REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 207 / 2003

In the matter between:

SOLIDARITY **First applicant**

RN HUTCHINGS & OTHERS **Second and further applicants**

and

ESKOM HOLDINGS LTD **Respondent**

Heard: 25- 29 October 2010; 29 November 2010; 9 June 2011

Delivered: 5 August 2011

Summary: Applicants claim that Eskom agreed to early retirement without penalties for nuclear operators. The agreement was embodied in a Management Directive. Eskom withdrew the directive and argued that the agreement was unenforceable; that there was no consensus; and that the director who allegedly entered into the agreement; was not authorised to do so. *Held* that the applicants could rely on Eskom's manifestation of assent; and that Eskom is bound by the agreement.

JUDGMENT

STEENKAMP J

Introduction

1]This matter considers the doctrine of quasi-mutual assent and the application of the *Turquand* rule. Solidarity, the trade union acting for the second and further applicants, alleges an agreement between it and the respondent, Eskom Holdings Ltd, giving reactor operators at Koeberg Nuclear Power Station the right to early retirement without the loss of benefits. It argues that there was an actual agreement to this effect; alternatively, it relies on Eskom's manifestation of assent.

2]The case was initially referred to the Labour Court as long ago as may 2003. Eskom raised a special plea that the claim had prescribed. That aspect was heard as a point *in limine* in the Labour Court in September 2004. Judgment was handed down on 19 January 2005, ruling that the special plea was upheld. Leave to appeal was granted on 1 September 2005. The applicants appealed and the respondent cross-appealed. The finding was overturned on appeal by the Labour Appeal Court in February 2008. It was eventually referred back to this court for trial and came before me on 25 October 2010. The trial continued in October and November 2010. Further trial days were set aside to hear the evidence of the Koeberg power station manager, Mr Peter Prozesky. Neither party elected to call him. The parties had to wait for a transcript of the proceedings. Once that had been obtained, the applicants filed their heads of argument on 20 May 2011 and the respondent did so on 3 June 2011. Oral argument was heard on 9 June 2011. This judgement was prepared during the July recess.

The parties

3]The first applicant is Solidarity, a registered trade union that was previously known as MWU Solidarity and before that as the Mineworkers' Union or Mynwerkersunie. It acts in its own name and on the part of 34 of its members (the second and further applicants) who were or are employed at the Koeberg nuclear power station as licensed operators, either reactor operators ("RO's") or

senior reactor operators ("SRO's"). The respondent, Eskom Holdings Ltd, has its head office at Megawatt Park, Sandton. Koeberg nuclear power station at Melkbosstrand outside Cape Town is a business unit that forms part of the Eskom generation group.

The issue to be decided

Solidarity's statement of case

4]Solidarity relies on the agreement contained in a document styled as Management Directive 102 (Rev 2). Under that instrument, MD102 (rev 2),[1] Eskom undertakes to defray the loss otherwise incurred through early retirement by making the requisite contribution to the pension fund. The payment is to be made out of the Koeberg budget, as testified by the then Group Human Resources Manager for the Generation Division of Eskom, Ms Nerina Begg (née Boshoff).

5]Solidarity contends that the agreement was proposed – effectively, in principle - on 10 July 1998 in a meeting at Koeberg *inter alia* by Mr Bruce Crookes, the Executive Director (Generation) (authorised by the Eskom CEO, Mr AJ Morgan) and accepted in principle by the operators present at the meeting.

6]Solidarity then goes on to plead that the agreement was ultimately finalised on 2 November 1998 by the adoption of MD102 duly signed under the authority of Mr Peter Prozesky, the Power Station Manager.

Eskom's Response on the in-principle agreement

7]On the issue of whether an in-principle agreement was reached on 10 July 1998, Eskom admits that proposals were indeed made for deemed service, the effect of which would be to secure a right to early retirement without penalties that would be financed out of the Koeberg budget.

8]Eskom denies, however, that such an agreement was reached, whether in principle or at all. In addition, it denies that Crookes was authorised to enter

1 Hereafter referred to as MD102

into any such agreement. According to Eskom, the agreement, once drawn up by 'a task team', would only come into force once approved by Crookes and the Executive Director: Human Resources. It contends that the meeting of 10 July 1998 was called to consider and discuss proposals regarding an early retirement scheme; that no consensus was reached as to the implementation of the alleged agreement; that the early retirement scheme contained in MD 102 had not been authorised by Eskom's Head Office; and that no manager nor official at Koeberg was authorised by Head Office to give effect to, or publish any changes to the retirement scheme for licensed operators.

9]The applicants contend that, in dealing with this question, Eskom impliedly accepts that MD102, if approved by head office, could properly have been signed off by or under the authority of Prozesky, since it is pleaded that he could, and did, legitimately sign off on a bonus agreement. Put another way, no dispute is raised in the Response about his ability to sign off on an early retirement scheme that has been sanctioned by head office.

Eskom's Response on whether MD102 was validly concluded

10]On this issue Eskom does not deny that MD102, if valid, can be characterized as an agreement between Eskom and the operators. What it contends is that the conclusion of the agreement 'was not authorised by Eskom's Head Office, Sandton'. In the context of the pleadings, this must mean Crookes and the Executive Director: Human Resources, since they are said to be the persons who could authorize the in-principle agreement.

Solidarity's Replication

11]In its replication, Solidarity raises the doctrine of quasi-mutual assent – in essence, a species of estoppel.

12]This plea is broad enough to bring the *Turquand* rule (considered below) into operation. That is the principle, laid down in *Royal British Bank v Turquand*[2] that:

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2 (1856) 6 El & Bl 327; 119 ER 886.

'[a] third party is entitled to assume that all internal formalities have been complied with if the person acting on behalf of the company is acting within the usual authority of the office that he holds or purports to hold – and where that is the case, it does not matter whether or not the third party in fact knew of the power of delegation.'[3]

13]De Wet & Yeats[4] also refer to the doctrine as "die leerstuk van toegerekende kennis". In terms of this doctrine third parties dealing with the company are entitled to assume that a company's board of directors, managing director or a director who purports to be acting on behalf of the company, is acting within his or her "scope of authority" and can bind the company.

14]The issue to be decided, then, is whether there was an actual agreement between the parties; and if not, if Solidarity can rely on Eskom's manifestation of assent. Eskom further argues that, even if there was consensus, the agreement is unenforceable.

The facts emerging from the evidence

15]Solidarity led the evidence of:

(a)Mr Derrick Douglass, past chairman of the Koeberg branch of MWU/Solidarity.

(b)Mr Robin Hutchings, an operator at Koeberg.

(c)Mr Raymond Wilcewski, a MWU/Solidarity shop steward at Koeberg.

16]Taken in the main, their evidence concerned the structures and personnel of Eskom; Eskom's conditions of employment; the meeting of 10 July 1998 at which Crookes made his proposals; and the events leading up to and following the adoption of MD102.

17]Eskom called two witnesses.

(a)Mr AJ Morgan, the erstwhile Chief Executive of Eskom, spoke in generalities about the bureaucratic processes in Eskom.

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3 Blackman, Jooste & Everingham *Commentary on the Companies Act* 4-36.

4 JC de Wet & AH van Wyk, *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (1978) p 556.

(b)Ms Nerina Begg (née Boshoff) was the Group HR Manager for the Generation Division of Eskom in 1998.

18]Crookes was in charge of the Generation Division at Eskom. In that capacity, he could make decisions within his budget for the Division, Koeberg included, provided they remained in compliance with Eskom standing instructions. Begg's testimony confirms that he had the power to decide whether the early retirement provisions would continue or be withdrawn.

19] In 1995 Mr Willem Jungschläger, a psychologist at Eskom, compiled a report concerning early retirement for licensed operators and other workers in stressful jobs at Eskom. He proposed that they be considered for early retirement and that licensed operators should be taken off shift work five years before retirement.

20]The proposals in the Jungschläger report were not implemented. In April 1995 Mr Crookes decided not to introduce early retirement for any category of Eskom employee.

21]On 10 February 1997 the senior shift supervisors at Koeberg wrote to Mr Crookes requesting that licensed operators be seconded to less stressful positions or be granted early retirement and for the policy to be documented. The letter was signed by a number of RO's including Mr Hutchings, who testified in these proceedings. The letter stated, inter alia:

"Early retirement

Many SSS's[5] are now in the 45-50 age group. Due to the stressful nature of the work it is common international practice to allow early retirement or secondment to a less stressful position on daywork hours...

"Recently a Shift Manager was seconded to a daywork position in the training group, we would like Eskom Management to continue this practice for all licensed operators and for the policy to be documented.

...

"We would appreciate an early response to this letter as our experience with Koeberg's

5 Senior Shift Supervisors

management has left us with very little patience. You are our last hope of achieving the above goals through any meaningful discussion with Eskom management. None of us want to progress to alternative means of action without giving you every opportunity."

22]Mr Crookes replied by letter dated 13 March 1997 in the following terms:

"I wish to update you on the progress with my investigation on the issues raised by you.

Unfortunately, I am not in a position to respond at this stage, as each issue needs thorough investigation. The objective is to establish a positive outcome for yourselves [*sic*] and the organisation.

Expertise [*sic*] in senior management have been requested to assist me in the process.

I appreciate the urgency of this matter, however, no quick fix solutions can address or overcome the problems experienced.

I should be in a position to share my findings with you by 2 April 1997."

23] Mr Crookes responded fully in a letter dated 1 April 1997, referring to "the results of my investigations into your concerns." Under the heading, "Early Retirement", he said:

"A decision has been made at Executive Director level during April 1995 not to systematically introduce early retirement to any category of Eskom employee. This was following a study undertaken into various categories of employee, in particular Koeberg operators and other shift workers, by Willem Jungschlager..."

24]Under the heading, "Remuneration", Crookes continued:

"I have been working with several advisors to investigate these issues and have approved in principle a draft Koeberg Management Directive. This directive deals with changes in the remuneration structure for, amongst others, SRO licensees.

I have instructed the Power Station Manager[6] to convene a working group at the station to discuss the content of this directive with yourselves [*sic*] and other affected parties and stake holders."

25]On 23 June 1997 Mr Hutchings addressed a letter to Mr B. Winckler, the Council for Nuclear Safety representative. It was copied to the CEO of Eskom,

6 This refers to the Power Station Manager at Koeberg, Mr Peter Prozesky.

Mr A. Morgan, concerning excessive overtime work by operators and extra examinations they had to take. A reply dated 1 July 1997 on behalf of Mr Morgan was sent to Mr Hutchings. In the letter, Morgan states:

"I hereby acknowledge receipt of your letter dated 23 June 1997.

The right way to deal with this matter would have been through the Power Station Manager[7] and the Executive Director (Generation).[8] Nevertheless I have asked Mr Bruce Crookes, Executive Director (Generation), to look into the issues raised in your letter as a matter of urgency.

Once Mr Crookes has come back to me and I am in possession of his input I will respond to you in more detail."

26] Despite this promise, neither Morgan nor Crookes responded to Hutchings.

27]Despite Morgan's promise that Crookes would "look into" the issues raised by Hutchings "as a matter of urgency", the next significant moment appears to be almost a year later. At a monthly meeting of the Generation Executive Committee (GEC) in May 1998, Mr Crookes informed Ms Nerina Begg (then Ms Boshoff), the Group Human Resources (HR) Manager (Generation) at Eskom's Head Office, and Mr Peter Prozesky, the Power Station Manager, that they had to deal with some issues around potential early retirement and bonuses for licensed operators. He instructed Mr Prozesky to put his thoughts on paper so that it could be discussed at the next GEC meeting.

28]At the next GEC meeting in June 1998, Mr Prozesky prepared some information about a bonus system to attract and retain licensed operators. According to Begg, however, there was no information relating to the early retirement proposal. Unfortunately Eskom could not provide any minutes of that or any other relevant meeting. Prozesky did not testify. I shall return to both those aspects at a later stage. It was agreed that Mr Prozesky would prepare PowerPoint slides on topics to be discussed, namely the bonus system and early retirement, at a meeting at Koeberg to be held on 10 July 1998. This latter meeting would turn out to be highly significant, and the question of whether an

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7 i.e. Prozesky.

8 i.e. Crookes.

agreement had been reached, at least in principle, turns primarily on that meeting. Once again, though, neither the minutes of that meeting nor Prozesky's PowerPoint presentation is available; and Prozesky did not testify.

29]According to Ms Begg, neither she nor Mr Crookes had any proposals concerning early retirement when they went to the meeting at Koeberg on 10 July 1998. Prior to the meeting they had a briefing session. I deal with Begg's evidence more fully at a later stage; however, I find it highly improbable that Crookes would not have had any such proposals, given that he had delegated Prozesky to prepare slides on that very topic, which was already a contentious one and one that he (Crookes) had promised to address urgently.

30]When Mr Crookes came to Koeberg on 10 July 1998, it was the first time that the issue of early retirement was discussed directly with licensed operators. He apparently met with licensed operators some years before, regarding a 14th cheque prior to 10 July 1998. Between July 1997 and 10 July 1998, there was no discussion between Croookes and MWU, its Chairperson, Mr Douglass, or any other member of MWU, regarding early retirement. MWU did not put up any proposal regarding early retirement at the meeting of 10 July 1998. According to Douglass, the MWU had proposals, "but because of what Mr Crookes said we left it at his proposal. We were happy with what he said."

31]Mr Crookes opened the meeting on 10 July 1998. He said that he was there to listen to the concerns of the operators. According to the applicants' witnesses, he also proffered a set of proposals for an extra bonus and early retirement without penalties. According to Hutchings, Crookes pertinently explained that this was being structured in such a way as to circumvent head office and central bargaining. Although Begg protested in her evidence that Crookes could not and would not have done so, the applicants' evidence is, on a balance of probabilities, borne out by later events.

32]Mr Prozesky did a slide or PowerPoint presentation of certain proposals, after which there were discussions in groups and an open-floor question and answer session before Mr Crookes closed the meeting. Ms Begg acted as the facilitator at the meeting.

33]Pursuant to the meeting of 10 July 1998, two working groups were formed. One had to work on the bonus system and the other on the early retirement proposal. The task team which dealt with the early retirement proposal comprised Ms Begg, supported by a team from the group structure of Eskom, and Mr Prozesky with a small team from Koeberg. Mr Jan Olckers, a remuneration specialist, and Mr Andries Heystek, served on the task team in respect of early retirement, attended meetings at Koeberg and reported to Ms Begg. No formal meetings were held but the information was circulated and several telephonic discussions took place. In respect of the early retirement proposal, the task team explored options which included exploring early retirement wider than Koeberg. International research was done and work categories outside of Koeberg had to be looked at to formulate some kind of concept and craft a document relating to early retirement.

34]Mr Douglass, who testified on behalf of the applicants, was the Chairperson of MWU for at least seven years. He was a shop steward for some six years. He testified that he was aware of the fact that contributions to the pension fund, medical aid and annual leave would comprise conditions of service that must be negotiated at the Central Negotiating Forum. He knew that early retirement had not been negotiated with the unions. But he testified that, when Crookes addressed them on 10 July 1998, the employees were of the opinion that the issues he discussed with them had already been negotiated with the Managing Director, Morgan.

35]Mr Wilcewski, who also testified on behalf of the applicants, was the Vice Chairperson of MWU for 7 to 8 years. He has extensive experience as a shop steward. He too was aware of Eskom's procedures relating to retirement. On 10 July 1998 he knew that the condoned service purportedly given in terms of the alleged agreement was going to be brought about at local level at Koeberg.

36]There was a recognition agreement in place at the time of the alleged agreement. Anything relating to conditions of service at that time was negotiated annually, normally in the first half of the year, because the outcome was implemented by 1 July of any year. Any changes to conditions of service had to be placed on the agenda and negotiated with trade unions. Conditions of service, including pension, would be negotiated at the main forum, the CNF.

However, the applicants were of the view that, if Crookes was willing to agree to early retirement for SRO's at Executive Director level, it could be implemented at Koeberg level by the Power Station Manager, Prozesky.

37]By analogy, the bonus system had to be approved at corporate level in Eskom's Head Office. The draft proposals relating to the bonus system had to be supported by the Executive Director (Generation) and Ms Begg. It then had to be taken to the relevant persons in the corporate remuneration structures, and the Generation Group HR Manager. It was then referred back to Koeberg to follow the required procedure i.e. Mr Prozesky would engage the stakeholders and once consensus had been reached, they would produce a management directive and the bonus system would be implemented. It took between July 1998 and 2 November 1998 to implement the bonus system.

38]On 13 July 1998, Prozesky addressed a letter to the operating department staff at Koeberg under the heading, "Reward and recognition and early retirement proposal". He told them:

"At the meeting of 10 July [1998], proposals were made and endorsed by the Executive Director (Generation)[9] on the above issues. I am instructing the Operating Manager to consult with all Operating Department staff, Operating Training Group staff and Koeberg Trade Unions in order to provide me with a mandate to proceed with the development of details surrounding these proposals.

A brief description of the principles involved in each of these proposals is outlined below. Remember that the aim of these proposals is to find a set of proposals that could be readily implemented within the authority of the Executive Director (Generation) at Koeberg Power Station, and would not necessitate lengthy deliberation at national level. The ED(G) gave his assurances that such proposals would be implemented as of 01 August 1998."

39]Under the heading, "Early retirement proposal", Prozesky continued:

"For licensed operators a system would applied [*sic*] whereby the individual would qualify for additional third service according to the following formula:

For each one year of active licensed duty, or part thereof on a pro rata basis, the

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9 i.e. Crookes

individual would be credited with (for example) 1.33 years service. This would enable the licensed operator to qualify for early retirement, depending on the number of years service at this level.

The business unit[10] would then make a contribution to the Eskom pension fund that would match the normal pension penalties that would be applied to the individual for the early retirement.

The scheme would be able to be exercised on a voluntary basis by each individual."

40]On 19 August 1998, Prozesky sent an almost identical letter to Begg, except that the example of 1.33 years of service had been amended to 1.5 years; and he stated pertinently: "Details would be negotiated and included in the Koeberg Management Directive No 102." Remarkably, Begg did not respond.

41]According to Ms Begg, there was no corporate stance on the early retirement proposal by 19 October 1998, despite Mr Prozesky's frequent queries in this regard. She informed Mr Prozesky accordingly.

42]On 20 October 1998 Mr Olckers sent an e-mail to Ms Begg with a recommendation that Koeberg prepare a draft procedure for early retirement to be discussed with the HR group staff. According to Begg, the content of this e-mail was conveyed to Mr Prozesky, but she could find no proof that it had been done.

43]On 2 November 1998 Ms Begg sent a letter to Mr Prozesky under the heading, "Proposed recognition system for licensed operators". She said: "You may proceed to negotiate and implement the above system at BU[11] level."

44] In her evidence, Ms Begg testified that this letter referred only to the reward or bonus system, and not to early retirement. It was put to her under cross-examination that both issues were dealt with together, as in Prozesky's earlier letter. I shall return to the probabilities.

45]MD 102 was published at Koeberg on 2 November 1998. It was signed off by Messrs Prozesky, Brian Dowds and JE Hanekom. It was not tabled at

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10 i.e. Koeberg power station.

11 i.e. business unit level.

Eskom's Management Board for consideration or deliberation. A management directive (such as MD 102) is a document unique to Koeberg, ie published at business unit level. Documents issued by Eskom's Head Office at Megawatt Park, Sandton, are known as *"ESKADAA"* documents. On 1 April 1997 pension in respect of any Eskom employee was regulated by an ESKADAA document. On 10 July 1998 the position was exactly the same. A management directive such as MD 102 cannot trump an ESKADAA policy.

46]On 10 November 1998 Ms Kotie Kompaan, Ms Begg's secretary, forwarded an e-mail (referring to a meeting on 19 October 1998) from Mr Jan Olckers to Mr Brian Dowds at Koeberg. It states that the request for early retirement was not supported, as similar requests were made by Eskom pilots and employees working at national control, even with good business cases. It was suggested that a presentation be made to the relevant pension fund advisory council, but this did not happen.

47]After the bonus system had been implemented, on 14 January 1999, Ms Begg and Mr Ehud Matya, the Executive Director designate, went to Koeberg to assist Mr Prozesky. The unions other than MWU/Solidarity -- more specifically NUM and NUMSA -- were unhappy that the bonus system had been implemented for the licensed operators and were threatening industrial action, more specifically, the disruption of the outage planned for January 1999.

48]Whilst at Koeberg in January 1999, Ms Begg discovered – according to her, for the first time -- that MD 102 also contained an early retirement scheme. The early retirement scheme was immediately withdrawn on 14 January 1999. She informed Mr Crookes of the withdrawal of the early retirement scheme in MD 102 and according to her, he was satisfied that the right action had been taken.

49]The early retirement part of MD 102 was never implemented. As a result, MWU/Solidarity declared a dispute. At an internal conciliation meeting on 22 January 1999, Mr Peter Prozesky informed MWU that the early retirement proposal had been withdrawn because there had been a "miscommunication / misunderstanding" between power station management and Generation HR manager; that he had understood from Begg's letter of 2 November 1998 that

he could implement “all aspects” of the proposals, including early retirement; but that it was “subsequently determined” that approval had only been given to proceed with and implement the remuneration recognition (i.e. bonus) part of the proposal, and not the early retirement portion, as it was “still under review by Corporate”. MWU stated that their dispute remained unresolved. They requested that Mr Wilcewski be nominated to serve on the national working group.

50]When Crookes returned from sick leave, he asked Begg for a report about what had happened. In the written document dated 19 January 1999, she explained away the ‘mistake’ as a species of ‘poor communication’. She conceded that ‘there was negligence’, but that ‘no intentional harm was planned’. She made nothing of the supposed failure to observe the standing instructions governing changes to conditions of employment. She contented herself with the statement that, in adopting the bonus scheme, ‘no known policy was breached’ since ‘this was a principled decision’. Seemingly, this was enough to enable her to escape disciplinary action.

51]Over the ensuing years, Eskom took no steps to resolve the issue in the central collective bargaining forums.

(a)Begg explained that it was not enrolled for bargaining since it had no support from Eskom.

(b)Prozesky was unable to make any formal progress in the light of this attitude, but with one notable exception he kept to his promise to exercise his discretion in favour of the approval of applications for early retirement.

52]The ‘withdrawal’ of MD102 was unprocedural in terms of Eskom’s internal processes. Technically, it remains in place to this day, but is not being implemented. The reason it has not been removed from the database, according to Eskom, is that Solidarity will not permit its retraction for so long as this dispute is continuing.

The failure to call Prozesky

53]If here was one person who could give the most valuable evidence as to

what occurred on 10 July 1998; how he understood his mandate; and how it was implemented, it was the power station manager at Koeberg, Mr Peter Prozesky. He was present in court throughout the proceedings. The court expected the respondent – with whose other witnesses he was sitting all along – to call him. To the surprise of the court, Eskom did not. Instead, they belatedly made him available to the applicants after Eskom had closed its case, but the applicants did not call him either. To the frustration of the court, then, I was deprived of the evidence of the most pertinent witness.

54]Mr *Schippers,* for Eskom, protested that the onus rests on the applicants, and they were free to call Prozesky in rebuttal after Eskom had closed its case and made Prozesky available. But I agree with Mr *Brassey*, for the applicants, that despite the onus, the party that could have been expected to call Proesky was Eskom. Prozesky purported to have acted on Eskom's behalf in the process by which MD102 was adopted. He also testified for Eskom in the earlier proceedings that went on appeal to the Labour Appeal Court. In those circumstances, Eskom –

(a)was the party that could naturally have been expected to call them;

(b)appreciated as much, since it took time specifically to consider whether Prozesky should be called.

55]Prozesky was an important, even crucial, actor in the events giving rise to the adoption of MD102. *Inter alia* -

(a)he was present at the important meeting on 10 July 1998 at which Crookes presented his proposals;

(b)he himself gave a presentation with the aid of PowerPoint slides and/or a flip chart;

(c)he was the person who principally liaised with Begg;

(d)he was the person who authorised the adoption of MD102;

(e)he undertook to honour the intent of MD102 –

(i)by utilizing the Koeberg budget;

(ii)to give Koeberg operators the benefit of early retirement in the exercise of his discretion.

(f)Much of the evidence given by Begg under cross-examination conflicted with stances taken by Prozesky in the correspondence.

(g)The conflicts, which were generally on matters that were highly germane to the issues in the case, called out for resolution, and they could be resolved only by finding out what Prozesky had to say about them. This is particularly so as Crookes, the other important actor, was no longer alive to give evidence.

(h)At the time, Prozesky was a senior executive with a track record of honesty, conscientiousness and reliability. Eskom could not, in consequence, have believed that his evidence would be valueless. The only conclusion to be drawn is that his evidence, if led, would have resolved the conflicts against Eskom and so caused considerable damage to Eskom's case.

56]In the present case, I am constrained to conclude that Prozesky would have given evidence consistent with the stance he articulated in correspondence and in support of the steps he actually took. In addition, it is proper to discern a fear that, if he did so testify, his evidence might be preferred to that of the witnesses actually called.

57]Given these assumptions, the court can legitimately draw an adverse inference against Eskom for failing to call Prozesky.

> 'A party's failure to call available witnesses may in exceptional circumstances lead to an adverse inference being drawn against the party concerned. The extent to which such inference can be drawn will depend on the circumstances of the case.'[12]

58]Such an inference cannot but cast a shadow over the whole of the testimony adduced by Eskom.

59]Even though the overall onus rests on the applicants, Prozesky was clearly a

12 Schwikkard & van der Merwe *Principles of Evidence* 2 ed (2002) 513

witness “in the respondent’s camp”. As Smalberger J explained with regard to a similar situation in *Kroon v JL Clark Cotton Company (Pty) Ltd:*[13]

“There is also the fact that Bennie, although available, was not called as a witness by the defendant to refute the evidence of the plaintiff and Zietsman. This raises the vexed question of what inference can be drawn from the failure to call an available witness. Everything depends upon the circumstances of each particular case (*Hoffmann and Zeffertt (supra* at 473)). If a witness is available to both sides, and there is no particular reason why he should not be called by one side rather than the other, it will be difficult to found an inference for omitting to do so against either. In that situation, in terms of the decision in *Brand v Minister of Justice and Another* 1959 (4) SA 712 (A), no more can be said than that the party bearing the *onus* runs the risk of losing if the remaining witnesses are insufficient to carry the necessary degree of conviction. In the present case there is no *onus* on the defendant. But the circumstances are such that the failure by the defendant to call Bennie justifies, in my view, an adverse inference being drawn against it. It is true that Bennie, being a servant of Elanco at the relevant time, was potentially Elanco's witness. But throughout the piece the defendant and Elanco have made common cause, and Bennie is clearly someone in the defendant's camp.”

13 1983 (2) SA 197 (E) 209 C-E

Was there consensus?

60]Messrs Crookes and Prozesky were the people best placed to put beyond doubt whether the parties reached consensus on early retirement without loss of benefits at the meeting of 10 July 1998, as subsequently embodied in MD 102. But Crookes is dead and Prozesky, whilst alive, present and available, was not called to testify. I therefore have to decide this question on a balance of probabilities at the hand of those witnesses who did testify, and the contemporaneous documentary evidence.

61]In this regard, I am inclined to attach rather more weight to the contemporaneous documentary evidence than to the memories of witnesses who are testifying 13 years later about the events of a single meeting, except where that evidence is corroborated. The court's frustration at the absence of testimony by Prozesky, though, is further exacerbated by the dearth of documentary evidence discovered by Eskom, including any minutes or notes whatsoever emanating from the all-important meeting of 10 July 1998, including Prozesky's PowerPoint presentation.

62]Unfortunately, this absence of relevant documentation was a signal feature of Eskom's case. For an entity that prides itself, according to Begg, on meticulous record-keeping, and for people like Crookes and Prozesky who were known to be sticklers for rules who 'played it by the book', as one witness put it, it beggars belief that they would not have kept the relevant records when Solidarity (then MWU) had declared a dispute and litigation was pending.

63]Eskom's failure or inability to produce documents that had admittedly been generated but were not to hand, is disconcerting. This included board minutes and correspondence with the other trade unions about the implementation of MD 102. Many of these documents seemed, *prima facie*, to be potentially damaging to Eskom's case. The explanation for the absence of these documents is far from satisfactory.

64]On a balance of probabilities, it is hard to reach any conclusion other than

that those present at the 10 July 1998 meeting did reach consensus, at least in principle. Begg is the only witness who was present who disputes this. Prozesky, inexplicably, did not testify; and his PowerPoint presentation has disappeared. The applicant's witnesses are all clear as to what their understanding after the meeting was.

65]Begg was not an entirely satisfactory witness. Her testimony often appeared to be rehearsed, and her oft-repeated line of defence – that the correct procedures through the head office structures at Megawatt Park and the national collective bargaining structures had not been followed – was not raised in Eskom's pleadings. It only pleaded that MD 102 "had not been authorised by Eskom's Head Office, Sandton, and had been incorporated in error in the said Directive."

66]Perhaps the most striking contemporaneous explanation of what actually occurred at the meeting, and how it was understood by those present, was Prozesky's summary in his letter of 13 July 1998, i.e. three days later. That letter refers pertinently to proposals that were "made and endorsed" by Crookes at the 10 July meeting; that it could "readily be implemented within the authority of the Executive Director (Generation) and Koeberg Power Station"; and it spelt out the basics of the early retirement proposal. Prozesky did not come to explain to the court how this very definite interpretation of events could have been wrong. Neither did anyone raise any objection to it until six months later, in January 1999 – this despite the fact that Prozesky spelt out the very same understanding, based on the meeting of 10 July, in his letter to Begg on 19 August 1998. Begg did not even bother to respond to the letter.

67]It is also quite improbable that neither Begg, nor Crookes, nor Morgan, nor any other senior employee at Eskom, bar Prozesky, would have had sight of MD102 – implemented on 2 November 1998 – prior to January 1999. It becomes even more improbable in the light of Begg's concession that Prozesky was pestering her for a response on both the bonus system and early retirement; her email to Prozesky on 15 October 1998 that reassures him that the "Early Retirment [sic] Option is with Con Engelbrecht and you will have Corporates [*sic*] final stance by Monday 19 Oct 1998"; that the conditions of service would not be influenced as it is a principled decision; and her letter to

Prozesky on 2 November 1998 under the heading, “Proposed recognition system for licenced [*sic*] operators” stating that: “You may proceed to negotiate and implement the above system at BU Level.” On the same day – 2 November 1998 – the comprehensive document, comprising 11 pages in minute detail, is signed off as authorised by Prozesky; and signed off by the compiler, JE Hanekom, as well as the production manager, Brian Dowds. It could not have been hastily compiled on that same day.

Did Crookes and Prozesky have actual authority to enter into the agreement?

68]For the following reasons, it is more probable than not that Crookes and Prozesky had actual authority to conclude the agreement embodied in MD 102:

(a)Morgan pressed Crookes to do what in any event he was entitled, as Executive Director (Generation), to do: sort out the problems raised by the operators.

(b)On 10 July 1998 Crookes and Prozesky made in-principle proposals to the operators on the matter of early retirement that, in general, were acceptable to them.

(c)Prozesky was tasked to establish a task team through which the proposals might be implemented. This team produced MD102.

(d)Prozesky signed off on MD102. He had the authority to do so, and that authority encompassed the power to grant bonuses in this way, as Begg conceded. In doing so, he brought an agreement to fruition that embodied the early retirement provisions, as well as the bonus benefit.

(e)The payments were to come out of the Koeberg budget, and Prozesky had the authority to manage this budget. Crookes supported him in the use of the budget to finance the extra benefits and, in the full knowledge of what the standing procedures required, both were comfortable about proceeding to implement the two new benefits.

69]But I need not decide whether these individuals did, in fact, have actual

authority. Mr *Brassey* invited me to use Occam's razor[14] in order to decide the matter. I intend to take up that invitation. If the applicants succeed on their alternative argument, based on Eskom's manifestation of assent and the *Turquand* rule, I need not decide whether Crookes had actual authority.

Can the applicants rely on Eskom's manifestation of assent?

70]In the alternative, Solidarity relies on Eskom's manifestation of assent. Its case under this head is that –

(a)Eskom accepts–

(i)that Crookes received Morgan's mandate and, in any event, had the authority to make proposals of the sort he made;

(ii)in addition, that Prozesky had the authority to effectuate the formal adoption of MD102.

(b)Eskom, Ms Begg testified, is not resisting this claim because of the money: it is seeking to preserve the hegemony of its internal processes. What Eskom says is that the exercise of their powers was subject to approval by certain people in head office (and, as the case developed, at the collective bargaining table). This approval, it says, was never given.

(c)These contentions, needless to say, are in no way conceded by Solidarity. Even if they are established, however, Solidarity argues that they make out no defence, for the preconditions for the exercise of the power, being matters of internal management, must be left out of account in determining whether an official of a corporate entity validly exercised the power that he admittedly has or, by reason of his office, can be taken to have.

71]So much is clear from the *Turquand* rule, discussed above.

72]Eskom argued that, even if Mr Crookes had represented that he had the

14 i.e. the principle that one should not increase, beyond what is necessary, the number of entities required to explain anything. (Ascribed to English philosopher and logician William of Ockham (c. 1288 – c. 1348). Also expressed as the *lex parsimoniae).*

requisite authority to enter into the alleged agreement, it would still not avail the applicants. Where a party to a contract purports to act in a representative capacity but in fact has no authority to do so, the person whom he purports to represent – in this case Eskom – is not held bound by the contract unless Eskom, by its own conduct, justified the applicants' belief that authority existed.[15] Mr *Schippers* submitted that there is no evidence that there was any appearance of authority on the part of Mr. Crookes, created by Eskom.[16] In fact, he argued, the evidence points the other way. MD 102 was a Koeberg management directive adopted by Mr. Prozesky at Koeberg. Eskom's Head Office did not give Koeberg any authorisation to include any proposal in relation to early retirement in MD 102. Neither was such an instruction given by either Mr Crookes or Ms Begg.

73]On the probabilities, I have already found that Crookes created the impression – in the minds not only of the operators, but also of Prozesky, a management representative – that Prozesky could implement the early retirement proposal at Koeberg level.

74]There can be no question but that Crookes was seen to be the "directing mind" of Eskom when he, together with Prozesky and Begg, met with the operators on 10 July 1998. As Heher JA put it in *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd and another:*[17]

"In each case the court strives to determine whether it is the company which has spoken or acted to a particular effect through the voice or conduct of a human agency and is thereby to be held to the consequences, or whether that agency was engaged in an activity which cannot fairly be attributed to the company. Each case raises different facts and the eventual conclusion must depend upon inference and probability in the absence of express evidence of adoption of the statements or conduct as the company's own. Respondents' counsel referred us to the following dictum from *Re Bank of Credit and Commerce International SA (In Liquidation) (No 15): Morris v Bank of India* C [2005] 2 BCLC 328 (CA) as to the kind of factors that

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15 Joubert et al: *The Law of South Africa* (2nd ed, 2003) vol 1 p 204 para 210; *South African Eagle Insurance Co. Ltd v NBS Bank Ltd.* 2002 (1) SA 560 (SCA) para 31.

16 *NBS Bank Ltd v Cape Produce Co. (Pty) Ltd and Others* 2002 (1) SA 396 (SCA) paras 24 and 25.

17 2010 (3) SA 382 (SCA) para [31]

a court would look at in determining whether a particular natural person is the directing mind of the company for a particular act or state of mind. The rules of attribution would -

'typically depend on factors such as these: the agent's importance or seniority in the hierarchy of the company: the more senior he is, the easier it is to attribute. His significance and freedom to act in the context of a particular transaction: the more it is his transaction, and the more he is effectively left to get on with it by the board, the easier it is to attribute. The degree to which the board is informed, and the extent to which it was, in the broadest sense, put upon enquiry: the greater the grounds for suspicion or even concern or questioning, the easier it is to attribute, if questions were not raised or answers were too readily accepted by the board.'

75]In the present case, Crookes was, as the Executive Director (Generation), in a senior position; he was clearly "left to get on with it" by the Board when he went to Koeberg to address the operators; and he created the clear impression that he was acting on behalf of Eskom. Prozesky clearly understood it that way, and implemented the agreement at business unit level on that basis.

76]The same principle was explained in the context of a city council in *Potchefstroomse Stadsraad v Kotze:*[18]

"Die juiste posisie is dat raadsbesluite waardeur opdragte aan die stadsklerk gegee word handelinge aangaande die interne bestuur van die raad is. Soos blyk uit die aanhaling hierbo uit die *Turquand* saak word 'n onderskeid getref tussen aangeleenthede van publieke aard en handelinge aangaande die interne bestuur van liggame. Terwyl kennis van die inhoud van eersgenoemde veronderstel word kan die bestaan van laasgenoemde afgelei word en veronderstel word dat daaraan voldoen is. Hierdie reël is, soos appèlregter GREENBERG in die *Mine Workers' Union* saak[19] *supra*, bl. 845, sê:

' . . . based on the principle of convenience, for business could not be carried on if a person dealing with the apparent agents of a company was compelled to call for evidence that all internal regulations had been duly observed.'

77]In the present case, it could not have been expected of the applicants to interrogate Crookes and Prozesky as to whether they had the requisite authority from the Board of Eskom to enter into the agreement as they did. Crookes was quite obviously acting as the agent of Eskom – he flew to Koeberg from Megawatt Park in order to address their concerns on behalf of Eskom, not on a frolic of his own. The applicants quite rightly assumed that internal processes had been complied with. And that perception was strengthened by Prozesky's letter to them, three days letter, in which he reiterated that proposals were "made and endorsed" by Crookes; and that they "could be readily implemented

18 1960 (3) SA 616 (A) 622 C-D.

19 *Mine Workers' Union v J. J. Prinsloo* 1948 (3) SA 831 (AA).

within the authority of the Executive Director (Generation) and Koberg Power Station".

78]I find, therefore, that the applicants were entitled to rely on Eskom's manifestation of assent.

Was the agreement enforceable?

79]Eskom further argues that, even if there was an agreement, it is unenforceable because it concerned conditions of service that had not been centrally negotiated.

80]It was confirmed in evidence that the Eskom Recognition Agreement 1994 (reference ESKPVAAB5) was in force at the relevant time. There were nine trade unions which were party to that agreement, including MWU.

81]Clause 4.2 of the Recognition Agreement provides inter alia, as follows:

"4.2 SENTRALE NASIONALE FORUM

4.2.1 Die Sentrale Nasionale Forum is 'n geïntegreerde forum vir al Eskom se werknemers en dit is die gepaste forum waar alle nasionale onderhandelinge, konsultasies en deel van inligting plaasvind, maar dit maak ook voorsiening vir Groep spesifieke kwessies. Alle aangeleenthede wat 'n Eskom nasionale impak mag hê moet by hierdie forum hanteer word, bv onderhandelinge oor salarisse, diensvoorwaardes, byvoordele en ander Eskom nasionale of Groep spesifieke beleidsaangeleenthede."

82]Mr *Schippers* submitted that the subject matter of the alleged agreement – early retirement for a specific category of Eskom employees, namely licensed operators – plainly constitutes a condition of service.

83]Mr Douglass, the Chairperson of MWU, conceded that a pension benefit is a condition of service that must be negotiated. He knew that early retirement had not been negotiated with the unions.

84]The fact that no agreement had been entered into for the reason that the retirement scheme had to be approved by Eskom's Head Office, is an issue

raised in the response. However, the submission that it is a condition of service that had to be negotiated with the unions, was only raised by Eskom in the evidence and in argument. I will nevertheless deal with it.

85]Ms Begg testified that the issues on the table on 10 July 1998 related to a condition of service, which could not be "readily implemented" under the authority of either the local Business Unit Manager at Eskom or the Executive Director (Generation). Eskom argues that early retirement is a condition of service which is governed by a recognition agreement with labour and has to be negotiated with trade unions. Apart from this, early retirement also needed to go through the Management Board of Eskom and ultimately the Electricity Council, before a mandate could be given to the management of Eskom to negotiate the issue of early retirement at a bargaining forum. It would then have to go back to the Management Board and the Electricity Council as well as the pension fund, before it could actually be implemented.

86]The evidence of Mr. Morgan, the Chairman of Eskom's Management Board and the Chairman of the Electricity Council, was likewise that he considered the issue of early retirement to be a condition of service which had to be referred to the Management Board, which in turn would refer it to a working group under the recognition agreement to look at the consequence of such a decision. Once it had gone through that process within the working group in the consultation forums, it would have to go back to the Management Board. A proposal for early retirement of the kind in question had to be dealt with according to the negotiation framework in place as determined by the recognition agreement.

87]Mr *Schippers* submitted that early retirement for licensed operators at Koeberg is a matter which has a national impact, as contemplated in clause 4.2.1 of the Recognition Agreement, because:

> (a)The alleged agreement purports to grant individual licensed operators additional condoned service, which enables them to qualify for early retirement. For each year of active licensed duty, a licensed operator is credited with 1.5 years' service. This benefit is given to a select group of employees.

(b)Aside from this, the unchallenged evidence is that early retirement for licensed operators could potentially have a national impact. The early retirement proposal was a potential precedent for national control staff, pilots and other categories of staff involved in shift work or physical work, such as artisans and line workers.

88]It follows, Mr *Schippers* submitted, that defrayment of the loss otherwise incurred by making the requisite contribution to the relevant pension fund out of Koeberg's budget, is quite irrelevant. It does not change the fact, he argued, that granting early retirement to a select group of employees in Eskom constitutes a change in their conditions of service.

89]The Labour Appeal Court has held that changes to the rules of a compulsory pension fund benefit was an element of an employee's "conditions and benefits of employment" in terms of the union's recognition agreement with the bank in that case; and that the bank's refusal to negotiate with the representative trade union in respect of a change to the pension fund rules constituted an unfair labour practice under the 1956 LRA.[20]

90]Mr *Schippers* accordingly submitted that inasmuch as the alleged agreement constitutes a change to conditions of service, which did not follow the procedures prescribed in terms of the Recognition Agreement, it is unenforceable.

91]Attractive as this argument appears, I do not agree.

92]The way in which the early retirement benefit was to be granted, is that an extra payment would be made out of the Koeberg budget. That payment would be made to the pension fund and not to the employees themselves; but it is undisputed that Prozesky, as the power station manager, had the authority to pay bonuses (such as a 14th cheque) out of the Koeberg budget. I do not understand there to be a major difference between the two methods of payment: the fact that the recipient of the extra payment in the one case is the pension fund rather than the employees directly, does not transmogrify it into a

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20 *SA Society of Bank Officials v Bank of Lisbon International* (1994) 15 ILJ (LAC) 555 at 559A-G. See also *SA Clothing & Textile Workers Union v Garlick Stores (1922) (Pty) Ltd* (1996) 17 ILJ 255 (IC) at 260G-J.

condition of service. In any event, Prozesky has been giving effect to the spirit of MD 102 in individual cases over the last 13 years without any objection or discipline from Megawatt Park.

93]Furthermore, Eskom's senior human resources advisor, Mr M Young, himself expressly stated in a letter to Solidarity on 1 October 2002 that "early retirement is **not** a condition of service".[21] Like Prozesky, Young was present at these court proceedings but was not called to testify.

94]I find that the agreement that reactor operators could opt for early retirement without penalties did not constitute an amendment to conditions of service that had to be centrally negotiated with other trade unions. It gave the affected operators an enhanced benefit, at the election of individual employees, that was within the budget and authority of the Koeberg business unit.

Conclusion

95]I find that Eskom is bound by the agreement embodied in MD102 (Rev 2).

Costs

96]Eskom has, for the past 13 years, attempted to escape its obligations under an agreement entered into by its agents and a promise made to the applicants, many of whom are by now too old to benefit from it. Some have already retired and others have resigned. Eskom's conduct of the case has been distinctly unhelpful. Relevant documents were only discovered during the course of the trial, and some essential documents cannot, somewhat inexplicably, be found to this day. The decision not to call the most pertinent witness, Mr Prozesky, was unhelpful to the resolution of the dispute. In law and fairness, I see no reason why costs should not follow the result.

Ruling

97]It is declared that the respondent is bound by the provisions of Management Directive MD 102 (Rev 2) dated 2 November 1998.

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21 Bold in original.

98]The respondent is directed to implement the provisions of MD 102 (Rev 2) with immediate effect.

99]The respondent is ordered to pay the applicants' costs of suit, including the costs of senior counsel.

A J Steenkamp
Judge of the Labour Court

APPEARANCES

APPLICANTS:	MSM Brassey SC Instructed by De Lange attorneys, Durbanville.
RESPONDENT:	Ashton Schippers SC Instructed by J Ramages attorneys, Athlone.