IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA65/2017

In the matter between:

TRACEY LUCILLE ROSCHER **Appellant**

and

INDUSTRIAL DEVELOPMENT CORPORATION **First Respondent**

COMMISSIONER ERIC MYHILL **Second Respondent**

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Third Respondent**

Heard: **03 May 2018**

Delivered: **19 July 2018**

Summary: Review application – employee dismissed for misrepresentation and failure to act in the best interest of the employer thereby breaching her fiduciary duty – employer contending that employee failed to disclose a negative report that warned against the funding of the film project and that employee misrepresented to the Credit Committee that Wal-Mart had undertaken to purchase the DVD – held that:

While the recommendation to the Credit Committee was edited by Ford prior to being submitted to the Credit Committee, the tracked version of the document clearly indicates that Ford's editing did not change the substance of employee's recommendation, but merely made the document easier to read. Further that

There was no justifiable basis for employee's non-disclosure of the negative remarks made by the NFVF and she failed to advance a plausible justification for her conduct. By the same token, the representation of the information about the security or guarantee requirement in the recommendation is equally indicative of a serious lack of judgment on the part of the employee. The document is replete with misleading and ambiguous statements about the nature of the security on offer. What was in fact conveyed to the Credit Committee, if not deceitful, reflects a disturbing lack of understanding of Wal-Mart's commitment, the basics of the due diligence process and the quality of the security required. The e-mail disclosed the true situation that employee should or must have known. Its obvious variance with the version she put forward in the recommendation was at the very least a grossly negligent and misleading breach of fiduciary duty, confirming her unreliability in undertaking the task at hand. Her attitude reflected a lack of concern or insight about the possibility that her misrepresentations and non-disclosure had significant potential to cause IDC reputational and financial prejudice.

Commissioner's finding disconnected with the evidence and thus unreasonable as employer is entitled to expect a high fiduciary standard of disclosure by employees responsible for recommending substantial loans to potential clients. Employee's conduct fell way below par and severely damaged trust to the point that a continued employment relationship became intolerable. – Labour Court's judgment upheld and appeal dismissed.

Coram Phatshoane ADJP, Murphy and Savage AJJA

JUDGMENT

MURPHY AJA

[1] This appeal concerns the dismissal of the appellant, Ms Tracy Roscher, ("Roscher"), in January 2010, on the grounds that she allegedly misrepresented

material information to a decision making body of the first respondent, the Industrial Development Corporation ("the IDC"), in relation to the funding of a film titled "Vanilla Gorilla".

[2] The IDC finances various developmental projects including the funding of film production. It is a requirement of the IDC that the funding of films must be preceded by a due diligence process aimed at minimising the IDC's risk exposure. The due diligence process in this case involved *inter alia* an evaluation of the security to be granted to the IDC in return for funding and the obtaining of a script review (an expert opinion) from the National Film and Video Foundation ("the NFVF") on the prospects and viability of the film.

[3] After the due diligence process was completed, Roscher compiled a report ('the recommendation") for presentation to the IDC's Credit Committee, being the body within the IDC responsible for deciding whether to fund the film. The Credit Committee was not involved in the due diligence process.

[4] The IDC dismissed Roscher on the grounds that the recommendation to the Credit Committee failed to include important information contained in the script review and misrepresented the nature of the security offered.

[5] The first count of alleged non-disclosure, misrepresentation or failure to act in the best interests of the employer, stems from the fact that the NFVF review of the Vanilla Gorilla script indicated, *inter alia* that the film was "patronising and racist towards Africans" and that previous films of a similar taste and nature had low returns in the United States and worldwide. The IDC maintains that Roscher failed to disclose this information to the Credit Committee. The IDC was perturbed by the non-disclosure for two reasons: firstly, IDC is a development and financial institution in Africa, and hence the criticism of the patronising and racist undertones of the film were of obvious relevance from a reputational perspective; and secondly the financial magnitude of the credit facility required by the producers (being US$14 369 193), made it imperative to disclose the NFVF's scepticism about investing in such a film in view of the previous poor performance of similar films in other markets.

[6] The IDC further alleged that Roscher's recommendation to the Credit Committee was misleading about the nature of the security for the funding and misrepresented the outcome of discussions with Wal-Mart (a multi-national retail company) as a potential purchaser and distributor of the film. The recommendation stated that the funding would be secured by an order of 1.2 million DVDs from Wal-Mart on a non-returnable basis and Roscher had met with Wal-Mart to confirm the validity of the order. The IDC claimed that none of these representations was accurate. The impression created by the recommendation was that there was an order from Wal-Mart when in fact there was none. No purchase order had been received from Wal-Mart. The recommendation thus created the incorrect impression that the IDC had received a guarantee or meaningful security when it had not.

<u>The background</u>

[7] Roscher entered into employment with the IDC on 31 May 2007, effective from 1 June 2007. She had worked for the IDC in the past. On this occasion, she was employed as a Senior Account Manager in the Media and Motion Pictures Strategic Business Unit of the IDC ('the SBU").

[8] In early 2008, the IDC received an application for funding from the film producers, White Ape Producers (Pty) Ltd ("White Ape"), in respect of the film. It sought more than US$14 million which would constitute about 49% of the total film production budget.

[9] On 14 March 2008, Mr. Moses Silanda ("Silanda"), the then head of the SBU, addressed correspondence to White Ape including a "term sheet" which detailed the terms and conditions under which the IDC would consider funding the transaction. The term sheet was signed by both parties. Clause 8 of the term sheet sets out the conditions precedent to the IDC funding. Paragraph 4 of Clause 8 provided:

> 'The Producer shall provide IDC with a letter of creditor guarantee from Wal-Mart or like institution in its group acceptable to the IDC. This guarantee is in respect of the Wal-Mart order for 1.2 million DVD units of the film Vanilla Gorilla, at a price of $13.25 per unit, for the time frame required by the IDC. The terms

> and conditions of this guarantee must be agreed upon in full and IDC is to be completely comfortable with this before the IDC can request approval for the funding of this transaction.'

[10] Ms Kashifa Burke, a senior legal adviser at the IDC, in an e-mail addressed to Roscher on 17 March 2008 set out the guidelines for a guarantee to be acceptable to the IDC. These required the guarantee to be: i) issued by a reputable financial institution; ii) payable by the issuer; iii) unconditional and unequivocal; iv) not able to be withdrawn; v) in full force and effect until full payment is made to the IDC; and v) transferable and negotiable.

[11] Correspondence between various role players during March-June 2008 gives a clear indication that there was no likelihood of the IDC obtaining a guarantee in accordance with the requirements set out in Burke's e-mail of 17 March 2008. However, an e-mail dated 18 February 2008 addressed by Mr. Jeff Maas of Wal-Mart to Genius Products LLC, a distribution company, indicates an initial intention for Wal-Mart to purchase 1.2 million DVDs. It stated:

> 'Per our discussion, in exchange for the full branded integration and partnership package Genius Products Inc offered in regard to Vanilla Gorilla, Wal-Mart will commitment (sic) to purchase 1.2 million units of the DVD when released at a wholesale cost of $13.25 on a non-returnable basis paid to Genius Products on our normal terms of net 60.'

[12] The exact nature and extent of this form of security was open to some doubt. In correspondence between Roscher and a legal adviser, Mr. Gregg Homer, on 19-20 March 2008, it became evident that Wal-Mart was not prepared to offer a guarantee. Roscher mentioned to Homer that she had strict instructions to get a guarantee. Homer replied unequivocally that there would be no guarantee but proposed an alternative involving another company referred to as Anderson, a retail distributor, as follows:

> 'Again, there will be no guarantee. Anderson will sign a purchase order confirming that it will pay $15.9 million to Genius on delivery of the DVD's…This is the proposal Genius has made. Wal-Mart is no longer going to be a party to the transaction at all. So there is nothing for either Wal-Mart or Anderson to guarantee.'

[13] This proposal obviously did not meet the IDC's requirements in that it would establish no direct legal relationship between the IDC and Wal-Mart but only between Anderson and Genius, two American companies. Although nothing came of this proposal, it evinces a clear indication that Wal-Mart was not prepared to offer any guarantee or security for IDC making a loan to White Ape.

[14] In the absence of clarity, it was decided that Roscher and Burke should visit Wal-Mart in the USA. Roscher sought and obtained approval from the Credit Committee for payment of R252 000 to finance the 7-day trip from 10-18 June 2008. Burke ultimately withdrew from the arrangement and Roscher was accompanied by Mr. Prosper Chavarika, Manager Legal Department at the IDC. The proposal motivating the need for the trip and the budget for it stated:

> 'The IDC risk in this transaction is largely based upon the DVD order from Wal-Mart and IDC needs to confirm the validity of this order first hand from Wal-Mart. It is thus prudent for the IDC team to meet with Wal-Mart to properly understand the rationale for providing the purchase order at such an early stage, as it is quite unusual in the motion picture industry for the DVD sales to take place prior to production of the motion picture. The verification of the order and the rationale behind it is critical to the assessment of the risk to IDC.'

[15] After Roscher and Chavarika returned from the USA, various documents were produced for the purposes of the Credit Committee meeting scheduled for 30 June 2008. Roscher was the primary author of the recommendation distributed to the members of the Credit Committee, though it was subjected to editorial revision, particularly by Mr. Basil Ford, the new head of the SBU.

[16] Paragraph 1 of the recommendation, setting out the background to the project, stated:

> 'The IDC funding will be secured by an order of 1.2 million dvds at a unit price of $13.25 from Wal-Mart, the world's largest retailer, serving 176 million customers worldwide per week. The order is on a non-returnable basis.'

[17] Paragraph 2.1 gave further details as follows:

> 'Vanilla Gorilla has a total production budget of US $ 29 324 884…..The Producers have approached the IDC to support this project and finance 49% of the budget, being $14 369 193. This is to be financed in the form of mezzanine funding, secured by an order place by Wal-Mart Stores Inc with Genius Products LLC. The extent of the order is 1.2 m DVD units of Vanilla Gorilla at a price of $13.25 on a non-returnable and transferable basis….'

[18] In paragraph 3.1 of the recommendation the following is stated:

> 'Although the transaction represents a significant increase in the motion picture portfolio, the Film is one of the first motion picture investments where IDC enjoys a strong security position…..The Film is also unique in that it has achieved a significant DVD pre-sale to the largest retailer worldwide like Wal-Mart.'

[19] Paragraph 3.6 deals with the financial aspects of the recommendation. The relevant part reads:

> '3.6.1 The IDC funding is secured against a pre-sale to Wal-Mart of 1.2 million DVD's. These dvds are to be made available for sale at Wal-Mart stores on 23 April 2009…Consequently IDG should receive payment by no later than August 2009…
>
> 3.6.3 Wal-Mart has requested that Genius Products LLC ("Genius") act as distribution agents in respect of the order. Genius will print the DVD's. As a result of the order, the IDC's risk initially lies with Wal-Mart. However, given that the funds are to flow from Wal-Mart to genius, the risk moves to Genius…
>
> 3.6.5 In order to mitigate the risk of Genius, IDC has requested the condition that the producer shall enter into a binding and fully executed distribution agreement for the picture with Genius…that provides that IDC obtains a direct, first priority first position security interest in the Wal-Mart receivable (relating to Wal-Mart's non-refundable purchase order for no less than 1 200 000 DVD's of the picture at $13.25 per unit) an irrevocable direction to pay to IDC…..Should Genius be in financial difficulty or any other difficulty that causes it to be unable to fulfil its obligation to the Wal-Mart order, the Producers shall have the right to terminate the distribution agreement with Genius and in such event all rights in and to the picture licensed to Genius thereunder shall revert to Producer free (subject to IDC's security interest) and clear of any liens, claims or

> encumbrances of Genius. The rights shall be transferred to another distributor (to IDC's satisfaction) that can fulfil the Wal-Mart order and thereby enable IDC's loan to be repaid.'

[20] The recommendation to the Credit Committee thus stated that i) the IDC's funding would be secured by an order of 1.2 million DVDs from Wal-Mart and that this order was made on a "non-returnable basis"; ii) there had been a significant DVD pre-sale to the largest retailer worldwide – Wal-Mart; iii) the IDC's funding was secured through the pre-sale order from Wal-Mart; iv) the IDC would recoup its US$14 million investment from the DVD sales guaranteed by Wal-Mart; and v) Roscher had met with Wal-Mart to confirm the validity of the order and they had already placed an order for 1.2 million DVDs. These assertions were made notwithstanding the now undisputed fact that no purchase order had in fact been received from Wal-Mart. The impression undeniably created by the recommendation was that there was an order from Wal-Mart, when in fact there was none.

[21] On 27 June 2008, a few days before the Credit Committee meeting scheduled for 30 June 2008. Ford signed a new term sheet with VG Producers (Pty) Ltd ("VG"), the company established to produce the film. The document was expressly stated to be for discussion purposes only and was concluded in respect of certain special conditions necessary for ultimate approval. Clause 3 of the term sheet deals with the issue of security as follows:

> 'Borrower (VG) shall grant Lender (IDC) a first priority, first position security interest in all of Borrower's assets, including, without limitation, all right and interest in the Picture, and subject only to the Permitted Liens.
>
> Purchase order placed by Wal-Mart Inc to the extent of 1.2 million DVD's at a unit price of $13.25
>
> Payment before delivery of DVD's
>
> First position security over the Wal-Mart Inc accounts receivable in the financial statements of Genius Products Inc.'

[22] This description of the security arrangement varies somewhat from that in the proposal that served before the Credit Committee. Be that as it may, both descriptions clearly indicate that Wal-Mart would need to place a purchase order.

[23] The true position about the security arrangement is captured in an e-mail addressed by Chavarika to Roscher at 23h57 on 27 June 2008 after he had read Roscher's recommendation which had been circulated. He said:

> 'I have not had the benefit of seeing your most recent draft of the Credit Committee Report, so it may be that what I express below is already covered in the Credit Committee Report.
>
> This evening I have been communicating with our lawyers in the USA, who have advised me that Genius is (i) not going to enter into the Inter-Party Agreement (ii) not going to provide IDC with the security that IDC requires (iii) not going to provide written evidence of the agreement between Genius and Wal-Mart in respect of purchasing the DVD's.
>
> Whilst I acknowledge that you and I met with Wal-Mart and I acknowledge that at the meeting Wal-Mart expressed an interest in buying the DVD form Genius. The fact that (i) both Genius and Wal-Mart are unwilling to make a written commitment to each other and (ii) Genius has indicated that they are not going to be a party to the Inter-Party Agreement (iii) Genius is not going to provide the IDC with the security that IDC requires, is in my view indicative of the fact that Wal-Mart's expression of interest is worth very little. As a result of the aforegoing, my view is – an accurate disclosure to the Credit Committee requires you to disclose the fact that *<u>Wal-Mart expressed an interest to buy the DVD's, but that expression of interest should not be construed as a commitment to purchase the DVD's.'</u>*

[24] On the following morning, Ford addressed the following e-mail to the team:

> 'It looks like Katinka's efforts at saving this project have been in vain!!!!! Without security arrangements that we need and in the absence of a concrete order from Wal-Mart, the risk to IDC is too high.'

It would seem from the outcome of the meeting, which I will discuss presently, that this position was communicated to the Credit Committee at its meeting on 30 June 2008.

[25] Chavarika did not testify at the arbitration proceedings, but the fact that he authored the e-mail and the truth of its contents are not disputed.

[26] On 26 June 2008, the NFVF issued its script report. It comprises a comprehensive review of the project. In its discussion of the target audience, the NFVF made the following remarks about the proposed film:

> 'It probably will not do well on SA screens because of its obviously patronizing characterization of Africa and the stereotypical characters it uses to convey the events of the story…The question should be asked, why should we be making films for this market with its clearly racist precepts about Africa and Africans. After all, it says Africans need a rich little white girl to come and teach them about the true values of nature conservation and love of animals!'

[27] The NFVF had compared the film with other like films such as "Mighty Joe Young" which had not succeeded financially. In its conclusion, the NFVF stated:

> 'It is very hard to think of ways to make this story less patronizing and racist given the point of departure for these writers. Even were this possible, I don't think these writers would readily agree to drastically change their precepts.
>
> With regards to the financial viability of investing in a film with comparisons to Mighty Joe Young which was made for $110 million…but only grossed $50 million….it makes it very hard to invest $35 million to make a similar film.'

[28] Thus, the NFVF took a negative view of the project, and essentially cautioned against proceeding with it.

[29] The only reference to the NFVF report in Roscher's recommendation to the Credit Committee is in Paragraph 3.8 addressing the technical aspects of the project. In paragraph 3.8.6 it is stated:

> 'The NFVF have reviewed the script and given comment. They view the script as average.'

The recommendation thus did not disclose to the Credit Committee the view of the NFVF that the storyline was racist and patronizing and that the venture was financially risky.

[30] At its meeting of 30 June 2008, the Credit Committee conditionally approved the application for funding. It did so without the benefit of the opinion of the NFVF. The minutes of the meeting record that its approval was subject to various specified conditions precedent, which included a requirement that a certified copy of the Wal-Mart purchase order be provided to the satisfaction of the IDC. This condition could not be met, as Wal-Mart had made it clear since March 2008 that it would not make such an order or provide any other form of guarantee. This, at least according to Chavarika, had been confirmed in effect during the visit to the USA. The lack of adequate security resulted ultimately in the IDC not financing the project.

[31] The record shows that in the period between July 2008 and January 2009 problems arose in the relationship between Ford and Roscher which led to mutual recriminations about performance and compatibility. On 19 February 2009, Roscher lodged a formal grievance against Ford in which she raised a number of job related issues including a strong sense of grievance that Ford had been responsible for the Vanilla Gorilla film project not being financed.

[32] On 20 February 2009, Roscher was served with a notice of disciplinary action which notified her of a disciplinary hearing on 5 March 2009 where she would be required to answer charges of breach of confidentiality, improper conduct, insubordination, incompatibility and poor work performance. During this period, Roscher took sick leave and the disciplinary enquiry was postponed three times. The charge sheet was amended on 1 April 2009 to include *inter alia* allegations of non-disclosure and misrepresentation arising out of the Vanilla Gorilla project. Roscher was placed on special leave on 22 May 2009.

[33] During the course of the disciplinary process, the IDC decided to proceed only with the charges related to the non-disclosures in the Vanilla Gorilla project. The relevant charges alleged fraudulent non-disclosure, or misrepresentation or failure to act in the best interest of the employer in that:

> ‘1.7.1 you obtained an independent review of the Vanilla Gorilla script from the National Film and Video Foundation, which review indicated, inter alia, that the film was “patronizing and racist towards Africans” and that previous films of a similar taste and nature had low returns in the United States and worldwide.
>
> 1.7.2 you failed to disclose these views of the NFVF to the Credit Committee and to the Head of the Media and Motion Pictures SBU.
>
> 1.7.3 given the business of the IDC as an African Development and Financial Institution, it was imperative and incumbent upon you to disclose the views of the NFVF regarding the patronizing and racist effect of the film, Vanilla Gorilla.
>
> 1.7.4 given the financial magnitude, being US$14 369 193 of the facility required by the producers of the Vanilla Gorilla Film, it was imperative and incumbent upon you to disclose the views of the NFVF regarding the previous performance of the film in other markets and as well as such to disclose the NFVF’s sceptical views about investing US$ 35 million to make a similar film.
>
> 1.7.5 further, in your submission to the Credit Committee regarding Vanilla Gorilla, you failed to bring to the attention of the Credit Committee the discrepancies between the terms contained in the submission and those terms contained in the terms sheet signed by the parties on 15 March 2008 and why those discrepancies occurred, leaving the Credit Committee with an impression that the Finance facility to Vanilla Gorilla was secured by a guaranteed purchase order from Wal-Mart, when to your knowledge that was not the case.”

[34] Roscher was found guilty on these charges and dismissed by the IDC on 4 January 2010.

<u>The arbitration proceedings</u>

[35] Roscher challenged her dismissal before the Commission for Conciliation, Mediation and Arbitration (CCMA). An arbitration hearing was held on various dates between May and October 2010. The second respondent (the Commissioner”) handed down a comprehensive award on 19 October 2010.

[36] During the arbitration proceedings, IDC presented the evidence of Silinda, the head of Support Services; Curatius Ramodipa an internal auditor; Ford, the Head of the Media and Motion Picture Strategic Business Unit; and Mthombeni,

the chairperson of the disciplinary enquiry. Roscher gave evidence on her own behalf and adduced evidence from the following witnesses: Frederick Kyle; Paul Raleigh; Michael MacCarthy; and Craig Gardner – much of which is no longer relevant.

[37] Silanda confirmed that from the point of view of IDC, the recommendation submitted to the Credit Committee was misleading in relation to the security arrangements and the script review. The impression was created that there was a pre-sales agreement in place with Wal-Mart. More importantly, Silanda insisted that Roscher had been under a duty to disclose the negative comments of the NFVF and had not done so. He accepted that Ford had presented the recommendation to the Credit Committee and that the document was a team effort, but with reference to Roscher's job description, he was adamant that Roscher was the primary author of the recommendation and ultimately responsible for what it contained.

[38] Ramodipa conducted the internal audit into the Vanilla Gorilla project which resulted in the disciplinary charges against Roscher. Ford testified that management at IDC had been unhappy with the Vanilla Gorilla funding application process and had instructed Ramodipa to undertake an audit to determine whether the appropriate procedures had been followed during the funding application process. With regard to the script review, Ramodipa concluded that it was essential that the result of any script review be objectively reported to avoid biased reporting inappropriately influencing the decision-making process. The non-disclosure posed financial and reputational risks, which he identified in his audit report as follows:

> 'The distortion of such report of the script review may constitute misrepresentation to the Special Credit Committee. The said misrepresentation may result in the merits of the application being misconstrued and the Committee making a decision which they otherwise would not have made. This presents a risk of financial loss to the IDC…For IDC to fund a film which is racist towards Africans in context, may prove to be a contradiction of its values and objectives. This may be an unfavourable effect on IDC's reputation as an established African Developmental Financial Institution.'

[39] Ford, the Head of Media, Motion Pictures, SBU, took over from Silanda in May 2008, about two months prior to the meeting of the Credit Committee, by which time the negotiations on the Vanilla Gorilla project were at an advanced stage. He maintained that it was practice to obtain and disclose a script review as an objective assessment. He testified that he had not received a copy of the NFVF report from Roscher prior to circulating the submission to the Credit Committee. He first saw it during the audit process. He had asked Roscher about it, and she had informed him that the review was "OK". He claimed thus to have been unaware of the NFVF criticisms when he presented the recommendation to the Credit Committee.

[40] Ford maintained that he would not have recommended the approval of the funding if he had been aware of the criticisms, which he saw as a more significant misrepresentation than the security issue. In this regard, he referred to an internal IDC document – "An IDC Credit Methodology for Motion Pictures" – adopted at an Exco Policy Meeting on 21 January 2008. The document was adopted because a "need was identified to establish a credit methodology for the motion picture industry given the high level of losses incurred by IDC." Paragraph 8.3 of the policy states:

> 'A well-written script …has been identified as a key success factor. IDC must endeavour to ensure that all scripts must be vetted by an external party (e.g. NFVF) before the film project is considered for initiation of the due diligence process. IDC does not have internal creative assessment skills and experience, hence an independent panel or external party comprising of experienced individuals with industry insights can assist in evaluating the creative content and the people behind the film.'

[41] Ford further testified that he was first alerted to the problem with the security arrangements when he received the e-mail from Chavarika two days prior to the Credit Committee meeting. He had accepted the assurance of Roscher that there was a confirmed purchase order from Wal-Mart. After receiving the e-mail from Chavarika, he decided to raise and highlight the lack of security at the Credit Committee meeting. His intervention resulted in the resolution adopting the conditions precedent.

[42] Ford conceded that he had edited the recommendation before submitting it to the Credit Committee but claimed not to have changed the substance of the information regarding the security. He had proceeded with the edit on the assumption that the purchase order had been secured.

[43] Roscher denied that she had misrepresented the extent of security in place. She claimed Ford had written that the funding was secured by a pre-sale to Wal-Mart and that it was unfair to hold her entirely responsible for the misrepresentation. She emphasised that the Credit Committee, in any event, could not have been misled.

[44] In relation to the script review, Roscher denied that the document dealing with a credit methodology for motion pictures was policy (even though she later admitted under cross-examination that she had reviewed and signed the document). She testified that on the basis of previous practice she was under no obligation to disclose the negative script review. She claimed to have handed the script review to Ford and conceded that she had told him it was "OK". She had not told him about the negative comments because in the interest of objectivity she wanted him to form his own opinion. When asked whether she should have disclosed more information to the Credit Committee, Roscher essentially passed the buck and claimed that in the past she had followed the instructions of Silanda not to disclose such information. She justified her limited disclosure and non-disclosure as follows:

> 'Well based on past experience, I operated on past experience of what Moses Silanda had told me or instructed me how to operate. I actually put in more than what Moses Silanda – we did not have to disclose the NFVF report. There was no policy on it so I put in more than what he – Moses required me to do.'

[45] At various points in her testimony, Roscher intimated that she disagreed with the script review claiming that the NFVF was "not well disposed towards looking at international transactions".

[46] She persisted during her testimony in chief with the notion that absent any clear policy she was under no obligation to disclose the negative criticism of the NFVF with which she disagreed. She went so far as to say:

> 'it was not a decisive factor with the IDC what the NFVF thought of a feature film…Regardless of what their views are it was not a deciding factor for the IDC as to whether the IDC participated in the feature film or not.'

[47] When her attorney asked her if she believed it was incumbent on her to raise it at the Credit Committee meeting, which she attended, she emphatically answered: "Not at all". When asked if she had an obligation to disclose the criticism she replied: "No, I did not believe that had (sic) any obligation whatsoever to disclose it. As I said, it was not policy…." Later in her testimony, Roscher stated that she had not acted fraudulently because she did not know she was obliged to disclose the criticisms. She also indicated that she was not overly concerned with the allegations of racism because similar allegations had been made without consequence about other movie scripts. And finally, she added that the NFVF report was not a "priority" because after the e-mail from Chavarika there was "no deal on the table".

[48] When asked to comment on the internal audit report's conclusion that the non-disclosure posed financial and reputational risks, Roscher responded:

> 'My comment is that the NFVF does not dictate what the IDC invest in so I do not believe this would have had a significant impact at all on what the IDC decision would be.'

[49] Roscher's interpretation and explanation of her duty to disclose the negative comments thus amount to the following: i) she had no duty to disclose because of past practice; ii) she had disclosed the report by giving it to Ford and telling him that the report was "OK"; iii) she had not gone into the detail of the negative remarks with Ford because she wanted him to "look at it himself and get an objective view"; iv) she did not know she had to disclose the remarks and thus lacked the intent to act fraudulently; v) she was not concerned about the racism since such had been tolerated in other films in the past; vi) her disclosure in the recommendation of the review of the script as "average" was sufficient; vii) she did not attach much value to the criticisms as she disagreed with them and the NFVF was adversely pre-disposed to international transactions; and viii) the script review was not a priority because after Chavarika's e-mail there was no prospect of a deal.

[50] The Commissioner found that the dismissal of Roscher was procedurally fair but substantively unfair. While he accepted that Roscher was the primary author of the recommendation, he held that IDC had failed to establish fraud (or intent to deceive) on the part of Roscher in relation both the non-disclosure of the content of the script review and the misleading representation of the Wal-Mart order. He accepted that Roscher acted negligently and not in the best interests of IDC when she failed to disclose the negative remarks of the NFVF but this did not amount to misrepresentation or fraud. Likewise, he accepted that the submission was "misleading" about the Wal-Mart order but again there was no fraudulent intent or any potential prejudice to IDC because Chavarika had alerted Ford to the misleading nature of the representations prior to the Credit Committee meeting.

[51] In the opinion of the Commissioner, Ford bore an equal responsibility to make the required disclosures and thus he was equally negligent. Ford was not disciplined for his failures and therefore Roscher's dismissal was unfair as IDC had acted inconsistently in the application of discipline. In assessing whether the misconduct was serious and of such gravity to render the continuation of the employment relationship intolerable, the Commissioner held it did not because Roscher's negligent conduct was not so serious and she had "an excellent record" with IDC. He accordingly ordered IDC to reinstate Roscher with retrospective effect.

<u>Labour Court proceedings</u>

[52] In its review application before the Labour Court, IDC submitted that the Commissioner had made a material error of law in relation to the principles of misconduct in the form of misrepresentation; had misconstrued the true nature of the inquiry into Roscher's alleged misconduct; had preferred Roscher's version to that of Ford without making credibility findings based on the evidence; ignored the uncontested evidence that Ford had no responsibility to include the NFVF's negative remarks; applied the parity principle incorrectly; and failed to appreciate that the misconduct had fundamentally damaged the trust relationship. Hence, IDC submitted, the cumulative effect of the errors resulted in an award that was not reasonable.

[53] The Labour Court identified the primary issues for determination by the Commissioner as being whether Roscher bore a duty to disclose to IDC the exact nature and ambit of the commitment by Wal-Mart to purchase DVD's of Vanilla Gorilla and an accurate account of the script review obtained from the NFVF. If so, whether Roscher had made a proper disclosure, and, if not, whether the failure to make proper disclosure was deliberate or negligent. The question thus was whether the findings of the Commissioner that the conduct of Roscher in not making proper disclosure was negligent (rather than deliberate with the intention to deceive) and did not warrant dismissal, were reasonable.

[54] The Labour Court concluded in regard to Wal-Mart's disclosure that there was no doubt that Roscher's depiction of the facts was a deliberate misrepresentation of the true position. She had been involved with the deal from the outset and had travelled to the USA specifically to meet with Wal-Mart to resolve any confusion. Having so ascertained the true position, she bore the primary duty to ensure that the Credit Committee was fully and accurately informed of the relevant facts pertaining to Wal-Mart's commitment. That she failed to disclose the truth is evident from Chavarika's e-mail of 27 June 2008 which clearly reflected the true position that Wal-Mart had not given any commitment along the lines set out by Roscher in the submission, but had merely expressed interest. It was the belated disclosure by Chavarika that prompted Ford to intervene to ensure that the Credit Committee was not misled. Roscher's gross overstatement of the position constituted a failure to discharge her duty of full and honest disclosure to the Credit Committee.

[55] The Labour Court concluded further that Roscher's depiction of the position was a deliberate misrepresentation. She had stated explicitly and repeatedly, in various ways, that IDC's risk exposure was low as it was secured by Wal-Mart's irrevocable order when this was obviously untrue. She purposely and deliberately created an impression in the recommendation opposite to that outlined by Chavarika, who had also attended the meeting with Wal-Mart in the USA. It was "simply inexplicable that Roscher, a senior employee tasked with driving the project and fully immersed in it could have innocently misconstrued

the nature of Wal-Mart's commitment, especially after she was dispatched to meet in person with Wal-Mart, at great expense, in order to iron out any misunderstandings and to obtain a clear understanding of the extent to which Wal-Mart's commitment reduced IDC's risk of recouping its investment". Thus, Labour Court held that Roscher set out deliberately to deceive Ford and the Credit Committee by misrepresenting the nature and extent of Wal-Mart's commitment, with a view to having the deal approved. Her failure to present a full and honest account of Wal-Mart's commitment amounted to serious misconduct, a breach of fiduciary duty and an act of gross dishonesty

[56] With regard to the script review, the Labour Court held that the disclosure in the recommendation was hopelessly inadequate and was in fact "downright misleading". Given the severity of the criticism in the script review, the Labour Court found it difficult to believe that Roscher honestly thought that the content was irrelevant to the Credit Committee. The NFVF had concluded that the story was racist in nature and that the script could probably not be rescued. The Labour Court rejected as incredible Roscher's explanations that she had no duty to disclose the script review, that past practice justified non-disclosure and that the script review was not a priority after Chavarika's intervention. It was more probable that Roscher, having read the script review, realised that it would sink the entire project and thus deliberately engaged in an act of deception by merely recording the NFVF's review of the script as "average". Her insistence in evidence that this was "technically correct" was not convincing.

[57] Moreover, there was no contemporaneous e-mail trace of the script review being forwarded from Roscher to Ford, or distributed by her to any other IDC team member. It was thus unlikely that Roscher gave Ford the script review prior to the Credit Committee meeting. In any event, on Roscher's own version, she never brought to Ford's attention the key aspects of the script review. She admitted to telling him it was "OK." She did not bring to Ford's attention, the negative remarks in the script review. Her failure to do so was a clear breach of her duty of disclosure. Moreover, Roscher who was present at the Credit Committee meeting, would have observed that the issue of a negative script review was not raised for discussion (as it was not known to anyone else in the

meeting) and failed to bring the issue to the attention of the Credit Committee. The failure to do so, in the opinion of the Labour Court, was deliberate. As appears clearly from her testimony, Roscher disagreed with the NFVF script review and therefore sought to conceal its contents from Ford and the Credit Committee.

[58] Were it not for the Wal-Mart order having fortuitously come to light, it was likely that the Credit Committee, in ignorance of the problems with the script, would have approved funding for the Vanilla Gorilla project without any restrictions or conditions as to the script and would thereafter have been bound to finance a film that was potentially racist and patronising towards Africa and Africans, with no legal right to insist on revisions to the script. The reputational damage to IDC could have been significant. Roscher, therefore, failed in her duty of disclosure toward her employer. This failure was not negligent but was deliberate and amounted to an act of dishonesty by a senior employee.

[59] The Labour Court concluded that the award was reviewable in that the Commissioner failed to determine the true issue. In particular, the Commissioner applied the criminal standard for determining fraud and ignored the relevant fact that Roscher not Ford bore the primary responsibility and provided a deficient and misleading disclosure. The conclusion that Roscher was merely negligent could not be reasonably supported on the evidence. Likewise, the finding that there was no potential prejudice caused by the misrepresentations was patently unreasonable and irrational, especially in view of the fact that the prejudice was only averted as a result of the intervention of Chavarika and Ford.

[60] Moreover, the Labour Court held that the Commissioner's application of the parity principle was irrational in that Roscher was the lead executive on the project and had travelled to the USA, while Ford was a recent appointee and had been in the job less than two months before the Credit Committee meeting. The Commissioner did not appreciate that Ford was acting in an oversight role. In addition, it is common cause that Roscher did not bring the negative remarks in the NFVF report to Ford's attention and in fact left him under the impression that the NFVF report was "OK". There is no evidence that Ford acted

dishonestly and his conduct was not comparable to that of Roscher. There was accordingly a lack of rational connection between the evidence and the conclusion reached by the Commissioner on sanction which added to the unreasonableness of the result.

[61] Given her seniority, expertise and lack of remorse, the Labour Court held that sanction of dismissal was appropriate.

<u>The appeal</u>

[62] Most of the submissions before us related to whether Roscher had intended to deceive IDC. Counsel for Roscher submitted that the arbitration award contains a detailed and accurate summary of the material evidence, and it is apparent *ex facie* the award that the Commissioner applied his mind to the evidence before him, properly assessed the evidence and reached a conclusion that a reasonable commissioner could reach, namely that there was no intention on the part of Roscher to deceive IDC and that her conduct did not warrant dismissal. It was contended that the Labour Court incorrectly concluded that the evidence before the Commissioner was such that Roscher intended to deceive IDC, particularly in view of the fact that it was never put to Roscher during her testimony that she had acted to deceive.

[63] Counsel, therefore, argued that the Commissioner ought not to be criticised for making a finding of negligence when no case of fraud was made out at the hearing before him and where Ford was apprised of the material facts before the Credit Committee meeting. It was submitted therefore that the Labour Court ignored the case presented by IDC at the arbitration, made findings in respect of a case never presented, and condemned Roscher in strong terms despite the fact that she was never confronted with those same allegations whilst testifying. It was further submitted that the Commissioner properly assessed the evidence before him and that his conclusion that the conduct of Roscher did not warrant dismissal is a conclusion that a reasonable Commissioner could reach and is reasonably supported by the evidence.

[64] Counsel for IDC emphasised that the allegations against Roscher were more broadly that she misrepresented the material facts necessary for the purposes

of decision-making by the employer. While a finding of fraud unquestionably would make Roscher's misconduct more serious, the evidence overwhelmingly supports the finding of the Commissioner that Roscher was guilty of negligently misleading the Credit Committee and thus not acting in the best interests of the employer. She was in breach of her fiduciary duty to her employer. That much is essentially common cause.

[65] Importantly, the misrepresentations occurred during a due diligence process aimed at minimising IDC's risk exposure. The Credit Committee was not involved in the due diligence process and naturally would have relied on the recommendation placed before it by Roscher who conceded that it was her responsibility to implement due diligence measures to minimise risk and to gather and share information relevant to the project. The risk comprises the reputational risk for IDC, given the nature of its business, in funding a film which has racist connotations. The further risk to which IDC would have been exposed arises from the absence of adequate security impacting negatively on the IDC's prospects of recoupment of its investment thus creating a possibility of financial loss.

[67] As stated, there is no denying that the recommendation was misleading as to the extent of security alleged to have been provided by Wal-Mart and that Roscher was at least negligent and did not act in the best interests of IDC by not ensuring that the recommendation was completely accurate in that regard. Likewise, Roscher's defence for her failure to include NFVF's remarks, namely that she gave the NFVF report to Ford and had no duty to disclose, do not exculpate her and in fact, reveal her poor judgement. It was not sufficient to merely say she gave the script review to her superior without including the contents in the recommendation to the Credit Committee.

[68] While the recommendation to the Credit Committee was edited by Ford prior to being submitted to the Credit Committee, the tracked version of the document clearly indicates that Ford's editing did not change the substance of Roscher's recommendation, but merely made the document easier to read. The ultimate responsibility for sourcing information, compiling the information and drafting the recommendation lay with Roscher, the team leader. The role profile

document of a senior account manager makes it clear that Roscher was responsible for conducting the due diligence of the transaction.

[69] Most importantly of all, as just stated, there was no justifiable basis for Roscher's non-disclosure of the negative remarks made by the NFVF and she failed to advance a plausible justification for her conduct. If anything, Roscher's testimony indicates that she may have withheld the views of the NFVF from the Credit Committee because she disagreed with them. Her recordal of the review of the script as a finding of "average" was a conscious act that was incomplete and did not do justice to the full criticism. In the circumstances, an inference of conscious deceit would be legitimate, having regard also to Roscher's obvious wish for the film to be funded.

[70] However, it is unnecessary to make a definitive finding on whether Roscher acted deceitfully. The appeal can and perhaps may better be determined on the narrower question of whether dismissal is an appropriate sanction for the misrepresentations in question, which were undisputedly negligent and not in the best interests of the employer.

[71] A reasonable senior accounts manager in the position of Roscher would have understood the implications of the NFVF report and would have alerted the Credit Committee by making a full and frank disclosure.

[72] Roscher's testimony before the CCMA brings to light her flawed insight at the time she drafted the recommendation and her persistence in that error throughout the hearing. Through her conduct (and her testimony justifying it) Roscher established that she lacks judgement and cannot be trusted to act appropriately in the best interests of her employer. Her defence of her conduct on the dubious bases she advanced during the CCMA hearing confirms her unreliability. Her repeatedly stated conviction that she had no duty or obligation to disclose the negative assessment of the NFVF to the Credit Committee, and her assumption that her inaccurate and incomplete disclosure was sufficient, defy reasonable belief. Her version that she handed the report to Ford, told him it was OK and did not mention the damning comments because she wanted him to bring an objective opinion to bear, is improbable; and, were it to be

believed, revealing of exceptionally poor judgment for a person in her position. Her stance reveals a notable lack of appreciation of her fiduciary duties in the due diligence process.

[73] By the same token, the representation of the information about the security or guarantee requirement in the recommendation is equally indicative of a serious lack of judgement on the part of Roscher. The document is replete with misleading and ambiguous statements about the nature of the security on offer. The communication of the true position was way below par, especially in light of the fact that Roscher would or should have known the true position (as conveyed by Chavarika) after the meeting with Wal-Mart in the USA. What was in fact conveyed to the Credit Committee, if not deceitful, reflects a disturbing lack of understanding of Wal-Mart's commitment, the basics of the due diligence process and the quality of the security required. The fact that Chavarika's e-mail resulted in the Credit Committee ultimately not being misled on the security issue does not help Roscher. The e-mail disclosed the true situation that Roscher should or must have known. Its obvious variance with the version she put forward in the recommendation was at the very least a grossly negligent and misleading breach of fiduciary duty, confirming her unreliability in undertaking the task at hand. Her attitude reflected a lack of concern or insight about the possibility that her misrepresentations and non-disclosure had significant potential to cause the IDC reputational and financial prejudice.

[74] It is plain from his arbitration award that the Commissioner did not take full account of this relevant factor or apply his mind to the fact that Roscher's belief that she was under no obligation to disclose the negative remarks to the Credit Committee rendered her unsuitable to carry out the fiduciary responsibilities of the position she occupied.

[75] In addition, it is apparent that the Commissioner was influenced primarily by his finding that Roscher had not committed fraud. The nature of the enquiry, as apparent from the charge sheet, required fuller consideration of the implications of the breach of fiduciary duty to the tolerability of a continued employment relationship. The charges went beyond an allegation of fraud and included

misrepresentation and failure to act in the best interest of the employer. In not considering these questions fully, the Commissioner effectively misconstrued the true nature of the enquiry.

[76] The IDC submitted furthermore that the Commissioner acted unreasonably in resolving the dispute of fact as to whether Roscher had furnished Ford with a copy of the NFVF report. Ford testified that he never received such a copy from Roscher and furthermore that had he known about the NFVF's comments, he would not have sent the recommendation to the Committee. His evidence is supported by the course of conduct he followed when he discovered the problem with the security. The Commissioner, however, accepted Roscher's version and stated: "if I am wrong and he did not receive the script report from [Roscher], he should have insisted on receiving it, reading it and including the criticisms of the script in the recommendation". In such speculation, the Commissioner committed an irregularity by ignoring the uncontroverted evidence that it was never Ford's responsibility to include NFVF's comments in the recommendation. Such responsibility was solely that of Roscher.

[77] The Commissioner's finding that IDC acted inconsistently in disciplining Roscher because Ford was equally negligent for the non-disclosure of the NFVF's negative comments is also unreasonable. The finding ignores the cogent evidence that it was Roscher's duty to collect information and to prepare the recommendation to the Credit Committee. Not only did the Commissioner ignore the evidence led by the IDC, he also ignored the concessions which were made by Roscher, wherein she agreed that it was her role to limit IDC's exposure to financial loss and to implement due diligence measures to minimise risks.

[78] Additionally, the difference in the duties and responsibilities between Roscher and Ford renders the parity principle inapplicable. In relation to the security issue, Ford testified and explained that he edited the draft recommendation from Roscher merely to make it read better. As mentioned, the tracked changes to the report indicate that Ford's amendments were merely editorial and did not add anything which had not been included by Roscher. Each paragraph addressing the security issue remained largely unchanged after Ford's editorial.

This testimony was however ignored by the Commissioner, who found Ford equally negligent as he contributed to the recommendation “as is evident from his extensive editing”. The Commissioner thus ignored material evidence in the form of Ford’s testimony and the tracked version of the report which evinces the limited changes made by Ford.

[79] These failures and misapprehensions by the Commissioner in the determination of an appropriate sanction for the undisputed misconduct resulted in an unreasonable outcome. The IDC, as employer, given the nature of its business and operations, is entitled to expect a high fiduciary standard of disclosure by employees responsible for recommending substantial loans to potential clients. Roscher’s conduct fell way below par and severely damaged trust to the point that a continued employment relationship became intolerable.

[80] In the premises, while our reasoning and ultimate conclusion differ somewhat, the Labour Court did not err in setting aside the arbitration award. The appeal must accordingly be dismissed. In light though of a measure of complexity, and the legitimate need of Roscher to seek vindication in relation to the nature and scope of the misconduct established by the evidence, we decline to make any order of costs in the appeal.

[81] The appeal is accordingly dismissed.

JR Murphy

Acting Judge of Appeal

I agree

Acting Deputy Judge President VM Phatshoane

I agree

K Savage

Acting Judge of Appeal

APPEARANCES:

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