REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 58/12

In the matter between:

SASOL INFRACHEM **Appellant**

and

SEFAFE DANIEL **First Respondent**

NATIONAL BARGAINING COUNCIL

FOR THE CHEMICAL INDUSTRY **Second Respondent**

SINGH ASHMINI **Third Respondent**

Heard: **14 May 2014**

Delivered: **21 October 2014**

Summary: Review of arbitration award- Condonation for the late filing of record granted. Reasonable apprehension of bias- arbitrator failing to disclose business interests with employer and recuse herself from the arbitration proceedings. Test of reasonable apprehension of bias restated. Two stage inquiry into whether arbitrator bias in not disclosing his/her interests in one party. Arbitrator should first enquire whether to disclose his/her interests with one of the parties. The second leg of enquiry is whether a reasonable, objective and informed person would on the facts reasonably apprehend bias. Evidence showing that arbitrator shareholder of a company doing business with appellant- a reasonable litigant would reasonably apprehend bias on the part of the arbitrator - failing to disclose such relationship and recuse herself

from the proceedings vitiated the entire proceedings before her- Labour Court's Judgment upheld. Appeal dismissed with costs.

CORAM: TLALETSI DJP, MOLEMELA *et* COPPIN AJJA

JUDGMENT

COPPIN AJA

[1] This is an appeal against the judgment and order of the Labour Court ("*Boda AJ*"), in terms of which an award of the third respondent ("*the arbitrator*"), acting under the auspices of the second respondent, was set aside in its entirety and the matter was referred back to the second respondent for a fresh hearing before a different arbitrator. The Labour Court granted the appellant leave to appeal to this Court.

[2] Besides an issue of condonation, the merits of the appeal essentially turns on whether the Labour Court correctly found that the arbitrator had failed to disclose a business relationship with the appellant and whether the Labour Court was correct in setting aside the award in its entirety on the basis of the facts concerning the relationship which the arbitrator disclosed in an affidavit placed before the Labour Court and by referring the matter to the second respondent for a fresh hearing.

[3] I shall first set out the background, then deal with the issue of condonation and lastly with the merits.

Background

[4] The first respondent was employed as a Crime Control Officer by the appellant. His duties entailed, *inter alia,* the investigation of and the prevention of crimes on the premises of the appellant. He had, approximately, 22 years of service at the time of his dismissal by the appellant, following upon a disciplinary enquiry on or about 22 March 2007, where he was charged and found guilty of neglecting to perform his duties as crime control officer, more particularly, for failing to respond promptly to an armed robbery that had taken place at the appellant's premises on 6 February 2007.

[5] The first respondent challenged his dismissal and the matter was referred to the second respondent for resolution. There, the first respondent contended that his dismissal by the appellant was both procedurally and substantively unfair.

[6] The third respondent ("the arbitrator") was appointed to arbitrate the unfair dismissal dispute between the appellant and the first respondent. At the conclusion of the arbitration, the arbitrator found in her award that the first respondent's dismissal was substantively fair and "procedurally fair, save for the fact" that the Chairperson of the Disciplinary Enquiry "at times" prevented the first respondent from "properly cross-examining certain witnesses and putting his version forward". The arbitrator, effectively, confirmed the dismissal, but awarded the first respondent compensation equivalent to one month's salary (that is about R11 776,28, less tax deductions) for the procedural unfairness, further recorded that "*the Chairperson did not act in a biased manner*" and made no costs order.

[7] Unhappy with this outcome at the arbitration, the first respondent brought an application in the Labour Court to review and set aside the arbitration proceedings and the arbitrator's award. In an affidavit supplementing his founding papers in the review application, the first respondent contended, *inter alia*, that it has since come to his knowledge that a certain company PAS Automation Services (Pty) Ltd ("*PAS*") was a preferred contractor of the appellant; that it was owned by the arbitrator's husband and that the arbitrator conducted her consulting services business from the same premises as PAS. The first respondent averred that these facts were not disclosed by the arbitrator and were not known to him at the time of the arbitration. He contended that the third respondent should have disclosed the facts linking her to the appellant and should have recused herself and not presided as arbitrator in his matter, because of the closeness of the relationship between herself and the appellant which gave rise to a reasonable apprehension of bias.

[8] When the matter initially came before the Labour Court and this point was raised, the arbitrator was given an opportunity by the court to respond to the

allegations of non-disclosure and reasonable apprehension of bias. Consequently, the arbitrator delivered an affidavit in which she gave details of the link between herself and PAS and the link between the latter and the appellant.

[9] Having considered the facts, the law and the submissions of the appellant and the first respondent, the Labour Court concluded that the arbitrator ought to have made disclosure of the facts at the outset of the arbitration. In essence, the Labour Court also found that a reasonable apprehension of bias on the part of the arbitrator had been shown; went on to declare the arbitration proceedings "*null and void*" and further ordered that the arbitration be conducted afresh before another arbitrator. The parties were ordered to pay their own costs.

[10] The appellant sought leave to appeal to this Court against the Labour Court's order. It was, *inter alia*, contended that the Labour Court erred in finding that the arbitrator had to disclose the link between herself and PAS and between the latter and the appellant; and further, in finding that a reasonable apprehension of bias on the part of the arbitrator had been proved. It also disputed the finding that the arbitrator had interests that required disclosure and contended that even if there had been a failure to disclose, this did not automatically result in a reasonable apprehension of bias. The appellant contended that the Labour Court had, accordingly, wrongfully set aside the arbitration proceedings and the arbitrator's award.

[11] The Labour Court commented in its judgment granting the appellant leave to appeal to this Court, that as the case was "*a difficult one, especially because of the mixture of the facts, some favouring one party, some favouring another …*", it was in the interests of justice to grant leave to appeal. The costs of the application for leave to appeal were ordered to be costs in the cause. The order granting leave to appeal was handed down on about 12 October 2012.

Condonation

[12] At the outset of the appeal hearing, the appellant applied in terms of a written application for condonation for the late service and filing of the appeal record. The application was opposed by the first respondent.

[13] It is not disputed that the Labour Court had handed down its order granting the appellant leave to appeal on 12 October 2012 and that, the record had to be lodged within 60 days of that date in terms of Rule 5(8) of this Court. The record of proceedings, accordingly, had to be lodged by the appellant on or about 4 January 2013. However, the appellant only lodged the record on 24 June 2013, which is about 115 days later

[14] In terms of Rule 5(17) of this Court, if the appellant fails to lodge the record within the prescribed period, the appellant will be deemed to have withdrawn the appeal, unless the appellant has within that period applied to the respondent, or to the respondent's representative, to consent to an extension of the time period and such consent had been given. If the consent is refused, the appellant may by notice of motion supported by affidavit, which had also been delivered to the respondent, apply to the Judge President in chambers for an extension of the time.

[15] It was not disputed that the appellant did not apply to the respondent or to the respondent's representative within the prescribed period for an extension of the period for the lodging of the appeal record, and did not apply to the Judge President in chambers within that period for an extension of the time within which to lodge the record as contemplated in Rule 5(17). It is only on 15 April 2013, about 67 court days after the prescribed period had expired, that the appellant, in a letter to the respondent's attorney, sought consent for the extension of the period for the lodgement of the appeal record. The first respondent's attorney, by letter dated 17 April 2013, informed the appellant's attorneys that such consent was refused.

[16] The application for condonation, which the appellant consequently launched, was issued and served on the first respondent's attorneys on or about 25 June 2013. This was 116 court days after the prescribed period and more

than two months after the respondent (or his attorneys) had refused to consent to an extension of the prescribed period.

[17] Notwithstanding the provisions of Rule 5(17), this Court is empowered in terms of Rule 12(1) to hear and determine a condonation application for the late filing of the record. The rule provides that this Court may for "*sufficient cause shown*" excuse the parties from compliance with any of its rules.

[18] The factors to be taken into account when considering an application for condonation are trite.[1] In *Melane v Santam Insurance Co Ltd,*[2] it was stated:

> '*…the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, in essence, it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation thereof, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. The respondent's interest in finality must not be overlooked.*'

[19] Ms Mohsina Chenia of Cliffe Dekker Hofmeyr Inc is the deponent to the appellant's founding affidavit in the condonation application. She advances the reasons for the delay. At the time the notice of appeal in this matter was served, she was representing the appellant but was then employed at a different firm of attorneys, namely Glen Marais Inc. She was employed at the latter firm until the end of February 2013 and only joined Cliffe Dekker Hofmeyr Inc as Director after that.

[1] See *Motloi v SA Local Government Association* [2006] 3 BLLR 264 (LAC).
[2] 1962 (4) SA 531 (A) at 532C-E.

[20] Ms Chenia explains that on 5 November 2012, her secretary at Glen Marais Inc had sent correspondence which she had not seen or approved of to the representative of the appellant informing the appellant that the next step in the appeal process was to await a directive from the Labour Court with regard to the filing of heads of argument and the hearing of the appeal. The advice to the appellant was incorrect because the record still had to be compiled. Ms Chenia mentions that on 16 November 2012, a further letter was sent to the first respondent's legal representatives without her knowledge and consent informing them that the appellant was awaiting a directive from the Labour Court. Ms Chenia was also unaware that her secretary at Glen Marais Attorneys had diarised the matter accordingly i.e. erroneously on the basis that a directive from the Labour Court was being awaited.

[21] Ms Chenia explains that during January 2013, she was on leave and acted in the Labour Court. After that she and her team were busy preparing to move from Glen Marais Inc to join Cliffe Dekker Hofmeyr Inc. The move was marked by delays and much turmoil. It was only by about 22 February 2013 that she and her team managed to move the majority of their files over to Cliffe Dekker Hofmeyr Inc. It was an arduous process to establish which files had to remain with Glen Marais Inc and which ones had to be transferred to Cliffe Dekker Hofmeyr Inc. The process involved some 200 files and she believes that the file in this matter had remained in storage.

[22] It was only on 26 March 2013, after the first respondent had sent a letter to the second respondent informing it that the appellant had failed to comply with Rule 5(17) of this Court and asking the second respondent to set the matter down for arbitration, that she became aware of the true state of affairs pertaining to this appeal. She realised that the record had not been attended to and urgently arranged for the compilation of the record. The contents of the file in the matter were sent to the transcribers on 5 April 2013, as soon as it had been uplifted, with a request that the record be compiled urgently.

[23] Ms Chenia avers that on 15 April, she sent a letter to the first respondent's attorneys of record in which she explained the situation and requested an indulgence. A response from the first respondent's attorneys was received on

17 April 2013 in which they refused to grant an indulgence to the appellant. The compilation of the record took some time. Various enquiries were made by her secretary regarding progress with the compilation of the record. She furnishes details of the dates and the measures that were employed to secure the record. By 17 May 2013, the transcribers were still requesting various documents from Ms Chenia for the compilation of the record. On 24 May 2013, more documents were requested, which were dispatched to the transcribers on 27 May 2013.

[24] In the meantime, the first respondent attempted to set the matter down for arbitration. From 27 May 2013 there were several more requests by the transcribers for various documents that were responded to. According to Ms Chenia, the location and retrieval of documents were difficult. On 3 June, the transcribers informed Ms Chenia's office that the record was being processed. Payment for the preparation of the record entailed another delay. After payment was effected on 14 June 2013, the record was ready to be collected and was collected from the transcribers late in the afternoon of that day and was only given to Ms Chenia's secretary on 18 June 2013. The application for condonation could not be finalised on 18 June 2013 due to Ms Chenia being ill and was only finalised on 21 June 2013.

[25] Ms Chenia avers further that the first respondent would not be prejudiced if condonation for the late filing of the record is granted. She disavowes any dilatoriness and ascribes the delay in the filing to "an extremely unfortunate administrative error" by her former secretary at Glen Marais Inc and to the move of her department from those attorneys. She contends that unless the appeal is reinstated, the prejudice to the appellant would be substantial. She mentions that the initial award in this matter, which was the subject of the review in the Labour Court, had already been handed down in April 2008 and that "the attendance to a further arbitration at this stage will negatively impact on the appellant's case and the same witnesses are no longer available".

[26] The first respondent contends that the appellant and its attorneys are the sole authors of the situation they find themselves in. The delay was entirely of their making and not due to anything that the first respondent, or his attorneys, did.

On behalf of the first respondent, it was submitted that a substantial portion of the delay for the period (57 court days), was solely due to the appellant's attorneys' negligence. It was also pointed out that even after becoming aware (on her own version) on 17 March 2013 of the need for condonation, Ms Chenia only requested an indulgence from the first respondent's attorneys on 15 April 2013, almost a month later.

[27] With reference to decisions dealing with attorneys' negligence in the context of applications for condonation, such as in *Saloojee and Another v Minister of Community Development;*[3] *Waverley Blankets Ltd v Ndima and Others; Waverley Blankets Ltd v Sithukuza and Others;*[4] *Superb Meat Supply CC v Maritz*[5] and *Queenstown Fuel Distributors CC v Labuschagne NO and Others,*[6] it was submitted on behalf of the first respondent that the appellant should not be excused for its attorneys' negligence and that the attorneys' explanation for the delay was not compelling and adequate. Therefore, so it was argued, condonation ought to be refused.

[28] In my view, there is merit in the first respondent's submissions concerning the appellant's reasons for the delay. The delay was relatively long. There was arguably laxity in getting the matter ready for appeal and some negligence on the part of the appellant's attorneys' administrative staff. However, I am of the view that there are some redeeming features. The position Ms Chenia found herself in is not so inexcusable that condonation should be refused despite the blamelessness of the appellant. In any event, the reason for the delay is also not the only factor to be considered.

[29] The first respondent's representative also submitted that the appellant had no prospects of success on appeal. In light of my view of the importance of the issues of bias and recusal that are raised crisply in this appeal, and in the interests of the finality of the matter, I do not consider the prospects to be decisive of the issue of condonation either. The explanation for the delay was not wholly unreasonable and the issues raised in the merits of the appeal are

[3] 1965 (2) SA 135 (A) at 141B-H.
[4] (1999) 20 ILJ 2564 (LAC) para 10.
[5] (2004) 25 ILJ 96 (LAC) para 16.
[6] (2000) 21 ILJ 166 (LAC) at 174E-F.

important. Condoning the late filing of the record would not in my view prejudice the first respondent if the merits were dealt with and finalised. I consider it in the interests of justice that condonation be granted for the late lodging of the record. The first respondent's opposition to the application was not unreasonable and the appellant is seeking an indulgence. In light of the conclusion on the merits, it is fair for the costs of the condonation application to be costs in the appeal.

The merits

[30] The arbitrator, a non-practising attorney, at the invitation of the Labour Court, filed an affidavit giving details of her relationship with PAS and the latter's relationship with the appellant. A part of the affidavit is repeated in the judgment of the court *a quo*. I quote here for convenience the relevant part of the affidavit. It states *inter alia*:

> '*6. In essence the applicant alleges that by virtue of the fact that my husband conducts work for Sasol and that my husband and I share offices and that I therefore have a conflict of interest when presiding as an arbitrator in matters in which Sasol or one of its subsidiaries of affiliates are a litigant.*
>
> *7. The applicant alleges that my husband and I have a common interest in the business that we pursue separately for the purposes of our family and that the downfall of one party may well be the downfall of the other. As such, the applicant alleges that my husband and I will necessary pool our resources to maximum our joint profit for the benefit of the common family. As a result the distinction between my husband (an engineer) and myself (an attorney acting as arbitrator) becomes blurred and creates a perception that our interests are one and the same thing. In my view there is no merit whatsoever to the allegations against me or the inferences which the applicant seeks to draw. However, I am advised that I am merely required to place all relevant information before the court and the court will reach a decision as to the allegations of bias against me.*
>
> *8. I obtained my LLB degree from the University of Natal in 1995. I completed articles and the Attorneys' Admission Exams and was admitted in Gauteng during early 1998 as practising attorney.*

9. I practised as a professional assistant with the firm Mollenaar and Griffiths Inc in Sasolburg, Free State from January 1998 to July 1999. In August 1999 I started a Labour Law Consulting Service and I practised in a close corporation Ashmini Singh Consulting Services CC.

10. Since September 1999 I have been registered as an accredited Level B part-time Commissioner in the Free State Division of the CCMA and later promoted to Level A. Between September 2002 and 2009 I was registered as a Level A part-time Commissioner in the Free State Division of the South African Local Government Bargaining Council.

11. From September 2002 until 2010 I was registered as a Level A part-time Commissioner for the National Bargaining Council for the Chemical Industry in Free State and Gauteng. The NBCCI is the second respondent in the review application.

12. In 2010 my private consulting work grew to such an extent that I was unable to act as arbitrator on any kind of regular basis. To my recollection I only handled three to four matters for the NBCCI during 2010.

13. During 2011 I performed no work whatsoever for the NBCCI or SALGBC. My current work consists primarily of chairing private disciplinary enquiries.

14. I am married out of community of property to Mr Nirmal Narotam. I have been married for 16 years. My husband is an engineer by profession and since 2005 has conducted a business, PAS Automation Services (Pty) Ltd. PAS Automation Services is an engineering company. It is part of a global organisation PAS that provides highly specialised software and services to various large refineries and similar large industrial corporations throughout the world. My husband's company conducts work for Sasol, Eskom, Engen, Natref and various other large international companies, like Total, Saudi Aramco, Excon Mobile, Kuwait National Petroleum.

15. I helped my husband to start the business by providing start up capital and as such I am a 50% shareholder in the business and was appointed Legal Director. I have no involvement other than that in the business as I am not at all qualified in the engineering profession. I may for all practical purposes be termed a silent partner.

16. My husband's business and my consultancy share offices in Sasolburg for the purposes of saving costs. My consultancy occupies 15% of the floor space and the receptionist is shared. Other than this, we have nothing to do with each other's businesses.

17. PAS Automation Services is contracted to Sasol and provides software and specialist process alarm management services to it. To the best of my knowledge PAS is the only business of its kind offering specialised alarm management services in South Africa. I am advised by my husband (who deposes to a confirmatory affidavit hereto) that procurement decisions are driven by engineering staff typical from the Sasol Technology Department. The procurement decisions are driven by the actual requirements and there are very strict international specifications on process safety that have to be conformed to. Failure to adhere to these specifications could lead to severe loss of life and/or damage to expensive plant equipment. Accordingly decisions regarding procurement are not in any way influenced by other factors such as whether an arbitrator with some link to the company has made a ruling in some arbitration.

18. It is a fact of life that Sasol and that surrounding towns such as Vanderbijlpark are by and large dominated by Sasol which employs tens of thousands of people in the area and is by far the largest employer in the area.

19. It is therefore inevitable that many of the matters which come before the NBCCI in the Free State involve Sasol or one of its affiliates or subsidiaries.

20. During the years as an arbitrator with the NBCCI I presided over many arbitrations involving Sasol. I have never been influenced in any way by the fact that my husband's company provides services to Sasol and that we share premises or that we are married. I have on numerous occasions ruled against Sasol in arbitration.

21. As an example in arbitration award under FSCHEM 4757 issued on 6 April 2009 in the matter between Mr J J Rantili and Sasol Infrachem in which I found that the sanction of dismissal was too harsh and I ordered Infrachem to reinstate the employee into his employment. As appears from the award that

Mr Seleke of Majavu Inc, the applicant's attorneys in the present matter appeared for the applicant in that matter.

22. On numerous other instances I have presided over arbitrations in which Sasol was a party in which I have ruled against Sasol. The fact that my husband had a business relationship with Sasol has never had any influence whatsoever on me.

23. I have never seen the need to disclose to the parties the fact that I am married to a person whose company provides services to Sasol and with whom my consultancy shares office space.

24. I am not aware that these facts give rise to any duty to disclose or any reasonable perception of bias on the part of a litigant.'

[31] The court *a quo*, having considered the affidavit, submissions and the law, including the decisions in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* ("*the SARFU case*"),[7] *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No 2),*[8] *Bernert v Absa Bank Ltd*[9] *and Ndimeni v Meeg Bank Ltd* (*Bank of Transkei*),[10] held:

'*[30] On a balance, it is my view that the arbitrator should have made disclosure. I say so for the following reasons:*

30.1 First, as pointed out in Bernert, the failure to disclose, is not on its own decisive but may lead to an inference in all the circumstances. I remain uncomfortable with the Arbitrator's decision not to disclose the facts. In my view, a reasonable Arbitrator would have disclosed the association. Had the Arbitrator disclosed these facts, it may have been difficult for the applicant to persist with the claim that there is a reasonable perception of bias. The non-disclosure leads me to draw an inference in favour of the Applicant.

30.2 Secondly, the Labour Court must be satisfied that the party has had a right to a fair trial. I cannot, on the facts before me, conclude that the

[7] 1999 (7) BLLR 725 (CC).
[8] [1999] 1 All ER 577 (HL).
[9] 2011 (3) SA 92 (CC).
[10] 2011 (1) SA 560 (SCA).

Applicant's perception that he did not have a fair trial, is unreasonable. I cannot fault the Applicant for being left with the impression that the Arbitrator did not disclose the facts in order to hide the interest, despite the fact that I have no difficulty in accepting the arbitrator's bona fide. The test is not actual bias. The test is whether there is a reasonable perception of bias.

30.3 Thirdly, the Arbitrator was not only a shareholder of a major contractor of Sasol, but she was also a director of the contractor. As a director, she would owe fiduciary duties to the Company and she would have to ensure that she acts in its best interests. There is a real possibility that these interests could clash with the duties of the Arbitrator. This was all the more reason for the Arbitrator to make disclosure.

30.4 Fourthly, the Arbitrator was closely associated on a day-to-day basis with the contractor, not only because of her shareholding and the husband's shareholding, but also because she shared premises from which she obtained a financial benefit in a private practice. This strengthens the Applicant's perception.

30.5 Fifthly, the First Respondent is a major player in the industry and a significant player in the bargaining council. This is all the more reason why it was necessary in my view for the Arbitrator to make appropriate disclosures upfront. I accept that she was bona fide but she erred in not doing so.

30.6 Finally, the fact that the Arbitrator had previously found against Sasol demonstrates that she did not have actual bias. Her non-disclosure, however, still led to a reasonable perception of bias. Similarly, the fact that the Arbitrator was not actually influenced by the association, again demonstrates that there was no actual bias. It does not take away the reasonable perception of bias. The fact that the Arbitrator found against Sasol on procedure is not decisive. Again, the Applicant has a reasonable perception that, but for the association, another Arbitrator may have awarded him much more.

[31] Accordingly, I prefer to err on the side of caution. I find that the feared deviation from impartial adjudication of the case, which is held by the Applicant, is a reasonable one.'

[32] The court *a quo* then concluded by finding that the proceedings before the arbitrator were null and void and ordered that the arbitration should be conducted afresh before another arbitrator.

[33] The Labour Court thus found that the arbitrator had a duty to disclose a link with the appellant through the business that she co-owned with her husband and was also director of; that given all the relevant facts and circumstances, the first respondent has shown a reasonable apprehension of bias. Without having specifically articulated it, the court *a quo*, seemingly, implicitly also found that enough had been shown for the arbitrator to have recused herself and that the proceedings before her were accordingly a nullity.

[34] The arguments of the appellant on appeal in respect of the merits were, essentially, the following. The court *a quo* erred in finding that the arbitrator had a duty to make the disclosure. In that regard the court *a quo* erred in its application of the decision in *Bernert* and did not properly consider its effect. The court *a quo* also erred in its conclusion for failing to give any or sufficient weight to the affidavit submitted by the arbitrator, which the court *a quo* described as "*frank and forthright*", and in which, she, *inter alia*, states that she genuinely and in good faith did not believe that she had a duty to make the disclosure and that she had previously arbitrated in matters where the appellant was a party and had found against it.

[35] It was further submitted on behalf of the appellant that this matter should be distinguished from the facts in *Ndimeni,* because there, the Bank conceded that the acting judge ought to have disclosed his interest which was not the case here and further that it was clear from the arbitrator's affidavit that there was no commercial or other potentially prejudicial relationship between the arbitrator and the appellant. It was submitted that the fact that the arbitrator's husband does work for the appellant "*only in circumstances where his company meets stringent safety requirements cannot…be considered to constitute a commercial or other relevant interest for the purposes of bias*".

[36] It was also submitted on behalf of the appellant that the arbitrator "*based her decision not to disclose her alleged interests on the absence of the*

connection between her husband's success in his relationship and tendering" to the appellant on the one hand, and "*her decision-making vis-à-vis the appellant on the other*"; that her decisions as arbitrator "*were made completely independently and could not have had any impact upon her husband's business relationship*" with the appellant; that the court *a quo* erred in finding a reasonable apprehension of bias despite the fact that the arbitrator "*clearly applied her mind to the relationship between her, her husband's business and the* [appellant] *before genuinely and in good faith determining that disclosure was not necessary*". It was thus argued that in those circumstances "*a reasonable apprehension or bias ought not to exist*".

[37] Counsel for the appellant submitted further in argument before us at the appeal hearing and apparently "*off-the-cuff*", that if this Court were to uphold the court ***a quo's*** findings regarding reasonable apprehension of bias then this Court should, nevertheless, set aside the Labour Court's finding that the entire proceedings before the arbitrator were null and void and refer the matter back to the Labour Court for it to consider the other grounds of review that were raised by the first respondent in his application for review. Since this latter argument was entirely new, the parties were given an opportunity to file supplementary notes of argument in respect of it.

[38] In its supplementary note, the appellant submits that the first respondent's establishment of bias on the part of the arbitrator does not necessarily vitiate the entire arbitration proceedings and relied for this submission on a *dictum* in *SARFU*[11] where it was stated (in the context of the facts of that case) that: "*If the allegation of bias is established it does not necessarily mean that the entire proceedings will be vitiated.*"

The appellant also referred in support of this argument to the decisions in *Rondalia Versekeringskorporasie van Suid-Afrika Bpk v Lira*[12] and *S v Rall.*[13] It was submitted that those cases provided examples of situations where proceedings were not vitiated in their entirety even where bias was found.

[11] See para 42.
[12] 1971 (2) SA 586 (A).
[13] 1982 (1) SA 828 (A).

According to this argument, the approach that ought to be adopted in this case is that which was adopted in *Rondalia,* where the court did not rely on the evaluation of the evidence of the trial judge, but decided to reach a decision on the papers, because, according to the court in that case, the probabilities, apart from the impression which the witnesses made in the witness box, were sufficient and satisfactory to determine which evidence was acceptable.

[39] It was further argued on behalf of the appellant, that *Rondalia* and *SARFU* were referred to by the Supreme Court of Appeal in *Ndimeni,* where it was stated *inter alia*:

> '*It is indeed so that the fact that an allegation of bias might be established does not necessarily mean that the entire proceedings will be vitiated.*'

Furthermore, it was submitted that even though the facts of the present case are different from those in *SARFU, Rondalia, Rall* and *Ndimeni*, those cases are not distinguishable from the present. According to this argument "*provided that the reasonableness of the decision of the arbitrator can be tested against the reasonable commissioner test by the court a quo, which, given the comprehensiveness of the record it is submitted it can be, the first respondent's right to have applied for the recusal of the commissioner is not abrogated, the more so where the court a quo is fully aware of the facts and circumstances surrounding the failure of the arbitrator to disclose her interests*". In elaboration of this latter point, it was submitted on behalf of the appellant that the reasonable test laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[14] which was expounded in *Herholdt v Nedbank*[15] and *Gold Fields Mining (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others,*[16] "*by its very nature promotes an analysis which removes the Commissioner who heard the matter from the consideration of the evidence and looks to the notional reasonable commissioner to determine if the decision reached was a reasonable one in the light of all the evidence.*" This, according to the

[14] [2007] 12 BLLR 1097 (CC).
[15] (2013) 34 ILJ 2795 (SCA).
[16] (2014) 35 ILJ 943 (LAC).

argument, provided the first respondent with sufficient protection against "*perceived bias and illustrates that his rights in this regard cannot be abrogated by the court a quo considering the merits of the matter*". The appellant submitted that this Court should, therefore, in the exercise of its powers under section 174(a) of the LRA, refer the matter back to the Labour Court for it to deal with the other grounds of review.

[40] In respect of the merits, and particularly on the point of bias, the following was submitted on behalf of the first respondent. It is evident from the common cause facts that the arbitrator had a direct and substantial financial interest in the relationship between PAS, of which she was part owner, and the appellant; that the court *a quo* correctly held that the arbitrator's failure to disclose facts, necessitated her recusal on the grounds of a reasonable apprehension of bias. Reference was made to what was said in *Monnig and Others v Council of Review and Others*[17] and in *S v Roberts*[18] in respect of the test for bias. Reference was also made to the facts in *Ndimeni* and *Benert* and it was submitted that there were similarities between the facts in *Ndimeni* and the facts of this case.

[41] In the first respondent's supplementary note, it was submitted that the appellant's argument, that a finding of bias should not result in a vitiation of the entire arbitration proceedings, should be rejected for several reasons. There are material differences between the facts in this case and those in *Rondalia* and *Rall*. Firstly, in both those cases, the appeal court was able to cure the irregularity committed by the court of first instance by exercising its powers as appeal court and substituting the findings of the lower court with findings of its own. It was not possible in this case. If the matter was to be referred back to the Labour Court, that court only has the powers of a reviewing court and may not liberally substitute the arbitrator's findings with its own. The decisions in *Sidumo, Herholdt* and *Gold Fields* do not change the position in that regard. Secondly, in *Rondalia* and *Rall,* the courts were dealing with forms of bias that were identified and were thus able to cure the irregularities committed by the lower court. In this case, there is no reliance on

[17] 1989 (4) SA 866 (C) at 879.
[18] 1999 (4) SA 915 (SCA).

actual acts of bias, or identifiable or clearly identifiable manifestations of it and it would be difficult, if not impossible, for the Labour Court to identify and eliminate or cure any irregularity occasioned by bias.

[42] In its supplementary note, the first respondent goes on to ask rhetorically how the Labour Court is supposed to "factor in" any reasonable and objective basis from which to question the arbitrator's partiality. The first respondent further refers to the decision in *BTR Industries SA (Pty) Ltd and Others v Metal and Allied Workers Union and Another*[19] where the Appellate Division stated: "*Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If a suspicion is reasonably apprehended, then that is the end of the matter.*"

[43] The first respondent further submitted that merely referring the matter back to the Labour Court to deal with the other grounds of review, after having found that a reasonable apprehension of bias has been established, would mean that the first respondent, who has a constitutional right to a fair hearing, has effectively been denied a remedy for the infringement of that right. According to this argument, referring the matter back to the Labour Court would therefore not be appropriate and ordering a fresh hearing was correct and supportive of the first respondent's constitutional right to a fair hearing from the outset.

The law

[44] The law and the duty of disclosure and recusal have been aptly summarised by Ngcobo CJ in *Bernert,* even though the Constitutional Court was dealing there with the position of a judicial officer and was not specifically dealing with a case of non-disclosure. The position pertaining to an arbitrator would in material respects be the same as that pertaining to a judicial officer, save that in the case of judicial officers there is a presumption of judicial independence.

[19] 1992 (3) SA 673 (A); (1992) 13 ILJ 803 (A) at 691F.

[45] Regarding the duty of disclosure, it was stated there:[20]

> '*The question which a judicial officer should subjectively ask himself or herself, therefore, is whether, having regard to his or her share, ownership or other interest in one of the litigants in proceedings, he or she can bring the necessary judicial dispassion to the issues in the case. If the answer to this question is in the negative, the judicial officer must, of his or her own accord, recuse himself or herself. If, on the other hand, the answer to the question is in the affirmative, the second question to ask is whether there is any basis for a reasonable apprehension of bias on the part of the parties, whether on the basis of an interest in the outcome of the case, interest in one of the litigants (by shareholding, family relations or otherwise) or attachment to the case. If the answer to this question is in the affirmative, the judicial officer must disclose his or her interest in the case, no matter how small or trivial that interest may be. And, in the event of any doubt, a judicial officer should err in favour of disclosure.*'

[46] Ngcobo CJ went on to state that the aforesaid was an established rule of practice and that disclosure gave the parties an opportunity to object to the judicial officer sitting, or of bringing to the judicial officer's attention some aspect of the matter which he or she might have overlooked. The Chief Justice went on to mention that the failure to disclose an interest, in itself, does not lead to a reasonable apprehension of bias, but may be relevant "only because it may be said to cast some evidentiary light on the ultimate question of reasonable apprehension of bias".[21]

[47] The arbitrator ought, therefore, to consider at the outset whether his or her interest in one of the litigants, however small or trivial such an interest might be, ought to be disclosed. If the interest is of a kind that would cause the arbitrator not to bring the necessary dispassion to the determination of the issues in the case, then the arbitrator must of his, or her, own accord recuse himself, or herself. If the interest is not of a kind which would prevent the arbitrator from bringing the necessary dispassion to the decision of the issues in the case then the arbitrator must, nevertheless, ask a second question,

[20] At p 111 para 63.
[21] See at p111 para 64, referring to what was said in that regard in *Ebener v Official Trustee* (2001) 205 CLR 337 (HCA) ([2000] HCA 63; 176 ALR 644; 75 ALJR 277) para 37.

namely whether there would be any basis for a reasonable apprehension of bias on the part of any of the parties because of the arbitrator's interest in the outcome of the case, or relationship to one of the litigants, whether it be through or by shareholding, family relations or any other kind of attachment to the case. If the answer to that question is in the affirmative, the arbitrator has to disclose that interest no matter how small it is. If the arbitrator has any doubt about whether to disclose the interest, he, or she, should err in favour of disclosure. At all times, an arbitrator should aim to prevent the consequences that might ensue if a reviewing or appeal court concludes that the arbitrator ought to have made the disclosure at the outset.

[48] The failure to disclose an interest in itself does not lead to a reasonable apprehension of bias. The test for bias is settled and it is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend bias.[22] The failure to disclose serves to cast "evidentiary light" on whether there is a reasonable apprehension of bias.

[49] On the question whether the entire proceedings are vitiated by bias, the principle to be deduced from the cases, including *SARFU, Ndimeni,* and others, is as follows. If it is held that the arbitrator, or the judicial officer, ought to have recused himself, or herself, at the outset then the entire proceedings before him or her are vitiated by the failure to recuse himself or herself. It has been held that continuing to sit in proceedings in which the presiding officer ought to have recused himself or herself at the outset, constitutes an irregularity for every minute of the proceedings in which the presiding officer or arbitrator continues to sit.[23] In *Ndimeni* the judge did not disclose his interest in one of the litigants. On appeal, the Supreme Court of Appeal held that he ought to have disclosed his interest and that his failure to do so was an irregularity. It was argued on behalf of the one party that the consequence of that conclusion was that the proceedings before the judge were a nullity. Counsel for the respondent, however, argued that since it was a labour matter which should be disposed of expeditiously, the Supreme Court of Appeal

[22] See *Bernert (supra)* at page 11 para 64 referring to what was said in the *Ebener* case (see previous footnote) at para 70.
[23] See *R v Milne and Erleigh* 1951 (1) SA 1 (A) at 6H, which was cited with approval in the *SARFU* case at 170 para 32.

should not set aside the proceedings of the trial court, but consider the merits of the appeal as it can be disposed of on the probabilities. The Supreme Court of Appeal, dismissing this argument, held that there was no reason "*why the appellants or litigants in labour disputes generally, should be denied a right to a fair trial, to which everyone else is entitled*. *In case where the judicial officer refuses to recuse himself or herself when he or she should in fact have done so, what occurs thereafter, i.e. the continuation of the proceedings, is a nullity*".[24] In support of the decision on that point, reference was made to what the Appellate Division had said on the matter in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service*[25] where, in turn, reference was made to what was held in *R v Milne and Erleigh,*[26] and, more particularly, in *Council of Review, South African Defence Force and Others v Monnig and Others*[27]*.* In the latter case, Corbett CJ, in dealing with a situation where officers, constituting a court martial, refused to recuse themselves, stated:

> '*What must be remembered is that in the present case we are concerned with the proceedings of what is in substance a court of law… If, as I have held, the court martial should have recused itself, it means that the trial which it conducted after the application for recusal had been dismissed should never have taken place at all. What occurred was a nullity. It was not, as in many of the cases quoted to us, an irregularity or series of irregularities committed by an otherwise competent tribunal. It was a tribunal that lacked competence from the start. The irregularity committed by proceeding with the trial was fundamental and irreparable. Accordingly there was no basis upon which the Council of Review could validate what had gone before. The only way the Council of Review could have cured the proceedings before the court martial would have been to set them aside.*'[28]

[50] In *Moch*, Hefer JA, applying what had been stated in *Monnig* to the facts in *Moch, said*: "*The reasoning in Monnig's case leads ineluctably to the*

[24] At para 24.
[25] 1996 (3) SA 1 (A) at 8J-9G and the cases cited there.
[26] See footnote 23.
[27] 1992 (3) SA 482 (A).
[28] At 495A-D.

conclusion that should it be found that Fine AJ ought to have recused himself, the proceedings in his court must be regarded as a nullity."[29]

[51] However, in other cases of bias, the proceedings are not necessarily entirely vitiated as has been consistently held in *inter alia, SARFU, Ndimeni, Rondalia* and *Rall.* The question in each of those cases would be whether the irregularity constituted by the bias is curable. It has been held that it is not possible to lay down a general rule in that regard, but a failure of natural justice may be cured on appeal.[30] In *Monnig and Others v Council of Review and Others,*[31] the Cape Division of the High Court found that the bias in the initial hearing had been so severe that the wrong was incapable of being cured. It is conceivable that where there is a complete re-hearing it may be possible to cure any unfairness, but where there is anything less than a completely re-hearing, for example, as in the case of an appeal, where the court of appeal is confined to the record, it would not generally be possible to cure the unfairness of the initial proceedings.[32]

[52] In *Rondalia,* the appellant complained of the trial judge's bias, and asked that a new trial be ordered, alternatively that the Appellate Division should determine the appeal on the basis of its own evaluation of the evidence. The Appellate Division did not find that the trial judge had prejudged the issues or was biased, although it was critical of aspects of the trial judge's conduct. It appeared to nevertheless adopt a precautionary approach and identified the trial judge's evaluation of the evidence as the reservoir of any possible bias or source of an impression of bias and so did not rely on that evaluation. The court was also mindful that it was dealing with a judge and that there was a presumption in favour of the integrity of the trial judge. The Appellate Division considered it a case where, even though it had to forego the trial judge's impressions and evaluation of the evidence, a decision could be made on the papers because the probabilities, apart from the impression which the

[29] At 9F-G.
[30] See *Slagment (Pty) Ltd v Building Construction and Allied Workers Union* 1995 (1) SA 742 (A) at 756G.
[31] 1989 (4) SA 866 (C).
[32] See for example *Police and Prison Civil Rights Union v Minister of Correctional Services* 2006 (2) All SA 175 (E) para 74.

witnesses made in the witness box, were sufficient and satisfactory to determine what evidence was acceptable.[33] But it is important to remember that the court made that decision with reference to the facts and circumstances of that case and that the Appellate Division had the power to do what it decided to do. It was not a case where the Appellate Division held that the judge ought to have recused himself.

[53] In *Rall,* the trial judge was held to have exceeded the bounds of reasonable questioning. The Appellate Division held that the questioning had constituted an irregularity which had prejudiced the appellant. The Appellate Division, however, found that the irregularity was curable and that the best way to remedy the prejudice and ensure that justice was seen to be done by the appellant was "*to disregard the adverse finding of the court a quo concerning the appellant's credibility and to determine afresh his guilt or innocence according to the recorded evidence*". There too the court decided with reference to the particular facts of that case that the irregularity there, namely excessive questioning, was curable and did not result in the vitiation of the entire proceedings. It was not a case where the Appellate Division held that the trial judge ought to have recused himself.

[54] To summarise, in cases where it was held that the presiding officer ought to have recused himself or herself at the outset, but failed to do so, the entire proceedings before the arbitrator or presiding officer are a nullity. In cases where it is found that the arbitrator or presiding officer did not have to recuse himself or herself despite bias, the appeal court generally has a discretion to cure any defect which in turn will depend on the facts and circumstances of every particular case. Bias may nevertheless be so severe and pervasive that it cannot be cured other than by a complete re-hearing of the matter, or the facts may be of the kind encountered in *Rondalia* and *Rall* where the court of appeal or review, depending on its powers, may cure the irregularity or perceived irregularity. The guiding principle is that a litigant has a constitutional right to a fair hearing from the outset to its conclusion. The hearing must not only be fair, but must also be seen to be fair. Anything less

[33] See at 590F.

than that would not suffice. The remedy employed must cure the irregularity; it must restore the right. Generally, nothing less than a complete rehearing would be required.

The facts in this case

[54] In my view, the court ***a quo's*** finding, that the arbitrator ought to have disclosed the facts linking her to the appellant, was correct.

[55] The Code of Conduct for Commissioners of the Commission for Conciliation, Mediation and Arbitration ("*CCMA*") which also applies to arbitrators of Bargaining Councils deals *inter alia,* with the duty to make disclosure and provides that "*Commissioners should disclose any interest or relationship that is likely to affect their impartiality or which might create a perception of partiality. The duty to disclose rests on the Commissioner*". This provision in the Code of Conduct is in line with the law as earlier discussed.

[56] In my view, taking into account the facts as disclosed by the arbitrator in her affidavit in the court *a quo*, this is clearly a case where, at least, the correct facts would have given rise to a reasonable perception of partiality in favour of the appellant.

[57] The law requires disclosure of the correct and true facts of an interest of relationship that the arbitrator or presiding officer has with one of the litigants. The presiding officer or arbitrator is not only to ask himself or herself whether, notwithstanding his, or her, interest or link to one of the litigants, he, or she, can nevertheless bring the necessary impartiality (or dispassion) to the issues in the case, but also whether the link or interest in the litigant might create a perception of impartiality. If there is any doubt about any of those questions, it was for the arbitrator to err on the side of disclosing the interest rather than not disclosing it in order to avoid the consequences of a later finding by an appeal or reviewing body that he, or she, ought to have disclosed the interest or link in the first place.

[58] Much has been made by the appellant in argument of the fact that the arbitrator had stated in the affidavit that she "*genuinely*" and "*in good faith*" did

not believe that she had a duty to make the disclosure concerning her interest in or link to PAS and that between PAS and the appellant and that the court *a quo* had found her affidavit to be "*frank and forthright*". I do not agree with the court *a quo's* assessment that the affidavit was "*frank and forthright*". It might appear so at first glance, but on a closer reading, the absence of important facts pertaining to the relationship and the possible impact which an adverse finding against the appellant might have had on the business relationship between the appellant and PAS, becomes apparent. Obvious facts that were not disclosed in the affidavit include the value of the contract between PAS and the appellant and its duration and renewability. Frankness and forthrightness are also not demonstrated by the arbitrator, or the appellant, by their persistent referral to PAS as the arbitrator's "*husband's business*", whereas the arbitrator was not only the financier of the business, but a 50% shareholder in PAS, thus a co-owner and also a director of PAS. She also operated from the same premises as PAS and shared facilities, and possibly, expenses with it. Her averment that she was merely a "sleeping partner" in the business is inconsistent with the fact that she is its Legal Director. It is not unlikely that she was given that position because of her legal expertise and that she would be involved with the legal aspects of that business. That she would be benefitting financially from PAS, and indirectly from the appellant through its contract with PAS is not unlikely, given her position in PAS.

[59] In my view, the alleged genuineness (and "*bona fides*") of the arbitrator in considering whether to make the disclosure of the facts pertaining to her relationship to PAS and the appellant, is also questionable, unless the arbitrator was completely ignorant of the rules pertaining to disclosure, which are simplified in the Code of Conduct. Such ignorance, however, is also not likely if one has regard to the arbitrator's apparent knowledge of the subject of bias and recusal as demonstrated in her handling of this subject in her award in deciding whether the chairperson of the disciplinary enquiry was biased. The arbitrator's interest in PAS and the appellant (by virtue of the contract PAS had with the appellant) cannot be said to be "*small or trivial*", but even if it was, it still required disclosure. The arbitrator and the appellant's attempts at trivialising those interests of the arbitrator are poor and far from convincing.

The non-disclosure is perhaps more explicable in light of what the arbitrator has to say about her business as arbitrator and consultant and the prevalence or dominance of work in that area involving Sasol and its divisions and subsidiaries.

[60] The facts pertaining to the arbitrator's relationship to PAS and in turn, the appellant, are indeed of a nature that might reasonably have led to a perception or apprehension that she may not have had the necessary impartiality, or judicial dispassion which is required by the law, in particular, by our Constitution. The court *a quo* was thus correct in concluding that she should have disclosed the facts pertaining to her business relationship with PAS and the appellant at the outset of the arbitration proceedings. This would have presented the first respondent with a choice to ask for her recusal.

[61] Having said that, the mere failure of the arbitrator to disclose the said facts at the outset of the arbitration, does not mean that she was biased, or that she had to recuse herself. The latter is to be determined by means of a second, objective enquiry, namely, whether a reasonable, objective and informed litigant would, on the correct facts, reasonably apprehend bias. The court *a quo* in effect found that the test was satisfied and that the arbitrator's failure to disclose at the outset of the arbitration proceedings the facts she disclosed in her affidavit before it, strengthened the apprehension of bias. In my view, the finding of the court *a quo* is unassailable save to add that the arbitrator's omission of crucial additional facts pertaining to the contract between PAS and the appellant, adds to a reasonable apprehension of bias. It is noteworthy that the arbitrator does not simply minimise her interest and role in PAS and omit other detail, pertaining to her relationship with PAS and the relationship between PAS and the appellant, in her affidavit, but musters argument to justify her non-disclosure and her decision to preside in the matter. The fact that the arbitrator might have on occasion found against the appellant does not dispel the apprehension of bias in the present case. In any event, the test is not whether the arbitrator could have reasonably perceived to have been biased in those other cases, but whether, on the true facts in this case, a reasonable litigant would reasonably apprehend bias on her part.

The court *a quo's* finding in that regard is in my view also unassailable. On the facts, the arbitrator would have had to recuse herself from the arbitration proceedings because of a reasonable apprehension of bias. The first respondent did not have to show actual bias. Proof of a reasonable apprehension of bias by a reasonable and informed litigant is sufficient for a recusal. The law does not only require that justice be done but that it be seen to be done.

[62] In light of the finding that the arbitrator ought to have recused herself at the outset, it follows that the entire proceedings before her are a nullity. Accordingly, the court ***a quo's*** finding that the entire proceedings before her were "*null and void*", is correct. A fresh hearing is necessarily called for.

[63] In the result, the appeal must fail. There is no reason in fairness and in law why the appellant should not be ordered to pay the costs of the appeal.

[64] It is accordingly ordered that:

1. The late filing of the appeal record is condoned. The costs of that application are costs in the appeal.

2. The appeal is dismissed with costs.

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P Coppin AJA

Tlaletsi DJP and Molemela AJA agreed.

APPEARANCES:

FOR THE APPELLANT: Mr AN Snider

Instructed by Cliffe Dekker Hofmeyer Inc.

FOR THE RESPONDENT: Mr TR Seleke of Seleke Attorneys