failed to "deliver" the notice of appeal as prescribed ...' (emphasis added). It follows that this belated case of an alleged non-compliance with article 22.3 is simply not open for consideration, must be refused on this basis alone.

[57] Considering the decision I have come as aforesaid, it is not necessary for me to decide the applicant's alternative case that the respondents acquiesced in the conducting of the appeal process, and simply could not challenge such appeal as having lapsed at a later stage, on the basis of the application of issue estoppel. I will therefor make no finding on this.

[58] In the end, I feel compelled to refer to the following pertinent statement made by Sutherland JA in *Adams v National Bargaining Council for the Road Freight and Logistics Industry and Others*[50], which I believe finds room for repetition in casu:

'Although it is highly desirable for good order that rules be complied with on their own terms, the function of the rule is the paramount

consideration and, where it can be safely found that the purpose of the rule is achieved, it is highly undesirable to approach the matter in a literalist way. Mechanical thinking is anathema to our law ...'

Conclusion

[59] For all the reasons set out above, I am satisfied that the applicant is entitled to the declaratory relief sought in the notice of motion, to the effect that its appeal against the arbitration award issued on 27 February 2023 by arbitrator Nkosi-Thomas SC has not lapsed. I am of the view that the notice of appeal filed by the applicant on 2 March 2023 was timeously served on all the parties involved in the arbitration, which is what is contemplated by clause 33.6.2 of the CSA, and as matters stand, remains extant. Article 22.2 of the AFSA Rules finds no application in this instance.

[60] On the facts, it is clear that the two arbitrators nominated by both the parties in terms of clauses 33.6.2.1 and 33.6.2.2 of the CSA, have properly been nominated by them, are retired Justice Brand and Advocate Mokoena SC, and both these arbitrators have accepted their nomination and indicated their willingness to sit on the appeal arbitration panel. All that is left is for these two arbitrators to appoint a third arbitrator in terms of clause 33.6.2.3, and then the three of them will decide on the conducting of the appeal process going forward. As prayed for, the applicant would be entitled to relief giving effect to these provisions.

[61] The applicant has applied for relief to the effect that AFSA formally appoint all three the arbitrators and do all that is necessary to administer the appeal. But considering what I have set out above, and in particular the attitude adopted by AFSA towards the appeal, I do not

believe this relief is appropriate. AFSA clearly wants no part of the appeal proceedings, and should not be compelled to accept a case it does not want. There is in any event no legal basis to compel AFSA to accept any case even if the parties agree to it being referred there, considering that it has the discretion to decide whether to accept a case or not. The fact is that the parties have agreed and decided to self-manage the entire arbitration until now, without the involvement of AFSA. I see no reason why they should not continue to do so going forward.

[62] This only leaves the issue of costs. The applicant was overall considered successful, and is entitled to its costs. I am satisfied

that the matter is of sufficient complexity to warrant the costs of two counsel, at scale C. I also consider the respondents'

rather opportunistic position adopted, which unnecessarily gave rise to this matter, in making this costs award.

[63] In all the circumstances as set out above, the following order is made:

Order

1. It is declared that the applicant's (Eskom's) appeal against the arbitration award delivered on 27 February 2023 by Advocate Lindi Nkosi-Thomas SC (FA1 to the founding affidavit) ("the award"), has not lapsed.
2. It is declared that retired Justice Brand and Advocate Mokoena SC have been duly appointed as the nominated arbitrators of the applicant and the first and second respondents in terms of clause 33.6.2 of the Coal Supply Agreement entered into between the applicant and the first and second respondents on 19 September 2011.
3. It is directed that retired Justice Brand and Advocate Mokoena SC shall appoint a third arbitrator to serve on the arbitration appeal panel as contemplated by clause 33.6.2.3 of the Coal Supply Agreement entered into between the applicant and the first and second respondents on 19 September 2011.
4. It is directed that the appeal arbitration panel shall determine the process for conducting the appeal of the award.
5. The first and second respondents are ordered to pay the applicant's costs on party and party scale C, the one paying the other to be absolved, which costs shall include the costs of two counsel.

SNYMAN AJ

Acting Judge of the High Court of South Africa

Gauteng Division, Pretoria

Appearances: Heard on: 6 June 2024 For the Appellant: Advocate J Blou SC together with Advocate D Wild Instructed by: Mothle Jooma Sabdia Inc Attorneys For the First and Second Respondent: Advocate C D A Loxton SC together with Advocate A Milovanovic – Bitter Instructed by: MacRobert Attorneys Date of Judgment: 24 July 2024

[1] 2002 (4) SA 661 (SCA) at para 25; See also Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another 2009

(4) SA 529 (CC) at para 197.

[2] See Kuyasa Mining (Pty) Ltd v Eskom Holdings Soc Limited 2020 JDR 1581 (GJ), which concerned a dispute between the same parties relating to the challenge of a determination by the arbitrator

relating to the discovery of documents.

[3] See Lufuno (supra) at para 236; Du Toit NO v the Road Accident Fund 2010 JDR 0600 (WCC) at para 7; Thomas v Heystek NO 2015 JDR 0654 (GP) at para 12; Leanique Peace CC v Sparkling Auto Care Services (Pty) Limited 2018 JDR 0117 (GP) at paras 32 – 33.

[4] The applicant later abandoned its dispute concerning compliance with the CSA, leaving only the respondents' claim.

[5] The individual provisions set out in the AFSA Rules are referred to, in those Rules themselves, as 'articles'.

[6] 2009 (4) SA 529 (CC) at para 236.

[7]

[2006] ZASCA 112; 2007 (3) SA 266 (SCA) at para 50.

[8] The Court was referring to the Arbitration Act 42 of 1965. In this regard, specific reference is made to section 14.

[9] 2010 JDR 0600 (WCC) at para 7.

[10] 2012 (4) SA 593 (SCA) at para 18.

[11] See Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA) at para 12; Unica Iron and Steel (Pty) Ltd and Another v Mirchandani 2016 (2) SA 307 (SCA) at para 21 and all the authorities cited there; Nel v De Beer and Another 2023

(2) SA 170 (SCA) at paras 22 – 23.

[12] 2022 (1) SA 100 (SCA) at para 25.

[13] 2021 (6) SA 1 (CC) at para 66.

- [14] There was some argument presented about whether the pre-arbitration minute in fact seeks to amend the CSA, but in my view, there is no need to decide this. This matter is best determined by reading the CSA together with the pre-arbitration minute, as they are not in conflict with one another.
- [15] 1990 (1) SA 311 (C) at 334G-J. See also *Food and Allied Workers Union on behalf of Gaoshubelwe v Pieman's Pantry (Pty) Ltd* (2018) 39 ILJ 1213 (CC) at para 203.
- [16] Articles 4.2.1 to 4.2.5.
- [17] Article 4.2.6.
- [18] Article 5.
- [19] Article 6.1.
- [20] Article 6.3.
- [21] Article 9.
- [22] Article 9.1.3.
- [23] Article 9.2.1 and 9.2.2.
- [24] Article 10.2.3.
- [25] Article 9.2.3.
- [26] Article 17.3.
- [27] Article 22.4.2.
- [28] Article 22.5.
- [29] See articles 11 – 20.
- [30] Compare *Yunnan Engineering CC and Another v Chater and Others* 2006 (5) SA 571 (T) at para 18, the Court held: ‘... In its replying affidavit at p 189, para 3 the second applicant says that the parties agreed to refer to the AFSA Rules where they did not agree on particular procedure. At para 4 he says that, if the parties agree on a particular procedure at variance with the AFSA Rules, it is implied that the parties would not follow the AFSA Rules in respect of the agreed procedure. I can find nothing wrong with this proposition since the parties would have agreed to depart from the AFSA Rules to the extent that they would have specifically agreed upon ...’.
- [31] 2022 (4) SA 420 (SCA) at para 52.
- [32] 2006 (5) SA 571 (T) at para 16.
- [33] *Id* at para 17.
- [34] See para 26.

- [35] 2015 JDR 1499 (ECM).
- [36] See para 13 of the judgment.
- [37] Para 15 of the judgment.
- [38] Id at para 17.
- [39] 2023 JDR 4179 (GP).
- [40] Para 23 of the judgment.
- [41] Id at para 25.
- [42] See *Labuschagne v Labuschagne; Labuschagne v Minister van Justisie* 1967 (2) SA 575 (A) at 587E-G.
- [43] 2017 (2) SA 264 (CC) at para 36.
- [44] 2007 JDR 0578 (T) at para 14. See *South African Police Services v Coericius and Others*
- [2023] 1 BLLR 28 (LAC) at paras 11 – 12.
- [45] 2011 (3) SA 570 (SCA) at para 10.
- [46] See *National Union of Metalworkers of SA v Intervolve (Pty) Ltd and Others*
- (2015) 36 ILJ 363 (CC) at para 68; *Knox D'Arcy AG and Another v Land and Agricultural Development Bank of South Africa* [2013] 3 ALL SA 404 (SCA) at para 35; *First National Bank of Southern Africa Ltd v Barclays Bank PLC and Another* 2003 (4) SA 337 (SCA) at para 6; *Absa Bank Limited v IW Blumberg and Wilkinson* [1997] ZASCA 15; 1997
- (3) SA 669 (SCA) at 681G-H; *Roman Catholic Church (Klerksdorp Diocese) v Southern Life Association Ltd* 1992
- (2) SA 807 (A) at 816D-F.
- [47] See *Transnet Ltd v Rubenstein* 2006
- (1) SA 591 (SCA) at para 28; *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008
- (2) SA 184 (SCA) at para 43; *Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) at para 17; *De Lange v Presiding Bishop, Methodist Church of Southern Africa and Another* 2015
- (1) SA 106 (SCA) at paras 19 – 20.
- [48] 2012 (1) SA 247 (SCA) at para 14.
- [49] Paragraphs 8 and 18 of the answering affidavit.
- [50]

(2020) 41 ILJ 2051 (LAC) at para 16.

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Prepared on 12 October 2026 · Esheria