IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case No: A590/09

In the matter between:

A J DU TOIT N.O. Appellant

and

THE ROAD ACCIDENT FUND Respondent

JUDGMENT DELIVERED: 19 MAY 2010

FOURIE, J:

[1] This is an appeal, with leave of the court *a quo*, against the following order made by Matojane AJ (as he then was) in a review application:

"*1. That the ruling of first respondent* (the arbitrator, Adv. H M Carstens SC) *issued on 7 April 2008 be set aside.*

2. That the arbitration commence afresh before another arbitrator.

3. That second respondent (appellant) *is ordered to pay the costs of this application."*

[2] The background to the review application may be briefly summarised as follows:

Appellant is the claimant (as the curator *ad litem* for one Du Preez), and respondent the defendant, in a part heard claim for damages (resulting from a motor vehicle collision that occurred during 2001) which claim, by agreement, has been referred to arbitration. The hearing commenced before the arbitrator during 2004, and had run for 33 days before respondent brought an application during April 2008, for an order directing Du Preez to submit to an assessment by a psychiatrist, Dr. L Paneri-Peter. On 7 April 2008, the arbitrator heard and dismissed the application. This prompted respondent to bring the review application, which resulted in the aforesaid order made by Matojane AJ.

[3] The principal issue in the arbitration, is whether Du Preez has developed a psychiatric disorder (psychosis) as a consequence of the injuries sustained by him in the collision. Respondent contends that the alleged psychosis is simulated and that the claim for damages is fraudulent. Although Du Preez had been subjected to various medical examinations by a variety of medical experts, including several psychiatrists, prior to and during the course of the arbitration, respondent considered it necessary for him to be assessed by Dr. Paneri-Peter to show that the claim is fraudulent.

[4] It is common cause that at the hearing of 7 April 2008, respondent's counsel was allowed to make introductory remarks concerning the merits of the application,

whereupon the arbitrator *mero motu* initiated a debate with him regarding the impact of the proposed assessment by Dr. Paneri- Peter on Du Preez's constitutional right to privacy. In the course of this debate the arbitrator interjected and dismissed the application.

[5] In its founding papers in the review application, respondent alleged that the arbitrator failed to allow respondent's counsel an opportunity to fully respond to the constitutional issue raised by the arbitrator. Respondent stressed that the arbitrator had summarily and totally unexpected dismissed the application, without allowing respondent's counsel an opportunity to present his full argument. In its answering papers, appellant did not take issue with this version of the events as described by respondent.

[6] In reviewing and setting aside the ruling made by the arbitrator on 7 April 2008, Matojane AJ found that the manner in which the arbitrator conducted himself at the hearing, was grossly irregular as he displayed an attitude of pre-judgment that was not capable of being altered, regardless of the arguments that were to be presented on behalf of respondent. The learned Judge held that respondent was denied a fair and complete hearing and concluded that the arbitrator had misconducted himself within the meaning of section 33 of the Arbitration Act No. 42 of 1965 ("the Arbitration Act"). The learned Judge also found that the conduct of the arbitrator was such that a fair minded person

would reasonably have suspected that he might not resolve the question before him with a fair and unprejudiced mind.

[7] In adjudicating the appeal, I believe that it is necessary, at the outset, to distinguish between an arbitral award and a procedural ruling made in the course of an arbitration. I am respectfully of the view that the failure of the parties and the court *a quo* to bear this distinction in mind, caused them to adopt the wrong approach in dealing with the review application.

[8] The Arbitration Act does not define the term "award", but merely provides that an award includes an interim award. It is, however, clear from the provisions of the Arbitration Act that an award (including an interim award) refers to a final decision by the arbitrator on the issues in dispute between the parties. This view is confirmed by **The Law of South Africa**, 2nd Edition, Vol. 1, para 596, where the following is said:

"*The term award should be restricted to decisions of the arbitral tribunal that finally determine the substantive issues with which they deal…an interim award finally determines the issues with which it deals."*

[9] In English arbitration law, which served as a model for the development of our

arbitration law, there is also no statutory definition of an award. In considering what an award is, **Russel on Arbitration**, 22nd Edition, para 6-001, states that, in principle, an award is a final determination of a particular issue or claim in the arbitration.

[10] In **Gaillard & Savage, International Commercial Arbitration**, at 737, the term "award" is given a wider meaning, as including not only final decisions concerning the merits of the dispute, but also a final decision on a procedural issue leading the tribunal to end the proceedings. I do not unreservedly concur with this view, but it should be borne in mind that the learned authors only refer to a decision on a procedural issue which actually results in the final determination of the arbitration proceedings.

[11] A procedural ruling is one made by the arbitrator in the course of the proceedings in regard to procedural issues. It does not determine any of the substantive issues in dispute between the parties to the arbitration. In **Arbitration in South Africa**: **Law and Practice**, **Butler and Finsen**, (1993), page 175, the nature of a procedural ruling is explained as follows:

"*Procedural rulings deal with matters like the admissibility of evidence, the amendment of pleadings, an application for a postponement, the interpretation of rules of procedure applying to the proceedings by virtue of the arbitration agreement and an application by one party that the arbitrator refer a question of law to the court for an opinion.*"

This list of procedural rulings provided by the learned authors, is obviously not exhaustive. It should also be borne in mind that a procedural ruling is usually interlocutory in nature and not intended to finally dispose of any of the substantive issues in dispute between the parties to the arbitration.

[12] An important consequence of a procedural ruling made in the course of a trial in a lower court or in quasi-judicial proceedings such as an arbitration, is that a review thereof should usually only be sought after the conclusion of the proceedings. However, in rare and exceptional cases, a review may be brought prior to the conclusion of the proceedings. **Butler and Finsen**, *supra*, explain this principle as follows at page 175:

"*A court will only interfere with a procedural ruling by an arbitrator during the course of the reference in exceptional circumstances. A party who feels aggrieved by an arbitrator's procedural ruling will therefore usually have to wait until the arbitrator makes an award and then try to use the alleged procedural irregularity as a ground to attack the award."*

In general, see **Wahlhaus v Additional Magistrate, Johannesburg** 1959 (3) SA 113 (A) at 119H-120C; **Hip-Hop Clothing Manufacturing CC v Wagener NO & Another** 1996 (4) SA 222 (C) at 230G; **Acting Premier, Western Cape v Regional Magistrate, Bellville** 2006 (2) SA 79 (C) at 85; **Brock v SA Medical and Dental Council** 1961 (1)

SA 319 (C) at 324 D-E. In regard to arbitrations, see **Tuesday Industries (Pty) Ltd v Condor Industries (Pty) Ltd and Another** 1978 (4) SA 379 (T) at 383F-384E; **Badenhorst-Schnetler v Nel en 'n Ander** 2001 (3) SA 631 (C).

[13] Bearing in mind this fundamental difference between an arbitral award and a procedural ruling made by an arbitrator in the course of an arbitration, it is clear to me that the parties erred in their approach in the court *a quo,* and on appeal, in applying section 33 of the Arbitration Act. The order made by the arbitrator on 7 April 2008, refusing respondent's application to have Du Preez assessed by Dr. Paneri-Peter, amounted to no more than an interlocutory procedural ruling. Section 33 of the Arbitration Act, deals exclusively with the setting aside of an arbitral award and not with procedural rulings. The drastic remedy provided in section 33 (4), underscores the Legislature's intention, i.e that section 33 only applies to the setting aside of an arbitrator's award, i.e his or her decision on the substantive issues submitted to arbitration.

[14] It was submitted on behalf of appellant, that it may have absurd consequences to apply the provisions of section 33 of the Arbitration Act to an award, but not to a ruling (which is not an award) by an arbitrator. I do not agree with this submission. Section 33 deals expressly with the setting aside of an award. It has to be accepted that the Legislature is aware of the difference between an arbitral award and a procedural ruling.

If, therefore, the Legislature intended section 33 to also apply to procedural rulings, I would have expected a clear indication in the wording of the section of such an intention. In my view, the wording of section 33 is unambiguous; it refers to an arbitral award which is final in nature and not to an interlocutory procedural ruling. In fact, I believe that to apply section 33 to a procedural ruling, would result in an absurdity, particularly in view of the drastic remedy in section 33 (4) which would be brought into play upon the setting aside of any procedural ruling in the course of the arbitration.

[15] In my opinion, the correct approach in dealing with an application for the setting aside of an interlocutory procedural ruling by an arbitrator, is dictated by our common law and not by section 33 of the Arbitration Act. I therefore respectfully disagree with the view expressed in **Badenhorst-Schetler v Nel**, *supra*, at 637F-G, that the principles applied by the Courts in interpreting section 33 (1) of the Arbitration Act, should be applied in dealing with a review application for the setting aside of a procedural ruling made by an arbitrator in the course of arbitration proceedings.

[16] In my view, a court's power to intervene in the course of an arbitration to review an arbitrator's procedural ruling, is correctly summarised as follows in **The Law of South Africa**, *supra*, at para 594:

"*The court has an inherent power under the common law to intervene in the course of an arbitration prior to an award in order to review an arbitral tribunal's procedural ruling, although this power will ostensibly only be exercised in exceptional circumstances. The irregularity must also be of a sufficiently serious nature that would justify a court, at the award stage, in setting aside the award. The court has justified the availability of this power on the basis that if it could not intervene to correct a fundamental irregularity before the award, considerable wasted costs could be incurred by continuing with the arbitration proceedings and at least one party could suffer serious prejudice."*

[17] The circumstances in which a High Court will exercise its common law jurisdiction, to interfere with the procedural ruling of an arbitrator, are conveniently set out as follows in the **Tuesday Industries**-case, supra at 384C-D:

"*I am of the opinion that on the affidavits as amplified by the record of the proceedings the applicant has not made out a case to show that the conduct, in refusing the postponement, is so arbitrary as to justify the inference that the court could come to the conclusion that the arbitrator did not consider the matter, or apply his mind to the matter, or that there was a grave irregularity in the proceedings. It is only under those circumstances that the court would be justified in taking the ruling of the arbitrator under review."*

[18] In sum, interference on review with the arbitrator's procedural ruling of 7 April 2008, would be justified:

(a) only in exceptional circumstances; and

(b) if the conduct of the arbitrator, in refusing respondent's application, was so arbitrary as to justify the inference that he did not consider the matter, or apply his mind to the matter; or where there was a grave irregularity in the proceedings.

[19] A *caveat* which should be added to the aforegoing, is that not every irregularity committed by an arbitrator will constitute a ground for review. As was stressed in **Bester v Easigas Pty Ltd & Another** 1993 (1) SA 30 (C) at 43B-C, an irregularity must have been of such a serious nature that it resulted in the aggrieved party not having his or her case fully and fairly determined. In **The Law of South Africa**, *supra* at para 594, it is emphasised that the irregularity must be of a sufficiently serious nature that would justify a court, at the award stage, in setting aside the award.

[20] A court called upon to review a procedural ruling made by an arbitrator, should also bear in mind the following warning sounded by the Constitutional Court in **Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another**, 2009 (4) SA 529 (CC) at para 236:

"*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 s33(1), the goals of private arbitration may well be defeated."

Although the **Lufuno**-case involved a final award and not a procedural ruling, the general comments of our highest court are equally applicable in the instant matter.

[21] I now turn to the question whether there were exceptional circumstances justifying interference on review in the course of the arbitration, with the procedural ruling made by the arbitrator on 7 April 2008. Put differently, were there exceptional circumstances justifying a departure from the usual approach that a party who feels aggrieved by an arbitrator's interlocutory procedural ruling, will have to wait until an award is made before the alleged procedural irregularity is used as a ground to attack the award.

[22] In **Seatrans Maritime v Owners, MV Ais Mamas & Another** 2002 (6) SA 150 (C), Thring J researched the meaning of the phrase "exceptional circumstances" and concluded as follows at 157B:

"*Depending on the context in which it is used, the word "exceptional", has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.*"

[23] In view of the approach, followed over many decades by our courts, that procedural rulings are usually not to be interfered with during the course of a lower court's or quasi-judicial body's proceedings, it seems to me that "exceptional circumstances" should in the present context bear the strict meaning of markedly unusual circumstances. Only if exceptional circumstances of this nature are present, should a court, in my opinion, interfere on review with a procedural ruling made by an arbitrator in pending arbitral proceedings. In **Badenhorst-Schnetler v Nel**, *supra* at 639F-G, the court held, correctly in my view, that the required exceptional circumstances were present. Cleaver J decided that this requirement was met as the arbitrator had *bona fide* restricted his jurisdiction in such a way that all further proceedings in the arbitration could have resulted in a miscarriage of justice. Immediate interference was accordingly justified.

[24] As explained above, respondent's main complaint is that at the hearing of 7 April 2008, the arbitrator, who *mero motu* raised the constitutional issue of Du Preez's right to privacy, failed to allow respondent's counsel an opportunity to respond fully to this issue. This, respondent alleges, constituted a miscarriage of justice, as it was denied a

fair and complete hearing. In the result, respondent maintains, it was denied the opportunity of having its case fully and fairly determined. To this respondent adds that, in the circumstances, it harboured a reasonable apprehension that the arbitrator is biased against it and is not impartial in dealing with the matter.

[25] It should be mentioned that at no stage has respondent alleged that there are exceptional circumstances justifying intervention on review in the course of the arbitration, prior to an award being made by the arbitrator. On appeal the crux of the argument on behalf of respondent was along the same lines as in the court *a quo*, i.e. that the arbitrator misconducted himself by failing, in breach of the *audi alteram partem* principle, to allow respondent's counsel an opportunity to fully present his argument on the constitutional issue. This conduct, respondent's counsel argued, is sufficiently egregious to amount to misconduct in terms of section 33 (1) of the Arbitration Act, warranting the setting aside of the ruling of 7 April 2008 and the granting of an order that the arbitration is to commence *de novo* before another arbitrator. In argument on appeal, no reliance was placed on specific exceptional circumstances justifying interference on review during the course of the arbitration proceedings. I should also mention that in the judgment of the court *a quo*, no finding was made as to the existence of exceptional circumstances justifying intervention in the course of the arbitration proceedings.

[26] As mentioned earlier, the substance of respondent's application brought before the arbitrator, was to obtain further evidence and the ruling of the arbitrator on 7 April 2008, was nothing more than procedural in nature. It was clearly not an award of a final nature, which could have been attacked in terms of section 33 of the Arbitration Act. In view of the purely interlocutory nature of the ruling, one can only speculate as to how the arbitration would have proceeded had the ruling not been taken on review by respondent. In such event, it may be that during the continued hearing of the arbitration, changed circumstances or available evidence would have justified respondent seeking a further ruling from the arbitrator to have Du Preez assessed by Dr. Paneri-Peter or another psychiatrist. One can obviously not predict what the arbitrator's ruling in regard thereto would have been. It may also be that the need to have Du Preez assessed, could have fallen away as the hearing progressed. One may also speculate that, even if the ruling of 7 April 2008 were to stand, that the final outcome of the arbitration could have been in favour of respondent. It is impossible to predict, before the conclusion of the arbitration, whether the arbitrator would find that Du Preez is psychotic or whether he is a malingerer. All of this demonstrates, in my view, that the proper time for an attack on this procedural ruling of the arbitrator is at the conclusion of the arbitration when an award is made. Only then would one be able to establish the impact and possible prejudice to respondent, if any, of the ruling of 7 April 2008.

[27] In my opinion, it has not been shown that this was a proper case in which the

interlocutory procedural ruling of the arbitrator should, during the course of the arbitration, be taken on review. On the contrary, I am of the view that respondent failed to show that at the time when the ruling was taken on review, there were exceptional circumstances, in the sense of markedly unusual circumstances justifying interference by a court prior to the arbitral award being made. It is worthwhile to heed the following warning of Reynolds J in **Wessels v General Court Martial & Another** 1954 (1) SA 220 (E) at 222C:

"*The court has this power to interfere at this stage, but it should hesitate to intervene unless the circumstances are very clear and require interference."*

I hold the view that on the facts placed before the court *a quo* there was no basis for a finding that circumstances "*which are very clear and require interference",* were present.

[28] I should add that, in my view, there is a fundamental difference between the present matter and the circumstances prevailing in the **Badenhorst-Schnetler** case. In the latter, as I have already indicated, early interference was justified as the arbitrator's erroneous interpretation of his own terms of reference would have resulted in him excluding all the evidence relating to the mitigation of damages, which was materially relevant to the issues which had been referred to arbitration. In the instant matter,

however, no such exceptional circumstances have been alleged or shown to exist, to justify interference by the court in the course of the arbitration. On this basis alone, the review application ought, in my view, to have been dismissed.

[29] I proceed, however, to decide the remaining issue, whether, if interference by the court during the course of the arbitration was justified, respondent has shown that the arbitrator acted reviewably. As mentioned earlier, the court has an inherent power under the common law to intervene in circumstances where it can be said that the arbitrator did not consider the matter, or apply his mind to the matter, or where there was a grave irregularity in the proceedings. In the instant matter the gravamen of respondent's complaint is that there was a grave irregularity in the proceedings, in that respondent's counsel was not allowed to present full argument prior to the arbitrator dismissing respondent's application. This conduct, respondent contends, also justifies an inference of bias on the part of the arbitrator.

[30] Firstly, I hold the view that, for the reasons furnished in paragraph 26 above, even if the arbitrator's conduct is regarded as a reviewable irregularity, it cannot at this stage of the arbitration proceedings be said that it resulted in respondent not having had a fair hearing. This determination, as explained above, can only be properly be made at the end of the proceedings after an award had been made. Put differently, it cannot, at this stage, be found that the consequences of the alleged irregularity are of a sufficiently

serious nature to justify a court, at the award stage, in setting aside the final award.

[31] Secondly, I am, for the reasons which follow, in any event not convinced that the conduct of the arbitrator, in cutting respondent's counsel short during argument on 7 April 2008, constituted a reviewable irregularity.

[32] In essence, respondent's complaint is that it was not afforded a fair hearing. In the **Lufuno**-case**,** *supra* at para 261, the Constitutional Court emphasised the requirement of fairness, also in arbitration proceedings, thus:

"*The requirement of fairness obtains there, as it does in adversarial proceedings. Its content is simply different. In each case, the question will be whether the procedure followed afforded both parties a fair opportunity to present their case".*

[33] It is also worthwhile to have regard to what Harms JA had to say about the requirement of fairness in court proceedings, in **Take & Save Tradings CC and Others v The Standard Bank of SA Limited** 2004 (4) SA 1 (SCA) at para 3:

"*Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources."*

Heed should also be taken of the warning sounded by the Constitutional Court in **Lufuno**, as far as arbitration proceedings are concerned, to which I have referred in paragraph 20 above.

[34] I agree with the submission made on behalf of appellant, as to the importance of viewing the arbitrator's ruling in the light of the factual matrix in which it was given. It is therefore necessary to have regard to the background facts and circumstances, to which the arbitrator would have been alive, when making his ruling on 7 April 2008. One should not merely focus on the conduct of the arbitrator in cutting respondent's counsel short during argument, thereby not allowing him a full opportunity to respond to the constitutional issue raised by the arbitrator. The relevant background facts and circumstances are set out hereunder.

[35] The arbitration commenced during 2004and had run for a total of 33 days, when respondent brought the application for an order directing Du Preez to submit to an assessment by the psychiatrist, Dr. Paneri-Peter. Prior to the arbitrator hearing oral argument on 7 April 2008, respondent stated its case in application papers filed of record and legal argument was presented in heads of argument filed on behalf of respondent. The arbitrator confirms that he perused and considered the contents of these documents prior to making his ruling. Respondent therefore had every opportunity to place all

relevant facts and arguments before the arbitrator prior to the hearing of the application.

[36] At the commencement of the hearing on 7 April 2008, the arbitrator advised respondent's counsel that he was not required to address him on the issue of urgency. The arbitrator then raised the issue of Du Preez's constitutional right to privacy with respondent's counsel, a consideration that was not addressed by respondent in its heads of argument. Respondent's counsel was allowed the opportunity to respond to the constitutional issue raised by the arbitrator and in argument he relied on section 19 of the Road Accident Fund Act No. 56 of 1996 and certain authorities. The debate between the arbitrator and respondent's counsel, in regard to the constitutional issue, then continued and in the course of respondent's counsel responding, the arbitrator interjected and dismissed the application.

[37] I believe that it is important to note, as submitted on behalf of appellant, that respondent does not state that it was deprived of the opportunity to bring to the attention of the arbitrator particular aspects that were not addressed in the application papers and the heads of argument or during oral argument. Nor did respondent's counsel, before the dismissal of the application, ask for time to consider the constitutional issue or to file additional heads of argument in regard thereto.

[38] It is also important, in my view, in considering the conduct of the arbitrator, to bear in mind that, in emphasising Du Preez's right to privacy, the arbitrator would have been aware of the following history of examinations and assessments to which Du Preez had been subjected to determine whether he was suffering from an underlying psychotic disturbance or not:

(a) On 12 December 2003, respondent's clinical psychologist, Mr. G Van Wyk, identified certain unusual symptoms that could be psychotic.

(b) On 25 November 2003, appellant's neuropsychologist, Dr. Madden, found that Du Preez was neuropsychologically very unstable and that there was evidence of dementia.

(c) Assessment reports dated 5 January 2004 and 15 October 2004, prepared by respondent's neuropsychologist, Ms. De Villiers, were filed.

(d) Reports dated 9 September 2003 and 18 December 2004 respectively, prepared by respondent's neurosurgeon, Dr. Parker, were filed.

(e) Reports dated 13 September 2004 and 22 October 2004 respectively, prepared by appellant's psychiatrist, Dr. Le Fevre, were filed. He diagnosed a psychotic disorder due to head injury.

(f) On 16 March 2005 Dr. George, appellant's psychiatrist, stated in a letter that he had diagnosed evidence of a psychosis, in addition to dementia due to brain

damage.

(g) During 2005, and on the instructions of respondent, Du Preez was assessed by the neuropsychiatrist, Dr. Hugo. During cross-examination, Dr. Hugo conceded that he was not an expert on psychosis and stated that Prof. Oosthuizen was an expert in this field.

(h) Prof. Oosthuizen, a psychiatrist, reported that Du Preez was suffering from a psychosis. After Dr. Hugo and Prof. Oosthuizen had discussed the possibility of Du Preez being assessed by another medical expert, Prof. Oosthuizen objected to Dr. Hugo allegedly misrepresenting their conclusions. Be that as it may, Prof. Oosthuizen reported that in order to have Du Preez examined by another medical expert, he would have to be kept medication free for a month. He concluded as follows:

"*It would be clinically unwise and ethically unacceptable to take him off his medication at this time. The concern would be that, if the psychosis became much worse he (a) could potentially harm himself or others and (b) may not respond to the medication in the same manner.*"

[39] It appears to me that, in these circumstances, the arbitrator was fully justified in raising the issue of Du Preez's constitutional right to privacy, a factor which respondent had not taken into account in its application papers or in its heads of argument.

[40] It is also necessary, for purposes of the present enquiry, to bear in mind the fundamental differences between arbitration proceedings and litigation in a court, particularly when the fairness of procedure is under consideration. I have already, to a certain extent, alluded to these differences. It is worthwhile, though, to emphasise the following views expressed by the Constitutional Court in the **Lufuno**-case, *supra* at para 236:

"*The final question that arises is what the approach of a court should be to the question of fairness. First, 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.*"

[41] The rationale for the reluctance of courts to interfere with the procedural rulings of an arbitrator, is even more accentuated in matters such as the present, where the rules of the Arbitration Forum require the arbitrator to determine the issues before him in a just, expeditious, economical and final manner. (See Rule 9.1). Reference should also be made to Rule 9.2, which provides that the arbitrator shall have the widest discretion and powers allowed by law, or determined by the parties, to make any ruling or give any direction mentioned in the rules, or as he otherwise considers necessary or advisable for the just, expeditious, economical and final determination of all the disputes raised in the

proceedings. (See also Rule 9.3.18). Further, Rule 9.3.6 provides that the arbitrator shall have the power to limit or exclude such evidence as he or she deems to be irrelevant or unnecessarily repetitive and to adopt an investigative approach in an attempt to narrow the points of dispute and to limit the scope of the evidence that has to be presented.

[42] While dealing with the rules of the Arbitration Forum, I should also refer to Rules 4.2 and 4.5.3. The first provides that the parties shall each within 20 days from the conclusion of the first meeting held prior to the arbitration, deliver a summary of the opinions, and the reasons therefor, of any expert witness that they intend calling. Rule 4.5.3, provides that the parties shall at a later summary process meeting consider the holding of a meeting between experts with the purpose of narrowing the points of dispute between them or the calling of a third expert, agreed on by the parties, to advise on the reports of other experts. The rules do not appear to allow for expert reports, additional to the aforesaid, to be filed, but it is clear from the number of reports filed in the instant matter, that these rules were not strictly adhered to. However, it seems that the admission of such additional expert reports or evidence, is dependent upon the exercising of a discretion on the part of the arbitrator.

[43] When the conduct of the arbitrator is considered against the background facts and circumstances, as well as the applicable legal principles, read with rules of the Arbitration Forum, I incline to the view that it has not been shown that his conduct on 7

April 2008, constituted a reviewable irregularity in the proceedings. On the contrary, I hold the view that the arbitrator properly raised and debated the constitutional issue with respondent's counsel. Respondent's counsel was allowed the opportunity to respond to the constitutional issue and the fact that the arbitrator may not have been impressed with his argument, and accordingly disposed of the matter expeditiously, does not, in my opinion, amount to the grave irregularity for which respondent contends. In fact, having regard to the requirement of the rules of the Arbitration Forum, namely to dispose of issues expeditiously and economically, the arbitrator was, in my opinion, fully within his rights in acting in the manner which he did.

[44] In my view respondent was allowed a reasonable opportunity to state its case, by means of its application papers and in the heads of argument. In addition, respondent's counsel was afforded the right of oral argument, while our courts incline to the view that oral representations are unnecessary where adequate provision is made for written ones. See Cora Hoexter, **Administrative Law in South Africa**, page 334. In **Pick 'n Pay Retailers v Commissioner for SARS**, SATC52, Van Reenen J said the following at para 24:

"*The particular manifestation of the applicant's entitlement to fair procedure which had allegedly been violated is its right to a hearing. Assuming that it was thereby intended to refer to the failure by the fifth respondent to have allowed the making of oral*

submissions by the applicant's legal representatives, my understanding of the legal position is that no right of that nature exists."

See also **Catholic Bishops Publishing Company v State President and Another** 1990 (1) SA 849 (A) at 871C-E, where it was decided that the failure to grant a personal audience did not contravene the principle of *audi alteram partem*.

[45] Admittedly, the conduct of the arbitrator, in cutting short the argument of respondent's counsel, may be regarded as abrupt or dismissive, but it certainly cannot, in my view, be regarded as so gross and unreasonable that it justifies interference by a court on review during the course of the arbitration proceedings. It should be borne in mind that the arbitrator is an experienced senior counsel of the Cape Bar of many years standing and that, in any event, litigants should not be too sensitive and easily upset by the manner in which a presiding officer or arbitrator may deal with arguments presented on their behalf, especially where the arbitrator is not impressed by such arguments.

[46] Finally, I have to deal with respondent's contention that the arbitrator's conduct led it to believe that he was biased. Respondent has the onus of establishing a reasonable apprehension of bias. It has often been stressed by our courts that the threshold for a finding of real or perceived bias is high. See **South African Commercial Catering and Allied Workers Union & Others v Irvin and Johnson Ltd (Seafoods Division Fish**

Processing) 2000 (3) SA 705 (CC) at para 15. In my view, respondent has, for the reasons already furnished, not even closely succeeded in discharging this onus.

[47] It should be borne in mind that at no stage during an arbitration which had run for 33 days, was there any suggestion of bias on the part of the arbitrator. This, while during the arbitration, the arbitrator had made various interim rulings in favour and against both parties. It is worthwhile, in this regard, to repeat the following sentiments expressed by Blieden J, in **Coop and Others v SA Broadcasting Corporation and Others** 2006 (2) SA 212 (W) at 217B-D, which apply with equal force in arbitration proceedings:

"*A trial is a living phenomenon. It has a life of its own that changes from day to day if not from hour to hour. The Judge in his efforts to come to a just and proper decision is enjoined to participate in this phenomenon. Because he at one time adopts a provisional prima facie view, does not in any way demonstrate bias one way or the other. It is the duty of every judicial officer to be an active participant in the trial. It is the duty of counsel and attorneys to explain this to their clients who are not experienced in the rough and tumble world of court litigation. Because my body language at some stage or other indicates my admitted irritation or impatience, this is because of the way the proceedings are being conducted and cannot be construed as bias in favour of one or other of the litigants and most certainly cannot lead any reasonable informed layman, duly advised by his legal advisors as already mentioned, to come to the conclusion that I will not impartially and fairly determine the issues in this case to the best of my ability.*"

[48] In the result, I conclude that the appeal should succeed with costs, including the

costs of two counsel. In addition, I would set aside the order of the court *a quo* and substitute the following therefor:

"*The application is dismissed with costs, including the costs of two counsel.*"

[49] However, as this is a minority judgment, no order is made.

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P B Fourie, J