REPUBLIC OF SOUTH AFRICA

Of Interest to Other Judges

THE LABOUR COURT OF SOUTH AFRICA,

IN DURBAN

CASE NO: D 130/2012

In the matter between:

HILLSIDE ALUMINIUM LTD **First Applicant**

INDUSTRIAL

and

POOBALAN KUPPUSAMI **First Respondent**

METAL AND ENGINEERING **Second Respondent**

INDUSTRIES BARGAINING COUNCIL

JABULANI NGWANE (*N.O.*) **Third Respondent**

Heard: 6 June 2013

Delivered: 17 November 2014

Summary: (Review – reasonableness – failure to consider material evidence – outcome of arbitration not unreasonable notwithstanding limitations of arbitrator's reasoning – conflict of interest not proven).

JUDGMENT

LAGRANGE, J

Introduction

[1] The applicant company, is part of the BHP Billiton Group and an operator of an aluminium smelter in Richards Bay. On 16 September 2010, following a disciplinary hearing held over a number of days, it dismissed the first respondent, Mr Kuppusami, a maintenance supervisor in the casthouse, after finding him guilty of two charges of misconduct, namely:

1.1 gross negligence for a failing to formally declare his business interests, and

1.2 gross dishonesty arising from a conflict of interest because he had engaged in business while at work with two vendors that did business with the applicant.

[2] Following his dismissal, the applicant referred an unfair dismissal claim to the second respondent, the Metal and Engineering Industries Bargaining Council. The third respondent, the arbitrator, in an award dated 06 January 2012, held that Kuppusami's dismissal was substantively unfair and reinstated him retrospectively.

Pre-arbitration minute

[3] The parties concluded a detailed pre-arbitration minute. In the minutes it was recorded that the Commissioner had to decide if the applicant's dismissal was substantively fair only. He contended it was unfair because:

3.1 he had no knowledge of the rule requiring him to complete the conflict of interest document (FMHR0052);

3.2 he denied having committed either offence, and

3.3 dismissal was not appropriate because:

3.3.1 the employer had acted inconsistently;

3.3.2 the offences were not gross, and

3.3.3 and his length of service (18 years).

[4] Disputed matters recorded in the minutes were that:

4.1 Kuppusami had no knowledge that Strang Rennies had done work for the company since 1996 or 1997.

4.2 Kuppusami's business with Strang Rennies whilst it was a contract for the employer did not involve him in a conflict of interest.

4.3 Kuppusami was unaware of TD Industrial CC having a cleaning contract with the company since 2008, and similarly his business dealings with it while it had a cleaning contract with the employer did not entail a conflict of interest on his part.

4.4 Kuppusami had no knowledge of the requirement to fill in the conflict of interest document after it was introduced in February 2007 to reflect his business interests, and he had not completed from 2008 to September 2010 because he had no knowledge of it.

The arbitrator's award

[5] The arbitrator found that certain issues were common cause, apparently based principally on the pre-arbitration minute, namely:

5.1 In a memo during 2007 Kuppusami had disclosed in a memo to Mr D Mathieson and N Pillay that he was operating a chemical manufacturing business manufacturing household detergents an industrial chemicals. In May 2010, he had further advised C Naicker that he had made that disclosure to them.

5.2 He had been dealing with two of the firm's clients, Dickinson Marketing ('Dickinson') and Nat-Africa Construction ('NAT') in 2007.

5.3 Kuppusami became aware of the upgraded business code (POHR0002) which required disclosure to be made on a particular form (FMHR 0052).

5.4 He did not complete the form to disclose his other dealings with Strang Rennies and TD Industrial.

5.5 No other employee declared their business conflict of interest on such a form prior to Kuppusami's suspension on 18 August 2010.

5.6 Between 17 August and 17 September 2010 there had been a flurry of e-mails advising employees to declare the private business interests.

5.7 On 20 August 2010, an e-mail was sent to casthouse supervisors stating that there had been an omission to mention that they needed to do the same with their staff, namely to complete declarations. The email also warned employees not to assume that because they might have mentioned the activity to someone in the past that the information had been captured and positive confirmation was required from the company that the practice was acceptable.

5.8 Employees who were asked to complete a declaration after Kuppusami had been suspended, were interviewed by Ulbricht who did not ask them about their prior business dealings.

5.9 Some of these employees were in a supervisory position.

[6] The arbitrator reasoned as follows on the evidence before him:

6.1 There had been no objection raised or disapproval registered over the disclosures by the applicant in 2007 that he was dealing with Dickinson marketing and NAC, or that he was operating a chemical business manufacturing household detergents and industrial chemicals. Consequently it could be inferred that there was nothing unbecoming about that conduct.

6.2 The first charge failed to state when Kuppusami's alleged failure to disclose his business interests had taken place and it was not clear whether this referred to his failure to complete the FMH R0052 form. If it did refer to this, then the employer had unfairly singled him out for misconduct whereas other employees including supervisors were simply sent reminders after he had already been suspended. This was a flagrant display of inconsistent treatment and was blatantly unfair.

6.3 In relation to the second charge, the arbitrator found that it also failed to disclose which vendors the applicant had engaged in business with. In the case of three of them the evidence was that he had not done this during working hours. In respect of Arumugan he had discussed business with the applicant at work during a smoke break and conducted business with him thereafter. The arbitrator felt that the policy was not intended to discourage business talks amongst "enterprising individuals in the workplace" and that the discussions the applicant held did not contravene the provisions of the business interest policy. The policy required that Hillside employees must not engage in practices or pursue private or personal interests in conflict with Hillside's interests. It further identified a conflict of interest as one which offended 'against normal standards of good business practice or which could result in financial damage or loss for Hillside'. The arbitrator concluded that the business talks which Kuppusami had engaged in did not amount to a contravention of this policy.

6.4 The arbitrator held that the firm's failure to identify the vendors in question and when the misconduct allegedly occurred either deprived Kuppusami of a proper opportunity to prepare his defence or indicated that charges had been formulated in a rush without conducting a thorough investigation beforehand.

6.5 The arbitrator also dismissed the relevance of another matter involving another employee who was dismissed for not disclosing a conflict of interest because he felt evidence should have been led by the presiding officer who decided that matter about the reasons for the dismissal. By way of elucidation, the evidence on this case was that the employee in question had owned a business that was transacting directly with Hillside, so the facts of that case put it in quite a different category from Kuppusami's case anyway.

[7] The arbitrator concluded that, given the lack of detail and particularity in the charges and the high degree of inconsistency exposed by the evidence and taking into account the applicant's long service of 18 years,

the decision to dismiss him was unfair even though he accepted that the employer had not been unfair in the rollout of the disclosure policy.

[8] Consequently the arbitrator ordered the applicant to reinstate Kuppusami with backpay to the date of his dismissal.

Grounds of review

The general nature of the review

[9] The applicant's principal grounds of review rest on a claim that the arbitrator failed to consider certain evidence affecting the fairness of the arbitration and the reasonableness of the award. Some of the criticisms also suggest misdirected inquiries on the part of the arbitrator.

[10] It must be mentioned that some of the review grounds advanced, in general terms, relied on the proposition that the applicant was denied a fair hearing because of the arbitrator's apparent failure to deal with certain issues. In advancing this argument, the applicant relied on the principle that a commissioner commits a gross irregularity in the conduct of proceedings if he or she fails to have regard to material facts, irrespective of the correctness of the end result, because such conduct supposedly denies a party their right to a fair hearing. This principle is based on a dictum of Ngcobo J, as he then was, in ***Sidumo & another v Rustenburg Platinum Mines Ltd & others* 28 *ILJ* 2405 (CC)** in which he stated:

> *" It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot, in principle, be said to be fair because the commissioner fails to perform his or her mandate. In so doing ... the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings, as contemplated in s 145(2)(a) (ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the*

commissioner has committed a gross irregularity in the conduct of the arbitration proceedings."[1]

[11] This dictum in Ngcobo J's minority, but concurring, judgement led to the development of a significant trend in review jurisprudence in terms of which arbitration awards were scrutinised not necessarily on the basis of whether or not an arbitrator's conclusion represented one plausible interpretation of the evidence but whether or not the arbitrator had failed to simply *consider* a material component of the evidence, irrespective of whether the conclusion reached was one that a reasonable arbitrator could have reached on the evidence. The scope for launching review proceedings on this broad process-related basis does not exist since the SCA judgement in ***Andre Herholdt v Nedbank Ltd & Another*** (unreported, Case 701/2012, 5 September 2013).[2] The SCA held that process-related review in the form of a latent irregularity will only constitute a gross irregularity within the meaning of section 145 (2) (a) (ii) of the Labour Relations Act 66 of 1995 (' the LRA') if the arbitrator misconceived the nature of the enquiry or arrived at an unreasonable result. The SCA emphasised that:

"Material errors of fact, as well is the weight and relevance to be attached to particular facts, not in and of themselves sufficient for an award to be set aside, but only of consequence if their effect is to render the outcome unreasonable."[3]

[12] This more constrained approach to process-related review has been restated by the LAC recently in ***Gold Fields Mining South Africa (PTY) Limited (Kloof Gold Mine)*** (unreported,JA2/2012,04/11/2013)

[15] A 'process-related review' suggests an extended standard of review, one that admits the review of an award on the grounds of a failure by the arbitrator to take material facts into account, or by

[1] At 2491,par [268].

[2] At paras [15] to [20].

[3] At para [25]

taking into accounts facts that are irrelevant, and the like. The emphasis here is on process, and not result. Proponents of this view argue that where an arbitrator has committed a gross irregularity in the conduct of the arbitration as contemplated by the s145(2),[4]it remains open for the award to be reviewed and set aside irrespective of the fact that the decision arrived at by the arbitrator survives the Sidumo test. I disagree. What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by Sidumo. The gross irregularity is not a self-standing ground insulated from or standing independent of the Sidumo test. That being the case, it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard failure by the arbitrator to consider all or some of the issues albeit material as rendering the award liable to be set aside on the grounds of process-related review.

[16] In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decisions he or she arrived at.

[17] The fact that an arbitrator committed a process-related irregularity is not in itself a sufficient ground for interference by the reviewing court. The fact that an arbitrator commits a process-related irregularity does not mean that the decision reached is necessarily one that a reasonable commissioner in the place of the arbitrator could not reach.

[18] In a review conducted under s145(2)(a)(c) (ii) of the LRA, the review court is not required to take into account every factor

[4] S142(2) reads that: (2) A defect referred to in subsection (1), means -

(a) that the commissioner -

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(b) that an award has been improperly obtained.

individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the review court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.

[19] To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in section 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly. This is also confirmed in the decision of CUSA v Tao Ying Metal Industries.[5]

[20] Failing to consider a gross irregularity in the above context would mean that an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his award; or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or considerations of facts presented at the arbitration. The questions to ask are these: (i) In

[5] 2009 (2) SA 204 (CC) at paragraphs 64 and 65 where the court held that: '…commissioners are required to "deal with the substantial merits of the dispute with the minimum of legal formalities."This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, arbitrators must be allowed a significant measure of latitude in the performance of their functions. Thus the LRA permits commissioners to "conduct the arbitration in a manner that the commissioner considers appropriate". But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do. An arbitrator must, as the LRA requires, "deal with the substantial merits of the dispute". This can only be done by ascertaining the real dispute between the parties.'

terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate?(iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?[6]

[21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as aprocess. It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable- there is no room for conjecture and guesswork."

[13] For the purposes of this judgement, I am not persuaded that the outcome of this review would be any different if the test adopted was based on the wide or narrow approach to latent irregularity. In relation to the broader test of process-related review it is worth noting an important observation made by the SCA in discussing the dictum of Ngcobo, J, namely that the

[6]The *Sidumo* test.

learned judge did not mention how material an oversight had to be in relation to a fact to justify setting aside an award for latent irregularity.[7] By contrast, the degree of materiality of the oversight is something that the LAC was plainly aware of in its judgement in *Herholdt,* when it stated the wide test for process-related irregularity:

> *"There is no requirement that the Commissioner must have deprived the aggrieved party of a fair trial by misconceived in the whole nature of [the] enquiry. The threshold for interference is lower than that: it being sufficient that the Commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different."*[8]

(emphasis added)

[14] The emphasised portion of the passage above illustrates that even *before* the scope of process related review was cut back by the SCA, the test still required a judge to consider whether the failure to consider certain material evidence or issues held a real danger that a party might be prejudiced by such an omission. Accordingly even under the more widely stated test of latent process irregularity an award ought never to have been set aside simply because of an omission to consider a material issue if that omission did not have an obvious potential for prejudice to such an extent the very outcome could have been different. Thus even that test, properly construed, embodied a requirement that the relative weight of material evidence ignored by an arbitrator had to be evaluated. An undifferentiated approach to the value of the material evidence omitted from consideration by the arbitrator was never a proper part of the wider test. Consequently, even if the award in this case is evaluated on the broader test as argued for by the applicant, the test applied would still be subject to the qualification just outlined.

[15] Nevertheless, the key question since the SCA decision in *Herholdt* is whether the evidence can provide sufficient support for the arbitrator's

[7] at paragraph [19].

[8] at paragraph [39].

findings to be ones that could reasonably be reached. That does not mean the outcome must be the most probable one but it must be one that can plausibly be reached on the material evidence and that to do so does not require the decision maker to indulge in speculation not warranted by the facts nor to turn a blind eye to evidence which would significantly affect the plausibility of that outcome. It also cannot be a reasonable outcome if it is a conclusion that can only be reached by avoiding obvious inferences or by committing errors of deductive logic. However, this does mean that it will happen that a decision must be considered reasonable even though it is not the one that the court would have reached.

The specific grounds of review

Material omissions relating to Charge 1 -

[16] The applicant says that the arbitrator failed to consider that Kuppusami admitted that he had read clause 5.3.4 of the code of business conduct and conceded that in terms of clause 5.3.2 employees are required to make a new disclosure soon as they start conducting business with a new company. Had the arbitrator taken account of this he would have found that Kuppusami had committed an offence by not completing the form reflecting that he was conducting business with Strang Rennies and T D Industrial.

[17] In this regard it must be noted that the policy required an employee to declare *"potential conflicts of interest"* and defined a conflict of interest as existing *"…when employees have direct or indirect personal interests, or could derive benefits from transactions to which Hillside or an employee is also a party. Such situations must be avoided and prevented at all times in the interest of honest business practices."* Elsewhere a slightly different definition of a conflict of interest is described after describing Hillside as requiring *"…that its employees will not engage in practices or pursue private or personal interests which are in conflict with Hillside interests."* Thereafter the following passage appears: "*The conflict of interest in this sense is one which offends against the normal standard of good business practice or which could result in financial damage or loss for Hillside, or*

harm to Hillside's image in the eyes of the business associates or the general public."

[18] Further, the applicant submits that the arbitrator committed an irregularity in relation to charge 1 by not enquiring whether or not Kuppusami had in fact committed the offence of which he was charged and whether he knew of the rule, whereas Kuppusami had not persisted with his defence that he had not breached the rules by failing to declare his business interests on form FMHR0052, but had admitted in his evidence that he was aware of the amended code of business conduct which provided for the disclosure of interests on the form in question. What in fact he conceded was that he ought to have read the policy in full and ought to have realised that disclosure had to be made on the prescribed form, but he had not done so.

[19] The arbitrator also allegedly ignored a concession made by Kuppusami under cross-examination that he would have filled in the declaration form to reflect that he was doing business with Strang Rennies and TD IndustrialI if he had read the code properly. Kuppusami records that it was clear from the evidence that the importance of completing the form was only brought to his attention after his suspension and that he had previously obtained permission to conduct outside business in 2007. He further claims that he never admitted to being aware of the form and the fact that he read the disclosure policy at the time when the form was not mentioned that could not be construed as evidence of his knowledge of the form at that stage.

[20] If one considers the arbitrator's chain of reasoning, he accepted tacitly that Kuppusami had become aware of the policy which required the disclosure to be effected on the FMHR 0052 form and that he did not disclose his dealings with Strang Rennies and TD Industrial on that form. What the arbitrator was clearly reluctant to make a clear finding on was whether he had not only been aware of the policy but had read it and was aware of the need to make disclosure of his dealings with Strang Rennies and TD Industrial on the form. Perhaps because he was reluctant to make the finding, the arbitrator glossed over this issue and moved directly on to the

question of whether it was inconsistent of the applicant to have dismissed him when other employees were simply sent reminders about the need to comply with the procedure.

[21] The significance of this for the purposes of the review is that his ultimate conclusion that Kuppusami was inconsistently treated on the basis that he had breached the rule when compared with others who had not complied with it, is consistent with two possible subsidiary conclusions. The first is that Kuppusami specifically knew of the requirement to fill in the form as did other employees. The alternative, is that the arbitrator accepted that even though he might have been remiss in not reading the policy carefully and therefore did not realise the formal requirements of disclosure, he was in the same position as others in that respect who had not complied either because they had not paid careful attention to the policy and were not aware of what had to be done. Whichever version the arbitrator believed, his concern was what he perceived to be the harshness of the treatment meted out to Kuppusami compared to that of other employees in the same position.

[22] Apart from criticising the arbitrator for not making a finding on the extent of Kuppusami's knowledge of the details of the policy, Hillside argued that in reaching the conclusion that he had been treated so inconsistently that it was blatantly unfair the arbitrator could not have considered the fact that none of those other employees *were* engaged in businesses involving a conflict of interest, as none of them conducted the business on the applicant's premises or with entities which provided a service to the applicant. Conversely, had he considered this he could not have reached that conclusion.

[23] Other factors which the applicant claims the arbitrator could not have considered in arriving at his conclusion of unfair consistent treatment were that all of the other employees willingly disclosed their other businesses whereas the applicant denied that he was required to make such disclosure regarding Strang Rennies and TD IndustrialI until the arbitration hearing. In fairness to the arbitrator, Kuppusami's defence was that he did not see the need for disclosure because he *bona fide* believed the type of

business relationship he had with Strang Rennies and TD Industrial was covered by his previous disclosure in 2007 in which no conflict of interest was found to exist, and that because his workplace relationship with Strang Rennies and TD Industrial was more tenuous than the relationship he had with his first two clients who were also suppliers to Hillside. Secondly, the issue for the arbitrator concerning consistent treatment related to whether anyone was in fact complying with the requirement of making disclosure using the prescribed form, which was clearly a significant component of charge 1. The criticism of the arbitrator also presumes that there was indeed a potential conflict of interest that Kuppusami should have disclosed.

[24] It is true that the wrangling over Kuppusami's actual or deemed knowledge of the new form and his failure to complete it was a significant aspect of the first charge, but another element of it was his failure to make a fresh disclosure relating to his new clients Strang Rennies and TD Industrial which was not part of his original disclosure in his memorandum of March 2007. By focussing on the completion of the form itself without having regard to the substantive component of the disclosure that Kuppusami ought to have made, the arbitrator appears to have overlooked this facet of the charge.

[25] Lastly, the applicant claims the arbitrator ignored the fact that it acted in good faith and consistently by disciplining Kuppusami and not the other employees. Further, whereas Kuppusami had knowledge of the rule requiring him to complete the disclosure form, the other employees testified that they did not have knowledge of the rule. As mentioned above Kuppusami never admitted knowledge of the form as such, but only that if he had read the policy properly he ought to have been aware of it.

[26] Kuppusami, in defence of the reasonableness of the arbitrator's finding on inconsistent treatment makes the point that, other employees were given an opportunity to make proper disclose using the form, but he was denied the opportunity of doing the same or being suspended and charged. He also maintains his ignorance of the form and that the evidence of the other

employees on this question lends credibility to his version that he too did not know about it.

[27] Ulbricht's evidence on this issue is that the reason other employee's such as Ganesan were not disciplined even thought they too had not made the declaration using the form was that, when they were reminded they had to make it and they did so, the disclosure did not reveal they were involved in the kind of problematic business interests which Kuppusami had and therefore did not reveal they had a conflict of interest. That made Kuppusami's non-disclosure more serious. By emphasising this, the applicant seeks to diminish the significance of the first element of charge 1 namely, the failure to follow the correct procedure. Instead it seeks to emphasise the substantive failure to disclose a conflict of interest, which was really the gravamen of the second charge.

Material omissions relating to Charge 2

[28] In relation to the second charge, the applicant complains that the arbitrator ignored unchallenged evidence to the effect that Kuppusami was not entitled to do any unauthorised work, and particularly work which conflicted with its interests, and that he had conducted business with Strang Rennies at work during working hours, which was also in conflict with the firm's interests and contrary to Kuppusami's obligations to the firm. The arbitrator also allegedly ignored equivalent evidence relating to his dealings with TD Industrial.

[29] Kuppusami responds that the initial contact at work took place during two brief casual interactions at work and the real transactional business was effectively conducted after hours or by the office of his business, and not directly with himself. It must be said that the evidence of the representatives of the two businesses who said that Kuppusami approached them, tend to support the brevity of the workplace interaction attested to by Kuppusami and the employer's witnesses could only speculate there must have been more. This speculation was not canvassed in any noticeable way with the two representatives in question.

[30] The applicant further complains that the arbitrator also failed to make a determination on whether in fact Kuppusami had a conflict of interest when he engaged in business with Strang Rennies and TD IndustriaI. Instead the arbitrator had simply engaged with the issue of whether Kuppusami had conducted business with them while he was at work. In this regard, it claims that Kuppusami's conflict of interest, which the arbitrator allegedly ignored, was that, this was a key contract to the applicant providing services primarily to the Casthouse where Kuppusami worked. Strang Rennies essentially transported trolleys of aluminium ingots from the casthouse to the harbour and there was evidence it was a key contractor, and according to the evidence of Ulbicht maintained both its own equipment and that of the applicant used in that process. Kuppusami had claimed ignorance about the importance of its role, even though according to Ulbricht he would have had daily interactions with Strang Rennies personnel.

[31] The applicant submits that Kuppusami interacted with Strang Rennies on a daily basis in his work and could influence the relationship between Strang Rennies and the Casthouse. In relation to TD Industrial, Kuppusami sold degreaser and industrial brooms to it, which were products used by TD Industrial at the applicant's smelter from 2008 until mid-2010, when Kuppusami was suspended. Ulbricht had also testified that TD Industrial supplied labour to perform cleaning services in the casthouse and the smelter on a day to day basis and specifically on maintenance days. Again Kuppusami as a line manager he uses TD Industrial staff and is involved in directing what they do, so the perception might be created that if chemicals were not bought by TD Industrial from his company, he might have been able to influence the continued use of their services by the applicant even if he was not responsible for concluding such service contracts. Similarly, both Strang Rennies and TD Industrial representatives dealing with Kuppusami would not have simply perceived him as an independent supplier of products they might use, but as a relatively senior line manager of the applicant to which they were contracted, so the potential existed for a perception to be created that he could influence their relationship with the applicant. Under cross-

examination he explained how the relationship between the supplier and the firm could deteriorate, for example, if there were complaints about the trolleys supplied by the firm or about the performance levels of the suppliers. In essence he was emphasising the importance of maintaining good with the supplier firms and not making them vulnerable to possible stresses arising from Kuppusami's private commercial connection with them, though he conceded that nothing adverse to the relationship had occurred.

[32] Kuppusami contends that there was no conflict of interest in him supplying chemicals to Strang Rennies and TD Industrial at the same time those companies provided services to the applicant. Moreover, he never used his position to influence the suppliers in any way. Further, he retorts that the charge was not split into two portions, but was a single charge based on whether he had engaged in business whilst at work with two suppliers. Accordingly, he contends that it was not necessary for the arbitrator to determine if in fact there was a conflict of interest involved.

[33] Moreover, Kuppusami argued that if the applicant did not consider that his business dealings with Dickinson and NAC entailed a conflict of interest then it was inconceivable how it could construe his dealings with Strang Rennies and TD Industrial in that light. Repeatedly, in his evidence he reiterated his understanding of the approval of his business, namely that when he had declared his dealings with Dickinson and NAC, these were suppliers who reported to him in maintenance, whereas Strang Rennies and TD Industrial did not. He did not understand how dealings with the latter two firms with whom his workplace relationship was even more tenuous could have been construed as a conflict of interest whereas his dealings with the original two suppliers had not been seen as entailing a conflict. However, the applicant retorts that, the evidence showed that Kuppusami's relationship with Strang Rennies and TD Industrial was different to the one he had with the first two companies, in that the extent of the business dealings with Strang Rennies and TD Industrial was much greater and of much longer duration than with the first two companies.

[34] The evidence of Kuppusami's firm's dealings with Strang Rennies was sales in the region of R 9,000-00 per month, and in the case of TD Industrial was the sale of 200 litres of degreaser costing in the region of about R 900-00 per month and a once of sale of a few brooms. Apart from evidence that the business in each case commenced with an initial informal discussion at Hillside between Kuppusami and the respective representatives of those firms at Hillside, there really was no evidence of ongoing business transactions been conducted by Kuppusami with the suppliers during his working time.

Vague charges

[35] On the issue of the vagueness of the charges, the applicant submits that the arbitrator failed to take account of the fact that Kuppusami had agreed that he was required to disclose his business interests by filling out the FMHR0052 form, and that it was never disputed that the two vendors referred to in the second charge were Strang Rennies and TD Industrial. Further, the Commissioner failed to take account of Kuppusami's admission that Mathieson had not given him permission to do business with any service providers other than Dickinson and NAC, and therefore the charge could only have related to his failure to disclose his interests in relation to Strang Rennies and TD Industrial.

[36] I agree that the arbitrator's reasoning on the vagueness of the charges is something of a red herring and was a misdirection of his enquiry leading him to address an issue he was not required to.

[37] It is noteworthy that in his answering affidavit, Kuppusami concedes that it was only when he was asked to make submissions why he should not be suspended that he specifically brought to the applicant's attention his dealings with Strang Rennies and TD Industrial. In his answering affidavit he explains that the reason he failed to mention Strang Rennies and TD Industrial previously was that, unlike the other two firms which did report to him as a supervisor in the maintenance division, Strang Rennies and TD Industrial reported to Len Van Vuuren in the production division. Further, it points out that Naicker had advised Kuppusami that if there had been any material changes in his business since his disclosure in 2007 he should

make a fresh declaration of his interests, which he did not. The reason provided by Kuppusami was that he did not see that any potential conflict existed by the expansion of his business to Strang Rennies and TD IndustriaI if the previous dealings with the original two suppliers were acceptable to Hillside. Clearly, in Kuppusami's view the nature of his dealings had not materially changed in a way that would now place him in a conflict of interest.

The appropriate sanction

[38] In dealing with the sanction of dismissal, the applicant submits that the arbitrator failed to consider the evidence that Kuppusami had breached clause 5.3.2 of the code of business conduct and had engaged in significant business over a long period with Strang Rennies and TD Industrial in breach of the policy. Moreover, that engagement had been in conflict with his obligations as an employee towards the applicant.

[39] The arbitrator also failed to consider that Kuppusami had deliberately misled Arumugan of TD IndustriaI by stating that his business belonged to his brother. The applicant denies that he attempted to mislead Arumugan by concealing his own involvement in the business. His brother had started the business and still had a significant involvement with it. Kuppusami also claimed that Arumugan gave conflicting evidence about the fact that he was under the impression the business belong to Kuppusami's wife or his brother. Kuppusami said that his brother was involved in the manufacturing of chemicals at the time that Arumugan asked him about a multipurpose cleaner in 2007 and at that stage he was not manufacturing them in his own business, but Arumugan was not challenged when he had testified that it was in 2008 they had the conversation, by which stage Kuppusami admits he was manufacturing chemicals himself in his own business. This may indicate that Kuppusami had not been open with Arumugan about his own involvement in the business, but on the other hand there was no evidence Kuppusami had tried to conceal his interest in the business when he approached Mr De Klerk of SR, so it is equally possible he might not have misled Arumugan,

as one might have expected him to be consistent in the way he represented his role if he felt he had to conceal it.

[40] The applicant argued that a further consideration in relation to the appropriateness of the sanction of dismissal was that, the arbitrator failed to take account of the fact that Kuppusami had both denied any wrongdoing until he was cross-examined in the arbitration and denied his guilt on the second charge. He had also failed to show any contrition for acting in breach of the company's policy. Lastly, the applicant believes that the arbitrator failed to consider the implications of retaining Kuppusami in the responsible position of maintenance supervisor, in which role he had personally presented the firm's Code of Business Conduct to subordinates.

[41] Kuppusami maintains that even though he had not filled in the form he was not guilty of any wrongdoing because he had been under the genuine impression that the disclosure he made to Naicker in 2007 was enough. Essentially, Kuppusami contends that making disclosure by way of completing the form was simply not necessary in the circumstances.

[42] The applicant makes much of the fact that Kuppusami's clean disciplinary record in the course of his 18 year's service was not identified as a factor that Kuppusami contended made his dismissal unfair, and therefore the arbitrator was wrong to take account of it Just as much that he did not raise it specifically as a factor in the pre-arbitration agreement, neither did the employer seek to suggest that there was anything unsatisfactory about his disciplinary record that would adversely affect the determination of the appropriate sanction, which it could have raised if it thought that was so. So even if the disciplinary record of the arbitrator is viewed as the absence of an aggravating consideration I do not think it was beyond his remit to consider, quite apart from the issue whether an arbitrator could be prevented from considering this in a statutory arbitration when determining substantive fairness.

[43] On the question of the arbitrator's general approach to the evidence, the applicant maintains that the arbitrator should have considered whether to make a credibility finding about Kuppusami.

Is the outcome one that could not reasonably have been arrived at?

[44] It must be said that this is a case in which the arbitrator's reasoning is of limited help in deciding if his conclusion that the dismissal of Kuppusami was substantively unfair is one that he could reasonably have arrived at. In part, this is because he declined to make his subsidiary findings on the first charge explicit, though as mentioned it would seem that he at least tacitly accepted that Kuppusami had acted in breach of the policy by not formally reporting his interests, but then immediately shifted his focus to the consistency issue.

[45] The main basis on which Hillside sought to defend its allegedly inconsistent treatment of Kuppusami was that the other employees who completed the disclosure forms around the time of Kuppusami's suspension after email reminders had been sent out were not engaged in conflicts of interest and therefore their omissions were less serious. This brings to the fore the question whether it was reasonable for the arbitrator to have concluded that Kuppusami's non-disclosure of his business dealings with Strang Rennies and TD Industrial did not involve a failure to disclose a conflict of interest.

[46] I believe this conclusion was one that could reasonably have been reached on the evidence, based on the evaluation above and the following:

46.1 The evidence of Ulbricht on why Kuppusami's dealings with the Strang Rennies and TD Industrial entailed a conflict of interest was founded on the idea that Kuppusami's position at Hillside in relation to the two firms as supplier's was such that his business's relation to them as a supplier of degreasing material held the potential of harming Hillside's relations with those firms if something went wrong between his business and theirs.

46.2 He never dealt with the reason why the relationship with the former clients of Kuppusami's business who were also suppliers to Hillside and who reported to Kuppusami in the workplace could have been construed as acceptable, but the relationship with Strang Rennies and TD Industrial who, at best for Hillside, had a more tenuous

reporting relationship to Kuppusami at the smelter was not. Kuppusami was not challenged when he testified that he had even less ability to influence TD Industrial and SR's relationship with Hillside than he conceivably could have had with Dickinson and Nat-Afrika Construction.

46.3 The only element of conflict was when Kuppusami used the opportunity of having the representatives of the two firms at work to sound them out about buying chemicals from his business. There really was not tangible evidence supporting the employer's argument that such interactions must have continued on an ongoing basis on the workplace in course of the future conduct of business between Kuppusami's business and the two firms. On the evidence his pursuit of his own interests during Hillside business hours was a brief once off occasion in both instances. The thrust of the charge of dishonesty related to the failure to disclose the business relationship which was then established as a result of that interaction, rather than an infraction of the rule not to conduct his own business in his employer's time. It would have been better if the this issue had been separated as a charge in its own right rather than conflated with the allegation of dishonesty for not disclosing what Hillside believed was an improper relationship with the two firms which entailed a conflict of interest. Obviously, an employee conducting his own business in his employer's time is not serving his employer's interests and in that sense there is a conflict of interest, but this was not the conflict of interest which lay at the heart of the charge, but really incidental to it.

46.4 Even if the scale of the business Kuppusami did with Strang Rennies and TD Industrial was more substantial, it was still not unreasonable to conclude that the issue of scale was not decisive and that the nature of the relationship was such that it fell well within the bounds of the type of relationship which Hillside would find acceptable based on the previous assessment of Kuppusami's relationship Dickinson and Nat-Afrika Construction. There are other factors too. From the perspective of the representatives of TD Industrial and Strang Rennies they did not feel at all beholden to Kuppusami. In fact, if

anything, he was the dependent party in that relationship because they were only willing to buy his degreasing material if the price was better than they could obtain elsewhere and if the quality remained satisfactory.

[47] If the conclusion that there was no conflict of interest which required disclosure was not an unreasonable one, then first charge really ought to fall away as even on Hillside's own approach in the arbitration, the reason other employees who did not complete the declaration were not disciplined was because they were not involved in conflicts of interest. Strictly speaking the arbitrator could not have tacitly accepted that Kuppusami was guilty on the first charge but found he was not guilty of the second because the duty to disclose covered by the first charge would not have arisen.

[48] Assuming though that it was unreasonable to have concluded that there was no conflict of interest which the new accounts with Strang Rennies and TD Industrial required disclosure of, then the failure to complete the form or to make the disclosure at all would have to be considered. In that case, the arbitrator would still have to have considered if the non-disclosure was dishonest. There is good reason to believe that even in that event, Kuppusami reasonably believed that disclosure was not necessary because the company had accepted the previous commercial relationship he had through his company with the first two clients who were suppliers to Hillside. As such his non-disclosure would not have been made for the dishonest reason of concealing the relationship. This in turn would have been a factor which would have to be weighed in determining if the sanction of dismissal would still have been appropriate.

[49] Be that as it may, I am satisfied that the arbitrator's conclusion that Kuppusami was not guilty of charge 2 was one that a reasonable arbitrator could have reached on the evidence, even if his own reasoning in arriving at that outcome was a bit convoluted. Consequently, the arbitrator's failure to find Kuppusami guilty of the first charge was not unreasonable even though he reached that outcome by omitting to make an express finding.

[50] In the result, Kuppusami was not guilty of either charge, though he might have been guilty of not devoting a few minutes of his time to his employer's business when he initiated business relationships with Strang Rennies and SD Industrial, but that was not dealt with as a distinct charge and was intimately bound up with the fact that it was conducting business with the two suppliers that was the core element of the conflict of interest and the fact that he initiated the relationship in his employer's time was an aggravating factor. Hillside never argued that at the very least the arbitrator should have found that merely doing his own business during company time warranted a finding of misconduct that could also justify his Kuppusami's dismissal.

[51] Even if it could be argued that the applicant ought not to have trusted his own judgment in deciding that disclosure of Strang Rennies and SD Industrial as new customers did not qualitatively alter the nature of his business interest from the perspective of whether or not he had a conflict of interest, at best for Hillside that was an error of judgment, which hardly would have warranted his dismissal in the circumstances. An employer who has an intrinsically convoluted conflict of interest policy, ought to make allowance for difficulties of interpretation and accept that imposing the most extreme sanction would generally be inappropriate, where there is a bona fide reason to believe that the disclosure was not necessary and when reasonable persons could differ on whether a conflict was involved or not.

Costs

[52] There is no good reason in this instance why it would not be just and equitable to award the first respondent his costs.

Order

[53] The review application is dismissed.

[54] The applicant must pay the first respondent's costs.

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R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

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Instructed by: Norton Rose Inc

For the First Respondent: R.C.W. Pemberton for Garlicke and Bousfield