

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

- | | |
|-----|--|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: |

Date: **7th December 2022** Signature:

CASE NO:

2943/2022

DATE: 7TH DECEMBER 2022

In the matter between:

DOHNE CONSTRUCTION (PTY) LIMITED

Applicant

and

ADV LANE SC, PATRICK M M NO

First Respondent

UNKI MINES (PTY) LIMITED

Second Respondent

Coram: Adams J

Heard: 16 August 2022

Delivered: 07 December 2022 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 12:00 on 07 December 2022.

Summary: Opposed application – Arbitration Act 42 of 1965 – removal of arbitrator in terms of s 13(2)(a) – on the basis of perceived bias – reasonable perception of bias on the part of the arbitrator to be proven –

Whether s 13(2) application to set aside Arbitrator's appointment improper – if issue already dealt with in terms of AFSA Rules – the relevant rule 14.4 procedure not mandatory, nor exclusive – it is permitting of a party availing itself of the remedy provided for in s 13(2) – the Court is nevertheless justified in exercising its residual jurisdiction to entertain removal application on good cause shown –

Applicant failed to prove that 'a reasonable, objective and informed person would reasonably apprehend' that the Arbitrator will not bring an impartial mind to bear on the adjudication of the case – therefore, application refused.

ORDER

- (1) The applicant's application for leave to file a supplementary affidavit is refused with costs.
- (2) The applicant's application is dismissed with costs, such costs to include the second respondent's costs consequent upon the employment of Senior Counsel.

JUDGMENT

Adams J:

[1]. The applicant ('Dohne Construction' or 'Dohne') and the second respondent ('Unki Mines' or 'Unki') are both companies registered and conducting business in the Republic of Zimbabwe. They are embroiled in a protracted dispute in relation to a multimillion US Dollar construction contract, concluded between them during 2013. The dispute is at present and has since about 2016 been subject to arbitration before the first respondent (the

Arbitrator) – a Senior Counsel and a practising member of the Johannesburg Bar – who was appointed as the arbitrator by the Arbitration Foundation of Southern Africa ('AFSA') as per the agreement between the parties and as provided for in the construction contract between them. It is common cause between the parties that the AFSA Rules, as well as the Arbitration Act, Act 42 of 1965 ('the Arbitration Act'), apply to the arbitration.

[2]. The first case management meeting between the Arbitrator, Dohne Construction and Unki Mines was held on 18 April 2016 and by 13 March 2017, the arbitration was ready for hearing. By that date the parties had exchanged pleadings, witness statements and expert reports, and all interlocutory issues had been dealt with and adjudicated upon by the Arbitrator. The arbitration had in fact been set down for the hearing to commence on 13 March 2017 and to run for five days to 17 March 2017. The hearing did however not proceed on 13 March 2017. It was postponed at the request of Dohne Construction, which was ordered by the Arbitrator to pay the wasted costs occasioned by the postponement. At the subsequent case management conference on 16 August 2017, Dohne Construction was not legally represented, as its attorneys of record withdrew as such on the day of the said meeting. The Arbitrator directed that the opening statements were to be filed by 25 August 2017 and, as agreed to between the parties, the hearing of the arbitration was to commence for a period of five days from 4 September 2017. However, on the aforesaid date, Dohne Construction, who by then was still not legally represented, yet again applied for a postponement of the hearing, which application was granted with – understandably so – Dohne Construction to pay the wasted costs occasioned by the further postponement. The Arbitrator also ordered Dohne to put up security for costs relative to its counterclaim which it had preferred against Unki Mines.

[3]. Fast forward to 4 March 2021, on which date Unki Mines, in response to a demand by Dohne Construction that they comply with two decisions by Adjudicators dating back to 2015, indicated that they will be pursuing the arbitration proceedings against Dohne Construction. Unki thereafter, on 11 May 2021, addressed a communiqué to the Arbitrator, enquiring about dates for the

hearing. The 11th to 13th October 2021 were allocated by the Arbitrator as hearing dates and on 26 May 2021 Unki Mines delivered notice of set down of the hearing on those dates, in response to which, the present attorneys of record of Dohne Construction, advised that their Counsel was not available on the dates allocated for the hearing. Additionally, the said attorneys indicated that their client was concerned that it would not be receiving a fair trial before the Arbitrator and requested him to recuse himself.

[4]. This, the arbitrator was not prepared to do. And in this opposed application Dohne Construction applies for an order setting aside his appointment as the arbitrator in the pending arbitration. The Arbitrator does not oppose the application, but, by the filing of a formal notice of intention to abide, he has indicated that he will abide the decision of this Court.

[5]. In issue in this application is whether Dohne Construction has made out a case for the appointment of the Arbitrator to be set aside on the basis that there is a reasonable believe that he is biased against it in favour of the Unki Mines. The relief sought by Dohne Construction is in terms of s 13(2) of the Arbitration Act, which provides as follows: -

- '(2) (a) The court may at any time on the application of any party to the reference, on good cause shown, set aside the appointment of an arbitrator or umpire or remove him from office.
- (b) For the purposes of this subsection, the expression "good cause", includes failure on the part of the arbitrator or umpire to use all reasonable dispatch in entering on and proceeding with the reference and making an award or, in a case where two arbitrators are unable to agree, in giving notice of that fact to the parties or to the umpire.'

[6]. The grounds on which the relief is sought are the following: The relationship between the Arbitrator and the expert witness of Unki Mines, one Ms Bridget Kelly (Ms Kelly), and her employer, Kingsbourne (Pty) Ltd, and the fact that the Arbitrator failed to make disclosure of the existence of this relationship at the time of his appointment or during the conduct of the arbitration; the handing down of an award without affording the applicant an opportunity of securing legal advice; granting an informal application for security for costs without providing reasons and despite having dismissed a similar

application, earlier in the same year; being blindly led by the attorneys of Unki Mines as to the content of the award dated 4 September 2017 and allocating hearing dates, and excluding the applicant's counter-claim; and being coy (intentionally or unintentionally) regarding notes in his possession, as to what these notes indicate and/or whether they exist.

[7]. There is also a preliminary legal point raised by Unki Mines to the effect that this Court lacks the necessary jurisdiction to decide the suitability of the Arbitrator to remain appointed. The point, in sum, is that the parties are bound by and subject to the AFSA rules. In terms of those rules, a tribunal was appointed by AFSA for the purpose of deciding whether the Arbitrator should be removed and be replaced with someone else – the exact same issue presently before this Court. The tribunal, during 2021, considered the said issue and determined that there is no reason for the Arbitrator to be removed and for his appointment to be set aside. That, according to the point *in limine* by Unki Mines, spells the end of the matter and Dohne's application, which should be dismissed.

[8]. In that regard, it is common cause that on 26 July 2021, Dohne Construction made an application to the AFSA Secretariat for the termination of the Arbitrator's appointment under Rule 14.4 of the AFSA rules. AFSA appointed a four-member tribunal (or panel) to determine the challenge, who unanimously rejected and dismissed the challenge. In the process, identical complaints and contentions as those advanced by Dohne Construction in this application were considered.

[9]. The issue to be decided relative to the point *in limine* raised by Unki Mines is whether the arbitration agreement between the parties, which incorporated by reference AFSA Rules 14.3 and 14.4, on a proper construction, intended to lay down an exclusive procedure for the removal of the arbitrator. The aforesaid sub-rules read as follows: -

'14.3 An arbitrator shall recuse himself when, due to physical, mental, or other disability, he becomes incapable properly to perform his duties, and in circumstances which would require a judicial officer to recuse himself.

14.4 The Secretariat shall be entitled, after a written or oral hearing (as directed by the Secretariat) of the parties and the arbitrator, to terminate the appointment of an arbitrator on the grounds that he has become disqualified from acting or continuing to act in terms of these Rules, or his inability or refusal to act, or that he has failed timeously and effectively to perform any of his functions as arbitrator.'

[10]. As was held by the Full Court (per Rogers J) in *Hyde Construction CC v Deuchar Family Trust and Another*¹, 'in relation to the main dispute and matters truly interlocutory to the proper adjudication of the main dispute, it will almost always be the intention of the parties to exclude recourse to the courts, whether they say so expressly or not. Furthermore, where parties have agreed to refer a question of law for decision by an arbitrator, it will generally be inconsistent with that agreement to permit one of the parties to apply to court in terms of s 20(1) of the Arbitration Act to state the same question of law for opinion by the court'. In that regard, see *Telcordia Technologies Inc v Telkom SA Ltd*². However, in relation to the removal of the arbitrator, so the Full Court held, the inference that a removal procedure provided for in the arbitration agreement is intended (in the absence of clear language) to be to the exclusion of the statutory right conferred by s 13(2) is less compelling.

[11]. Section 13(2) should be considered, as was done in *Hyde Construction*, in the context of an argument as to whether, because parties had agreed to include a different procedure relating to the removal of an arbitrator, it remained open to approach the court, under section 13(2). And formulated with reference to the principles of waiver, the question is whether rule 14.4 unequivocally manifests an intention to oust s 13(2) and that such an interpretation is consistent with no other hypothesis. Rule 14.4 does not state that it operates to the exclusion of s 13(2). It 'entitles' AFSA, after a written or oral hearing of the parties and the arbitrator, to terminate the appointment of an arbitrator on the grounds that he has become disqualified from acting or continuing to act in terms of the Rules, or his inability or refusal to act, or that he has failed timeously and effectively to perform any of his functions as arbitrator. It appears

¹ *Hyde Construction CC v Deuchar Family Trust and Another* 2015 (5) SA 388 (WCC);

² *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) (2007 (5) BCLR 503; [2007] 2 All SA 243) para 154);

to me that those grounds are not as wide as those which a court could take into consideration in an application in terms of s 13(2). This, in my view, gives rise to the inference that the rule 14.4 procedure is not mandatory, nor exclusive, but rather permitting of a party availing itself of the remedy provided for in s 13(2). The point is simply that the removal of an arbitrator is not concerned in any direct way with the arbitral dispute and matters truly interlocutory to the determination of the dispute, and therefore the natural inference that the parties intended to exclude the court's jurisdiction is not present.

[12]. Accordingly, I am of the view that rule 14.4 is not inconsistent with the parallel operation of the Arbitration Act and that it does not serve to exclude the operation of s 13(2). Even though the parties' agreed to the AFSA Rules, including Article 14, that particular Rule does not and cannot modify or exclude the Court's jurisdiction as provided for in Section 13(2) of the Arbitration Act. In any event, I am, in my view, nevertheless justified in exercising my residual jurisdiction to entertain the removal application on good cause shown. In assessing the question of good cause, I regard as an important consideration that the matter which Dohne Construction requires the court to adjudicate is not the main dispute or a procedural matter truly ancillary to the determination of the main dispute, but a more fundamental question as to the propriety of the Arbitrator's continued role as the Arbitrator. This is a legal question going to the fairness of the arbitration.

[13]. In the circumstances of this case, therefore, I think the entertaining of the s 13(2) application is permissible. Unki Mines' legal point *in limine* therefore should be dismissed.

[14]. I now turn to the merits of the application and proceed to consider the question of a reasonable apprehension of bias on the part of the Arbitrator. The applicable test in this regard is set out by the Constitutional Court in the following passage in *President of the RSA v South African Rugby Football Union*³: -

'The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not [brought] or will not bring an impartial mind to

³ *President of the RSA v South African Rugby Football Union* 1999 (4) SA 147 (CC) para 48;

bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel.'

[15]. In some cases, this apprehension of bias is referred to as perceived bias, a perception of bias or objective bias. Perceived bias is to be differentiated from actual bias. In *Umgeni Water v Hollis NO and Another*⁴, and in regard to a perception of bias, the Court held as follows: -

'In other words, whether a reasonable, objectively informed person would, on the facts demonstrated and relied upon by the applicant, reasonably apprehend that the first respondent has not brought, or will not bring, an unbiased mind to bear upon the adjudication of the arbitration. Put differently, that he is not likely to approach such proceedings with a mind open to persuasion by the facts and submissions to be placed before him in due course.'

[16]. On the facts, Dohne Construction tells the Court that it has a reasonable apprehension and fears that it will not get a fair hearing before the Arbitrator. It is of the view that he is not able to continue with the pending arbitration impartially or independently. And in that regard, Dohne relies not on one incident but rather on an accumulation of events and actions by the Arbitrator over a period of time which, so it avers, have given rise to a reasonable apprehension of bias.

[17]. The first event, which, according to Dohne Construction, gave rise to its reasonable apprehension of bias, is the failure by the Arbitrator to make disclosure, at the time of his appointment and during the conduct of the arbitration, of his 'apparent relationship' with Ms Kelly (who is the expert witness of Unki Mines) and her employer, Kingsbourne (Pty) Ltd. The very first difficulty with Dohne's Case on this score is that there is a concession by it that they do not know, precisely, what this relationship is. This is evidenced by the manner in which the submission was formulated in her written Heads of Argument by Ms Humphries, who appeared on behalf of Dohne, when she makes reference to the 'apparent relationship' between the Arbitrator and Ms Kelly.

[18]. That being the case, it cannot possibly be suggested that the Arbitrator ought to have disclosed the relationship, the details of which are unknown, because by failing to do so, he would have been unable to be unbiased or to

⁴ *Umgeni Water v Hollis NO and Another* 2012 (3) SA 475 (KZD);

bring an independent judgment to bear on the merits of the dispute that he has been mandated to determine.

[19]. Moreover, the thrust of the complaint appears to be that the Arbitrator has presided – as arbitrator – in cases where Ms Kelly has been involved as an expert, and further that the Arbitrator has been on brief in cases where Ms Kelly has been retained as an expert (and Ms Kelly is employed by Kingsbourne). The point is however that it is a fact that the Arbitrator and Ms Kelly do not have a business relationship. The Arbitrator is not and has never been employed by the same employer as Ms Kelly and their commercial or business interests have never aligned. The Arbitrator also had no say in the appointment of Ms Kelly to act as expert for Unki Mines, who also did not ask for the appointment of the Arbitrator. What is more is the Arbitrator disclosed and confirmed that he is not (and has never been) on brief in any matter for the attorneys of record for Unki Mines and that he does not (and has never) acted for them or presided over a dispute in which it was involved.

[20]. Mr Daniels SC, Counsel for Unki Mines, submitted that the fact that the Arbitrator and Ms Kelly have worked together, for the same client(s) before and the fact that the Arbitrator may have presided over disputes where Ms Kelly was involved as an expert, cannot, on any conceivable basis, support a reasonable apprehension of bias. I find myself in agreement with this submission. On what basis, I ask rhetorically, is the quantum leap made from the Arbitrator working with Ms Kelly to the him being biased in favour of Unki Mines. The point is that it is hardly unusual for an arbitrator, who is also an advocate, to work with different experts from time to time (and to work with different counsel from time to time) and thereafter be required to sit as an arbitrator in matters where such counsel or expert appears. This in itself cannot possibly be a ground for any reasonable apprehension of bias or justified doubt on the impartiality of the Arbitrator.

[21]. The first ground on which Dohne Construction contends for perceived bias is therefore, in my view, bereft of any merit. Whilst a layperson may feel uncomfortable about such a situation, this will inevitably be a result of not being

properly informed and, once the lay-client has been well informed (by his or her legal representatives) that such a situation is not unusual and not sufficient to disturb the presumption of impartiality in respect of a judge or an arbitrator, reasonableness would dictate that any instinctive apprehension of bias would then dissipate.

[22]. The Arbitrator, in my view, was correct in considering the issue of his relationship with Ms Kelly and her employer as irrelevant. It can on no reasonable basis support a case for bias on the part of the Arbitrator, who cannot be faulted for not making the disclosure contended for.

[23]. The second ground on which Dohne claims bias relates to the handing down of 'an award' during September 2017 without affording it the opportunity of obtaining legal advice. This ground can and should be considered together with the remaining grounds on which it is alleged by Dohne Construction that the Arbitrator is reasonably perceived to be bias, those being: (1) the granting of an informal application for security for costs without providing reasons notwithstanding having previously dismissed such an application earlier in the same year; (2) allegedly 'blindly being' led by Unki Mines' attorneys of record as to the content of the award of 4 September 2017 and allocating hearing dates, excluding the Dohne's counterclaim; and (3) being coy, whether intentionally or unintentionally, regarding the existence of notes or records in his possession as to what they indicate and/or whether they exist.

[24]. As correctly contended by Unki Mines, all of these grounds for removal should be considered in context and with reference to all the facts and relevant circumstances, which are briefly set out in the paragraphs which follow. In that regard, sight should not be lost of the crucial fact that it was because of Dohne's unreadiness to proceed to trial on two occasions during 2017, that the arbitration proceedings have to date not been finalised. It is therefore misguided for them to attempt to place the blame on Unki Mines for the fact that the arbitration proceedings stalled for approximately three years.

[25]. During 2017 the Arbitrator dismissed an application by Unki Mines for security for its costs in the sum of R500 000 primarily because it (Dohne) had

been placed under provisional judicial management on 4 September 2015. This is one example of the Arbitrator ruling or finding against Unki, despite his alleged bias against Dohne.

[26]. As alluded to above, on 7 March 2017 the Arbitrator granted an application by Dohne to postpone the hearing scheduled to take place from 13 to 17 March 2017, and issued 'a procedural order' in terms of which the hearing was postponed to 4 September 2017 (a delay of approximately 6 months). The procedural order also dealt with related issues, including that the applicant should pay the wasted costs occasioned by the postponement. This is a further example of the Arbitrator – despite the opposition by Unki Mines – ruling in favour of Dohne on the requested postponement and making – as is commonplace in applications of that nature – an award for costs.

[27]. On 16 August 2017, with the arbitration hearing less than three weeks away, Dohne's previous attorneys of record withdrew because of concerns about its ability to pay their fees. A Mr Maphosa represented Dohne at the pre-arbitration meeting. As reflected by the minutes, there was no suggestion that Mr Maphosa intended seeking a (further) postponement pending the appointment of new legal representation. On the contrary, various issues regarding the upcoming hearing were debated and discussed. So, for example, Unki argued that Dohne bore the onus and ought to begin. Mr Maphosa contested this and the Arbitrator ruled in favour of Dohne. Also, the parties agreed that they would exchange their lists of issues by 1 September 2017 for it to be in time for the hearing scheduled to commence on 4 September 2017. And on 29 August 2017, Mr Maphosa delivered Dohne's opening submissions (which he authored).

[28]. However, on 1 September 2017, Mr Maphosa confirmed, in an email, that Dohne had failed to pay the required deposit for the Arbitrator's fees and that the arbitration was thus, as he put it, 'cancelled'. In the same e-mail, he confirmed that Dohne had been preparing for the arbitration scheduled to proceed on 4 September 2017. He also separately provided a power of attorney indicating that he (along with a Mr Mukaro) were authorised to represent Dohne.

[29]. It is against this factual backdrop that the other grounds on which the perceived bias is claimed, should be considered. And from which, in my view, it is clear that there is no merit in any of these bases on which bias is claimed. It is clear from the foregoing that the scheduled hearing could not proceed because of Dohne's failure to pay its share of the deposit required by AFSA. The parties nevertheless convened on 4 September 2017 to consider issues relating to costs. Mr Maphosa attended this meeting. Unki Mines sought its wasted costs and made an application for security for costs in relation to Dohne's counter-claim. This application for security for costs was not the same as the one instituted on 6 November 2016. The circumstances under which it was brought, were clearly different and there is, in the circumstances, nothing to be made of the fact that the Arbitrator granted an application for security for costs, despite previously dismissing an application for security for costs. Importantly, Dohne's previous attorneys of record withdrew (on 16 August 2017) because they were not paid for their services and it failed to pay the required AFSA deposit by 31 August 2017. All of this justified the application for security for costs and the Arbitrator granting such application.

[30]. As submitted on behalf of Unki Mines, there was nothing untoward about a costs order against the party that was seeking the postponement. There is absolutely no merit in the submission by Dohne that, whilst the Arbitrator should have entertained the request for a postponement, all other matters ought to have been held over pending the appointment of legal representation. Similarly, there was nothing untoward about the order directing Dohne to set security for costs, given the circumstances of the second postponement as set out above. Simply put, the Arbitrator was not constrained to consider the interests of one party (Dohne Construction) only and the fact that measures were put in place – the security for costs – at the behest of Unki Mines, does not indicate bias against the applicant.

[31]. Unki Mines submitted that the directive issued by the Arbitrator on 4 September 2017 illustrated an even-handed and balanced approach on his part. I find myself in agreement with this submission. On the one hand, the Arbitrator was being sensitive to Dohne's position (being legally unrepresented),

and who was the one seeking an indulgence in the form of a postponement, and on the other hand, protecting the legitimate interests of Unki Mines, who was ready to proceed with the hearing of the arbitration. Importantly, Mr Maphosa (at the time) had no difficulty with the 4 September 2017 directive, as is demonstrated by his 5 September 2017 response to Unki Mines' e-mail regarding the taxation process (as directed by the Arbitrator in the 4 September 2017 directive).

[32]. As regards the averment that the Arbitrator, in formulating and issuing his 'procedural directive' of 4 September 2017, was being 'blindly led' by the legal representatives of Unki Mines, I am of the view that this complaint has no merit. By all accounts, when it was pointed out to the Arbitrator that Dohne's counter-claim should also be set down, he agreed and as a fact, neither Dohne nor its counter-claim have been excluded. The actions of the Arbitrator cannot possibly be those of a biased adjudicator. The same applies to the nonsensical suggestion by Dohne Construction – on the basis of flimsy inferences – that the Arbitrator was 'being coy' about his notes.

[33]. For all of these reasons, and applying the above principles relating to perceived bias on the part of an Arbitrator, I am of the view that Dohne Construction failed to demonstrate good cause to have set aside the appointment of the Arbitrator. It failed to make out a case for a reasonable apprehension of bias – far from it. The case of Dohne amounts to nothing more than mere conjecture, speculation and allegations dealt with in vague terms, when clear evidence was required. It brings to mind what was held, as follows, by Nugent JA in *AllPay Consolidated Investment Holdings (Pty) Ltd & others v CEO, South African Social Security Agency & Others*⁵: -

'Whatever place mere suspicion of malfeasance or moral turpitude might have in other discourse, it has no place in the courts – neither in the evidence, nor in the atmosphere in which cases are conducted. It is unfair, if not improper, to impute malfeasance or moral turpitude by innuendo and suggestion. A litigant who alleges such conduct must do so openly and forthrightly so as to allow the person accused a fair opportunity to respond. It is also prejudicial to the judicial process if cases are adjudicated with innuendo and suggestion hovering in the air

⁵ *AllPay Consolidated Investment Holdings (Pty) Ltd & others v CEO, South African Social Security Agency & Others* 2013 (4) SA 557 (SCA) at [4];

without the allegations being clearly articulated. Confidence in the process is built on transparency and that calls for the grounds upon which cases are argued and decided to be openly ventilated.'

[34]. One more issue remains, which requires my attention. That relates to a supplementary affidavit filed by Dohne Construction literally at the eleventh hour, on 12 August 2022 – one business day prior to the date on which the opposed application was to be heard. At the hearing of the application on 16 August 2022, Dohne applied for leave to file the said affidavit, which, so it alleges, has as its purpose the setting out of additional facts, which had only recently come to their attention, regarding the 'intimate association' between the Arbitrator and the legal representatives of the Unki Mines.

[35]. In Unki's 'supplementary affidavit', deposed to by their attorney of record, it is pointed out that the so called 'additional facts' could not possibly have come to the attention of Dohne only 'recently'. Firstly, so Unki averred, the supposed new facts related to a Webinar invitation in respect of an event, which was to be co-hosted by AFSA and the legal representatives on 16 November 2021, which probably would have come to the attention of Dohne long before August 2022. Secondly, and more tellingly is the fact that in her written Heads of Argument, which were filed on or about 20 April 2022, Ms Humphries states the following: - 'The Applicant also relies on a subsequent event that took place in November 2021 in terms of which the Second Respondent's legal team did a presentation for the International Division of AFSA, of which the First Respondent is the head. Argument on this issue is not included herein but will be addressed in supplementary heads and a supplementary affidavit to the extent that same is allowed by the Honourable Court.'

[36]. From the foregoing, it is clear that the facts contained in the supplementary affidavit undoubtedly did not come to the attention of Dohne shortly before the said affidavit was filed, but at least some three months prior. Dohne was therefore being disingenuous in claiming that they received the information belatedly. I agree with the submission made on behalf of Unki Mines that the deponent to Dohne's supplementary affidavit was plainly being dishonest as far as this aspect is concerned. For this reason alone, the application for leave to file the supplementary affidavit should be refused.

[37]. Even if Dohne was to be granted leave to file the said supplementary affidavit rather belatedly, it would make little difference to the outcome of this application for the simple reason that, even on their own version contained in the said affidavit, the so called 'intimate association' between the Arbitrator and the legal representatives of Unki is not demonstrated. As rightly contended by Unki, the basis of Dohne's complaint amounts entirely to misguided conjecture to the effect that – simply because the Arbitrator is head of AFSA's international division – he necessarily had several 'interactions' and 'discussions' with the legal representatives of Unki. This, to my mind, appears to be a continuation by Dohne in that vein of its litigation by innuendoes and vague suggestions with very little, if any, concrete evidence in support of its allegations.

[38]. In any event, Unki denies these allegations and state that they 'are simply wrong as a matter of fact, and the assumptions are misguided'. Their attorney confirms that she did not have a single invitation, 'discussion' or 'interaction' with the Arbitrator in the lead up to, or in the conduct of the relevant webinar, whether during September 2021, October 2021, November 2021 or at any other time.

[39]. That sounded the death knell for the point that the Arbitrator is reasonably perceived to be biased in favour of Unki against Dohne because of his 'intimate association' with Unki's legal representatives.

[40]. For all of these reasons, I am of the view that the applicant's application falls to be dismissed.

Costs

[41]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so.

[42]. *In casu*, I can think of no reason why I should deviate from this general rule and I therefore intend awarding costs in favour of Unki Mines against Dohne Construction. In that regard, Mr Daniels urged me to grant punitive costs

on the attorney and client scale. I am not persuaded that a case was made out for such a punitive costs order.

Order

Accordingly, I make the following order: -

- (1) The applicant's application for leave to file a supplementary affidavit is refused with costs.
- (2) The applicant's application is dismissed with costs, such costs to include the second respondent's costs consequent upon the employment of Senior Counsel.

L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	16 th August 2022
JUDGMENT DATE:	7 th December 2022 – judgment handed down electronically
FOR THE APPLICANT:	Advocate Chantelle Humphries
INSTRUCTED BY:	Nourse Incorporated, Randpark Ridge, Randburg
FOR THE FIRST RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance
FOR THE SECOND RESPONDENT:	Advocate A J Daniels SC
INSTRUCTED BY:	Allen & Overy LLP, Sandton