THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: DA 20/2010

In the matter between:

ANDRE HERHOLDT **Appellant**

and

NEDBANK LIMITED **Respondent**

Heard: **23 August 2011**

Delivered: **04 May 2012**

Summary: Review of arbitrator's award. Labour Court finding that the commissioner ignored relevant evidence, and failed to apply his mind to a number of material issues, and as a result committed gross irregularities in the conduct of the arbitration. Labour Court reviewing award - Approach of the court *a quo* correct and consistent with the prevailing law regarding review on grounds of unreasonableness. Appeal dismissed with costs.

JUDGMENT

MURPHY AJA

[1] This is an appeal against the judgment of the Labour Court (Gush J) in which it set aside on review an arbitration award of the Commission for

Conciliation, Mediation and Arbitration ("the CCMA") and substituted it with an order that the dismissal of the appellant by the respondent was fair. The appeal is with the leave of the court *a quo*.

[2] The respondent, Nedbank Limited, a banking institution providing a broad range of financial services, dismissed the appellant, a financial broker, on the grounds that he dishonestly failed to declare a conflict of interest arising from his being nominated as a beneficiary in the will of a client.

[3] The relevant charge, being the main charge proffered against the appellant, read as follows:

> **'DISHONESTY**
>
> In that during or about the period December 2007 to June 2008 and despite the legal duty on an employee to avoid any conflict of interest between his own interests and that of his employer and the clear provisions of the Conflict of Interest Policy, Ethics Policy, as well as the General Conditions of Employment, you failed to disclose to Nedbank the conflict that developed as a result of your relationship with Mr. John Frederick Smith when you became aware thereof or at any time thereafter, until confronted with its existence. This failure to disclose has resulted in regulatory and reputational risk to Nedbank.'

[4] The conflict of interest policy is a detailed document embodying its objectives, scope and the applicable principles governing the behaviour of directors and employers of the respondent. These require *inter alia* that an employee should ensure that his services are rendered in good faith and must in no way detract from the relationship of trust. Employees are expected to uphold ethical standards, which include an obligation not to work against Nedbank's interests. The policy recognises that a conflict of interest may arise when an employee enters into any engagement in which he or she may acquire a personal interest which may conflict with the interests of Nedbank or may appear to compromise the employee's ability to perform his or her duties

impartially. Clause 4.1.1 of the policy imposes a duty on an employee 'when rendering his/her services, always to act exclusively in the interests of his/her employer -therefore his/her conduct, when rendering such services should never result in his/her private interests or the interests of either being in conflict with the execution of his/her duties or the interests of his/her employer." Clause 4.1.10 provides that Nedbank and the clients of Nedbank "expect an employee not only to disclose any circumstances that may produce a conflict of interest, but also to recuse himself/herself from any decision making process in regard to the issue in question." Clause 4.4 requires employees to familiarise themselves with the relevant policies of Nedbank and to disclose conflicts actively. It states: "when in doubt, disclosure, consultation and guidance must be sought from your manager and compliance officer.' [5] An annexure to the policy headed: "Disclosure of Gifts", includes the following:

> 'All employees are required to make a written declaration as soon as is reasonably possible … on receipt of any gifts, benefits, services or favours of any nature whatsoever ("gifts") on account of, or in the course of, his/her duties as an employee.'

Gifts greater than R10 000 require executive approval after ensuring that there is not an actual or perceived conflict of interests with the recipient's duties to Nedbank. There is no specific reference in the policy to a prohibition on employees benefitting from client's wills, but being a benefit, disclosure and approval are apparently necessary.

[6] The appellant received a copy of the conflict of interest policy in September 2007 and made a declaration of his conflicts of interests. The respondent accordingly assumed that the appellant was aware of the policy and should have known he was obliged to disclose the fact that he had been made a beneficiary in terms of the will of his client, Mr John Smith. The appellant was found guilty on the main charge and dismissed on 14 July 2008. He then referred an unfair dismissal dispute to the CCMA which culminated in arbitration proceedings

before Ms Grobler, ("the commissioner") in late January 2009. The commissioner issued an award on 11 February 2009 in which she found that the appellant's dismissal was unfair and ordered his reinstatement. In her opinion, the respondent failed to prove that the appellant knew that a conflict of interest existed. In addition she held that the respondent had not established that the appellant acted dishonestly or caused any regulatory or reputational risk to the respondent as a result of the non-disclosure of the conflict of interest.

[7] On review, the Labour Court held that the commissioner had failed to apply her mind to a number of material issues and as a consequence committed gross irregularities in the conduct of the arbitration. It set aside the award and substituted it with an order that the dismissal was fair and ordered the appellant to pay the costs of the review.

[8] The issues for determination on appeal are whether the Labour Court rightly decided that the commissioner failed to apply her mind to a number of material issues, thereby committing gross irregularities in the conduct of the arbitration, and whether the arbitration award is not one that a reasonable commissioner could make.

[9] The appellant commenced employment with the respondent as a financial planner and broker in 1994. He enjoyed considerable success in his position and was highly regarded by colleagues and clients. In 1996 the appellant befriended Mr John Smith and his life partner Mr Wilfred Cibane. Between 1998 and 2008 he performed various financial services for Smith and Cibane on an intermittent basis. In 1998 he assisted them with tax clearances and their wills, and in 2006 he sold a policy to Smith for which he received a commission. It is not disputed that Smith was thus a client of the appellant, who the appellant assisted to make specific investment decisions.

[10] In late 2007, Smith and Cibane, who were both old and frail, entered into an agreement with a certain Mr and Mrs Wheeler for the building of a garden flat on their property, where Smith and Cibane would live.

Pending completion of the building, it was agreed that Smith and Cibane would move in with the Wheelers. On 26 December 2007, Smith contacted the appellant and requested a meeting for the purpose of amending his will. At that stage Smith's will appointed Cibane as his heir and left the residue of his estate to him. By December 2007 Cibane had become mortally ill and it seemed likely that he would pre-decease Smith. The appellant met with Smith on 27 December 2007. Smith informed the appellant that he wished to make bequests to him and the Wheelers. The appellant indicated to Smith that because he acted as his financial advisor he did not think it was appropriate for him to receive a bequest. Smith insisted and the appellant agreed to be a beneficiary in the will and to receive a legacy in the amount of £92 000.

[11] On the same day the appellant telephoned Mr Garth Williamson, a legal adviser at BOE Trust, and sought advice in relation to his becoming a beneficiary in a client's will. Williamson was employed by BOE Trust as a fiduciary specialist and routinely provided a wills drafting service to Nedbank financial planners. In his evidence before the commissioner, Williamson testified that he had cautioned the appellant "because of the advisor/client relationship there's possibilities of conflicts of interest and that sort of thing". Wary of a possible perception of undue influence, Williamson suggested that Smith should sign a letter confirming that he was acting of his own volition, which the appellant should then give to his manager, who would need to know about the situation for "risk purposes". BOE Trust is an independent and separate entity to Nedbank, but the two entities have an ongoing relationship in terms of which BOE Trust is Nedbank's product provider for wills. Any will generated by a Nedbank financial planner would normally (depending on the wishes of the client) be handled by BOE Trust.

[12] Smith executed his new will on 28 December 2007 and signed a further document prepared in draft by Williamson in which he confirmed that the bequest of his offshore investment to the appellant was in

accordance with his instructions and that he had not been influenced in any way to make the bequest. On the same day the appellant handed over the newly executed will and the document in a sealed envelope to BOE Trust. It is common cause that these documents were never delivered to the appellant's manager. The appellant testified that he believed BOE Trust would deliver the documents to his manager.

[13] Cibane died in January 2008. Thereafter the relationship between Smith and the Wheelers soured, and the appellant moved Smith into his home, which he shared with his life partner, Mr Wayne Dalvaux. During February 2008 an acrimonious situation developed between the Wheelers on the one hand and Smith and the appellant on the other, regarding several matters including Smith's furniture, the agreement and finance for the building of the garden flat, the will and other issues. The quarrel resulted in demands being made by both sides. On 13 March 2008 a letter of demand was sent by attorneys on behalf of Smith, demanding repayment of the sum of R250 000, being monies advanced in respect of the building of the garden flat. On 17 March 2008 the Wheelers' attorneys replied that they were preparing affidavits concerning the conduct of the appellant in his capacity as a financial adviser to Smith. The attorneys then filed a complaint regarding the appellant with the Financial Services Board ("FSB") on 3 April 2008. The appellant responded to the complaint and filed affidavits with the FSB, including a lengthy one attested to by Smith refuting the allegations of impropriety made by the Wheelers.

[14] In a letter dated 30 April 2008 addressed by Mr G. Palmer, the attorney acting for Smith, to the Wheeler's attorney, the following is stated:

> 'Copies of the affidavits and all other relevant information have already been handed to the Regional Manager of Nedbank Financial Planning, who has been fully appraised (sic) of the situation. ….. …
>
> We would once again request that you draw to your client's attention that Mr John Smith's last Will and Testament is a private document and none of their concern.'

[15] It is common cause that the statement regarding the disclosure to Nedbank was incorrect. Palmer testified in this regard before the CCMA that he had misunderstood during a telephone conversation with the appellant that Nedbank had been placed in the picture. The appellant testified that he had assumed Nedbank was aware of his position as a beneficiary after he gave the documents to Williamson. He however did not instruct Palmer that copies of all the affidavits, including those making up the complaint to the FSB, had been handed to Nedbank. Palmer had misunderstood his instructions.

[16] On 14 May 2008 the FSB sent a copy of the complaint by email to Ms L Lindeque at Nedbank requesting Nedbank to investigate and to respond to the FSB no later than 23 May 2008. This email was sent to the wrong address and the complaint had to be re-sent on 29 May 2008.

[17] In the interim, on 22 or 23 May 2008, five months after becoming a beneficiary, the appellant contacted his regional manager, Ms Esterhuizen, with whom he had a friendship as well as a professional relationship, and disclosed to her for the first time that there was a possibility that he *might* "be becoming an heir in a will". Esterhuizen told him that he was obliged to disclose all the details to his area manager, Noel Snyman, and that the conflict would then be referred for consideration and decision to the compliance department.

[18] A few days later, on 27 May 2008, Smith executed another will removing the Wheelers as beneficiaries and bequeathing the entire residue of his estate to the appellant and Wayne Dalvaux, the appellant's life partner. The instruction to change the will was given by Smith to the appellant who carried out the instruction. Once again, Smith signed a document stating that he had not been unduly influenced. The appellant dropped off the new will and the document at BOE not long after they were executed. He did not follow Esterhuizen's advice to declare his interest and make disclosure to Noel Snyman for the purposes of obtaining a decision from the compliance department.

Moreover, the next day, 28 May 2008, both the appellant and Esterhuizen attended a convention of the Financial Planning Institute. Esterhuizen knew about the appellant's friendship with Smith and the fact that Smith had moved into his home. Despite their discussing Smith at the convention, the appellant failed to disclose to Esterhuizen that Smith was the client of whom he had spoken in their telephone conversation and that subsequent to that conversation he and Dalvaux had become the heirs under the will executed the previous day.

[19] When Nedbank eventually received a copy of the complaint from the FSB on 29 May 2008, Ms Taryn Steenkamp, a legal compliance officer at Nedbank, straightaway emailed Esterhuizen, Snyman and the appellant, attaching a copy of the complaint and requesting the appellant to provide his version of the events. The appellant did so and furnished relevant documentation.

[20] Not long afterwards, on 13 June 2008, Smith amended his will yet again, this time excluding the appellant as a beneficiary and leaving the entire residue of his estate to Dalvaux, the appellant's partner. Smith also nominated LHSF (instead of BOE Trust) as the executor of his estate. On the same day the appellant was charged with misconduct and suspended. Smith died age 92 on 22 June 2008.

[21] The appellant visited the offices of BOE Trust on 13 June 2008 and established that the documents he had handed to Williamson in December 2007 had not been forwarded to Nedbank.

[22] In order to determine the dispute referred to the CCMA, the commissioner had to decide whether the dismissal was substantively fair. Given that the disciplinary hearing had concluded that the appellant was guilty on the main charge of dishonesty, the principal issue was whether the appellant deliberately failed to disclose his interest in Smith's will to Esterhuizen and Snyman. This, counsel submitted, required the commissioner to apply her mind properly to a number of relevant issues, namely:

(a) whether the appellant knew that there was a conflict of interest;

(b) whether the appellant's dealings with Williamson on 27 December 2007 constituted proper disclosure in fact and in law;

(c) the reason the appellant failed to make full and proper disclosure to Esterhuizen and Snyman;

(d) the reason for the appellant not disclosing to Nedbank the complaint made to the FSB by the Wheelers;

(e) the implications of the incorrect allegation in Palmer's letter that Nedbank had been apprised of the situation;

(f) the import of the telephone conversation between the appellant and Esterhuizen on 23 May 2008;

(g) the failure of the appellant to inform Snyman and Esterhuizen about the contents of Smith's will of 27 May 2008; and

(h) the appellant's non-disclosure to Esterhuizen on 28 May 2008 that he had in fact become a beneficiary under the second will.

Proper consideration of these facts was required for the purpose of determining the appellant's state of mind and whether the non-disclosure of the conflict of interests was deliberate and accordingly dishonest.

[23] The commissioner's award is long and detailed. In the final analysis she held that the respondent had failed to prove on a balance of probabilities that the appellant had acted dishonestly, or knew that there was a conflict of interest, and accordingly she was not able to conclude that the information was deliberately withheld. She held further that the respondent had not proved that the non-disclosure resulted in any regulatory and/or reputational risk to Nedbank, because it was unlikely that it would lose its licence under the circumstances.

[24] The commissioner noted moreover that the respondent did not have an explicit rule speaking to the duty of an employee to disclose the fact that he or she was a beneficiary in terms of a client's will; and she considered the charge against the appellant to be vague because 'other than the heading the charge itself makes no mention of dishonesty'. She accepted that the appellant was concerned about the situation to the point that he consulted with Williamson, but in fact he had realised for the first time that there was a conflict of interest when he conceded as much under cross-examination. In her opinion, neither the appellant nor Williamson fully appreciated that there was a conflict of interest. She was satisfied that the "letter" included in the envelope with the will which was given to Williamson constituted sufficient disclosure to the respondent and indicated further that the appellant intended or wished to be in compliance. She also believed Palmer's explanation that he had misunderstood the appellant's instructions regarding disclosure to Nedbank.

[25] The grounds upon which the respondent sought review of the award before the Labour Court alleged that the commissioner had failed to apply her mind properly to the material facts and thereby committed a latent gross irregularity equating to an act of process-related unreasonableness. The Labour Court agreed stating that it was required to consider whether the commissioner failed to take into account factors that she was bound to take into consideration and if so whether her conduct amounted to a gross irregularity as contemplated in section 145 of the Labour Relations Act 66 of 1995 ("the LRA") with the resulting decision not being that of a reasonable decision-maker.

[26] As regards the finding that the charge was vague, the Labour Court, held, in my view correctly, that the charge clearly sets out the misconduct complained of with reference to the conflict of interest policy and refers to a general duty of disclosure between employee and employer which arises in such situations. The allegation of a failure to

disclose under the heading of "dishonesty" alleges in effect a deliberate non-disclosure.

[27] The Labour Court held that the finding that neither the appellant nor Williamson knew that a nomination as a beneficiary in a client's will amounted to a conflict of interest was unsustainable. Firstly, such a finding ignored and contradicted Williamson's material evidence that he warned the appellant of the possible conflict and of the issue of undue influence and advised him to report it to the respondent for risk purposes. Moreover, the evidence establishes that the appellant had signed the policy. He was also an experienced senior financial advisor, who, on his own admission, was originally not comfortable with the idea of being a beneficiary; thus his approach to Williamson for advice on the question, which advice he effectively chose to disregard. He also ignored the advice given to him by Esterhuizen on the phone and opted not to disclose the true and complete nature of his enquiry when he spoke to her on the day after the second will was executed. His conduct was also in contravention of the dictates of the policy that conflicts should be disclosed actively and when in doubt. He sought advice and guidance because he appreciated the potential for difficulty, but failed to follow through with proper disclosure. Accordingly, in the view of the Labour Court, the commissioner's conclusions regarding the appellant's state of mind were not justifiable (rationally connected to the evidence before her). She did not take into account his motivation in seeking advice from Williamson and Esterhuizen and his not complying with their suggestion to disclose the conflict to Noel Snyman.

[28] The Labour Court looked upon the commissioner's finding that there was no rule or policy requiring disclosure of nomination as a beneficiary in a client's will as a manifest indication that she did not understand the policy or simply did not take it in account. Had she applied her mind to the policy she would have appreciated that the nomination was a benefit obtained in the course of the appellant's

employment, but also resulted in a situation where the appellant's private interests may have led to a possible conflict with his employer's interests (reputational and regulatory risk) and his ability to perform his duty to his client impartially. That being the case, he had a duty to disclose in order that the compliance department might manage the risk in the best interests of all concerned, including the appellant. The commissioner evidently did not appreciate or grasp this underlying rationale of the policy and thus failed to take account of an important relevant consideration, as well as the fiduciary duties of the appellant.

[29] Moreover, the appellant's version (accepted by the commissioner) that he only realised that there was a conflict of interest during his cross examination fails to take heed of his evidence that he was initially uncomfortable, the reality of his experience and his position of seniority.

[30] The Labour Court rejected the commissioner's finding that the "letter" filed with the will and given to Williamson and BOE Trust constituted disclosure and revealed an intention or desire to be compliant. The learned judge observed:

> 'Firstly the so-called letter is not a letter at all, it is not addressed to the applicant (Nedbank) or any of its managers, secondly it does not purport to disclose anything and lastly as explained by the third respondent (the appellant) it was to be used in the case of the will being disputed by anybody. In fact the nature of the document signed by Smith and the purpose for which it was obtained suggest quite clearly that it was intended to be filed with the will and was not a notification at all.'

The commissioner's finding did not recognise the nature of the notification required by the policy (comprehensive details to be provided timeously to the appropriate manager) and discounted the fact that the appellant did not act in accordance with the advice given to him by both Williamson and Esterhuizen.

[31] Finally, the Labour Court was further of the view that the commissioner failed to take account of the inherent improbabilities of Palmer's explanation regarding his instructions and the reason for the false claim to the Wheeler's attorney that there had been full and proper disclosure to Nedbank. The importance and explicit nature of the assurance given by Palmer, in the opinion of the learned judge, rendered the suggestion of a misunderstanding inherently improbable.

[32] The Labour Court accordingly concluded that the award was not reasonable given the evidence and material which was placed before the commissioner and because she failed to apply her mind to a number of material issues and as a consequence committed gross irregularities in the conduct of the arbitration.

[33] In reaching the conclusion it did, the Labour Court followed the approach adopted in *Southern Sun Hotel Interests (Pty) Ltd v CCMA and others*[1] in which van Niekerk J held that a CCMA award is reviewable where it is shown that the commissioner's process related conduct is found wanting. The line of reasoning in that decision elaborates upon the standard of review enunciated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[2] which stated the test to be whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. In *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others*, van Niekerk J expressed the opinion that the reasonableness requirement is relevant to both process and outcome. In other words an award will be reviewable if it suffers either from dialectical unreasonableness or is substantively unreasonable in its outcome.

[34] In his seminal work *Administrative Law*,[3] Prof. Lawrence Baxter, in his discussion of review on grounds of unreasonableness, makes the point that whether a certain proposition is substantively reasonable depends

[1] [2009] 11 BLLR 1128 (LC)
[2] (2007) 28 ILJ 2405 (CC) at 2439F
[3] Juta and Co Ltd, 1984 at 486 and 487 *et seq.*

on whether it is supported by arguments and considerations recognised as valid, even if not conclusive. It is thus possible to be both reasonable and wrong. Distinguishing between dialectical and substantive unreasonableness, he elucidates on the two species of unreasonableness:[4]

> 'As far as the procedural or *dialectical* facet of decision-making is concerned, it is possible to adjudge someone to be reasonable or unreasonable without necessarily identifying or disagreeing with their views. Using 'unreasonableness' in this way, it is clear that to adjudge someone reasonable or unreasonable is not the same as adjudging them *right* or *wrong*. That is why it is a confusion to assert that the admission of 'unreasonableness' as a ground of review would blur the distinction between review and appeal. On the other hand, the substantive unreasonableness of the conclusion reached (e.g. whether the correct weight has been attached to each consideration or whether the 'best' values have been adopted) is a matter for each individual's subjective assessment. Some philosophers have suggested that it is *likely* that 'reasonable men' will reach the same conclusions but, in the nature of practical discourse, this is not necessarily so. Hence dialectical reasonableness is usually more susceptible to second and third party appraisal than is substantive reasonableness.'

[35] The test of reasonableness expressed in *Sidumo* mirrors that enacted in section 6(2)(h) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") which empowers a court to judicially review an administrative action if the exercise of the power or the performance of the function is so unreasonable that no reasonable person could have so exercised the power or performed the function. That review ground exists alongside other dialectical reasonableness grounds in section 6(2) of PAJA (for instance: acting with an ulterior purpose; taking account of irrelevant considerations; ignoring relevant considerations; acting arbitrarily, capriciously or in bad faith; acting under dictation; and irrationality). One may surmise therefore that the review ground in

[4] Ibid at 486.

section 6(2)(h) of PAJA grants a power to review on grounds of unreasonableness of a more substantive nature in the sense that the ultimate decision is assessed with regard to the sufficiency and cogency of the evidence to determine if it is reasonably supportable. The question under such a test is whether the evidence is such that a reasonable person, acting reasonably, could have reached the decision on the evidence and the inferences drawn from it.[5] By necessity this involves consideration of both substance and merits in relation to the outcome, but allows a measure of legitimate diversity and deviance from the correct or perfect decision. The enquiry is directed less at the method and more at the result of the proceedings. That being so, the reasonableness or otherwise of a commissioner's decision will not depend exclusively upon the reasons that the commissioner gives for the decision. Other reasons upon which the commissioner did not rely to support his decision or finding but which can render the decision reasonable or unreasonable must also be considered.[6]

[36] In *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others*,[7] van Niekerk J correctly dismissed the suggestion that it might be inferred from the *Sidumo* line of reasoning that in an application for review brought under section 145 of the LRA, process-related conduct by a commissioner is not relevant. Where a commissioner fails to have regard to material facts, this will constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner would have unreasonably failed to perform his or her mandate and thereby have prevented the aggrieved party from having its case fully and fairly determined. Proper consideration of all the relevant and material facts and issues is indispensable to a reasonable decision and if a decision-maker fails to take account of a relevant factor which he or she is bound to consider, the resulting decision will not be reasonable in a dialectical sense. Likewise, where a commissioner does not apply

[5] *Standard Bank of Bophuthatswana Ltd v Reynolds NO* 1995 (3) SA 74 (B) at 96 - 97
[6] *Fidelity Cash Management Service v CCMA and Others* [2008] 3 BLLR 197 (LAC) 226G-H
[7] Note 1 above.

his or her mind to the issues in a case the decision will not be reasonable.[8] Relying on these principles, van Niekerk J concluded:[9]

> 'If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.'

[37] As I have explained, the Labour Court in the present case followed this line of reasoning in arriving at its conclusion that the decision of the commissioner was unreasonable. In his notice of appeal the appellant contended that the Labour Court erred in over-emphasising the process by which the arbitrator reached her award. Mr *Findlay* submitted that the emphasis on process was misplaced in that the court was required to consider whether the decision, based on the material admitted as evidence, was one which a reasonable decision-maker could not reach. And while the failure to take into account relevant evidence may in certain circumstances constitute an irregularity the respondent was required to show that the commissioner gravely misunderstood the evidence. He submitted that a review does not require an in-depth analysis of the commissioner's finding on each and every issue. All that is required, he contended, is to ascertain whether or not the commissioner considered the issue and came to a conclusion on the facts, supported by the evidence, which was sufficiently reasonable to justify the decision. Put in another way, the target on review is the result or outcome rather than the process, and if that is sustainable as reasonable, no more should be expected.

[38] I am unable to agree with those submissions principally because, as I have discussed, the weight of authority favours greater scrutiny and

[8] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others (TAC and Another as amici curiae)* 2006 (2) SA 311 (CC); and *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at 2490-2491
[9] Above n1 at para 17

section 145(2) of the LRA expressly permits the review of awards on the ground of irregularity. In *Sidumo,* Ngcobo J stated:[10]

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

[39] This approach has been followed subsequently by this Court in *Ellerine Holdings Ltd v CCMA and Others*[11]; and appears to have been endorsed by the Constitutional Court in *CUSA v Tao Ying Metal Industries and Others*[12] where it was stated that it is now axiomatic that a commissioner is required to apply his or her mind to the issues before him. One of the duties of a commissioner is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. Commissioners who do not do so do not fairly adjudicate the issues and the resulting decision and award will be unreasonable. Whether or not an arbitration award or decision or finding of a commissioner is reasonable must be determined objectively with due regard to all the evidence that was before him or her and what the issues were.[13] There is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of enquiry. The threshold for interference is lower than that; it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for

[10] *Sidumo supra* at para 268.
[11] (2008) 29 ILJ 2899 (LAC) at 2905G-I.
[12] [2009] 1 BLLR 1 (CC) at paras 76 and 134.
[13] *Fidelity Cash Management Services v CCMA and Others* [2008] 3 BLLR 197 (LAC) 227C

prejudice and the possibility that the result may have been different. This standard recognises that dialectical and substantive reasonableness are intrinsically inter-linked and that latent process irregularities carry the inherent risk of causing an unreasonable substantive outcome.

[40] That said though, the distinction remains important. The basic principle laid down in *Ellis v Morgan; Ellis v Dessai*[14] still applies. There the court said:

> 'But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.'

In short, if the conduct of the commissioner prevents a fair trial of the issues, even if perfectly well-intentioned and *bona fide*, though mistaken, then such conduct will amount to a gross irregularity,[15] and that will be enough to successfully found a review under section 145(2) of the LRA. The court by necessity must scrutinise the reasons of the commissioner not to determine whether the result is correct; or for that matter substantively reasonable, but to determine whether there is a latent irregularity, that is, an irregularity that has taken place within the mind of the commissioner, which will only be ascertainable from his or her reasons.

[41] In conclusion therefore, I accept that the approach of the court *a quo* was correct and consistent with the prevailing law regarding review on grounds of unreasonableness.

[42] The appellant has challenged several of the factual conclusions of the Labour Court upon which it based its finding that the decision of the commissioner was unreasonable because she failed to apply her mind

[14] 1909 TS 576 at 581
[15] *Goldfields Investment Ltd and Another v City Council of Johannesburg and Another* 1938 TPD 551, 560

to a number of material issues and as a consequence committed gross irregularities in the conduct of the arbitration. I turn now to these.

[43] During the course of the appellant's cross-examination before the CCMA he was asked whether he accepted that if there is a conflict of interest and an employee made a conscious decision not to disclose it that such would amount to an act of dishonesty which would be a dismissable offence. The appellant agreed that if there was a conscious decision not to disclose that such would indeed be dishonesty justifying dismissal. This "concession", if indeed such, gave rise to some argument. In her finding the commissioner held however that the appellant was not dishonest because he believed either that there was in fact no conflict of interests or that he had disclosed the conflict. As I understand her reasoning, she regarded the concession as being a hypothetical concession of principle rather than any admission of wrongdoing. In that she was correct, in my view. In paragraph 36.2 of its judgment the Labour Court noted that the appellant had made the concession, but it is not clear whether the learned judge regarded it to be an admission of wrongdoing. Counsel for the appellant has submitted that the Labour Court erred in this respect by accepting that there had been an admission of dishonesty.

[44] The submission, with respect, is unfounded. As I have said, the judgment is unclear about the weight, if any, that was attached to the concession. The reference to it in paragraph 36.2 faithfully records its hypothetical nature by stating "that *if* he had made a conscious decision not to disclose it, it would amount to dishonesty and justify his dismissal". I am unable to find any further reference to the concession in the judgment; nor is there any finding that the commissioner failed to take account of that consideration resulting *ipso facto* in the award being unreasonable. The Labour Court's finding that the commissioner had misapplied her mind to the evidence and the issue of dishonesty is predicated not on the concession made by the appellant during cross examination. Rather, it is based upon the commissioner not taking

account of the fact that the appellant never brought the Wheelers' complaint to the attention of Nedbank; was complicit in falsely communicating that Nedbank had been informed about the potential conflict of interests, when it had not been; failed to disclose to Esterhuizen his interest in Smith's will during their telephonic discussion on 23 May 2008; did not follow Esterhuizen's advice regarding the need to disclose the conflict to Noel Snyman; and did not tell Esterhuizen of his interest in Smith's will at the conference of the Financial Planning Institute the day after the second will was executed, despite discussing Smith with her.

[45] While it is correct that the commissioner gave these facts and issues some thought and consideration, it cannot be said that she applied her mind to them properly. Her finding that the discussion with Esterhuizen was a general one, related to another client and should be viewed together with the appellant's belief that he had made disclosure via Williamson, which was corroborated by Williamson, totally misconstrued the evidence and the nature of the enquiry in relation to the issue of deliberate non-disclosure. Esterhuizen's evidence that she advised the appellant to make disclosure to Noel Snyman, and that she took it upon herself to alert Snyman that the issue might arise in her absence, was unchallenged under cross examination. That means that the appellant did not disclose to her that he was in fact already a beneficiary. Her evidence was that he disclosed to her that he might possibly become a beneficiary. It means also that he was at that point fully apprised of the conflict and still failed to disclose his status as a legatee under the first will and as heir under the second will when he was nominated as such a few days later. The conclusion that the appellant deliberately did not disclose the conflict is inescapable. The commissioner's finding to the contrary is wholly unsustainable, and more than a plausible intimation that she failed to apply her mind properly to the material facts and the relevant issues.

[46] The finding that neither the appellant nor Williamson understood that the appellant's nomination constituted a potential conflict of interests lies in the face of Williamson's evidence. The appellant approached Williamson because he felt uncomfortable and thus, in my opinion, had more than an intuitive inkling about the existence of a conflict of interests. Williamson shared that view. He testified that for that very reason he advised the appellant to act cautiously and specifically told the appellant to disclose the bequest to Nedbank management so that they could have insight into the risks involved which needed to be managed.

[47] This evidence gives the lie to the appellant's supposed belief that he had made full and proper disclosure in the letter handed to BOE Trust. Besides the fact that the letter did not constitute disclosure for the reasons stated by the Labour Court, had the appellant honestly believed that he had satisfied his obligation to make disclosure by delivering the letter to BOE Trust, then he would not have sought advice from Esterhuizen on May 2008. It is reasonable to infer that he sought advice because he had more than a suspicion that something extra was required in the way of direct and full disclosure to his own management at Nedbank. And, yet, when told that, he opted again not to make disclosure. Such an inference has adverse implications for the credibility of the appellant and supports a finding that his explanation regarding his instructions to Palmer is inherently improbable and implausible. More likely he was disingenuously attempting to cover his tracks. The conclusions to the contrary by the commissioner were clearly wrong, and were effectively conceded to be such by counsel for the appellant. He argued that such notwithstanding the outcome of the trial was nonetheless reasonable. The ultimate issue is whether the wrong findings amount equally to failures and defects that render the award unreasonable or irregular.

[48] Similarly problematic was the commissioner's finding that there was no rule requiring disclosure. The Labour Court, it will be recalled, held that

this indicated that the commissioner either did not understand the conflict of interest policy or simply did not take it into account. I agree with the appellant that the import of the commissioner's finding was not that there was no disclosure requirement, but was rather that the lack of an explicit reference in the policy to a conflict of this specific kind somehow mitigates the contravention and reinforced the conclusion that despite the appellant's discomfort he was not in fact aware of the conflict of interest until the implications of his conduct struck him fully during his cross-examination. Whatever the case, the fact remains that the policy which the appellant signed did indeed regulate this kind of conflict (which self-evidently is a conflict of interests), and the appellant's conduct reveals he knew it to be one. In any event, even had the appellant been ignorant initially, (such being inherently unlikely given his position, the aims and objectives of the policy, and his feeling of discomfort), he could have been under no illusion after discussing the matter with Williamson, and then again later with Esterhuizen. The commissioner's conclusion otherwise is unsustainable on the totality of the evidence and an unmistakable indication that she failed to take account of relevant considerations and misapplied her mind to the facts and the law of evidence.

[49] Finally, the commissioner's finding, on the basis of a supposed concession by the compliance officer Steenkamp, that the conflict of interest posed no risk to Nedbank was irrational and not justifiable with reference to the evidence or reasons given for the finding; and hence reviewable. Steenkamp conceded that it was unlikely that Nedbank would lose its licence because of the contravention of the legislation regulating conflicts of interest. The commissioner however ignored Steenkamp's evidence that the complaint would impact on its risk profile with the FSB. Moreover, the reputational risk to Nedbank is self-evident.

[50] The respondent accordingly submitted that by failing to apply her mind to numerous material facts and considerations, the commissioner

deprived Nedbank of a fair trial and thus committed a latent gross irregularity equating to an act of process-related unreasonableness. The facts and considerations ignored by the commissioner, it is contended, were of such a material nature that the failure to consider them deprived Nedbank of a fair trial. Put differently, the submission is to the effect that, the commissioner could not reject the respondent's version that the appellant deliberately failed to disclose the conflict without these facts and considerations being taken into account and still expect that it could be said that there had been a fair trial of the matter. The predictable rejoinder of the appellant, to which I have already alluded, is that the Labour Court scrutinised the award as if it was hearing an appeal and failed to keep in mind the distinction between an appeal and a review and substituted its own findings relating to particular issues for those of the commissioner. Thus, while conceding that the commissioner might have got it wrong on some of the issues, the appellant submitted that the commissioner applied her mind to all the relevant issues, considered them and arrived at a decision which while incorrect in the opinion of the Labour Court was nonetheless reasonable in the sense of being a legitimate deviance from the correct decision.

[51] I disagree. The range and extent of latent irregularities in the award leave no doubt that there has not been a fair trial of the issues. The commissioner not only ignored material evidence in relation to the deliberate conduct of the appellant but fundamentally misconstrued the conflict of interests policy of the respondent with the consequence that her method in determining the issues was latently irregular and in the final analysis led concurrently to a result that was not only incorrect but substantively unreasonable in the sense that no reasonable commissioner, acting reasonably, could have reached the decision on the evidence and the inferences drawn from it.

[52] I am conscious that my verdict, so expressed, comes close to introducing a requirement of substantive reasonableness going beyond

procedural propriety or rationality. This invites the predictable criticism of blurring the line between an appeal and a review, involving as it does a consideration of the merits and outcome of the decision. The courts consistently acknowledge that the line between a review on the grounds of substantive reasonableness and an appeal on the merits is a fine one and at times difficult to draw. Nevertheless, as Ngcobo J pointed out in *Sidumo*[16], it is a distinction that we are obliged to maintain if we are to honour the intention of the legislature.

[53] The drafters of the Labour Relations Act[17] expressly opted to limit the relief available in relation to awards of the CCMA. In the *Explanatory Memorandum*,[18] they explained their preference thus:

> 'The absence of an appeal from the arbitrator's award speeds up the process and frees it from the legalism that accompanies appeal proceedings. It is tempting to provide for appeals because dismissal is a very serious matter …. However, this temptation must be resisted as appeals lead to records, lengthy proceedings, lawyers, legalism, inordinate delays and high costs. Appeals have a negative impact on reinstatement as a remedy, they undermine the basic purpose of the legislation and they make the system too expensive for individuals and small business.'

I doubt that this rationale survives closer scrutiny. In my candid opinion, the idea that reviews are preferable to appeals has been shown to have been misplaced, with respect, as is amply demonstrated by the present case. None of the reasons advanced in the *Explanatory Memorandum* is factual. Reviews, just like appeals, lead to records, lengthy proceedings, lawyers, legalism, inordinate delays and high costs. The record in the present matter is more than 1000 pages and would have been no more had it been an appeal. Both parties were represented by lawyers, that is, attorneys and two counsel, including senior counsel. The proceedings have taken more than three and a

[16] Note 2 above at 2482-3
[17] Act 66 of 1995
[18] (1995) 16 ILJ 278 at 318

half years from the date of dismissal and there is no reason to assume that an appeal would have taken any longer. The laudable objective of a simple, quick, cheap and non-legalistic approach to the adjudication of unfair dismissals does not appear to have been achieved by constraining the relief against CCMA awards to review on the grounds of reasonableness. Indeed, I suspect, the opposite may be the case.

[54] As for the charge of "legalism", in my experience reviews lend themselves to greater legalism than appeals. The investigation and assessment of regularity can become arcane, pedantic and remote from the standpoint of lay litigants. It seems to me a far easier exercise to determine whether a commissioner's decision is right or wrong on the facts or the law than it is to ferret out and measure latent irregularities, or to make a value based assessment of whether a commissioner acted reasonably in making a value based assessment of an employer's fairness. The chances for subjective inconsistency are multiplied. Added to that, there is the somewhat unpalatable truth that litigants in a compulsory adjudication process are expected without demur to abide decisions which might be wrong on the facts or in law, on the expedient basis that they are deemed to be reasonable. The moral case for that option in contractual and voluntary arbitration, being that it is an election based on informed consent in which the parties get to choose their own arbitrator, is absent and deficient when applied to the compulsory resolution of labour disputes in a constitutional order where everyone has the right to have any dispute resolved by the application of law.

[55] Besides, I imagine, few decisions that are wrong are likely to be upheld as reasonable. Leaving aside the moral hazard of a message to commissioners that there is no need for them to get their decisions right, it being enough if they act reasonably, commissioners who get it wrong on the facts will usually commit the concomitant irregularity of not taking full or proper account of material evidence, and where they err on the law, they will fall short in not having properly applied their minds to the

issues and thereby have denied the parties a fair trial. The inexorable truth is that wrong decisions are rarely reasonable. If that is true, the hypothetical reward from limiting intervention to a reasonableness or rationality review is dubious. On the contrary, we risk reducing the final adjudication of labour disputes to an exercise in semantics or hair splitting in pursuit of a perceived socially expedient advantage that is at best illusory. Our experience in adjudicating reviews of awards issued in terms of the LRA and the controversy around this[19] only demonstrate that the requirement of substantive reasonableness is practically necessary to deal with obviously wrong awards.

[56] I would therefore tentatively venture that the time has come for the social partners and the legislature to think again. Justice for all concerned might be better served were the relief against awards to take the form of an appeal rather than a review. The protection granted by a narrower basis for intervention is, in all likelihood, fanciful -a chimera.

[57] For the reasons stated, the Labour Court did not err in its findings that the commissioner ignored or discounted relevant evidence, failed to apply her mind to a number of material issues and as a consequence committed gross irregularities in the conduct of the arbitration. The appeal should accordingly be dismissed. There is no reason why in this matter costs should not follow the result.

[58] Accordingly, the appeal is dismissed and the appellant is ordered to pay the respondent's costs, including the costs occasioned by the employment of two counsel.

[19] The numerous matters that have been considered by the Labour Court and LAC in this regard from the pre *Carephone* era culminating in *Sidumo* provide ample proof of this context.

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MURPHY AJA

Mlambo JP and Mocumie AJA concurred in the judgment of Murphy AJA.

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