IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

CASE NO: J2130/07

In the matter between

UASA **Applicant**

and

IMPALA PLATINUM LIMITED **1st Respondent**

NATIONAL UNION OF MINEWORKERS **2nd Respondent**

JH CONRADIE N.O **3rd Respondent**

JUDGMENT

AC BASSON J

[1] This was an application for the review and setting aside of the award issued by the third respondent (hereinafter referred to as "*the arbitrator*"). The applicant also prayed for an order that the dispute be remitted back to arbitration to be determined afresh by an arbitrator chosen either by agreement between UASA and the 1st respondent or failing agreement, by

this Court

[2] In terms of the award the arbitrator determined that the 1st respondent (Impala Platinum Limited – hereinafter referred to as *"the company"*) may validly de-recognise the applicant ("*UASA*"). The application is opposed.

Relevant facts

[3] Most of the facts pertaining to this dispute are common cause, the inferences to be drawn from these facts are, however, matters of hot contestation.

The threshold agreement of 23 July 1997

[4] On 23 July 1997 the company (in the form of its Rustenburg operations) and the second respondent (hereinafter referred to as *"NUM"*), who at all material times represented the majority of all the employees employed by the company, entered into a threshold agreement in terms of section 18 of the Labour Relations Act 66 of 1995 (hereinafter referred to as "the LRA"). (I will refer to this agreement as "*the 1997 threshold agreement*".) UASA was not party to the threshold agreement.

[5] In terms of this agreement, three bargaining units were created. The first comprised of employees in job categories 2-8 and ungraded employees, the second comprised of artisans and miners and the third comprised of officials. The agreement further established a threshold of 35% representivity by a registered trade union within a defined bargaining unit for the exercise of organisational rights. As a result of this threshold various unions that failed the threshold were not afforded organisational

rights.

The recognition agreement of 23 March 1998

[6] On 23 March 1998, the company entered into a series of recognition agreements with unions who had attained the 35% threshold in one or other of the bargaining units, including NUM and the Mineworkers' Union ("*MWU*" in respect of the second bargaining unit) and the Officials Association of South Africa ("*OASA*" in respect of the third bargaining unit). (I will refer to this agreement as "*the 1998 recognition agreement*"). UASA subsequently also obtained recognition in the third bargaining unit after it succeeded OASA by merger and in the second bargaining unit after it acquired the erstwhile members of MWU following its de-recognition for want of representativeness.

[7] UASA's recognition under the 1998 agreement continued until 30 October 2006.

The recognition agreement of 30 October 2006

[8] By October 2006 the only unions that were recognized were UASA (the minority union) and NUM (the majority union). On 30 October 2006 the company, NUM and UASA concluded a new collective agreement (hereinafter referred to as the "*2006-recognition agreement*"). A salient feature of this agreement was that the parties agreed that the three bargaining units referred to above, collapse into one bargaining unit (employees in grades A3 – A5) (hereinafter referred to as *"the bargaining unit*"). Both NUM and UASA were recognised as the collective bargaining

representative bodies of all the employees in the bargaining unit provided that the unions meet the representivity threshold agreed *from time to time* and contained in a threshold agreement. The agreement which provided for the granting of organisational rights would terminate, *inter alia,* if the union fails to meet the representivity level as determined by a threshold agreement as amended *from time to time*. Any dispute about the interpretation or application of the agreement would be resolved by non-statutory dispute resolution processes which included private mediation or arbitration or if the parties cannot reach an agreement in respect of the dispute resolution processes, the dispute resolution procedures under the LRA would be followed.

[9] It is common cause that at all material times, well in excess of 50% of the employees in the single bargaining unit, were members of NUM and that a mere 7% were members of UASA. UASA, at the time, had about 2000 members out of 27 000 employees in the bargaining unit.

The bilateral threshold agreement dated 28 March 2007

[10] On 28 March 2007, the company and NUM concluded a bilateral threshold agreement termed the "*Threshold Agreement*" (hereinafter referred to as the "*2007 threshold agreement*"). In terms of this agreement the following were recorded:

(i) NUM (being the majority union in the workplace) and the company have agreed to conclude a collective agreement that establishes a threshold of representativeness in accordance with the provisions

of section 18 of the LRA.[1]

(ii) The threshold agreement replaced the 1997 threshold agreement (clause 2.4) and amended the threshold for the granting of organisational rights to a registered trade union with 50% + 1% membership within the bargaining unit.[2] The threshold was thus increased from 35% to 50% .

(iii) Trade unions that were entitled to organisational rights at that stage but who did not meet the threshold were afforded three months to do so failing which their rights would be terminated on 30 days' notice.[3]

[11] Acting in terms of the 2007 threshold agreement, the company gave UASA three months' notice requiring it to meet the threshold requirement. The company also informed UASA that "*at the end of the three month period a verification exercise will be conducted and if you have still not met the threshold requirements, you will be given 40 days notice of termination of all organizational rights*".

The dispute

[12] On 11 May 2007 UASA referred a dispute to the CCMA. In the referral UASA contended that the notice of termination constituted a breach of the 2006 recognition agreement. According to UASA clause 4.1 of the recognition agreement contemplated that a trilateral (involving the company, UASA and NUM) and not a bilateral (NUM and the company)

[1] Clause 2.1 of the threshold agreement.
[2] *Ibid* clause 3.1
[3] *Ibid* clause 4

threshold agreement would be concluded. The interpretation of this clause is strongly in dispute. Clause 4.1 reads as follows:

> *"The company [the Employer) recognises the Union [NUM] and the Association [UASA] as the collective bargaining representative bodies for all employees in the applicable bargaining unit provided that the parties meet the representivity thresholds as* ***agreed from time to time*** *and contained in a Threshold Agreement*."[4]

[13] On behalf of UASA it was argued that the notice given to UASA by the company was clearly in accordance with its (the company's) understanding of the source from which the 2007 threshold agreement derived its status. The company, so it argued, located its justification for the notice not in the provisions of clause 4.1 (which according to UASA required a trilateral agreement threshold agreement) but in section 18 of the LRA. It was submitted that this understanding is clear from the following passage in the notice:

> "*We wish to advise that the National Union of Mineworkers and the Company have entered into a new threshold agreement with effect from 28 March 2007. The agreement is in accordance with the provisions of Section 18 of the Labour Relations Act 66 of 1995*."

[14] A dispute resolution meeting was convened between the parties on 22 June 2007. UASA rejected a proposal that the dispute be referred to private arbitration.

---

[4] My emphasis.

CCMA referral and the urgent application

[15] On 27 June 2007 UASA referred the dispute to the CCMA. The dispute was described as one about the interpretation/ application of a collective agreement in terms of section 24 of the LRA:

> *"The respondent has breached the attached collective agreement signed in October 2006."*

[16] On 4 July 2007 UASA received notice that the company would terminate the organisational rights extended to UASA with effect from 31 July 2007. On 19 July 2007 UASA launched an urgent application in the Labour Court for urgent interim relief pending the outcome of the CCMA referral.

[17] On 24 July 2007, at the doors of the Court, the parties agreed to refer the main dispute to arbitration. It was agreed that the dispute will be referred to private arbitration and that the award would be final and binding *"subject to either party's right to approach the Labour Court to review the award on appropriate grounds"*. The dispute that was referred to private arbitration in terms of the Court order is the following:

> *"The dispute referred to the CCMA by the applicant on 27 June 2007* ***regarding the interpretation of the collective agreement*** *(the dispute) is by agreement between the applicant and the first respondent referred to private arbitration."*[5]

[18] This arbitration agreement (which was made an order of court) therefore gave the arbitrator the necessary jurisdiction to arbitrate the dispute. The

[5] My emphasis.

dispute that was referred to private arbitration in terms of the court order was about the interpretation of the collective agreement.

Pre-arbitration conference

[19] The parties then agreed as part of the first pre-arbitration conference that the exact dispute would be defined in the pleadings. Mr. Pretorius (for the company) argued that it should be clear from this clause in the pre-arbitration that the parties themselves had agreed (in a pre-arbitration conference) to define the dispute more precisely in the pleadings but that this did not purport to constitute an arbitration agreement nor did it purport to limit or qualify the generality of the description of the dispute in the *arbitration agreement* (which was part of a court order). I will return to the relevance of this submission.

[20] During the second pre-arbitration meeting, the parties specifically agreed that the Arbitration Act would apply. UASA also notified the company that it amended its pleadings. (I will return to the significance of this herein below.)

Pleaded case of UASA

[21] The pleaded case of UASA appears from the amended statement of case which was placed before the arbitrator. In paragraph [9] the following is stated:

> *"[9] The operative clause by which recognition was conferred (clause 4.1 of the agreement) states that the 'company recognises the union [i.e. NUM] and association [i.e. UASA] as the collective*

bargaining representative bodies for all employees and the applicable bargaining unit provided that the parties meet the representivity thresholds as agreed from time to time and contained a threshold agreement."

The union goes on to plead:

"10. The said clause means and was understood to mean that:

10.1. UASA together with the NUM would obtain immediate recognition from the employer as a collective bargaining representative within the bargaining unit;

10.2 the recognition would continue until:

10.2.1.a party failed to meet the thresholds of representation

10.2.2 'agreed from time to time' between all three parties in a threshold agreement."

In paragraph [11] of the statement of claim, UASA pleads that clause 4.1 is *unambiguous*:

*"**11. Clause unambiguous***

The meaning above assigned to clause 4.1 unambiguously derives from –

11.1 a proper construction of the clause

11.2 as read in the context of the agreement as a whole

11.3 and in the context of such evidence as is admissible to place the agreement within its contextual matrix."

In the *alternative* to this paragraph, UASA pleaded as follows in the event it is deemed that the clause is *ambiguous*:

"**12 Alternatively to paragraph 11**

12.1 Insofar as clause 4.1, so interpreted, might be deemed to be ambiguous, either on the basis that, given the privos, no immediate recognition is conferred or on the basis that a Threshold Agreement can be concluded by mere bilateral consensus, then UASA states that the meaning assigned above derives from –

…….

12.2.5 ***the exchanges, oral and written, between the parties in the course of negotiating the recognition agreement, and the stances adopted in the course of such negotiations, and the understanding shared between the parties immediately prior to the conclusion of the agreement;"***[6]

Issues before the arbitrator

[22] Two issues were before the arbitrator.

(i) The first issue was whether or not clause 4.1 extended recognition to NUM and UASA. The arbitrator held that clause 4.1 unambiguously conferred on the signatory unions recognition which was to continue until either of them failed to comply with the threshold which was to be set by an agreement to be concluded. This finding is not in issue.

[6] My emphasis.

(ii) The second issue was the meaning of the phrase "*as agreed from time to time*" in clause 4.1 and in particular whether or not it meant that the threshold agreement provided for a bilateral or trilateral agreement. I have already pointed out that the parties held two rival views in respect of the interpretation of this clause. The arbitrator concluded that it envisaged a bilateral and not a tripartite threshold agreement and consequently, the company did not breach the recognition agreement. Only the second issue is before the Court.

[23] UASA pleaded that they would obtain recognition by virtue of clause 4.1 and that such recognition will continue until the parties have entered into a threshold agreement concluded by all three parties. UASA maintained throughout the arbitration proceedings that the 2007 threshold agreement that was concluded between NUM and the company could not be invoked against it since it (UASA) had never subscribed to the terms of the threshold agreement. It was, as already pointed out, UASA's case that clause 4.1 of the 2006 recognition agreement envisaged a *tripartite* agreement (between UASA, NUM and the company) and not a bilateral (between NUM and the company) threshold agreement. Because the 2007 agreement was a *bilateral* agreement, UASA was not bound by the agreement. In terms of paragraph [11] of the statement of claim it was submitted that clause 4.1 of the recognition agreement should be read in context of the whole agreement *alternatively* in light of the relevant circumstances (paragraph [12] of the statement of claim). UASA

contended that clause 4.1 should be read to mean that UASA and NUM would continue to enjoy immediate recognition within the bargaining unit and that such recognition will continue until a party failed to meet the threshold of recognition (which was 35% at the time) that would be agreed to from time to time by all three parties to the agreement (UASA, NUM and the company). If the parties are unable to conclude the tripartite threshold agreement, the resulting impasse could be broken by the termination upon notice of the agreement as contemplated in terms of section 23(4) of the LRA. In summary: UASA's pleaded case therefore was that the company had breached the collective agreement which it (UASA) contended implied a tripartite threshold agreement.

[24] The company's interpretation of clause 4.1 is different. According to the company there is no need for a tripartite threshold agreement. Put differently, although admitting that it is bound by the terms of the 2006 recognition agreement, the company denies that it is in breach of the recognition agreement.[7] The case for the company is that clause 4.1 extended organisational rights only to unions who meet the requirements of the 2007 threshold agreement and that it is entitled in terms of section 18 of the LRA to conclude a bilateral threshold agreement with NUM since NUM was a majority union. Because UASA had fewer than 35% of the employees in the reconstructed sole bargaining unit, UASA accordingly failed to meet the 1997 threshold agreement.

[7] Ad paragraph 10 of the statement of defence.

[25] The crisp dispute is the following: UASA says that the company is in breach of the agreement (clause 4.1 in particular) because there must be a tripartite threshold agreement. The company denies that it is in breach and argues that it is permissible in terms of section 18 of the LRA to conclude a bilateral threshold agreement with the majority union.

Section 18 of the LRA

[26] In terms of section 18 of the LRA it is competent for a majority union and an employer within a workplace to determine levels of representation for recognition and for purposes of organisational rights. The power to invoke section 18 appears to be subordinate to an agreement between the employer and the union. In other words, where a collective agreement regulates the issue of representivity in respect of organisational rights, the agreement takes preference over the provisions of section 18 of the LRA. In this particular case it was the contention of UASA that the agreement (clause 4.1) is determinative of the dispute and as such precluded the operation of section 18 of the LRA.

The arbitration hearing

[27] The arbitration hearing was conducted on 14, 15 and 17 August 2007. Both parties were represented by senior counsel. UASA by Mr. Brassey SC and Mr Suttner SC for the company.

[28] The arbitration commenced with the company raising an exception against the statement of case of UASA. Submissions were made to the arbitrator. The arbitrator dismissed the exception against UASA's amended

statement of case and ordered that, in light of the ambiguities surrounding the interpretation of clause 4.1, it was necessary to hear evidence regarding the surrounding circumstances relating to clause 4.1 of the 2006 recognition agreement. The arbitrator stated the following during the hearing:

> Arbitrator: "Y*es. Well, having listened to the arguments, can I say that I have become more firmly of the view than before when I read the papers, that this is a troubling clause and that there are obscurities in the clause which cannot be resolved simply by looking at the clause and the context of the agreement itself. I would feel much more comfortable if I hear evidence of surrounding circumstances directing to resolving the ambiguity which I - or the ambiguities, because there is more than one, the ambiguities which I feel in here, in its cause. I accordingly rule that after the tea adjournment we will proceed with the hearing of evidence, of such evidence as is directed to clearing up the ambiguity and of course which is admissible under the circumstances"*.

In his award, in deciding the second issue, the arbitrator explains why it was necessary to hear oral evidence. He states that he was of the view that the expression "*as agreed from time to time*" appeared to be ambiguous on the face of it. However, in light of the provisions of section 18 of the LRA, he was of the view that there was "*a reasonable possibility*

that that evidence of background circumstances might demonstrate that, contrary to what one would ordinarily assume, not all the parties to the agreement were required to conclude the threshold agreement. I therefore ruled that UASA should be given the opportunity of leading evidence of background circumstances directed to its construction of the phrase."

[29] The parties then proceeded to lead oral evidence. Before I summarise the evidence, it is important to briefly refer to the exchange between counsel on behalf of UASA and the arbitrator prior to the arbitrator deciding to rule that oral evidence be presented.

[30] In arguing the exception Mr. Brassey stated the following:

> *"But insofar as you do not accept that, we accept that the agreement may have a measure of ambiguity in relation to this and we are quite comfortable about leading evidence to clear up that ambiguity, such as it is admissible in those circumstances."*[8]

The following was also stated:

> *"So we submit that at the very least the agreement is ambiguous. We suggest that you reserve the question ultimately of whether it is ambiguous or unambiguous until the end of proceedings. You hear the evidence, this is evidence of surrounding circumstances including the correspondence, see what you make of it, use the evidence for two purposes. One is to place the agreement within its contextual framework as contemplated by cases such as Swart v*

[8] Page 42 – 43 of the transcript.

Cape Bricks and insofar as you conclude that there is an ambiguity which he did, use the evidence for purposes of resolving the ambiguity one way or the other."[9]

[31] These comments (and I will return to this point again) should be read in light of what was pleaded by UASA. I have already referred to the fact that UASA pleaded that, insofar as clause 4.1 is ambiguous regarding whether a bilateral or trilateral threshold agreement was to be concluded, then the interpretation to be preferred was that a tripartite agreement was to be preferred *inter alia* when this clause is read in the light of surrounding circumstances, including the correspondence. It was under these circumstances that the letter of 27 July 2006 (notwithstanding an objection that the letter was privileged – see herein below) was included in the common bundle of documents that was provided to the arbitrator. I will hereunder refer to the argument obo UASA that the arbitrator, by relying on the background evidence and more in particular on the common understanding between the parties which was not pleaded but which emerged from the evidence when reference was made to the letter of 27 July 2006, strayed beyond the scope of his terms of reference and therefore exceeded his powers.

[32] UASA led the evidence of Mr. Timothy Kruger (the general manger of its mineral resources division – hereinafter referred to as "*Kruger*") and Mr. Nicolaas Naude (full time UASA representative at the company). The

[9] Page 47 of the transcript.

company led the evidence of Ms Anita Simon (the manager: employment relations and legal of the company – hereinafter referred to as "Simon").

[33] I do not intend to refer to the evidence in detail. I am in agreement with the summary of his evidence as contained in the arbitration award. What is, however, of importance to these proceedings, is Kruger's evidence in respect of the letter dated 27 July 2006. Kruger, in his evidence in chief, first referred to this letter. He was also cross-examined on the contents of this letter.

[34] On 27 July 2006 Kruger wrote two letters to Simon. He copied the letters to NUM and UASA officials. In the first letter he set out UASA's position during the negotiations which he stated remained unchanged. In the second letter Kruger stated that "***UASA accept/agree to [the] percentage threshold,***[10] *to be concluded between NUM and management…"*. UASA's first suggestion was for a window period of three years with retention of, *inter alia,* rights during which it would strive to reach any required threshold. Its second suggestion was that the threshold agreement be made dependent upon "*a formal cooperation agreement between NUM and UASA, acting jointly, as trade unions with joint representation of well above the said threshold*". It was then suggested that the proposed cooperation agreement remain valid for a minimum of three years. I need to interpose here to again point out that this letter was contained in the common bundle. Moreover, the company

[10] Bold in the original letter.

referred and in fact attached a copy of this letter to its answering affidavit in the aforementioned urgent application. The following is stated in paragraph [12] of the answering affidavit in respect of the preferred interpretation of the threshold agreement as conveyed in this letter:

"I attach hereto marked "AS2" a letter dated 27 July 2006 from the Applicant to the First Respondent in which certain proposals are contained. Although I realise that these were merely proposals, which had not necessarily been implemented, it is instructive to consider that these proposals by the Applicant both presupposed that thresholds would be agreed between the First [the company] and Second [NUM] Respondents only and not to include the Applicant [UASA]."

[35] When Kruger sought to refer to this letter in his evidence-in-chief, counsel for UASA objected and stated that this letter was written in an attempt at settlement and that the letter was therefore written "*without prejudice"*. Counsel for the company intervened and stated that he intended to cross-examine the witness on the letter of 27 July and which he subsequently did. Two points are important in respect of this objection:

(i) Firstly, the objection of privilege cannot be sustained. The letter was discovered by UASA and was included in the common bundle of documents prepared and provided to the arbitrator.

(ii) Secondly, it is important to consider *what* was objected to. Mr Pretorius argued that it is important to note that the objection was based on *"without prejudice privilege"* and not on "*jurisdiction*".

I will return to the relevance of this point herein below where I discuss the merits of the review. Suffice to briefly point out that it was argued in this review that the arbitrator had exceeded his powers in that the pleaded case of the company was that it had the right to conclude a bipartite agreement by virtue of the provisions of section 18 of the LRA. UASA argued that it was not pleaded that there was a common understanding between the parties as revealed by the evidence and more in particular in the letter of 27 July 2007. The arbitrator was therefore not entitled to have regard to the common understanding point as this went beyond the terms of reference of the arbitrator – hence the submission that the arbitrator had exceeded his powers.

[36] Returning to the evidence of Kruger: During the course of Kruger's cross examination, Kruger was referred to the following passage from the letter:

"UASA accept/agree to percentage threshold to be concluded between NUM and management with a window period of 3 years afforded to UASA to remain recognised and maintain all current rights."

Kruger was asked the following by counsel obo the company:

"Now let us look at what you are putting on the table. What you were in this first proposal you were acknowledging that NUM and management could set the thresholds.

MR KRUGER: Yes."

[37] Kruger was also re-examined by counsel obo UASA on this letter despite the earlier objection. Saayman also dealt with the letter of 27 July 2006 in her evidence. Her evidence was that the proposal contained in the letter demonstrated that UASA was well aware at the time of signing the 2006 recognition agreement that a bilateral threshold agreement would be concluded. This evidence was elicited under cross-examination.

The arbitrator's award

[38] The arbitrator issued his award on 24 August 2007 dismissing the claim (in respect of the second point) of UASA. The arbitrator concluded that the background evidence showed that:-

> "…*when UASA concluded the recognition agreement, it intended the expression 'as agreed' to mean 'as agreed between the Employer and NUM'. This was also the Employer's intention. Ms. Simon may have erred in thinking that s 18 of the Act sanctioned the conclusion of the threshold agreement between the Employer and NUM. I do not need to enter into the controversies raised by her reliance on s 18. Ms Simson's inappropriate reliance on sec. 18 did not make the threshold agreement invalid, Whatever her motivation was, a solid basis for the agreement was that UASA had, in terms of the recognition agreement, agreed that the Employer and NUM were entitled to proceed the way they did. As for NUM, it was never suggested that it intended the phrase 'as*

agreed' in the recognition agreement to mean that UASA was to be party to a threshold agreement".[11]

[39] The arbitrator therefore concluded that the threshold agreement between the company and NUM was validly concluded. Because UASA did not meet the membership threshold of 50% + 1, the company was entitled to give UASA notice that it was to meet the required threshold within three months. The arbitrator thus concluded that it was within the contemplation of all three parties at the time of the conclusion of the 2006 recognition agreement that a bilateral threshold agreement would be concluded between the company and NUM. This is referred to by the parties as "*the common understanding point"*. In arriving at this conclusion in respect of the meaning of the phrase "*as agreed from time to time"*, the arbitrator referred to the evidence of UASA and more in particular that of Kruger in respect of the letter. The arbitrator summarized the evidence of Kruger as follows:

> *"If this proposal were to be agreed upon, and everyone was quite clear on this, UASA with its overall representation of about 7% of the workforce had only one realistic prospect of retaining its bargaining and organisation rights at the Rustenburg Operations and that was to reach an accommodation with NUM. Between the two of them, together representing over 70% of the workforce, they would comfortably reach any realist representivity level. The*

[11] Ad paragraph [22] of the award.

expectation of an accommodation was perhaps not unrealistic. During the negations, said Mr. Kruger, UASA and NUM Officials had twice reached agreement on the representivity level in recognition units and twice, just before a draft recognition agreement was about to be signed, some difficulty emerged that prevented NUM from putting its signature to the document."[12]

Grounds for review

[40] UASA submitted that the decision of the arbitrator was vitiated by material irregularity.

(i) Firstly, the arbitrator exceeded his powers in deciding the matter on the basis of the *common understanding point* because that was not pleaded by the company. It was argued that the arbitrator was obliged to decide the dispute in terms of the pleadings which defined the exact nature of the dispute between the parties. The arbitrator was therefore obliged to consider the material dispute thought the lens of *section 18* of the LRA (as this was pleaded as the rationale for being able to conclude a bipartite agreement) and therefore he was not entitled to treat section 18 as immaterial. Moreover, it was argued that the arbitrator was not entitled to seek other justifications (more in particular by relying on the *common understanding* point which emerged from the oral evidence) for finding in favour of the company (namely that the bilateral

[12] Ad paragraph [2] of the arbitration award.

agreement was sanctioned on the basis of the common understanding point). UASA argued that the pleadings, which set out the issues to be determined by the arbitrator, became the arbitrator's terms of defence and because the company relied on section 18 in its pleaded case for the conclusion of bilateral agreement and not on the common understanding point or the letter of 27 July, the arbitrator strayed beyond the scope of the pleadings and thus exceeded his powers under the submission to arbitration. It was further argued on behalf of UASA that once the arbitrator found that section 18 did not sanction the conclusion of the 2007 threshold agreement on a bilateral basis,[13] the dispute was determined in favour of UASA. The arbitrator therefore had no further jurisdiction. It therefore followed that once the arbitrator proceeded to decide the point on the broader basis of the common understanding point, he strayed beyond the cope of the pleadings and consequently exceeded his powers.

(ii) Secondly, the decision arrived at by the arbitrator was irrational, arbitrary or unreasonable. In respect of this point it was the case of UASA that the arbitrator firstly failed to give due weigh to the language of clause 4.1 of the agreement which signified that the threshold agreement should be trilateral; secondly, failed to recognise and give due weight to the fact that in its statement of

[13] See paragraph [22] of the award

defence, the company relied on section 18 of the LRA as the interpretation of clause 4.1. No reliance was placed on the letter of compromise. Thirdly, the arbitrator failed to recognise that even in argument before him the company placed no reliance on the letter of 27 July 2007 as an interpretative aid in the interpretation of clause 4.1. Fourthly, the arbitrator acted irrational in relying on the letter of 27 July 2003 in circumstances where the letter was designed not to articulate a standpoint but to produce a compromise. Fifthly, failed to recognise that in correspondence the company failed to state that the threshold agreement might be concluded bilaterally even though it knew that the basis for recognition was the central issue separating the parties and that UASA would never agree that the threshold agreement should be concluded bilaterally since this would place its continued recognition at the mercy of NUM and sixthly, the arbitrator failed to give weigh to the fact that nothing compelled UASA to submit to an agreement that placed its continued recognition at the mercy of NUM.

Review of private arbitrations

[41] I have already referred to the fact that the dispute that was referred to the CCMA by UASA was by agreement referred to private arbitration. The parties have agreed that the award would be final and binding on the parties and that either party had the right to approach the Labour Court to

review the award on appropriate grounds. It was submitted on behalf of UASA that the private arbitration was in substitution for the determination of the dispute by the CCMA and that it meant that it was within the contemplation of the parties that the Labour Court would have the powers of review that it enjoys when a CCMA award is brought before it on review. UASA relied on the decision in *MEC for Health, Gauteng v Public Service Co-coordinating Bargaining Council & Others* (2006) 27 *ILJ* 2638 (LC). This decision dealt with the review of an arbitration award issued by an arbitrator of a bargaining council. The Court in that case was of the view that the review had to be conducted in terms of section 33 of the Arbitration Act 42 of 1956 because the arbitration had been conducted pursuant to an arbitration agreement. The court was further of the view that the rationality test formulated in *Carephone (Pty) Ltd v Marcus NO & Others* [14] was applicable to arbitrations conducted under the Arbitration Act.

[42] I am of the view that the only grounds available to UASA to review the present arbitration award are those provided for in section 33(1) of the Arbitration Act (read with section 157(3) of the LRA). At the outset I must point out that I am not persuaded that the decision in *MEC for Health* is authority for the proposition advanced by UASA particular in light of the overwhelming case law that point to a different view. In *Telcordia Technologies Inc v Telkom SA Ltd* the Supreme Court of Appeals

[14] (1998) 19 *ILJ* 1425 (LAC).

unequivocally stated that:[15]

> *"[50] 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. Typically, they agree to waive the right of appeal, which in context means that they waive the right to have the merits of their dispute re-litigated or reconsidered. They may, obviously, agree otherwise by appointing an arbitral appeal panel, something that did not happen in this case.*
>
> *[51] Last, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in s 33(1) of the Act. By necessary implication they waive the right to rely on any further ground of review, 'common law' or otherwise. If they wish to extend the grounds, they may do so by agreement but then they have to agree on an appeal panel because they cannot by agreement impose jurisdiction on the court. However, as will become apparent, the common-law ground of review on which Telkom relies is contained – by virtue of judicial interpretation – in the Act, and it is strictly unnecessary to deal with the common law in this regard. But, by virtue of the structure of the judgment below and the argument presented to us, it is incumbent on me to take the tortuous route*."

[15] 2007 (3) SA 266 (SCA) at paragraphs [50] – [51].

[43] In other words, once parties have agreed to a private arbitration (as in this case) and, apart from the fact that the parties have agreed in the pre-arbitration meeting that the Arbitration Act will apply, the grounds of review are limited to section 33(1) of the Arbitration Act. A party or parties cannot impose a wider jurisdiction on this Court. Where parties wish to extend the right of review, parties may do so by appointing a private arbitral tribunal to review the decision under wider terms.

[44] A clear distinction is furthermore made between a private arbitration and a statutory arbitration. This distinction was also endorsed by the Constitutional Court in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC):

> *"[88] Compulsory arbitrations in terms of the LRA are different from private arbitrations. CCMA commissioners exercise public power which impacts on the parties before them. In the language of the pre-constitutional administrative law order, it would have been described as an administrative body exercising a quasi-judicial function. I conclude that a commissioner conducting a CCMA arbitration is performing an administrative function."*

[45] I am therefore not persuaded that the law is that one can bring into a private arbitration the rationally review test or the justifiability test. The rationality test as laid down in *Sidumo* is the test which applies in statutory reviews in terms of section 145[16] of the LRA. Moreover, the LRA

[16] "145 Review of arbitration awards

specifically provides that bargaining council arbitrations may be reviewed on a similar basis as CCMA awards.[17] No similar provision exists in respect of private arbitration awards with the result that section 145 is not applicable to the review of private arbitration awards. See also *Stocks Civil Engineering (Pty) Ltd v Rip NO & Another* (2002) 23 ILJ 358 (LAC) where the LAC unequivocally stated what is envisaged with a review of a private arbitration award:

> **"***[8] As the arbitration in this matter was a private arbitration as opposed to a compulsory arbitration provided for under the Labour Relations Act 66 of 1995 (the Act), the provisions of s 145 would ordinarily not be applicable with the result that the award would fall outside the ambit of the decision of this court in Carephone (Pty) Ltd v Marcus NO & others (1998) 19 ILJ 1425 (LAC)."*

[46] A similar approach was followed by Van Dijkhorst AJA in the minority judgment of *Stocks and Stocks* (supra):

> *"[23] The question which arises is whether, if these aberrations are reviewable, the Arbitration Act or the principles applicable in reviews under the LRA should govern the proceedings. One line of thought is that as s 33(1) of the Arbitration Act and s 145 of the*

---

(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-
(a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption; or .."

[17] Section 51(8) of the LRA reads as follows: "*Unless otherwise agreed to in a collective agreement, sections 142A and 143 to 146 apply to any arbitration conducted under the auspices of a bargaining council."*

LRA are virtually the same, this court and the Labour Court should apply the same norm under both, viz that of rational justifiability laid down in Carephone (Pty) Ltd v Marcus NO & others (1998) 19 ILJ 1425 (LAC). (Now since this matter was heard redefined by this court as rationality in Shoprite Checkers (Pty) Ltd v Ramdaw NO & others (2001) 22 ILJ 1603 (LAC); 2001 (4) SA 1038 (LAC) para 25.) This approach is to be found in Transnet v HOSPERSA (1999) 20 ILJ 1293 (LC) para 15; NUM v Brand NO & another (1999) 20 ILJ 1884 (LC); [1999] 8 BLLR 849 (LC) para 14 and Orange Toyota (Kimberley) v Van der Walt & others [2001] 1 BLLR 85 (LC). The other line of thought is that whatever the test may be for matters falling under the LRA regime, private arbitrations are to be reviewed (also in the Labour Court) in terms of the norms laid down in s 33(1) of the Arbitration Act. The latter view was expressed in Eskom v Hiemstra NO & others (1999) 20 ILJ 2362 (LC) and Seardel Group Trading (Pty) Ltd t/a The Bonwit Group v Andrews NO & others (2000) 21 ILJ 1666 (LC).

[24] In my view the latter is the correct approach. Private arbitrations are subject to the Arbitration Act 1965. Section 40 provides for an exception where an Act of parliament expressly or by implication excludes its operation. An example is s 145 of the LRA. There is no such exception in the case of private arbitrations. Considerations of expediency based upon the fact that the

arbitration provisions of the LRA coincide with those in the Arbitration Act and that it would be preferable for labour courts to apply one test throughout, cannot override the clear provisions of the Arbitration Act. I do not share the view of Molahledi AJ in the Orange Toyota case supra para 13 that the Arbitration Act is to be read subject to the Constitution and that therefore the test for review of the CCMA arbitration awards set out in the Carephone judgment would equally apply to reviews in terms of s 33 of the Arbitration Act. The important difference between the two types of arbitration is that CCMA arbitrations were held to be by an organ of state to which the constitutional precepts for just administrative action applied, whereas private arbitrations are not. This arbitration therefore has to be evaluated against the norms laid down in s 33(1) of the Arbitration Act as if this were a High Court doing likewise."

[47] Lastly, and perhaps more importantly, there is no doubt on the papers that the parties were in agreement that the arbitration would be governed by the Arbitration Act. This is not only clear from the second pre-arbitration hearing, but also from the opening statements to the arbitrator.

[48] In light of the conclusion that a review is not competent under section 145 of the LRA, UASA can only review the (private) arbitration award under section 33 of the Arbitration Act. This in turn means that UASA can only review the arbitration award under section 33(1)(b) of the Arbitration Act

on the basis that the arbitration exceeded his powers. See *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun* (Pty) Ltd 1994 (1) SA 162 (A) at 169:

> *"Before considering these grounds, it is as well to emphasise that the basis upon which a Court will set aside an arbitrator's award is a very narrow one. The submission itself declared that the arbitrator's determination 'shall be final and binding on the parties'. And s 28 of the Arbitration Act provides that an arbitrator's award shall 'be final and not subject to appeal and each party to the reference shall abide by and comply with the award in accordance with its terms'.*
>
> *It is only in those cases which fall within the provisions of s 33(1) of the Arbitration Act that a Court is empowered to intervene. If an arbitrator exceeds his powers by making a determination outside the terms of the submission, that would be a case falling under s 33(1)(b). As to misconduct, it is clear that the word does not extend to bona fide mistakes the arbitrator may make whether as to fact or law. It is only where a mistake is so gross or manifest that it would be evidence of misconduct or partiality that a Court might be moved to vacate an award: Dickenson & Brown v Fisher's Executors 1915 AD 166 at 174-81. It was held in Donner v Ehrlich 1928 WLD 159 at 161 that even a gross mistake, unless it establishes mala fides or partiality, would be insufficient to warrant interference."*

[49] The grounds for review in terms of the Arbitration Act are misconduct, gross irregularity or excess of powers. Section 33 (1) of the Arbitration Act reads as follows:

> *"[1] Where* **–**
>
> *(a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or as an umpire; or*
>
> *(b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or*
>
> *(c) an award has been improperly obtained, the Court may, on the application of any party to the reference after due notice, to the other party or parties, make an order setting the award aside."*

[50] It also follows, in my view, that a review based on rationality or reasonableness which derives from the Promotion of Administrative Justice Act 3 of 2002 ("PAJA") will not be competent. Private arbitration does not constitute administrative action with the result that the award may not be reviewed in terms of PAJA. There therefore exists no extended basis upon which a private arbitration award can be reviewed. See *Total Support Management (Pty) Ltd & Another v Diversified Health Systems (SA) (Pty) Ltd & Another.*[18]

[18] 2002 (4) SA 661 (SCA) at paragraph [24].

> *"[24] Arbitration does not fall within the purview of 'administrative action'. It arises though the exercise of private rather than public powers. This follows from arbitration's distinctive attributes, with particular emphasis of the following. First, arbitration proceeds from an agreement between parties who consent to process by which a decision is taken by the arbitrator that is binding on the parties. Second, the arbitration agreement provides for a process by which the substantive rights of the parties to the arbitration are determined. Third, the arbitration is chosen, either by the parties, or by a method to which they have consented. Fourth, arbitration is a process by which the rights of the parties are determined in an impartial manner in respect of a dispute between parties which is formulated at the time that the arbitrator is appointed. See Mustill and Boyd Commercial Arbitration 2nd ed (1989) at 41."*

[51] What constitutes a gross irregularity in the proceedings and when will it be concluded that the arbitrator exceeded his powers? In respect of the first question, Schreiner J in *Goldfields Investment Ltd & Another v City of Johannesburg & Another*[19] held as follows in respect of the nature of gross irregularity:

> *"It seems to me that gross irregularities fall broadly into two classes, those that take place openly, as part of the conduct of the trail – they might be called patent irregularities – and those that*

[19] 1938 TPD at 560.

> *take place inside the mind of the judicial officer, which are only ascertainable from the reasons given by him and which might be called latent.*"

The court also pointed out that in neither case there need be any intentional arbitrariness of conduct or any conscious denial of justice. The crucial question is whether the conduct prevented a fair trail of the issues. If it did, it will amount to a gross irregularity. Where the arbitrator merely comes to a wrong decision owing to him having made a mistake on a point of law in relations to the merits, this does not amount to gross irregularity. However, if the mistake led to the magistrate not merely missing or misunderstanding a point of law on the merits but misconceives the whole nature of the inquiry or his duties in connection therewith, then it will be concluded that the losing party did not have a fair trail.[20]

[52] It appears from the decision in *Telcordia (supra)* that a fairly narrow approach should be taken in dealing with private arbitrators in light of the fact that parties, through consent, determined the powers of the arbitrator. In respect of the grounds "*gross irregularity* and *"exceeding powers"* the Court quoted with approval from the judgment of Lord Steyn in the *Lesotho Highlands Development Authority v Impregelio SPA (2005) UKHL 43* ad paragraph [24] where the following was stated:

[20] Ibid ad page 651.

> *"But the issue was whether the tribunal "exceeded its powers" within the meaning of s68 (2) (b) (of the English Act). This required the court below to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have. If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under s68 92) (b) is involved. Once the matter is approached correctly, it is clear that at the highest in the present case, on the current point, there was no more than an erroneous exercise of the power available under s48 (4). The jurisdictional challenge must therefore fail".*

[53] Whether an arbitrator exceeded his or her powers is determined with reference to the terms of reference agreed to by the parties. I will return to this aspect in more detail hereunder.

Merits of the review

[54] When the dispute in the present case was referred to private arbitration, the parties have agreed in the first pre-arbitration meeting that the issues to be determined by the arbitrator would be delineated by an exchange of pleadings. The issues as set out in the pleadings then became the arbitrator's terms of reference. I have already pointed out that in terms of the pleadings the company justified concluding the bilateral agreement with reference to section 18 of the LRA. In terms of the notice terminating

the recognition of UASA was also premised on a threshold agreement concluded in terms of section 18 of the LRA. The company did not plead that it concluded the bilateral agreement in terms of a common understanding between the parties. The company also specifically did not plead that the letter of compromise (dated 27 July 2006) revealed the existence of such a common understanding. However, the arbitrator, after having heard oral evidence – including evidence about the said letter - concluded that the evidence demonstrated that the intention of the parties was that the recognition agreement intended to mean an agreement between the company and NUM. In essence, the arbitrator found that, irrespective of the workings of section 18 of the LRA, it was within the contemplation of all three parties at the time of the conclusion of the 2006 recognition agreement that a bilateral threshold agreement would be concluded between the company and NUM.

Legal framework

[55] In terms of section 1 of the Arbitration Act, an "*arbitration agreement*" is *"a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement whether an arbitrator is named or designated therein or not."*

[56] The arbitration agreement must be distinguished from the submission or reference of a particular dispute to the arbitrator (in terms of the arbitration agreement) although, as will be pointed out herein below, the arbitration agreement can also, depending on the circumstances, contain the terms

of reference. According to Butler and Finsen,[21] the Arbitration Act applies only to a written arbitration agreement. It is not required by the Arbitration Act that the reference or submission to arbitration in terms of that agreement be in writing for the Arbitration Act to apply. It is, however, as already pointed out, possible that the written statement of the matters in dispute which is drawn up by the parties and submitted to the arbitrator (such as pleadings) could qualify as the *arbitration agreement* for purposes of the Arbitration Act (see *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk*[22]). It is, however, also not unusual for parties to define the dispute and identify the issues for decision in the pleadings once a dispute has been referred to arbitration in terms of an arbitration agreement.[23] In such a case the pleadings will stand separately from the arbitration agreement.

[57] The *arbitration agreement* is the basic source of an arbitrator's jurisdiction. It is in fact the only source from which the jurisdiction of the arbitrator can come. The arbitrator's jurisdiction may, however, be further defined by his terms of reference as agreed between the parties. See in this regard *Harris v SA Aluminium Solder Co (Pty Ltd.*[24] In this decision the Court firstly pointed out that, if an arbitrator travelled outside the submission or where the arbitrator has wrongly construed the submission, the award "*will be bad as being not in terms of the submission from which they derive*

[21] *Arbitration in South Africa* (Juta 1993) at page 37 – 38.
[22] 1968 (1) SA 7 (C) at 15B-C).
[23] Butler and Finsen at 133.
[24] 1954 (3) SA 388 (N).

their jurisdiction."[25] Secondly "*[i]n order to determine the scope of the submission and the arbitrators' jurisdiction it is permissible to have regard to evidence of the circumstances prevailing when the submission was signed."*[26] It is permissible to also have regard to the conduct of the parties during the arbitration in interpreting an arbitrator's terms of reference (see in this regard: *Veldspun (Pty) ltd v Amalgamated Clothing and Textile Workers Union of South Africa & Another).*"[27]

[58] An arbitrator will therefore act within the scope of his jurisdiction if he decides a matter which falls within the scope of the arbitration agreement and his agreed terms of reference. Where an arbitrator decides an issue which falls outside of the scope of his original terms of reference (as alleged the arbitrator did in the present case), he may do so provided that the parties have agreed, at least tacitly to extend the scope of the terms of reference during the arbitration and provided that the new matter falls within the scope of the arbitration agreement. See in this regard *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk* (supra):

> *"In my view, this submission is sound. An examination of the statement of reference leaves me in no doubt that the parties, acting through their legal representatives, agreed that the arbitrator should determine the question of the validity of the second agreement. This agreement is to be found in the statement of*

[25] At 388G.
[26] At 389A.
[27] 1990 (4) SA 98 (SE).

reference itself. In para. 5 the issue of validity is pertinently raised by the parties and para. 6, which sets froth various other disputes……. It is clear to me that these words mean, and were intended to mean, in the event of the notarial lease being found by the arbitrator to be valid and effective. This establishes beyond doubt that the parties submitted the issue of validity for decision by the arbitrator and their subsequent conduct in advancing argument – through their counsel – upon this issue to the arbitrator shows that this is precisely what they intended to do."[28]

[59] I have already pointed out that pleadings often form the basis of arbitration proceedings and often constitute the terms of reference of the arbitrator. They must be dealt with in the same way as in any ordinary civil litigation. Mustill and Boyd [29] state that arbitrators should not allow an amendment if it would *"raise a dispute which is not one of the disputes in respect of which he was appointed to arbitrate":*

"More difficult questions arise where a dispute concerning a particular subject matter has been referred to arbitration, and where subsequently one or other of the parties wishes to put forward his case in a new way. It is plain, in general terms, that the arbitrator has no jurisdiction to entertain a dispute other than the one which he has been appointed to decide; and this is reflected procedurally

[28] At 14 – 15.
[29] *Commercial Arbitration* (Butterworths 2nd edition 1989).

by saying that an arbitrator would have no power to allow amendment to the pleadings which would raise a new dispute."

[60] The same authors deals with amendments by the respondent as follows:

"One may first consider the situation where it is the respondent who seeks leave to amend. For example, a buyer of goods rejects them on the ground that they were defective; an arbitration is commenced in which the seller claims damages for the failure to accept; the buyer subsequently discovers that he has an unanswerable defence on the ground that the goods were shipped out of time, and wishes to raise this in the arbitration. The seller could assert that the new pleas should not allowed, since the arbitrator was never entrusted with a dispute about the late shipment; the buyer could reply that the original dispute was concerned with the issue whether he was entitled to reject the goods and that ***the new plea is simply a variation on the same basic question****. Logic does not point clearly to either solution, since the problem is essentially one of defining the word 'dispute'.* ***Expediency does, however, suggest that the respondent should be allowed to amend – provided, of course, that the arbitrator considers that the circumstances make it fair for him to do so.*** *Any other result would produce unjust results, because if the arbitrator will not entertain the defence there is no way in which*

the respondent can rely upon it at all, either in court or in arbitration." [30]

In respect of amendments by the claimant the learned authors state the following:

"*This practical consideration does not apply with so much force where it is the claimant who wishes to amend; for if the arbitrator refuses leave, the only consequence is that the claimant is put to the trouble of starting a separate arbitration for the new claim…**the best approach is to identify (if possible) the central issue upon which the granting or withholding of the remedy depends, and to permit all amendments except those which would replace that issue, or add another issue**…… For example, if a buyer claims an allowance because goods are of defective quality; he can amend to allege defects additional to those on which he originally relied; but he cannot add a new claim for non-compliance with sample."*[31]

[61] In general the Court will only allow parties to introduce non-pleaded issues where there is no prejudice to the other party. See *Robinson v Randfontein Estates Gm Co Ltd*: [32]

[30] At 125. Own emphasis.
[31] At 126 – 127. Own emphasis.
[32] 1925 AD 173.

> *"The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a discretion for pleadings are made for the court not the court for the pleadings. And where a party has had every facility to place all the facts before the trail court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal merely because the pleading of the opponent has not been as explicit as it might have been."* [33]

[62] Where no objection has been raised during the trail in respect of evidence tendered to the Court, the Court will not be inclined to find that there was prejudice. See also *Wynberg Municipality v Dreyer:* [34]

> *"The defendant not only raised no objection to this course, but itself proceeded on similar lines, by calling evidence… Over this wide area the controversy ranged, the parties confining themselves neither to the period specified not to the matters complained of in the declaration. The position should, of course, have been regularized by an amendment of the pleadings. This was not done; but the defendant cannot now claim to confine the issue within limits which it assisted to enlarge; nor can it complain that the*

[33] At 198.
[34] 1920 AD 439.

learned Judge in his summing up death with the case on the basis which both parties had adopted." [35]

[63] The decisions in *Randfontein Estates (supra)* and the decision in *Wynberg Municipality* (*supra*) was endorsed in the decision of *Shill v Milner* where the Court held as follows:

"These principles apply to the present dispute. Assuming (though I disagree) that Mr. Ramsbottom's contentions, based on the frame of the pleadings, are just, the fact remains that the issues were substantially broadened in the court below….

Reverting however, to the issues which emerged at the trail, the substantial issue was, as I have stated. Shill's liability to transfer export quota certificates to Milner. And the learned judge by adjudicating on that basis caused no prejudice to Shill and did not prevent a full enquiry in terms of the judgment in the Robinson case." [36]

HOS+MED Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others 2008 (2) SA 608 (SCA)

[64] Mr. Brassey referred the Court to a decision of the Supreme Court of Appeals in *HOS+MED Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others* [37] (hereinafter referred to as "*Hosmed*") as authority for the proposition that an arbitrator may not stray beyond his terms of reference.

---

[35] At 442 – 443.
[36] 1937 AD 101 at 105 – 105.
[37] 2008 (2) SA 608 (SCA).

[65] In *Hosmed* the question before the Court was whether the appeal tribunal exceeded its powers or was guilty of gross misconduct. The appellant argued that the arbitration award should be reviewed in that the appeal tribunal had held that, notwithstanding the fact that the issue of unanimous assent had not been pleaded, it was entitled to go beyond the pleadings as the issue had been traversed in evidence. In the *Hosmed*-case the *arbitration agreement* provided that the issues before the arbitrator and the appeal tribunal were defined by the pleadings. It was argued on behalf of the appellant that the tribunal could not go beyond the pleadings and decide an issue that was not pleaded because an arbitrator, unlike a court of law (which has inherent jurisdiction to decide a matter even where it has not been pleaded), has no such power. It was common cause that the issue of unanimous assent was not pleaded at any stage. The Court held as follows:

> *"[30] In my view it is clear that the only source of an arbitrator's power is the arbitration agreement between the parties and an arbitrator cannot stray beyond their submission where the parties have expressly defined and limited the issues, as the parties have done in this case to the matters pleaded. Thus the arbitrator, and therefore also the appeal tribunal, had no jurisdiction to decide a matter not pleaded. Hosmed's rejoinder put in issue Thebe's allegation that there had been compliance with s 228. Had Hosmed intended to rely on the principle of unanimous assent it would have*

had to plead it specifically because it amounts to a classic confession and avoidance. There is a fundamental difference between a denial (where allegations of the other party are put in issue) and a confession and avoidance where an allegation is accepted, but the other party makes an allegation which neutralises its effect - which is what the raising of unanimous assent would seek to achieve. It is of course possible for parties in an arbitration to amend the terms of the reference by agreement, even possibly by one concluded tacitly, or by conduct, but no such agreement that the pleadings were not the only basis of the submission can be found in the record in this case, and Thebe strenuously denied any agreement to depart from the pleadings."

[66] The appeal tribunal in *Hosmed* was of the view that it was entitled to go beyond the pleadings where the issue had been traversed in evidence. In support of this argument the appeal tribunal referred to the decisions in *Shill* and *Robinson* (*supra*). With reference to the above authority, SCA concluded that the appeal tribunal was not entitled to take this approach as its powers were conferred by the *arbitration agreement* and it did not have the power to go beyond that. The Court, however, pointed out that even if it was accepted for sake of argument, that the appeal tribunal did have jurisdiction, the issue of unanimous consent was not properly canvassed before the arbitrator. The fact that counsel for the appellant did not object to questions asked to a witness about this issue was not,

according to the Court, significant simply because it was not obvious that a *new issue* was being raised. Even if counsel was aware of that fact, he was entitled to remain silent knowing that the issue was not pleaded. Moreover, the issue in *Hosmed* was raised for the first time in oral argument and did not even feature in counsel's heads of argument which formed part of the record.[38] The court concluded that the appeal tribunal had exceeded its powers.[39]

[67] Mr. Brassey argued, relying on *Hosmed*, that it is not possible where a dispute has been submitted to voluntary arbitration and where the parties have pleaded their respective cases, to expand the terms of reference. It is therefore not competent for the arbitrator to stray beyond the terms of reference and the arbitrator in particular has no power to go beyond the matter as pleaded. With reference to the cases where the Court has endorsed the approach that the pleadings may tacitly be expanded, varied or changed he argued that the pleadings may be amended or expanded by agreement between the parties in consequence of the manner in which the matter has been dealt with in the evidence. He argued that there are two different notions. Firstly, the pleadings stand but the evidence allows the Court to enter upon the matter on a broader bases. Secondly, the pleadings do not stand unchanged but have been tacitly varied by agreement. Mr Brassey argued that in light of the decision in *Hosmed* it does not matter which notion is adopted because, in arbitration

[38] Ad paragraph [32] – [35].
[39] At paragraph [36].

proceedings, the pleadings determine the issues and there is no capacity for elaboration or expansion of the issues on a factual basis. Moreover, in arbitrations the capacity for the alteration or amendment of the pleadings by tacit variation does not exist.

[68] Mr. Pretorius viewed the *Hosmed* case differently and argued that it should be viewed in light of the facts of that case. In order to facilitate the conduct of medical aid scheme run by Hosmed. Hosmed used the services of brokers and entered into a contract with Thebe. Thebe had to introduce new members for the scheme for which an introduction fee was payable. Thebe was also required to provide ongoing services to members of the scheme for which another fee was payable. The pleadings were amended and the existence of certain amending agreements to the 2001 agreement was introduced in the amendment to Hosmed's plea. Thebe responded in a replication by averring that these agreements were void because they were in contravention of section 228 of the Companies Act 61 of 1973. In other words, Thebe's defence was that the amending agreements (in terms of which Thebe gave up its right to claim fees for ongoing services to Hosmed's members) were void because it had not been approved by the general meeting of Thebe's shareholders. In Hosmed's rejoinder it denied that section 228 had not been complied with and relied in the alternative on estoppel or the *Turquant* rule. The disputes to be determined by the arbitrator were whether the amendment to the regulations in 2001 precluded Thebe from claiming fees for ongoing

services, and whether the amendments to the parties' agreement in 2001 were in contravention of s 228 of the Companies Act. This entailed also a determination of the defences based on estoppel and the *Turquand* rule.[40] It appears from the judgment that the unanimous consent point was raised on behalf of *Hosmed* in one question during cross-examination. No objection was made to this question at the time. The unanimous consent point was also not dealt with in the written heads of argument submitted to the arbitrator and which formed part of the appeal record before the appeal tribunal. The arbitrator also did not deal with the issue of unanimous assenting making his award which was that portion of Thebe's claim plus interest and costs were payable. *Hosmed* then appealed against the award to the appeal tribunal. The argument was that because the appeal tribunal (arbitrators) had considered a further ground, namely the point of unanimous consent, they had strayed beyond the terms of reference, which they could not do. The appeal tribunal had found that unanimous assent was present and therefore section 228 of the Companies Act was indeed complied with. The agreement was therefore valid and therefore no fees were paid.

[69] Mr. Pretorius submitted that this judgment is clearly distinguishable from the present one. In the *Hosmed* case the *arbitration agreement* recorded the issues which had to be determined. Paragraph [9] of the *Hosmed* decision records what the arbitration agreement stated:

[40] Ad paragraph [14] of the judgment

"4.The issues to be determined by the arbitrator are the issues contained in the pleadings referred to at clause 8 below. "

The issues to be determined in terms of the *arbitration agreement* were therefore the issues directly contained in the pleadings. They were not described in any other place. The arbitration agreement made provision for amendments to the pleadings. The pleadings were indeed amended as pointed out above when the existence of the amending agreements of 2001 was introduced in an amendment to *Hosmed's* plea. Because the *arbitration agreement* expressly stipulated that the issues before the arbitrator (and therefore also the appeal tribunal) were those which were defined by the pleadings, the arbitration appeal tribunal could not go beyond the pleadings and decide an issue not pleaded. The pleadings in the *Hosmed* case were therefore the only *locus* of the description of the dispute (as was stipulated in the arbitration agreement).

[70] It is important to note that the Court in the *Hosmed* case acknowledged that the arbitration agreement in the *Telcordia*-case was different to the one in the *Hosmed*-case. In *Telcordia* the terms of reference of the arbitrator incorporated the arbitral clause but provided that the issues that had to be decided was those that arose from the claims and counter claims as set out in the pleadings.[41] The terms of reference (which incorporated the arbitral clause) provided that the arbitrator was also

[41] Ad paragraph [9] of *Telcordia.*

entitled to decide any further issues of fact or law which he (the arbitrator) deemed necessary or appropriate.[42]

[71] In the present case, the *arbitration agreement* described the dispute as a dispute over the interpretation of a collective agreement (clause 4.1 in particular). Only later (at the first pre-arbitration meeting) did the parties agree to file pleadings. There is no provision made in the arbitration agreement for an amendment (as there was in the *Hosmed*-case). Pleadings could, therefore, in the present case be amended unilaterally simply by giving notice. This is in fact exactly what happened in the present case. UASA gave notice to the company during the second pre-arbitration meeting of its intention to amend its pleadings. The amended pleadings were also placed before the arbitrator. In clause [11] of the minutes the following is stated:

> *"The Claimant has indicated that in respect of paragraph 12.1 of the statement of case, the paragraph should be taken to read that the Claimant pleads in the alternative that clause 4.1 of the 2006 Recognition Agreement is ambiguous."*

[72] Mr. Pretorius argued, and it is an argument that I accept, that the parties must have presumed that the pleadings were separate from the arbitration agreement (which cannot be amended by simply giving notice to do so unilaterally). The principle confirmed in *Hosmed* namely that where the parties have limited and defined the issues in the *arbitration agreement*

[42] Ad paragraph [9] of *Telcordia.*

the appeals arbitration had no jurisdiction to decide the matter not pleaded, is not applicable in the present matter where the terms of reference were separate from the arbitration agreement. The Court in *Hosmed* held as follows in respect of any amendments to an *arbitration agreement*:

> *"[8] Thebe argues that the appeal tribunal both exceeded its powers and was guilty of a gross irregularity. The same conduct, however, was relied on as giving rise to both grounds for the setting aside of the award. The gravamen of the complaint is that the issues before the arbitrator, and thus before the appeal tribunal, were defined by the pleadings.* ***The arbitration agreement said so expressly.*** *The agreement also made provision for amendments, and both parties amended and added to their pleadings during the course of the proceedings. Hosmed even introduced an amendment at the stage of appeal. The arbitration appeal tribunal could not, it was argued, go beyond the pleadings and decide an issue not pleaded. Unlike a court, which has the inherent jurisdiction to decide a matter even where it has not been pleaded, an arbitrator has no such power. It was common cause that the issue of unanimous assent was not pleaded at any stage."*[43]

[73] Mr. Pretorius argued, and again I am in agreement with the submission, that, in light of the fact that the Court in *Hosmed* expressly pointed out that

[43] Ad paragraph [29] of Hosmed.

the arbitration agreement in Telcordia (on which *Hosmed* had relied) was completely different in its ambit, it is not a question of law applying to arbitrations that *pleadings* (necessarily) determine the ambit of the arbitrator's jurisdiction. Whether this is so will vary from case to case and more importantly will depend on the wording of the arbitration agreement. In the present case the arbitrator did not stray beyond the terms of reference as contained in the *arbitration agreement* as was the case in *Hosmed*.

[74] There is also one further point that distinguishes the decision in *Hosmed* from the present case. In the *Hosmed* case the Court clearly was of the view that the issue of unanimous consent was not properly canvassed before the arbitrator.[44] In fact in *Hosmed* it was not even obvious that a new issue was being raised and was raised in the oral argument before the arbitrator for the first time. It did not even feature in counsel's heads or argument which formed part of the record that was placed before the appeals tribunal. In fact, in the *Hosmed*-case counsel for *Hosmed* had no recollection of this aspect being raised in argument before the arbitrator. In the present case the common understanding point was fully dealt with and with full knowledge of both Counsel. Moreover, as already pointed out, the objection against the introduction of the letter of 27 July 2006 was based on *privilege* and not on *jurisdiction*. In light of the fact that there was no objection to the leading of evidence on the background circumstances and

[44] Ad paragraph [33] of *Hosmed.*

in light of the fact that counsel on behalf of UASA insisted that evidence would be able to resolve the ambiguity, it can hardly be said that the issue was not fully dealt with by the parties at arbitration.

[75] I have already pointed to the fact that a distinction may be drawn, depending on the circumstances, between an *arbitration agreement* and the *referral of a particular dispute* to the arbitrator (*the terms of reference*). In this case the arbitration agreement referred a dispute about whether or not the company breached the recognition agreement (and more in particular clause 4.1 thereof). It was only during the first pre-trail conference that the parties agreed to define the exact dispute in the pleadings. This is thus, in my view, clearly a case (and one which is entirely distinguishable from the *Hosmed*-case) where the *arbitration agreement* (which conferred the necessary jurisdiction on the arbitrator) referred a dispute to arbitration which was to be further identified and defined in the pleadings (which constituted *the terms of reference*). I accept that in terms of the *Hosmed*-case an arbitrator may not stray beyond the ambit of the *arbitration agreement*. I do not, however, read the decision of *Hosmed* to prevent an extension of the scope of the terms of reference during the arbitration in cases where the terms of reference are delineated in the pleadings and where such pleadings stand separately or outside of the scope of the arbitration agreement. In this case the dispute was not delineated in the arbitration agreement; it was delineated in the terms of reference (the pleadings).

[76] The following principles may therefore be distilled from the aforegoing: Where the arbitration agreement is in general and framed in cryptic terms, the *arbitration agreement* will nonetheless define the boundaries of the arbitrator's jurisdiction (in the present case the arbitrator was enjoined to determine whether or not the company breached the recognition agreement). This, at the very least constituted the boundaries of the arbitration. The arbitrator may not stray beyond the boundaries set by the arbitration agreement as this constitutes the only source of his or her jurisdiction unless it is done by consent. Where the pleadings constituted the arbitration agreement (as was the case in *Hosmed*) then it is trite that one party or the arbitrator may not amend the agreement simply because the arbitrator has no inherent powers and may not determine his own jurisdiction. Pleadings may, however, serve another purpose and that is to clarify or expand the issues before the arbitration further. In these circumstances the pleadings may by amended to expand the issues before the arbitrator even further. An arbitrator will therefore act within his jurisdiction in deciding a matter if:

(i) the matter falls within the scope of the arbitration agreement and his agreed terms of reference;

(ii) the matter falls outside the scope of his original terms of reference provided that the parties have agreed – at least tacitly – to extent the scope of the terms of reference during the arbitration and the new matter falls with the scope of the arbitration agreement;

(iii) the matter falls within the scope of his terms of reference (either original or amended) but outside the scope of the *arbitration agreement*, provided that the inclusion of the new matter properly constitutes an agreed variation of the arbitration agreement.

[77] In summary, an arbitrator exceed his jurisdiction if he decides a matter outside the scope of his original terms of reference (or fails to decide an issue within his terms of reference) *unless* the parties have agreed – at least tacitly – during the arbitration to extend the scope of his terms of reference and the new matter falls within the scope of the arbitration agreement, alternatively, constitutes an agreed variation of the *arbitration agreement*.

[78] In the present matter the arbitrator was concerned with investigating UASA's case on the proper interpretation of clause 4.1 in order to decide whether or not the company breached the recognition agreement (and more in particular clause 4.1). UASA's case was that the company had breached clause 4.1 which was based on its interpretation of clause 4.1 The company's case was that it did not breach the recognition agreement based on its interpretation (and initially at least with reference to section 18 of the LRA). In deciding whether or not there was a breach, the arbitrator had regard to the surrounding circumstances. In fact, he was invited by counsel obo UASA to do so. The issue, as already stated, was fully ventilated before the arbitrator. This situation is therefore not comparable with the *Hosmed-* case where the parties were not even

aware that a new matter was introduced. Both parties in the present matter knew exactly what was being canvassed in evidence.

[79] I accept that the arbitrator articulated the (second) dispute with reference to section 18 of the LRA.[45] I also accept that the arbitrator found that section 18 of the LRA did not sanction the conclusion of the threshold agreement between the company and NUM. What I do not accept is the submission that the arbitrator in deciding the matter on the broader basis namely that the parties must have intended a bilateral threshold agreement, the arbitrator strayed beyond his jurisdiction. He was, after all, given the jurisdiction to interpret clause 4.1 which he did. The arbitrator was, in my view, entitled to rely on the background circumstances to find that UASA's interpretation of the collective agreement to contemplate a tripartite agreement was incorrect and that its contention that the bipartite agreement constituted a repudiatory beach of the collective agreement was therefore incorrect. Although the company's pleaded case did not rely on the common understanding point, the introduction of this point was fully ventilated. Moreover, it certainly cannot be said that the arbitrator had ventured beyond the jurisdiction conferred in the arbitration agreement. The arbitrator, as already pointed out, stayed well within the boundaries of his jurisdiction, which was to interpret whether or not the company

---

[45] *"The second of the rival contention concerns the meaning of the phrase "as agreed from time to time" in clause 4.1: whether it means agreed by the three parties to agreement or agreed between the Employer and NUM who, as the majority union, would be entitled to conclude a threshold agreement with the former under the provisions of s 18 of the Labour Relations Act 66 of 1996 (the Act)."*

breached the recognition agreement. I am thus of the view that the arbitrator was entitled to decide the matter as he did. I am also in agreement with the submission that the pleadings played their ordinary roll in the arbitration process. No new disputes were introduced by the amendment. Moreover, the non-pleaded issue was fully ventilated before the arbitration without any objection. In so far as this has been done, and with no objection forthcoming on behalf of UASA, it can hardly be concluded that UASA suffered any prejudice. At the very least it can be concluded that the parties, through their conduct during the argument, tacitly agreed to the arbitrator's terms of reference being extended to include the common understanding point.

[80] I therefore find that there is no merit in UASA first ground of review.

Second ground of review

[81] In respect of the second ground of review I am in agreement with the submission that UASA cannot rely on the test irrationality or unreasonableness as a ground of review.

Order

[82] In the event the following order is made:

1. The review application is dismissed with costs including the costs occasioned by the engagement of two counsels and including the costs of the application for urgent relief.
2. The order of interim relief granted by Moshoana AJ is discharged.

AC BASSON, J

15 March 2010

FOR THE APPLICANT

MSM Brassey SC instructed by Rhoodie Attorneys.

FOR THE RESPONDENTS

PJ Pretorius SC and Adv At Myburg instructed by Leppan Beech Inc