



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: PA 8/16

Not Reportable

In the matter between:

JACQUELINE FORT

Appellant

and

COEGA DEVELOPMENT CORPORATION (PTY) LTD

First Respondent

JULIA CAMERON N.O.

Second Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Third Respondent

Heard: February 2017

Delivered: 17 August 2017

Summary: CCMA - finding that the dismissal of an employee on account of her conflict of interest/unethical conduct (nepotism) and influencing the recruitment process - substantively unfair.

On review to the Labour Court - the Court undertaking a process of independent assessment and evaluation of the evidence - concluding that the commissioner's award was "obviously wrong" and falling outside the range of reasonable decision makers - replacing the award with an order that the dismissal was substantively fair.

On appeal to the Labour Appeal Court - the Court finding - on a cumulative analysis of the evidence - that the employee was not a credible witness -

satisfied on the probabilities - that the employee actively manipulated the recruitment system in order to promote the appointment of an employee she had a personal relationship with - further finding - the Labour Court fairly evaluated the evidence and drew inferences that were consistent with the material facts.

On the issue of costs - setting aside the review costs on consideration of the requirements of law and fairness.

The order of the Labour Court confirmed on appeal- no order made as to costs in respect of both the proceedings before the Labour Court and the Labour Appeal Court.

Coram: Waglay JP, Davis JA and Phatshoane AJA

JUDGMENT

Phatshoane AJA

[1] This is an appeal against the whole of the judgment and the order of the Labour Court (per Myburgh AJ) in reviewing and setting aside the arbitration award dated 09 November 2014 issued under Case No: ECPE 5722-13 by commissioner Julia Cameron under the auspices of the Commission for Conciliation Mediation and Arbitration (CCMA) and replacing it with an order that the dismissal of Ms Jacqueline Fort, the appellant, was substantively fair. The present appeal against that judgment, which has since been reported as *Coega Development Corporation (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2016) 37 ILJ 923 (LC), is with the leave of the Court a quo.

[2] This case is predicated on the manifestation of alleged nepotism said to have been committed by Ms Jacqueline Fort, the appellant, at Coega Development Corporation (Pty) Ltd (CDC), the third respondent¹. She is accused of having improperly participated in the appointment of two employees, Ms Christa

¹ For purposes of reporting, the citation on the heading of the judgment has been changed to reflect Coega Development Corporation (Pty) Ltd (CDC) as the first respondent. CDC is on record the third respondent.

Layla Coetzer in July 2012 and Mr Muhammed Talha Ebrahim in October 2012. The basis of the allegation of nepotism at the arbitration phase was that Ms Fort's actions during the appointment process were actuated by an underlying conflict of interest arising from a romantic relationship she had with Mr Adnaan Ebrahim, a relative of the two appointees at the relevant period in which their appointments were effected. She then set about artificially obtaining and submitting their CVs; participating in the appointment of the two employees; and not disclosing the true nature and extent of the relationship between herself and these employees.

- [3] Ms Fort commenced employment at CDC, a largely state-funded public entity, on 01 November 2004. She was dismissed from the services of CDC on 21 November 2013 pursuant to a disciplinary enquiry, which was chaired by an attorney, in which she was found guilty of the following acts of misconduct:

'Charge 2- Conflict of interest /Unethical conduct:

'Conflict of interest and/or unethical conduct in that on or about 30 July 2012 you deliberately, and with an intention to deceive your employer, placed yourself in a position of conflict with the interest of your employer for your personal gain and/or the personal gain of Ms Christa Coetzer, and/or you deliberately failed to manage a conflict of interest in that despite the fact that you had submitted the CV of Ms Christa Coetzer and were therefore extremely compromised and/or conflicted, you agreed to partake and actually did so partake in the interview process and advanced your own interest to ensure that Ms Christa Coetzer was interviewed and employed by your employer and to the detriment of your employer's interest.'

Charge 3- Gross Misconduct:

'Gross misconduct in that you intentionally and wrongfully influenced the recruitment process and the decision of the interview panel, which you were part of, to appoint one Ms Christa Coetzer into the second position of Document Control Officer that was not advertised and authorised by your employer.'

Charge 4- Gross dishonesty:

'During or about October 2012 you intentionally and wrongfully acted without honesty towards your employer in that you, *inter alia*:

4.1 Obtained and submitted the CV of One Mr Muhammed Ebrahim, caused him to be interviewed for the position of an intern at the Construction Village of the CDC. As a result of your dishonest actions, you *inter alia*:

4.2 Gave the said Mr Muhammed Ebrahim an unfair advantage

4.3 Sought to unduly influence the ultimate decision of the interview panel which you were a member of;

4.4 Unduly preferred the said Mr Muhammed Ebrahim as the suitable candidate to the prejudice of your employer. '

Charge 5- Conflict of interest / Unethical conduct

'Conflict of interest, and/or unethical conduct in that during or about October 2012, you deliberately and with an intention to deceive your employer, placed yourself in a position of conflict with the interest of your employer for your personal gain and/or for the personal gain of Mr Muhammed Ebrahim, and or deliberately failed to manage a conflict of interest in that, despite the fact that you had caused the CV of Mr Muhammed Ebrahim to be submitted and shortlisted and were therefore extremely compromised and/or conflicted, you agreed to partake and actually did so partake in the interview process.'

[4] Ms Fort, a Unit head of Safety, Health, Environmental and Quality (SHEQ) reported to the Executive Manager (EM) of the Operations Business Unit, Mr Themba Koza, who in turn reported to the Chief Executive Officer, Mr Pepi Silinga. She was a senior manager earning around R1.4 million rand per annum and her unit had about 20 subordinate employees. She was overseeing the document control functions for CDC.

[5] The position of document control officer, previously occupied by Ms Michelle Bakker, became vacant when Ms Bakker was promoted to the position of integrated management systems (IMS) coordinator. Mr Robert Mogotsi previously occupied the position of IMS coordinator but was seconded to Coega Strategic Solution (a Rural Development Programme) in Pretoria. The

document control officer position was a contractual position and its funding would be sourced from the programme.

- [6] On 18 June 2012, Mr Monde Songongo, a recruitment consultant at CDC engaged in the Human Resource (HR) Department, received an instruction from the Acting HR Manager, Mr Graig Luckman, to assist Operations Business Unit in advertising the position of a document control officer. Mr Songongo prepared the internal advertisement. No suitable internal candidates were found. He requested CDC's five recruitment agencies to advertise the position externally and for each to provide him with their top two shortlisted candidates by 10 July 2012, the closing date. Mr Songongo says that Ms Fort informed him that she was in possession of a CV of a suitable candidate (probably a reference to Ms Coetzer's CV). It was not an unusual practice at CDC for employees to submit the CV of candidates they wished to be interviewed in the manner that Ms Fort proposed to do.
- [7] Mr Songongo screened the CVs received from the agencies. On 12 July 2012 he forwarded those that met the requirements to the Operations Business Unit line manager, Ms Michelle Bakker to do the final shortlisting. Ms Coetzer's CV was not in the pile of CVs submitted by Mr Songongo to Ms Bakker as it had not been submitted by Ms Fort at the closing date. However, on that same day, 12 July 2012, Ms Coetzer sent her CV electronically to Ms Fort. The next day, 13 July 2012, Ms Fort sent Ms Coetzer CV to Mr Songongo by e-mail which reads "*Please retain for future position in admin or finance.*" It appears that Mr Songongo did not understand this e-mail as having its source from a prior discussion with Ms Fort more so because the CV bore no relation to the document control position. He intimated that between 12-25 July 2012 he reminded Ms Fort on more than one occasion that he had not received the CV in issue. On one occasion Ms Fort wanted to give him a hard copy of the CV but he was uncomfortable in accepting same without Ms Bakker being aware of it. He consequently requested Ms Fort to put her proposal in writing which would enable Ms Bakker to know when and how the CV was received. It is not a practice that is encouraged at CDC to receive CVs after the closing date. However, the final say rested with the line manager, in this case, Ms Fort.

- [8] On 25 July 2012 Mr Songongo and Ms Bakker received an e-mail from Ms Fort to which was attached the second CV for Ms Coetzer. It reads *"This is a lady I was talking about that I'd like to have been included for Monday interviews (CV is not brilliant but I think she's excel (sic) in the position)"*.
- [9] Ms Coetzer's second CV was included in the pile of the CVs for shortlisted candidates and she was also shortlisted. The interviews were conducted on 30 July 2012. Ms Bakker, Ms Fort and Ms Marris Knepscheld, an HR coordinator, comprised the interviewing panel. Five candidates were interviewed which included Ms Coetzer. According to Ms Knepscheld, prior to the interviews, Ms Fort informed her fellow panelists that she knew Ms Coetzer *"through business dealings she had at the firm of attorneys where Ms Coetzer was working"*. No mention was made of the existence of any personal relationship between the two. Ms Knepscheld says that had there been any revelation of a personal relationship between Ms Fort and Coetzer the panel would in all probability have requested Ms Fort to recuse herself.
- [10] Ms Knepscheld and Ms Bakker scored Ms Leeane Winter the highest while Ms Fort scored Ms Winter in second position and Ms Coetzer the best candidate for the position. Ms Bakker says she and Ms Knepscheld did not agree with Ms Fort that Ms Coetzer *"was correct for the position"*. Ms Knepscheld scored Ms Coetzer the worst candidate while Bakker scored her the joint second worst candidate. On aggregate Ms Winter was rated first and Ms Coetzer second. The panel agreed that Ms Winter was the preferred candidate for the position. Ms Bakker says Ms Fort enquired from her, as the previous incumbent for the position, if there was sufficient work to divide the responsibilities into two to which she responded affirmatively. Ms Fort requested Ms Bakker to document the roles and responsibilities attendant to the position which Bakker did on 13 August 2012, almost two weeks later.
- [11] The panel discussed Ms Winter's relevant technical skills. During the deliberations Ms Fort mentioned that Ms Coetzer displayed better people management skills and said *"it would be nice if she could appoint both of them"*. Ms Knepscheld advised Ms Fort that there was only one position to fill and that if she was interested in appointing Ms Coetzer she would have to

seek the approval of Mr Themba Koza, the Executive Manager. Ms Fort informed them that she would do so. Ms Fort informed Ms Knepscheld at a later stage that she obtained the approval from Mr Koza to effect the appointment of Ms Coetzer. Ms Winter and Ms Coetzer were both appointed on 01 September 2012 as the document control officers.

[12] According to Mr Songongo there is no rule which prohibits the recruiting line managers or those employees who had submitted CVs for consideration by CDC from forming part of the interviewing panel. However, a declaration of interest should be made. Mr Songongo further explained that the convention had always been to obtain the approval from the Executive Manager of a requesting unit, in this case Mr Koza, with regard to the vacant positions that needed to be filled arising either at the inception, during or at the end of the interviews. Subsequent to the approval the unit line manager would request HR to assist with the filling of the vacancy. It was immaterial whether this was a contract or permanent position. This much was confirmed by Mr Zuko Mapoma, the Executive Manager Corporate Services, who intimated that in the event of a need arising to appoint a candidate in the position not in the staff establishment or staff structure the authority to do so rested with the Business Unit Executive Manager in respect of the Business Unit concerned and a programme director if it related to a programme. He would then *"sign off the actual appointment when that approval and authorization has been obtained from the Executive Manager."*

[13] Mr Koza testified that he delegated the authority of recruitment within SHEQ to Ms Fort to follow the CDC processes but she is supposed to engage him on the candidate(s) to be appointed and they both had to reach an agreement. He conceded that the problem was as identified by the CEO in his e-mail dated 18 July 2013 wherein he states *"It has been brought to our attention that there may be systemic abuse of authority that, in good faith, has been delegated to levels below EM's regarding recruitment and appointment of personnel to the CDC."* He went on to say that the systemic abuse of authority referred to by the CEO was not with reference to SHEQ.

[14] Mr Koza maintained that, where one position was advertised and the need to appoint a second candidate arose, then there ought to have been a discussion with various role players. In this case the discussion would take place with the programme director if the position was going to support a particular programme, the Executive Manager of operations, the HR Manager, or the Executive Manager of corporate services to determine whether there was a need to increase the headcount and to seek the necessary approval. If the services to be rendered by the incumbent was under a programme, the programme director, the Finance and HR Department would have to be consulted.

[15] The document control officer would have to do work for both the Industrial Development Zone (IDZ) and for the programme. Mr Koza expected Ms Fort, with regard to employing Ms Coetzer in a position that did not exist, to have brought it to his attention and to follow due process. In that way, Koza says, he would have engaged with the CEO of CDC for the approval of the position which would have to be sanctioned by the Board of CDC. He went on to say that the delegation of headcount from the CEO to operation rested with the Executive Manager. Even if the budget was sufficient to employ two people Ms Fort still required the approval of the Executive Manager. Mr Koza says he is not aware of any delegation given to Ms Fort on these aspects. He categorically disputed having had any discussion with Ms Fort in which the latter informed him of her intention to appoint two candidates in the document control position.

[16] Mr Koza became aware of the two appointments in issue in July 2013 when he was interviewed during the course of the investigation pertaining to this case. To the contrary, Ms Fort says she did not require Mr Koza's approval to appoint employees because he had delegated the recruitment function to her. In light thereof that the appointment of the two candidates to one position was a novel "suggestion" she sought Mr Koza's advice (not approval) in this manner:

'I went up to his office, stuck my head in and said to him we are finished (with) the interviews, we have got two candidates that we like, both of them, I can

afford it, can I hire both, we haven't done this before, what do you think of the idea of me hiring both...and he said to me if I can afford it, he can't see any problem, if HR doesn't have a problem with it, he doesn't have a problem with it. I then went to Marrisa (Ms Knepscheld) and said to her that Themba (Mr Koza) agrees and he can't see there being an issue; lets hire both.'

[17] The sequence of events set out herein under, leading up to the appointment of Mr Talha Ebrahim at CDC, are largely common cause. Mr Talha Ebrahim was introduced to Ms Fort by his brother, Mr Adnaan Ebrahim, at a coffee shop. As they were exchanging some pleasantries Mr Talha Ebrahim said to Ms Fort *"Oh you work for CDC, any chance there is a job"*. She responded *"Well we have got an internship programme, if you give me your CV there are a couple of departments that might be suitable for you, sent me your CV and I will see what I can do."*

[18] On 11 October 2012 Ms Fort sent an e-mail to Mr Ridwaan Davids, a section head of Vulindlela accommodation which reports to Operations Business Unit. The e-mail, to which was attached Mr Talha Ebrahim's CV, was to the effect that Ms Fort had a position for an intern available. It reads:

'Please don't go by the CV. Been doing anything and everything. If you have an opening as a maintenance intern, he'd really appreciate it. I feel sorry for him, hopefully an internship will give him a boost of confidence to enable a more permanent position within the filed.

Anyway he comes across as bright, willing and eager so if you find you have the space, please consider him...

(Ps, I have an intern finishing in November that I'm not going to replace...so if you want to utilize that spot...1st come first served...lol)'

[19] Mr Davids informed Ms Fort that he would take an intern provided everyone agreed and due process was followed. Ms Fort informed him that Mr Koza was satisfied with the transfer of an intern. She requested Mr Davids to obtain few more CVs, add Mr Talha Ebrahim's CV to the pile, and shortlist the candidates for interviews.

- [20] On 18 October 2012 Mr Davids received a further email from Ms Fort which reads: *"Hi. I am being stalked what's happening with the intern interviews?"* Davids says he expressed his reservations pertaining to Mr Talha Ebrahim's CV because he had no maintenance experience and did not possess the requisite qualification (a degree). Ms Fort's reply to Mr Davids was that the candidate *"..doesn't need to have maintenance experience as none of the interns are expected to have work experience..."*
- [21] On 30 October 2012 Ms Haroledene Labercensie² of the HR Department forwarded an e-mail to Mr Davids which was copied to Ms Fort advising them that HR was unable to secure additional CVs. Ms Fort replied to the e-mail as follows: *"Can we not just interview the one candidate then? If he is suitable then we can move with hiring?"* Ms Labercensie set up the interviews. The panel consisting of Ms Fort, Ms Labercensie and Mr Davids thereupon interviewed Mr Talha Ebrahim. Ms Fort did not disclose that she had any relationship with Mr Talha Ebrahim who was employed on 05 November 2012. Mr Koza raised a concern regarding the interview of only one individual in the circumstances where there had been *"a pool of people looking for work"*.
- [22] On 28 May 2013, several months following the appointment of Ms Coetzer and Mr Talha Ebrahim, Ms Fort reported to Mr Sibusiso Sibandze, CDC's Unit Head for Customs, Logistics and Security, that she had recently received an e-mail from an unknown source³ in which various allegations were made, including the allegation that Mr Adnaan Ebrahim and Ms Coetzer were in a romantic relationship and that they had used Ms Fort to commit fraud against CDC. Ms Fort sought the assistance of Mr Sibandze to establish whether the allegations were true. She revealed to Mr Sibandze that she was involved in a romantic relationship with Mr Adnaan Ebrahim and were contemplating getting married. She further told him that she met Ms Coetzer through Mr Adnaan Ebrahim and had been introduced to her as Mr Adnaan Ebrahim's cousin. Weeks later, Ms Fort requested Mr Sibandze to stop the investigation

² She is referred to as Heraldine Labuschange on the record.

³ The e-mail is at p1221 of the record and appears to have been sent to Ms Fort on 18 April 2013 by a certain Adri Bezuidenhout.

as the issues had been resolved within the family unit and that the likely author of the e-mail was Mr Talha Ebrahim, who was upset that Ms Coetzer was employed at a higher level than him.

[23] Mr Sibandze nevertheless appointed Mr Karl Edwards, a loss control consultant, to carry out the investigative work for CDC. Mr Edwards interviewed Ms Fort on 03 June 2013, made some contemporaneous notes and provided CDC with a report on 05 June 2013. When the interview was carried out there was no pending investigation against Ms Fort regarding her potential involvement in the irregularities relating to the appointments of Ms Coetzer and Mr Talha Ebrahim. According to Mr Edwards Ms Fort stated voluntarily that:

23.1 She had been in a relationship with Mr Adnaan Ebrahim for approximately a year after meeting him online while she was looking for a partner, which meant that the relationship commenced during mid-2012. Mr Edwards did not enquire on the nature of this relationship or what type of a partnership Ms Fort had been looking for. He went on to say *"According to Jacqui [Ms Fort]....she wants a family relationship, she wants a husband to look after, she wants security of, you know, having a relationship that works, she gave me the impression that Adnaan was the person that was going to bring that about."* He further says Ms Fort's expectation was that the relationship would lead to a marriage.

23.2 She regularly visited Mr Adnaan Ebrahim at his flat, No: 2 Doria Court, Fourth Avenue, New Park, Port Elizabeth, who shared this accommodation with his cousin, Ms Coetzer.

23.3 She confronted Mr Adnaan Ebrahim with the allegation as captured in the e-mail from the unknown source. Mr Adnaan Ebrahim was furious but did not provide any explanation to the allegation that he was married to Ms Coetzer.

23.4 She met Ms Coetzer at the flat. She was then working for a firm of Attorneys and had complained about her "miserably low salary".

23.5 She suggested to Ms Coetzer to submit her CV to CDC as there was a vacancy advertised. Ms Coetzer did so and was appointed on merit.

23.6 She suggested to Mr Talha Ebrahim (Mr Adnaan Ebrahim's brother) that he apply for an intern position at CDC. He did so and was appointed on merit.

[24] At the early stages of the investigation, when the octave tone started to rise, Mr Alistair Gajjar from the Internal Audit of CDC interviewed Ms Fort in connection with an anonymous tip-off which suggested the commission of some irregularities in the appointment of Ms Coetzer as a document control officer⁴. Ms Fort informed Mr Gajjar that she met Ms Coetzer *"outside of work through a friend"*; that *"Through meeting her and talking, I got an understanding of what she does;"* and further that, *"And I said to her that I am looking for a Doc Control person-she must give me her CV...and I will add it to the pile. She gave me her CV. She was shortlisted."*

[25] Ms Fort says she lied to Mr Edwards insofar as she told him that she met Mr Adnaan Ebrahim online and denied having told him that her romantic relationship with Mr Adnaan Ebrahim started in mid-2012. She says that she met Mr Adnaan Ebrahim through her former husband in June 2012 (before the appointment of Ms Coetzer and Mr Talha Ebrahim). To dispel any notion that she had been involved in a romantic relationship with Mr Adnaan Ebrahim she produced copies of the e-mails that were exchanged between herself and her former husband from 18 June 2012 to 25 June 2012. The e-mails show that her former husband had requested her to provide advice on an environmental matter to an acquaintance of his, Mr Adnaan Ebrahim. At that stage, she says, she was dating Mr Alphonsis Du Plessis who she attended a rugby match with on 23 June 2012 and was accompanied by some of her colleagues from CDC.

[26] Around June 2012 Ms Fort assisted Mr Adnaan Ebrahim whose licence to restart a service station had been turned down and had filed an appeal through attorneys JR Bester & Associates; this is when her "business

⁴ The precise date of the interview conducted by Mr Gajjar is not apparent from the record.

(professional) relationship” with Mr Adnaan Ebrahim commenced. Ms Coetzer was at that stage also in the employ of these attorneys. Ms Fort would drive with Mr Adnaan Ebrahim during the lunch breaks to meet his lawyers and waited at the reception while Adnaan was in consultation with his attorneys. She observed Ms Coetzer interacting with the clients and members of the public. She was impressed with the way she handled irate patrons. She gave Adnaan her business card and said *“listen next time you are in there, if that woman is interested, ask her to send her CV to see if she would be interested in maybe applying for a job at the CDC”*.

[27] Ms Fort says that during the interviews for the position of a document control officer she disclosed to her fellow panellists that she saw Ms Coetzer twice at her workplace; she liked her; and requested her to forward her CV. She suggested to the panel that both Ms Winter and Coetzer be employed because it was a contractual position and funding was available for both and would have no impact on the headcount.

[28] Ms Fort maintained that she commenced her romantic relationship with Mr Adnaan Ebrahim at the end of March 2013, long after Ms Coetzer and Mr Talha Ebrahim had been appointed into the services of CDC in September and November 2012, respectively.

The arbitration proceedings

[29] The commissioner was enjoined to determine whether the dismissal of Ms Fort was substantively fair and the appropriateness of sanction meted out. In her analysis of the evidence the commissioner was of the view that:

‘At the centre of all the events is the alleged romantic relationship between the applicant (Ms Fort) and Mr Adnaan Muhammed (Ebrahim), which relationship had to have started up so rapidly and intensely to have influenced the applicant, an employee of nine years with a clean record, to manipulate the appointment process in order to secure low level appointments for two of his family members. I am not persuaded that this was indeed the case’.

[30] The commissioner perfunctorily determined that there was no romantic relationship between Ms Fort and Mr Adnaan Ebrahim. She was unpersuaded

that Ms Fort manipulated the appointment process and reasoned that in the absence of a romantic relationship between Ms Fort and Mr Adnaan Ebrahim, at the relevant time of the appointments, the possibility of a conflict of interest in charges two and five was substantially "*watered down*".

- [31] With regard to Ms Fort's participation in the interviews the commissioner noted that none of her fellow panellists pointed out that they felt uncomfortable with her presence and therefore she had no reason to conclude that Ms Fort benefited in any manner in the appointments of the two employees. She was of the view that CDC failed to prove the existence of any rule that prohibited the submission of CVs by the members of the panel.
- [32] The commissioner held that Ms Coetzer's appointment into the duplicated position of a document control officer was warranted. She further held the view that Ms Coetzer was a suitable candidate whose skills would complement those of the other appointee, Ms Winter. She found the alleged verbal approval, that Ms Fort testified she obtained from Mr Koza, to have been sufficient and that it was improbable that Ms Fort had not discussed the appointment of the two document control officers with Mr Koza. In any event, she held, the HR Department did not question the approval which Ms Fort said she obtained from Mr Koza. On the contrary, she found, Ms Coetzer was appointed on the strength of it.
- [33] The commissioner further found that in mid-2012 the recruitment process at CDC was not *stricto sensu* conducted in terms of the rules. Ms Fort was left to interact with the programme director to determine the availability of funds and if a genuine need was established to recruit employees within SHEQ. She held that Mr Koza delegated the authority of external recruitment within SHEQ to Ms Fort. She noted that Mr Koza took issue with the headcount and the fact that an increase in staff had to be approved by the Board. Notwithstanding this the commissioner concluded that the appointment of the two document control officers on fixed term contracts that ran parallel to the period of an external programme could not add to CDC's headcount because the employees' contracts of employment terminated upon the expiry of the contract with the programme.

[34] The commissioner was further of the view that Mr Koza demonstrated some doubt on the aspect of whether the recruitment process allowed for the appointment of two candidates in an instance where only one vacancy had been advertised. She was of the view that if the Executive Manager was uncertain on the process to be followed, in respect of the novel situation, it could not have been expected of his subordinate, Ms Fort, to be conversant with it.

[35] The commissioner found no dishonesty in the manner in which Ms Fort obtained and submitted the CV of Mr Talha Ebrahim or any conflict of interest in circumstances in which she served as a panellist in Mr Talha Ebrahim's interview.

[36] In the overall the commissioner concluded:

"72. Central to the charges against the applicant [Ms Fort] was an alleged conflict of interest, which is based on the principle that an employee has to maintain good faith and further the interest of her employer. The employee is therefore required not to compete with her employer or to obtain additional employment where a conflict of interest may arise. A conflict of interest exists when an employee finds herself in a position where her personal interest are at odds with her employer's, and may include direct competition with the employer or making secret profits. A conflict of interest can also include a situation where an employee has an interest in an entity that has dealings with the employer.

73. I cannot find anything in the applicant's conduct that constitutes a conflict of interest as defined above. If she should have been found guilty of any allegations, it is not this. The above analysis concludes that I find the applicant to be not guilty of the serious charges of gross misconduct, conflict of interest and gross dishonesty that were levelled against her. I therefore find the dismissal of the applicant to be substantively unfair.'

[37] The commissioner also found no sufficient evidence demonstrating that the trust relationship had irretrievably broken down. She determined that reinstatement was not impracticable as Ms Fort had already moved to a different business unit prior to her dismissal and no longer reporting to Koza.

She reinstated her retrospectively on same terms and conditions applicable prior to her dismissal.

The proceedings before the Labour Court

[38] The Court a quo adopted an independent assessment of the evidence and determined the probabilities in the light of the material before it. In particular, it analysed the evidence in relation to the receipt of the second CV and the events leading thereto. The Court noted that Ms Fort's evidence, on how she met Ms Coetzer and how the second CV was procured, was contradictory. At arbitration Ms Fort's evidence was that she only observed Ms Coetzer working at a firm of attorneys in the reception and had not spoken to her before receiving her CV. This piece of evidence, the Court held, was contrary to at least the following three versions:

38.1 Ms Fort told Mr Sibandze that she was introduced to Ms Coetzer as Mr Adnaan Ebrahim's cousin and that Ms Coetzer had enquired about a job at CDC and applied.

38.2 Ms Fort informed Mr Gajjar that she met Coetzer *"Outside work through a friend...Through meeting her and talking, I got an understanding of what she does...And I said to her that I am looking for a doc control person-she must give me her CV." "...I said to her, I said: 'listen we didn't get anybody internally for this position that I am looking for. Don't you want to give me your CV and I will add it to the pile.'*

38.3 According to Mr Edwards Ms Fort told him that she met Ms Coetzer at her flat. Ms Coetzer's CV was submitted following her discussions with Ms Fort.

[39] The Court a quo was of the view that the commissioner did not apply herself to the aforesaid inconsistent versions. The Court was inclined towards the view that Ms Fort's version was false and that she probably interacted directly and substantially with Ms Coetzer in procuring the first CV.

- [40] The Court then examined the question whether Ms Fort had any dealings with Ms Coetzer in procuring her second CV. It found her version to have been problematic. This was so because at arbitration her case was that she had no dealings with Ms Coetzer whatsoever over the issue and had procured the second CV through Mr Adnaan Ebrahim by asking him to request Ms Coetzer to send her CV. This version was held to be clearly contrived and inconsistent with the forthright approach that Ms Fort adopted to the possible recruitment of Ms Coetzer as relayed to Mr Gajjar. It further held that although the commissioner had found that Ms Fort's version was contradictory, on the question whether she spoke to Ms Coetzer about the document control position, she did not consider the impact of the inconsistency on Ms Fort's overall credibility as a witness.
- [41] The Court then had regard to the aspect of the procurement of the second CV by Ms Fort from Coetzer after the first CV had already been submitted. It found that Ms Fort's evidence was "*a ruse aimed legitimising the calling of a second and improved CV*" insofar as she testified to the effect that she mistakenly thought that she had forgotten to send the CV to Mr Songongo and therefore asked Mr Adnaan Ebrahim to request Ms Coetzer to re-send the CV. The Court further found it improbable that Ms Fort would have forgotten that she had sent the first CV to Mr Songongo when she had procured it, read it and then forwarded it to Mr Songongo by e-mail. The Court remarked that it remained unexplained why Ms Fort did not again dispatch the first CV to Mr Songongo from her e-mail box when she had received it by e-mail from Ms Coetzer. In any event, the Court reasoned, Mr Songongo reminded Ms Fort on numerous occasions between 13 and 25 July 2012 to submit the CV that she told him she wished to submit. The message allegedly sent via Mr Adnaan Ebrahim to Ms Coetzer to re-send the CV resulted in the latter completely adapted the CV. The Court was of the view that it was a serious misdirection on the part of the commissioner not to have brought her mind to bear on Ms Fort's questionable explanation regarding the procurement of the second CV.

- [42] The Court then dealt with the issue of whether Ms Fort assisted Ms Coetzer in compiling the second CV. It rejected, as a recent fabrication, Ms Fort's version that she was told by Ms Coetzer that the latter obtained advice from an HR official on the nature of the job Ms Coetzer was applying for. The Court was of the view that for Ms Coetzer to produce a tailor-made CV of that kind she must have had internal assistance of someone very knowledgeable. The Court held that the spectre of Ms Fort herself having given that advice on the second CV looms large. Ms Fort's evidence that she barely looked at the second CV and simply forwarded it to Mr Songongo and Ms Bakker by e-mail was probably untrue. It found further that Ms Fort failed to discharge the evidentiary burden to explain how the second CV came about and what her involvement was in relation thereto.
- [43] The Court concluded that Ms Fort was involved in assisting Ms Coetzer in compiling the second CV and thus enhanced it. The commissioner's finding that it was far more probable that Ms Fort did inform Ms Coetzer about the vacancy and that there was nothing untoward in her conduct was a product of the series of errors and misdirections on the commissioner's part. The Court reasoned that, but for these errors and misdirections, the commissioner would probably have found that Ms Fort was guilty of enhancing Ms Coetzer's application.
- [44] On a conspectus of the evidence, the Court a quo found the commissioner's decision to have been "obviously wrong" and falling outside a range of reasonable decisions. It concluded that Ms Fort deviously failed to disclose that she was instrumental in embellishing Ms Coetzer's CV, otherwise she would inevitably have been required to recuse herself. She therefore placed herself in a conflict of interest situation with her employer. What aggravated the transgression, the Court found, was Ms Fort's participation in the interview and scoring Ms Coetzer the best candidate. She then devised the stratagem of appointing two candidates for the document control position which resulted in Ms Coetzer earning a salary four times higher than what she had been earning where she worked at JR Bester & Associates.

[45] The Court a quo found it unnecessary to determine whether Ms Fort was in a romantic relationship with Mr Adnaan Ebrahim on the occasion of the interviews. However, it accepted that there was a personal connection between them at the relevant period. It held that Ms Fort breached the relationship of trust; she showed no remorse; and went about presenting disingenuous defences at both her disciplinary enquiry and the arbitration. Accordingly, the Court set aside the award and replaced it with an order that the dismissal of Ms Fort was substantively fair.

The grounds of appeal

[46] The grounds of appeal boil down to this. That the Court a quo erred:

- 46.1 In finding that the arbitration award represented an outcome that a reasonable decision maker could not have reached on the material before the commissioner;
- 46.2 In finding that the commissioner had failed to determine the question of Ms Fort's credibility and thereby interfering with her factual and credibility findings;
- 46.3 In finding that Ms Fort's version was not credible. The Court ought to have found Ms Fort's version credible in all material respects;
- 46.4 In its application of the review principles;
- 46.5 In concluding that the commissioner should have found that Ms Fort misconducted herself by enhancing Ms Coetzer's CV and/or in failing to disclose the full extent of her interaction with Ms Coetzer to the interviewing panel;
- 46.6 In concluding that Ms Fort had failed to adequately explain her interaction with Ms Coetzer prior to the interview;
- 46.7 In concluding that Ms Fort rendered herself guilty of a serious misconduct and that her dismissal was substantively fair;

46.8 In upholding the application for review with costs in the circumstances where the consideration of the law and fairness dictated otherwise.

Appellant's argument

- [47] Mr Le Roux, for Ms Fort, contended that the Court a quo ought to have been slow to interfere with the credibility findings made by the commissioner because she arrived at those findings with the benefit of her observation and with reference to the quality of the witnesses' evidence and the probabilities. Having decided to revisit the commissioner's credibility findings, it was contended, the Court did so in a manner that incorrectly emphasised those aspects negative to Ms Fort's credibility while not sufficiently taking into account those aspects that were strongly supportive of the commissioner's conclusions.
- [48] Mr Le Roux further argued that if Ms Fort had known Ms Coetzer and Mr Adnaan Ebrahim, in the manner suggested by CDC, prior to the appointment of Ms Coetzer into the services of CDC, it would not have been necessary for Mr Adnaan Ebrahim to be placed in contact with Ms Fort through the latter's former husband. He contended that there was no direct or even circumstantial evidence of any relationship between Ms Fort and Ms Coetzer and that the Court a quo inferred the existence of that relationship purely from the limited contradictions in Ms Fort's version; the contradictions do not serve to establish CDC's case.

DCD's argument

- [49] Mr Fourie, for CDC, countered that the commissioner sought to justify her conclusion that Ms Fort's version of events was to be preferred over CDC's despite material contradictions in the various versions given by Ms Fort; the overwhelming weight of evidence presented by CDC; and the overall probabilities. He further contended that the commissioner attacked the evidence of various witnesses called by CDC which attack was not the product of a proper reasoning process. The commissioner's conclusion that Ms Fort was not guilty of any misconduct is not one that a reasonable decision maker could have reached on the material before her. What was

further fatal to the award, it was argued, was the lack of a properly reasoned determination, fairly reflecting the evidence presented. Resultantly, CDC was subjected to an unfair procedure and deprived of a fair hearing.

Evaluation

[50] The test laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁵ and restated in several decisions of this Court and the Supreme Court of Appeal is whether the decision reached by the commissioner is one that a reasonable decision-maker should not reach.⁶ In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*⁷ the SCA pronounced:

'[13] The distinction between review and appeal, which the Constitutional Court stressed is to be preserved, is therefore clearer in the case of the *Sidumo* test. And while the evidence must necessarily be scrutinized to determine whether the outcome was reasonable, the reviewing court must always be alert to remind itself that it must avoid 'judicial overzealousness in setting aside administrative decisions that do not coincide with the judge's own opinions'. The LAC subsequently stressed that the test 'is a stringent [one] that will ensure that ... awards are not lightly interfered with' and that its emphasis is on the result of the case rather than the reasons for arriving at that result. **The *Sidumo* test will, however, justify setting aside an award on review if the decision is 'entirely disconnected with the evidence' or is 'unsupported by any evidence' and involves speculation by the commissioner.**' (Own emphasis/ footnotes omitted)

[51] In this case, the challenge focuses the evaluation of the evidence by the commissioner. It must immediately be said that there is no merit in the argument that the Court a quo was conducting a process of reverse reasoning. In the end, the conclusion reached by a trier of fact must account

⁵ (2007) 28 ILJ 2405 (CC).

⁶ At 2439 para 110 the Court pronounced: "To summarise, *Carephone* held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: **Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?** Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair."

⁷ (2013) 34 ILJ 2795 (SCA) at 2802 para 13

for all the evidence presented at the trial and by parity of reasoning during the arbitration. In *S v Trainor*⁸ Navsa JA provided the following useful guide and principle with regard to the evaluation of evidence:

'A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the *onus* on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach...is illogical and wrong.'

[52] The SCA held that an assessment of the evidence based on demeanor, without regard to the wider probabilities, constitutes a misdirection⁹. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*¹⁰ the Constitutional Court pronounced that the advantages which the trial court enjoys should not be over-emphasised 'lest the appellant's right of appeal becomes illusory'. The truthfulness or untruthfulness of a witness can rarely be determined by demeanor alone without regard to other factors including the broader probabilities. In that case the Court applied the principles enunciated in *R v Dhlumayo and Another*¹¹ in particular the following instructive guidelines:

'10. There may be a misdirection on fact by the trial Judge where the reasons are either on their face unsatisfactory or where the record shows them to be such; there may be such a misdirection also where, though the reasons as far as they go are satisfactory, he is shown to have overlooked other facts or probabilities.

11. The appellate Court is then at large to disregard his findings on fact, even though based on credibility, in whole or in part according to the nature

⁸ 2003 (1) SACR 35 (SCA) at 41 para 9.

⁹ See *Medscheme Holdings (Pty) Ltd & another v Bhamjee* 2005 (5) SA 339 (SCA) at 345A-C para 14.

¹⁰ 2000 (1) SA 1 (CC) at 43-44 paras 79-80.

¹¹ 1948 (2) SA 677 (A) at 706.

of the misdirection and the circumstances of the particular case, and so come to its own conclusion on the matter.'

(see also the Judgment of this Court in *National Union of Mineworkers & Another v Commission for Conciliation, Mediation & Arbitration & Others*¹² referred to by the Court a quo in its judgment.)

[53] Central to this appeal is the determination of the question whether the decision by the commissioner fell within the band of a decision made by a reasonable decision maker. In my view, this question involves a consideration of the following three inextricably linked key issues. First, whether Ms Fort had any romantic (or personal) relationship with Mr Adnaan Ebrahim and knew Ms Coetzer and Mr Talha Ebrahim at the relevant period of their recruitment and appointment into the services of CDC. Second, whether Ms Fort's participation and/or actions during the recruitment process and the employment of the two employees were permeated by an underlying conflict of interest on her part to the detriment of CDC's interest. Third, if it is proven that Ms Fort advanced her own interest and/or those of the employees concerned, the impact of her conduct on the employment relationship should be evaluated. In answering these questions it behoves this Court to undertake a careful evaluation of the credibility of witnesses and the whole evidence against the underlying probabilities to which I now turn.

The question whether Ms Fort had any romantic relationship with Mr Adnaan Ebrahim and knew Ms Coetzer and Mr Talha Ebrahim at the relevant period of their recruitment and appointment into the services of CDC

[54] As already alluded to, in support of its case that Ms Fort was extremely compromised and/or conflicted insofar as she took part in the appointments of Ms Coetzer and Mr Talha Ebrahim, CDC's contention was that Ms Fort was involved in a romantic relationship with Mr Adnaan Ebrahim who was Ms Coetzer's cousin and Mr Talha Ebrahim's brother. It was found by the chairperson of the disciplinary enquiry that preceded this matter that such a romantic relationship was in existence at the relevant period covering the

¹² (2015) 36 ILJ 2038 (LAC) at 2044-2045 para 14.

charges. During the review proceedings and in this appeal the argument was developed further that the timing of the romantic relationship between Ms Fort and Mr Adnaan Ebrahim was not dispositive of the review or appeal because it was only relevant insofar as it affected Ms Fort's credibility as a witness and demonstrated the absurdity in the commissioner's unqualified acceptance of her evidence.

[55] Mr Le Roux argued that the factual conclusion urged upon the commissioner as being foundational to CDC's case, namely the alleged romantic relationship, was not the factual finding for which the CDC contended during its argument in the Labour Court. It had simply mutated because, before the commissioner, the alleged impropriety was not posited as having arisen from any direct relationship between Ms Fort and the appointees but on the romantic relationship she had with Mr Adnaan Ebrahim. Mr Le Roux contended that CDC ought not to have succeeded in the Labour Court on the strength of a factual proposition that it had not advanced in the first place.

[56] The commissioner cursorily found Ms Fort's evidence convincing that when she was introduced to Mr Adnaan Ebrahim by her former husband she was involved in a romantic relationship with Mr Du Plessis. The commissioner was of the view that it was unlikely that Ms Fort will attend a work function (the rugby match) and introduce Mr Du Plessis to her colleagues as her companion. According to the commissioner this made Ms Fort's version, that her relationship with Mr Adnaan Ebrahim was professional, probable. What appears to be significant, which the commissioner did not take heed of, is that Ms Fort's relationship with Mr Du Plessis ended a week after the rugby match and few days after she had met Mr Adnaan Ebrahim.

[57] Ms Fort's credibility as a witness came under close scrutiny with regard to the time she commenced her romantic relationship with Adnaan. It is to be borne in mind that the evidence by Mr Edwards was that Ms Fort informed him that she had already been dating Adnaan for approximately a year (that is since mid-2012) after having met him online. Ms Fort admitted to having lied to Mr Edwards on this aspect. This concession should have signalled to the commissioner to be careful in the assessment of Ms Fort's account on the

chronology of events. It was also Mr Sibandze's uncontested evidence that in late May 2013 Ms Fort told him that she was involved in a romantic relationship with Mr Adnaan Ebrahim which had progressed to the point that they discussed wedding plans.

[58] When Ms Fort had a discussion with Mr Edwards and Mr Sibandze there was no suspicion of any wrongdoing on Ms Fort's part or pending investigation against her. She freely volunteered the stated information to them. When the accusations emerged with regard to her alleged inappropriate conduct in the appointment of Mr Adnaan Ebrahim's relatives during 2012 Ms Fort made an about turn by distancing herself from any prior connection she had with Mr Adnaan Ebrahim. This she inventively did so as to exculpate herself from any alleged misconduct by claiming that their romantic relationship commenced during March 2013.

[59] Ms Fort was an unsatisfactory witness on the aspect of how she met Ms Coetzer. She presented various contradictory versions:

59.1 Firstly, during her interview with Mr Edwards, she informed him that she met Ms Coetzer at a flat which Ms Coetzer shared with Mr Adnaan Ebrahim. At that time Ms Coetzer was working for the firm of attorneys mentioned and had complained about her "miserably low salary". She suggested to Ms Coetzer to submit her CV to CDC.

59.2 Secondly, as already alluded to, in the early stages of the investigation concerning Ms Fort's potential misconduct, she told Mr Gajjar that she met Ms Coetzer outside the work situation through a friend (Adnaan). This must have been around June 2012 because Ms Fort intimated that her "business relationship" with Mr Adnaan Ebrahim commenced then.

Ms Fort could not explain why she told Mr Gajjar that she met Ms Coetzer under the said circumstances through a friend and that in "talking" she got to know what she does for a living. She also told Gajjar that she requested Ms Coetzer to give her a copy of her CV because she sought to recruit a document control officer. This version

completely negates her evidence at arbitration. For instance at arbitration she said that she had never spoken to Coetzer before the submission of her CV. On further probing during cross-examination regarding her discussions with Gajjar she went on to suggest that by “*talking*” to Ms Coetzer she meant that she gathered from Ms Coetzer’s interaction with clients what her work entailed; she did not know whether job description related to administration, reception work or filling. Ms Fort’s threadbare explanation was unhelpful to her cause and at times stretched credulity beyond limit. She ended up dismissing the interview she had with Mr Gajjar as casual and a waste of time. As she puts it “*I didn’t think CDC was taking the issue seriously...*”, this despite the fact that she was informed by Gajjar at the commencement of the interview that CDC had approached internal audit to investigate some irregularities into the appointment of Ms Coetzer.

59.3 Thirdly, Ms Fort and other employees of CDC were requested by Mr Mapoma, Executive Manager Corporate Services, during July 2013 to respond to certain questions concerning their involvement in the appointment of Ms Coetzer. On 18 July 2013 Ms Fort provided a statement which reads in part:

‘Other than being present at her place of employment on 2 occasions which availed me of the opportunity to observe her interactions with clients, I had had no conversation or interactions with the said person prior to the interviews except to request that she sent me her CV.”

[60] The commissioner did not apply her mind at all to these glaring contradictions. She preferred Ms Fort’s version of when her relationship with Mr Adnaan Ebrahim commenced without considering all the relevant factors when weighing up the irreconcilable versions. For instance, when rejecting Mr Edwards’ evidence she was of the view that he failed to pay proper attention to the timeline. However, the commissioner failed to recognize that Mr Edwards’ report incorporated details that could have only been provided by Ms Fort; for example, the duration of her relationship with Mr Adnaan Ebrahim; that Ms Coetzer was employed at the named law firm and

complained about her “*miserably low salary.*” The commissioner in addition did not take into account the unchallenged evidence by Mr Sibandze that in May 2013 Ms Fort told him that her romantic relationship with Mr Adnaan Ebrahim stood on the cusp of marriage.

[61] Ms Fort’s evidence to the effect that she observed Ms Coetzer at work and requested Mr Adnaan Ebrahim to ask Ms Coetzer to bring her CV is fraught with difficulty. She claimed that at that stage she was not aware that Ms Coetzer and Mr Adnaan Ebrahim were cousins. It is troubling that Mr Adnaan Ebrahim would not have informed her, at the time of her request for the submission of the CV, that Ms Coetzer was his cousin. The purported “business (professional) relationship” (as found by the commissioner to have existed between Ms Fort and Mr Adnaan Ebrahim) is also questionable. If Ms Fort was Mr Adnaan Ebrahim’s advisor on an environment issue, as she professed, it is strange that she would wait in the reception while Adnaan was consulting with his attorneys on the same issue that Fort was rendering advice on. In my view, this version was concocted to fortify Ms Fort’s case that she observed Ms Coetzer at work.

[62] On the probabilities Ms Fort attended meetings with Adnaan at his firm of attorneys and took part in the consultation process. Mr Adnaan Ebrahim introduced her to his cousin, Ms Coetzer. Ms Fort and Coetzer came to know each other through “*talking*”. In that manner she requested Ms Coetzer to provide a copy of her CV.

[63] The Labour Court found it unnecessary to determine whether Ms Fort and Mr Adnaan Ebrahim were lovers. The Court was of the view that from 27 June 2012 onwards Ms Fort appears to have struck up at least a friendship or sorts with Mr Adnaan Ebrahim. It found that there was a personal connection between the two. To this end, I am satisfied that the Court a quo’s conclusion cannot be faulted.

Whether Ms Fort's participation or actions in the recruitment and employment of Ms Coetzer and Mr Talha Ebrahim were permeated by an underlying conflict of interest to the detriment of CDC

- [64] It was a common occurrence at CDC for employees to submit the CVs of job seekers for consideration and possible appointment by CDC. There was also nothing unusual about submitting the candidates CVs late. It was also not in dispute that the employees who submitted the CVs of job applicants were not disqualified from active participation in the interviews as panellists where the job applicants, on whose behalf they submitted the CVs, were to be interviewed. However, disclosure by a panellist of prior knowledge and personal relationship with the candidate or any possible conflict of interest was obligatory.
- [65] The Court a quo dealt at length with the two CVs submitted by Ms Coetzer at CDC to show that it was probable that Ms Fort enhanced Ms Coetzer's CV to increase her chances of securing the document control position.
- [66] The structure of the second CV submitted after the closing date and the shortlisting process is different from the first CV received; the first CV was of a general nature whereas the second CV had additional roles and responsibilities which complemented the document control position. Mr Songongo intimated that he would have never shortlisted Ms Coetzer based on the first CV submitted because the experience captured therein is more of an administrative and financial nature and not of relevance to the document control position. He conceded that it was normal for job seekers to emphasize their attributes and experience in relation to the position they applied for but added that such an applicant, particularly for the document control position, would have to had sight of the advertisement before he/she could adapt his/her CV.
- [67] The commissioner was of the view that Ms Fort's version, insofar as it was contended that she had spoken to Ms Coetzer prior to the submission of the CV, was contradictory. She held that it was probable that Ms Fort spoke to Ms Coetzer about the vacancy but that this was not inappropriate. In her view "it

is common practice for any applicant to tailor their CV to the requirements of the position for which they are applying”.

[68] Mr Le Roux argued that if the Court a quo settled on the version that Ms Fort had spoken to Ms Coetzer with regard to the second CV, this took the matter no further than they did for the commissioner viz that it was probable that Ms Fort mentioned to Ms Coetzer that the position advertised was that of a document control officer. He contended that therein would lie one ready explanation for the fact that Ms Coetzer was able to present a tailor-made CV. Mr Le Roux further argued that if Ms Fort was intent on advancing Ms Coetzer's interest one would have expected her not to be critical of the second CV by labelling it “not brilliant” when she forwarded it by e-mail to Mr Songongo and Ms Bakker. In my view, the e-mail by Ms Fort describing the CV as she did must be read in context. Ms Fort attempted to support Ms Coetzer in that what she further recorded in the email was that, in her view, Ms Coetzer was more suitable to the position than what the CV sought to portray.

[69] The aspect of a tailor-made CV brings, once more, into sharp focus Ms Fort's credibility as a witness. When asked why the second CV captured the document control responsibilities Ms Fort's response was that Ms Coetzer called HR to enquire about the job description of the position and updated her CV accordingly. Ms Fort's evidence at the disciplinary enquiry was that she had no idea how Ms Coetzer obtained the information that made it possible for her to adapt her CV. When confronted on this aspect at arbitration she said that after her disciplinary enquiry she gleaned this from Ms Coetzer. What is remarkable is that it was not put to Mr Songongo that Ms Coetzer obtained advice from HR which would have enabled her to adapt her CV. It is improbable that Ms Coetzer would have called HR to enquire about the position which was only internally advertised. In any event, Ms Coetzer's own ipse dixit was to the effect that she “*did not respond to any particular position but rather to a request from Ms Fort to forward my CV*”¹³. It is important to

¹³ This appears in the statement dated 19 July 2013 written by Ms Coetzer in response to Mr Mapoma's request that she respond to the allegations of misconduct concerning her appointment at CDC (Vol 12- page 1084 of the record).

remember that Ms Fort told Mr Gajjar that she informed Ms Coetzer that she was looking for a document control officer and must provide her CV. This piece of evidence also contradicted her evidence at arbitration.

[70] The commissioner was right in having concluded that Ms Fort contradicted herself regarding whether she spoke to Ms Coetzer about the position and that it was far more probable that she informed Ms Coetzer about the vacancy. What the commissioner did not do, as correctly found by the Court a quo, was to evaluate the impact of her determination on Ms Fort's credibility and the overall probabilities.

[71] The general quality of Ms Fort's evidence in respect of the reason she procured the second CV after the first CV had already been submitted was unsatisfactory. Her evidence was to the effect that on receipt of Ms Coetzer CV she passed it on to Mr Songongo. When she received the interview pack she realized that Ms Coetzer's CV was not included. She thought that she had forgotten to forward it to Mr Songongo and advised him that it will follow in due course. The Court a quo was correct in its observation that Ms Fort's version on this score was convoluted in that:

71.1 She could not have forgotten that she sent the CV to Songongo in the circumstances where she had procured and read it;

71.2 It remained unexplained at arbitration why she had not forwarded the CV to Songongo by e-mail in circumstances where she had received it by e-mail from Ms Coetzer;

71.3 Even more troubling was the unchallenged evidence by Mr Songongo that on more than one occasion between 13 and 25 July 2012 he reminded Ms Fort to submit the CV she told him she intended to submit. Therefore there could not have been any memory lapse.

71.4 It also remained a mystery that Ms Coetzer, upon being requested to submit her CV for the second time, did not submit the same CV she initially sent to Ms Fort but sent the adapted one.

[72] Clearly, Ms Fort was at pains to distance herself from any involvement in the enhancement of Ms Coetzer's second CV. At first she testified that she was under the impression that Ms Coetzer's first CV and the second were the same. She asked Ms Coetzer to resubmit her CV because she could not find the original one. The probabilities are overwhelming that Ms Fort had read the first CV because she requested that it be retained for a future position in admin or finance. She did not say that it be retained for the document control position which at stage was vacant and had already been advertised internally. When she received the second CV she forwarded it to HR for inclusion in the pack of CVs for the shortlisted candidates in respect of the document control position. On the probabilities she must have been aware that the second CV addressed the document control responsibilities.

[73] One imponderable aspect on the record is how Ms Fort came to be in possession of the second CV. The e-mail attachment¹⁴ sent by Ms Fort to Mr Songongo on 25 July 2012 is titled "Lyla.docx". It appears very odd that a novice job seeker, who Ms Fort says she had hardly met, would title her CV "Lyla.docx" to her prospective employer.

[74] The probable inferences that could be drawn from my analysis of the evidence are that:

74.1 Subsequent to the submission of the first by Ms Coetzer to Ms Fort, the latter communicated with Ms Coetzer and provided her with information necessary for her to adjust her CV. This would account for the delay in forwarding the CV to the relevant HR officials from the date the first CV was received on 12 July 2012 to the date when Ms Fort forwarded the second CV to Mr Songongo and Ms Bakker on 25 July 2012.

74.2 Prior to the interviews Ms Coetzer had some personal relationship with Ms Fort which would not have come into existence had Ms Coetzer not been introduced to her by Mr Adnaan Ebrahim as his cousin. This resulted in Ms Fort promoting Ms Coetzer's CV as a justification for the inclusion on the shortlist.

¹⁴ Which is the second CV

- [75] The Court a quo correctly found that commissioner did not deal with the discrepancies in Ms Fort's version and had failed to undertake the proper evaluation of the evidence.
- [76] Turning now to the interview itself. Ms Fort perfunctorily disclosed to her fellow panelist, Ms Knepscheld and Ms Bakker, that she knew Ms Coetzer *"through business dealings she had at the firm of attorneys where Ms Coetzer was working"*. Ms Fort did not disclose any personal relationship she had with Ms Coetzer. Knepscheld went on to say that they would have requested Ms Fort to recuse herself from participation in the interview in the event that there was a personal relation between Ms Fort and Ms Coetzer as this would be unethical and result in favouritism.
- [77] Ms Knepscheld says that immediately following the appointment of Ms Coetzer she observed that the interaction between Ms Coetzer and Ms Fort was more personal than it was made out to be during the interview. She described their relationship as having been *"too close for comfort."*
- [78] The subtle disclosure Ms Fort made during the interviews to her fellow panelist demonstrates that she tried to downplay her interaction with Ms Coetzer prior to the interview because any more revelation would have disqualified her from participation in the interviews. It is startling that the commissioner found, without any basis for this, that *"There is no doubt that the applicant (Ms Fort) disclosed her prior knowledge of both Ms Coetzer and Mr Mohammed (Talha) Ebrahim"*.
- [79] The manner in which Ms Winter and Ms Coetzer were appointed to fill one advertised vacancy of a document control officer is also beyond the pale. By her own admission Ms Fort knew before the interviews that the workload was cumbersome and could not say why she did not approach the HR Department to regularize the appointment of the two candidates prior to the interviews and/or seek the requisite approvals. As she puts it she *"just never thought of it."*
- [80] It is to be recalled that Ms Bakker and Knepscheld scored Ms Winter the best candidate whereas Ms Fort scored Ms Coetzer the most suitable candidate.

Although Ms Fort initially claimed that she did not introduce the splitting of the position into two so as to accommodate Ms Coetzer she ultimately conceded that she did so. This suggestion came during the deliberations by members of the panel after the candidates had been allocated their scores. The question is why Ms Fort waited until after the scores had been announced to suggest the split. The ineluctable inference is that she had hoped that the outcome of the interview would be in favour of Ms Coetzer as the preferred candidate. When it became apparent that the panel's preferred candidate was Ms Winter she cunningly outsmarted her unsuspecting fellow panelists by bringing forth the idea of creating a duplicated document control officer position combining Ms Winter's technical skill with Ms Coetzer's people management acumen.

[81] Mr Le Roux posed a few rhetorical questions in his argument, *inter alia*: why would Ms Fort place her career in jeopardy by manipulating the appointment of Ms Coetzer? Why would Ms Fort bother to coach Ms Coetzer on her CV when she had the authority to appoint whomsoever she liked to the position? In my view these questions take the issue no further. While it is true that Ms Fort had been delegated the authority to recruit employees to the approved vacant positions this did not clothe her with the power to create vacant positions as she sought to do with the split. As to why Ms Fort did not simply appoint Ms Coetzer, the simple answer is that such a flagrant deviation from the normal recruitment routine would not fly.

[82] Ms Fort made it clear to Mr Gajjar *"I will be honest with you, I did not want Lee-Anne (Ms Winter)"...**"I know that I was against appointing Lee-Anne because I had major concerns about her people side of things."* There can be no doubt that Ms Fort was biased in favour of Ms Coetzer. She deliberately understated her dealings with Ms Coetzer in order to conceal her bias. Mr Fourie argued that Ms Fort made a concerted effort to bolster Ms Coetzer's chances of appointment to such a degree that the only reasonable inference is that Ms Fort manipulated the process with the aim of appointing Coetzer, come what may. She did so in a deliberate and devious manner in an effort to hide her machinations and to make the outcome of the interview process seem as natural and normal as possible. I have to agree.

- [83] The Court a quo found it unnecessary to move into a somewhat controversial terrain regarding the question whether Ms Fort had obtained Mr Koza's approval with regard to the appointment of a second document control officer. This was so because the Court had already pronounced, *inter alia*, that Ms Fort had treated Ms Coetzer with a degree of favouritism by enhancing her application and had not disclosed this to the selection panel which, the Court found, gave rise to a very serious conflict of interest.
- [84] As adumbrated earlier, the commissioner found the alleged verbal approval, that Ms Fort testified she obtained from Mr Koza, to have been sufficient and that it was improbable that Ms Fort had not discussed the appointment of the two document control officers with Mr Koza. She held that the HR Department did not question the alleged approval.
- [85] It is important to remember that Ms Knepscheld advised Ms Fort, in the event that she was interested in appointing Ms Coetzer, to seek the approval of Mr Koza. One significant observation made by the Court a quo was that the advice given by Ms Knepscheld to Ms Fort accorded with clause 2.1(a) of CDC's HR manual which reads: "*Recruitment is subject to the approval of the CEO or Business Unit Executive Manager, depending on the level of the position to be filled.*" Mr Gaig Luckman, the unit head of employment relations who had been called by the commissioner as a witness, also confirmed that Mr Koza's approval was required. According to Ms Bakker Ms Fort informed them that she will speak to the Executive Manager, Mr Koza, regarding the employment of the two candidates as opposed to one due to the enormous workload.
- [86] Ms Fort attempted to paint a picture that there had never been a discussion between the panel members for her to obtain Mr Koza's approval but merely to seek advice which she says she did. She maintained that Mr Koza had delegated the recruitment functions to her. There is no evidence showing that Ms Fort corrected Ms Knepscheld and Bakker that she already had a delegated authority to approve the second appointment when Knepscheld pointed out to her that she needed Mr Koza's approval.

- [87] Mr Koza's evidence, on the aspect of his approval, is not without any blemishes. It is correct that during the disciplinary enquiry he testified "*from a process point of view*" he was not sure "*if one is allowed to advertise for one person and then appoint two.*" Although he was not certain he went on to say that the delegation of authority required that, in case of an appointment of two candidates in respect of one advertised position, his approval had to be obtained. He was consistent both at the disciplinary enquiry and during the arbitration that he did not have any discussion with Ms Fort around the appointment of the two candidates.
- [88] There is no paper trail in respect of the approval which Mr Koza purportedly gave to Ms Fort for the division of the one document control position into two. There is also no record of the discussions between Ms Fort and Mr Koza concerning his approval and/or advice, save Ms Fort's say-so. Ms Fort could not produce an e-mail she said she directed to HR informing it of Mr Koza's approval. Ms Knepscheld testified that Ms Fort verbally informed her of Mr Koza's approval. There was nothing on the evidence to suggest that Ms Knepscheld was not a credible witness. In all likelihood the e-mail to HR was non-existent. Both Ms Knepscheld and Ms Bakker were Ms Fort's subordinates. They had reason to doubt her sincerity.
- [89] I am unpersuaded, on the evidence, that Mr Koza did not tell the truth in order to deflect blame from himself when the appointment became contentious as contended by Mr Le Roux. The evidence is overwhelming that the approval of the Executive Manager was required with regard to the appointment of the two document control officer because only one vacancy had been advertised while Ms Fort's request was that two candidates be appointed. It is improbable in the extreme that, in a large state owned company such as CDC, a new vacancy could have been created in the manner adverted to by Ms Fort. The delegated authority to recruit into the approved vacant position cannot include the implied authority to create a new position.
- [90] Ms Fort's version that she had funding for the two positions and therefore could carry out the appointments because this would not have affected the headcount is not without difficulty. According to the evidence by Koza,

Luckman and Ms Knepscheld the approval of the Executive Manager was required whether it be a permanent or contractual appointment. Luckman, the Acting HR Manager, explained that the appointment had an impact on the headcount because a person at the level of Ms Fort cannot have carte blanche: without executive oversight, to determine arbitrarily the number of employees she wanted to recruit mainly because this was a project-based appointment of a limited duration.

- [91] From this analysis it is clear that there is a significant incongruence between commissioner's findings and the evidence presented at the arbitration.

The appointment of Mr Talha Ebrahim

- [92] Mr Talha Ebrahim secured an internship at CDC's Vulindlela Construction Village without any competition within a period of a month after his brother, Mr Adnaan Ebrahim, had given Talha's CV to Ms Fort. Given the Court a quo's findings regarding the misconduct committed by Ms Fort, in respect of her participation in the recruitment and appointment of Ms Coetzer, the Court deemed it unnecessary to determine the regularity or otherwise in the appointment of Mr Talha Ebrahim. Notwithstanding this observation the Judge a quo remarked "*the contention (accepted by the commissioner) appears somewhat improbable*". No appeal lies against the findings of the Court a quo in respect of the issues raised concerning the appointment of Mr Talha Ebrahim.

Summary of findings

- [93] On a cumulative view of the analysis set out above, the inexorable conclusion is that Ms Fort was not a credible witness. She failed to provide a complete and honest account to CDC of her involvement in the appointment of Ms Coetzer. I am satisfied that the probabilities overwhelmingly indicate that she actively manipulated the recruitment system in order to promote the appointment of Ms Coetzer.

[94] I am satisfied that Ms Fort failed to disclose that she had been active in procuring Ms Coetzer second CV and assisting her in enhancing same. This amounts to wilful conduct in breach of the duty to avoid conflicts of interest.

[95] The conclusion reached by the commissioner that Ms Fort did not commit any misconduct is not sustainable on the facts of this case and certainly does not fall within the band of reasonable decision makers.

The impact of Ms Fort's conduct to the employment relationship

[96] Ms Fort had been in the service of CDC for a period of nine years. She had a clean disciplinary record. Ms Fort abused her position of authority in order to secure the appointments of Ms Coetzer and Mr Talha Ebrahim. It was argued for CDC that given the grievous nature of the misconduct (nepotism, a form of corruption, in a publicly-funded institution) dismissal was the only appropriate sanction. Mr Koza testified that the offences in respect of which Ms Fort was charged breached the trust relationship. He would not be able to efficiently discharge his obligation having to second guess decisions taken by a senior manager operating at the level of Ms Fort.

[97] In *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*¹⁵ this Court restated the consistently adopted approach, laid down in the jurisprudence of the Labour Court in *Standard Bank SA Ltd v CCMA & others*¹⁶ to the effect that it is one of the fundamentals of the employment relationship that the employer should be able to place trust in their employees to discharge their responsibilities dutifully. A breach of this trust in the form of conduct involving dishonesty, as in this case, is one that goes to the heart of the employment relationship and is destructive of it. The sanction of dismissal must be seen as a sensible operational response to risk management in the particular enterprise.¹⁷ Nepotism has a damaging effect on the positive corporate culture and is a potential threat to the morale of other employees. I am satisfied that dismissal is the appropriate sanction in

¹⁵ (2008) 29 ILJ 2581 (LAC) at 2585 para 16.

¹⁶ (1998) 19 ILJ 903 (LC)

¹⁷ See *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2000) 21 ILJ 1051 (LAC) at para 22.

the circumstances of this case. There is reason to upset the order of the Court a quo in this regard.

The question of costs

[98] While I am mindful that both parties had requested costs in the event of them achieving success at the proceedings before the Labour Court I am of the view that this is a case where consideration of law and fairness dictated the contrary. This is so because the Court a quo remarked that the review application was necessitated by the fact that the commissioner produced an unreasonable award. I am of the view that, in resisting the review, Ms Fort raised genuine and serious issues to be tried. Therefore, she should not have been ordered to pay the review costs. In respect of the costs of this appeal I am of the view that the same considerations should apply. Ms Fort had an arguable case and should not be mulcted into paying CDC's costs. The upshot of this is that each party should bear its own costs for the proceedings in both this Court and in the Labour Court. In the result I make the following order.

Order

1. The appeal is upheld in part.
2. No order is made as to costs in respect of the appeal.
3. Paragraph 3 of the order of the Labour Court in respect of the costs is set aside and substituted with the following:

“3. *No order is made as to costs*”

MV Phatshoane

Acting Judge of the Labour Appeal Court

Waglay JP and Davis JA concur in the judgment of Phatshoane AJA

APPEARANCES:

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