

SOUTH AFRICA / JUDGMENT

**Altech Radio Holdings (Pty) Ltd v
Aeonova360 Management Services (Pty)
Ltd and Another (2023/001585) [2023]
ZAGPJHC 1082 (28 September 2023)
[2023] ZAGPJHC 1082**

COURT

South Gauteng High Court, Johannesburg

BEFORE

Moorcroft

CASE / FILE NUMBER

2023/001585

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IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO: 2023-001585

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES:NO

DATE:28/9/2023

In

the matter between:

In

the application by

ALTECH

RADIO HOLDINGS (PTY) LTD

Applicant

And

AEONOVA360

MANAGEMENT SERVICES (PTY) LTD

First

Respondent

RETIRED

JUSTICE BR SOUTHWOOD

Second

Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Application for leave to appeal section 17(1)(a)(i) of the Superior Courts Act, 10 of 2013 –
reasonable prospect of success

Mootness

- section 16(2)(a)(i) of the Superior Courts Act

Order

[1] In this matter I make the following order:

- 1) The first respondent's application to place its supplementary affidavit together with the applicant's answering affidavit and the first respondent's replying affidavit before the Court, is granted;
- 2) The costs of the application shall be costs in the appeal;
- 3) The application for leave to appeal is dismissed;
- 4) The applicant is ordered to pay the first respondent's costs including the costs of two counsel where so employed.

[2] The reasons for the order follow below.

Introduction

- [3] The applicant ("Altech") and the first respondent ("Aeonova") are engaged in a domestic arbitration before the second respondent ("the arbitrator") in terms of the Commercial Rules of the Arbitration Foundation of Southern Africa ("AFSA").
- [4] The applicant brought two applications, both heard by me. In the first application, [1] heard in May 2023 and dealt with in this judgment, the applicant sought an order that an award made by the arbitrator be set aside on the basis of a gross irregularity in terms of section 33(1)(b) of the Arbitration Act, 42 of 1965, and the appointment of a new arbitral tribunal in terms of section 33(4) of the Act.
- [5] In the second application [2] heard in June 2023 Altech sought an order for the setting aside the appointment of and the removal of the arbitrator in terms of section 13(2)(a) of the Arbitration Act, and setting aside his decision taken on 9 March 2023 in an application for his recusal in terms of section 33(1)(b) of the Act.

- [6] I dismissed both applications and the applicant seeks leave to appeal against both decisions in terms of section 16(1)(a) of the Superior Courts Act, 10 of 2013. The two applications for leave to appeal were argued sequentially on 18 September 2023. The facts and the legal principles overlap to an extent, and so do the two written judgments in the applications for leave to appeal.

The applicable principles in an application for leave to appeal

- [7] Section 17(1)(a)(i) and (ii) of the Superior Courts Act provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. Once such an opinion is formed leave may not be refused. Importantly, a Judge hearing an application for leave to appeal is not called upon to decide if his or her decision was right or wrong.
- [8] In *KwaZulu-Natal Law Society v Sharma*[3] Van Zyl J held that the test enunciated in *S v Smith*[4] still holds good under the Act of 2013. An appellant must convince the court of appeal that the prospects of success are not remote but have a realistic chance of succeeding. A mere possibility of success is not enough. There must be a sound and rational basis for the conclusion that there are reasonable prospect of success on appeal.
- [9] In an obiter dictum the Land Claims Court in *Mont Chevaux Trust (IT 2012/28) v Tina Goosen*[5] held that the test for leave to appeal is more stringent under the Superior Courts Act of 2013 than it was under the repealed Supreme Court Act, 59 of 1959. The sentiment in *Mont Chevaux Trust* was echoed in the Supreme Court of Appeal by Shongwe JA in *S v Notshokovu*[6] and by Schippers AJA in *Member of the Executive Council for Health, Eastern Cape v Mkhitha and another*,[7] where the learned Justice said:

“[16] Once again it is necessary to say that leave to appeal, especially to this Court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.”

- [10] In *Ramakatsa and others v African National Congress and another*

- [8] Dlodlo JA placed the authorities in perspective. He said:

“[10] .. I am mindful of the decisions at high court level debating whether the use of the word ‘would’ as opposed to ‘could’ possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have

prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.”

The failure of the arbitrator to file affidavits

- [11] The arbitrator did not file any affidavits in defence of his awards and rulings, and Altech argues that the failure to do so merit a negative inference and that the Altech’s evidence is uncontested for this reason. I do not agree. Evidence by the arbitrator to explain ex post facto what he meant in his letters and awards would in my view be of no value. The arbitrator’s letters and awards must be read like any other document.[9]
- [12] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*, [10] Wallis JA said:
- [18] 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 ... 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....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....” [emphasis added]
- [13] The purpose of interpretation is to ascertain the meaning of the language of the document. [11]
- [14] In *Telkom SA SOC Ltd v Commissioner, South African Revenue Service* and in *Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* [12] the Supreme Court of Appeal held that the interpretation of documents will not vary depending on the characteristics of the document in question. The *Endumeni* principles are of universal application and were applied for instance to the interpretation of a trust deed in *Harvey NO and Others v Crawford NO and Others* [13] and to the interpretation of a will in *Strauss v Strauss and Others*. [14] There are however “differences in context with different documents, including the nature of the document itself.” [15]
- [15] I am not suggesting that the conclusion that affidavit or viva voce evidence by an arbitrator will never be relevant, just as evidence is admitted when it is appropriate to do so on *Endumeni* principles when contracts are to be interpreted. On the facts of this matter no case was made out that such evidence would be relevant

and therefore admissible, or that the absence of affidavits by the arbitrator merits a negative inference.

The test on review and the scope of a ‘gross irregularity’

- [16] The test in section 33(1)(b) of the Arbitration Act is whether the arbitrator committed a gross irregularity.[16] A Court should not shirk from its duty to set aside an award if it found that a gross irregularity had been committed, but should at all times remain mindful of the importance of party autonomy. A court must not be too quick to find fault or to conclude that a faulty procedure constitutes a gross irregularity.[17]
- [17] A gross irregularity can be committed with the best of intentions.[18] A gross[19] irregularity is an irregularity that prevents a party from having its case properly heard. It is a serious irregularity,[20] not an inconsequential one.
- [18] Altech seeks to draw a distinction between *Bester v Easigas (Pty) Ltd and Another*[21] and *Goldfields Investment Ltd. and Another v City Council of Johannesburg and Another*[22] that does not exist. Brand AJ in *Bester* referred to the same authority as were referred to by Schreiner J in *Goldfields* as authority for the same proposition, namely that high-handed and mistaken conduct is an example of grossly irregular conduct. Both rely on *Ellis v Morgan*; *Ellis v Dessai*. [23]
- [19] The judgment of May 2023 did not narrow the scope of what constitutes a gross irregularity and applied the established standard of review.

Purpose and effect of the path chosen by the arbitrator

- [20] The stated purpose of the arbitrator was to expedite the proceedings and reducing costs.[24] Altech professes to a difficulty to understand these reasons without accepting that the procedure was intended[25] to pre-empt and prejudge the remaining merit issues or had the effect of doing so. The use of the word “intended” is unfortunate as it seems to convey that the arbitrator intentionally wanted at the outset to make an award on the merits

that would deny Altech the opportunity of presenting its case on the merits. This was not the case as argued and such an averment would perhaps more properly resort under section 33(1)(a) of the Arbitration Act.

- [22] Whether the ruling by the arbitrator was a good one or a bad one is not a question to be decided on review. It may very well be that an arbitrator in an attempt to expedite the arbitration process (which is one of his or her duties) is simply optimistic and fails to achieve the aim of expedition, and even (as speculated or alleged by Altech), made the arbitration more expensive. Such an outcome cannot be termed a gross irregularity that vitiates the proceedings.

Pre-judgment of the merit issues

- [23] The arbitrator’s finding were based on the pleadings and common cause documents.[26] When evaluating the pleadings the arbitrator did no more than look at the averments that were not disputed, i.e. the common cause

facts.

[24] Altech deals in this application for leave to appeal with two of the claims in the award, namely claim 1 and claim 6. It is not alleged in this application for leave to appeal that claims 2, 3, 4 and 5 were finally determined by the arbitrator. Claim 1 deals with a breach of Aeonova's right to provide materials as set out in paragraphs 13 to 18 of the statement of case.

The arbitrator referred to a common cause[27] email dated 24 October 2014 that contradicted Aeonova's contractual right to provide certain services unless it consents to the work going to a third party. It was not alleged that Aeonova had consented and therefore giving the work to a third party would amount to a breach. The arbitrator analysed the claims to identify whether on the pleadings, Aeonova was entitled to an account and what should be included in the account. [28]

The fact of the breach that is apparent on the papers does not imply a finding that Altech is liable to Aeonova for damages and Altech is not precluded from leading evidence on the point.

[25] I now turn to the arbitrator's findings on claim 6. Altech was obliged to offer certain business opportunities to Aeonova in terms of the right of first refusal. The obligation appeared from the common cause documents. The arbitrator directed Altech to provide the contracts it was awarded during the period in question for the type of work in issue and which work had not already been contracted for, and to disclose relevant contracts awarded to third parties. Again, the order to account does not mean that Altech is liable for damages. Evidence would have to be led to proof that there were such opportunities.

The arbitrator's interpretation of the agreements[29]

[26] A court must be careful not to re-interpret an agreement (or other document) and set aside an award on review because the court comes to a different conclusion to that of the arbitrator.[30] Interpretation is a matter of law, not fact.[31]

[27] The interpretation of the agreement did not require the arbitrator to pronounce on whether Aeonova had performed its contractual

obligations. The arbitrator read the agreement to determine whether a duty to account arises from the agreement. The duty arises in this matter from what is common cause – the common cause terms and the existence of a fiduciary relationship.[32]

[28] Altech conceded[33] a duty to account "in the abstract" and the point of divergence between the parties was whether the existence of a duty to account is dependent on a prior determination

of liability,[34] a question analysed with reference to the Appeal Court authority of *Doyle and Another v Fleet Motors PE (Pty) Ltd.*[35] The arbitrator held that there was no authority in support of Altech's submission that a duty to account was dependent on a finding of liability.

There is no suggestion that in analysing the judgment he committed a gross irregularity. It bears mention in passing that that had the arbitrator been intent on also deciding liability in order to make the accounting award, his analysis of Doyle would have been unnecessary. The question would not have arisen.

Impermissible reliance on repudiation

[29] Altech argued that the arbitrator tried to justify his award by an event that occurred after the hearing and that Altech was not given an opportunity to address argument on, namely the concession made by Altech after the hearing and before the award that it had repudiated the agreement.[36] These arguments are speculative.

[30] It is argued that there was no reason for the arbitrator to refer to the concession but there is no merit in this argument. In the letter to the Deputy Judge President on 23 January 2023 the arbitrator was motivating an urgent allocation in the commercial court In the letters to the parties in February 2023 the arbitrator was addressing the future conduct of the arbitration and expressed the view (rightly or wrongly) that the concession should shorten the proceedings.

Mootness

[31] Aeonova sought leave to introduce a further affidavit in support of its submission that the application for leave to appeal falls foul of section 16(2)(a)(i) of the Superior Courts Act, in that the appeal that is envisaged has become moot. The application is not opposed by Altech but it contends that the facts relied upon do not support a finding of mootness.

[32] The hearing of the merits continued on 19 to 30 June 2023. The parties also agreed on the appointment of independent accountants to finalise the accounting and an appointment letter was signed on 23 August 2023. Costs have been incurred. The report by the independent accountants is intended to resolve the issues in dispute between the parties and now constitutes the agreed method for investigating the amounts in dispute. Aeonova relies on these facts in support of the argument that the appeal is moot.

[33] It is Altech's case that the arbitrator committed a gross irregularity because he pre-judged the merits-issues.[37] It is argued that if the appeal is upheld the arbitration will be tainted and Altech will be entitled to request that the arbitration

begin de novo before a new arbitrator.[38]

It is this aspect of the case that renders the application for leave to appeal not moot – if Altech succeeded the arbitration would begin anew before a new arbitrator and therefore the issues are of such a nature that the decision sought will have a practical effect or result.[39] The status of the report that is now being awaited in the event that the appeal succeeds can and should not be decided now – it is a fight for another day.

[34] In its replying affidavit Aeonova also sought to rely on peremption and prematurity. These two issues were argued at the hearing of the review application in May 2023 and they should not be revisited at this stage.[40]

Conclusion

[35] There is in my view no reasonable possibility on any of the grounds of appeal that a court of appeal will come to a different conclusion. For the reasons set out above I make the order in paragraph 1.

J MOORCROFT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 28 SEPTEMBER 2023.

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KATHRADA INC DATE OF ARGUMENT: 18 SEPTEMBER 2023 DATE OF JUDGMENT: 28
SEPTEMBER 2023

[1] Altech Radio Holdings (Pty) Ltd v Aeonova360 Management Services (Pty) Ltd and another [2023] ZAGPJHC 475, 2023 JDR 1421 (GJ). The case number is 2023-001585.

[2] Altech Radio Holdings (Pty) Ltd v Aeonova360 Management Services (Pty) Ltd and another [2023] ZAGPJHC 631, 2023 JDR 1969 (GJ). The case number is 2023-032734.

[3] KwaZulu-Natal Law Society v Sharma

[2017] JOL 37724 (KZP) para 29. See also Shinga v The State and another (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O'Connell and others 2007 (2) SACR 28 (CC).

[4] S v Smith 2012 (1) SACR 567 (SCA) para 7.

[5] Mont Chevaux Trust (IT 2012/28) v Tina Goosen 2014 JDR 2325 (LCC),

[2014] ZALCC 20 para 6.

[6] S v Notshokovu 2016 JDR 1647 (SCA),

[2016] ZASCA 112 para 2.

[7] Member of the Executive Council for Health, Eastern Cape v Mkhitha and another

[2016] JOL 36940 (SCA) para 16. See also See Van Loggerenberg Erasmus: Superior Court Practice A2-55; The Acting National Director of Public Prosecution v Democratic Alliance [2016] ZAGPPHC 489, JOL 36123 (GP) para 25; South African Breweries (Pty) Ltd v Commissioner of the South African Revenue Services [2017] ZAGPPHC 340 para 5; Lakaje N.O v MEC: Department of Health

[2019] JOL 45564 (FB) para 5; Nwafor v Minister of Home Affairs [2021] JOL 50310 (SCA), 2021 JDR 0948 (SCA) paras 25 and 26; and Lephoi v Ramakarane

[2023] JOL 59548 (FB) para 4.

[8] Ramakatsa and others v African National Congress and another

[2021] JOL 49993 (SCA), also reported as Ramakatsa v ANC 2021 ZASCA 31. See also Mphahlele v Scheepers NO 2023 JDR 2899 (GP).

[9] Judgment paras 28 and 29.

[10] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18.

[11] Ibid para 20.

[12] Telkom SA SOC Ltd v Commissioner, South African Revenue Service 2020 (4) SA 480 (SCA) paras 10 to 17 and Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd 2020 (4) SA 428 (SCA) paras 16 to 17.

[13] Harvey NO and Others v Crawford NO and Others 2019 (2) SA 153 (SCA).

[14] Strauss v Strauss and Others

[2023] ZAGPJHC 377, 2023 JDR 1302 (GJ), [2023] JOL 58905 (GJ).

[15] Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd 2020

(4) SA 428 (SCA) para 16.

[16] Judgment paras 16 to 19. See also Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another 2009 (4) SA 529 (CC) para 236 and Telcordia Technologies Inc v Telkom SA Ltd

[2006] ZASCA 112; 2007 (3) SA 266 (SCA) paras 71 to 73, and 99.

[17] I note that in my judgment the reference in footnote 23 was inadvertently omitted. The reference is to the judgment by O'Regan ADCJ in Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another 2009 (4) SA 529 (CC) para 236. See also Palabora Copper (Pty) Ltd v Motlokwa Transport & Construction (Pty) Ltd 2018 (5) SA 462 (SCA) para 8 and Umgeni Water v Hollis NO and Another 2012 (3) SA 475 (KZD) para 42.

- [18] Judgment para 18, referring to Goldfields Investment Ltd. and Another v City Council of Johannesburg and Another 1938 TPD 551 at 560 where Schreiner J said that the crucial question was whether the conduct prevented a fair trial of the issues.
- [19] The dictionary meaning of the word in this context is “obviously or exceptionally culpable or wrong; flagrant.” See Sinclair et al Collins Concise Dictionary 5th ed. 2001 at 638.
- [20] See also See Butler & Finsen Arbitration in South Africa – Law and Practice 294. Compare also, albeit in the context of the Commission for Conciliation, Mediation and Arbitration (CCMA), the judgment by Nugent J in Nationwide Car Rentals (Pty) Ltd v Commissioner, Small Claims Court, Germiston, and Another 1998 (3) SA 568 (W) 569E-F.
- [21] Bester v Easigas (Pty) Ltd and Another 1993 (1) SA 30 (C) 42E to 43. See also Brand Judicial Review of Arbitration Awards Stell LR 2014 2 at 247 and in the context of Ordinance 24 of 1904 the following dictum by Ward J in Anshell v Horwitz and Another 1916 WLD 65 at 67: “... it seems to me that the arbitrator has the control of the proceedings before himself, and unless his conduct of the proceedings is grossly irregular or contrary to natural justice the Court cannot interfere.”
- [22] Goldfields Investment Ltd. and Another v City Council of Johannesburg and Another 1938 TPD 551 at 560 to 561. See also Telcordia Technologies Inc v Telkom SA Ltd
- [2006] ZASCA 112; 2007 (3) SA 266 (SCA) para 52 and OCA Testing and Certification South Africa (Pty) Ltd v KCEC Engineering and Construction (Pty) Ltd and another
- [2023] JOL 57791 (SCA) paras 21 to 23
- [23] Ellis v Morgan; Ellis v Dessai 1909 TS 576.
- [24] Judgment paras 12 and 13.
- [25] Altech’s heads para 31.
- [26] Award para 4, judgment para 9, 10, 30, 35, 36, 41, 42, and 43.
- [27] Statement of defence para 8.
- [28] Award para 32.
- [29] Judgment para 27.
- [30] Telcordia Technologies Inc v Telkom SA Ltd
- [2006] ZASCA 112; 2007 (3) SA 266 (SCA) paras 53, 71 to 73, and 99. See also Doyle v Shenker & Co Ltd 1915 AD 233.
- [31] KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA),

[2009] 2 All SA 523 (SCA) para 39 where Harms DP said that “... interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses...”

[32] Judgment paras 25 to 28.

[33] Judgment para 34.

[34] Judgment para 29, 31,

[35] Doyle and Another v Fleet Motors PE (Pty) Ltd 1971

(3) SA 760 (A).

[36] Judgment paras 48 to 53.

[37] Altech’s heads para 72.1.

[38] Altech’s heads para 70.2 and 3.

[39] Section 16(2)(a)(i) of the Superior Courts Act, 10 of 2013.

[40] See Hudson v Hudson and Another 1927 AD 259 at 268, Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others 2013 (6) SA 499 (SCA) para 45, referring to Cook and Others v Muller 1973

(2) SA 240 (N) 245E, Niksch v Van Niekerk and Another 1958

(4) SA 453 (E) 456, and Reichel v Magrath (1889) 14 App Cas 665 (HL).

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