



THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable / not reportable

Case no: PR270/14

In the matter between:

**COEGA DEVELOPMENT CORPORATION
(PTY) LIMITED**

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

JULIA CAMERON N.O.

Second Respondent

JACQUELINE FORT

Third Respondent

Heard: 11 August 2015

Delivered: 2 December 2015

Summary: Section 145 review application – commissioner finding senior manager not guilty of charges relating to a conflict of interest in the appointment of two employees and reinstating her – award found unreasonable, set aside on review and replaced with an order that employee's dismissal fair – various review principles considered

JUDGMENT

MYBURGH, AJ

Introduction

- [1] This is a section 145 review application. The commissioner¹ presided over a long arbitration – the matter ran for the better part of two weeks with the record comprising some 2000 pages – and issued a comprehensive award, in which she ostensibly applied herself to the matter in finding that the dismissal of the employee (Ms Fort²) by the company³ was substantively unfair because she was not guilty of misconduct. But according to the company, on a proper analysis of the evidence and the award, the commissioner's decision that the employee was not guilty of misconduct was wrong and unreasonable. This is thus what may be termed a review going to guilt.
- [2] At all material times Ms Fort was employed by the company as the unit head: SHEQ⁴ operations, and was dismissed in November 2013 after having been found guilty of serious charges of misconduct relating to a conflict of interest in the appointment of Ms Coetzer and Talha Ebrahim.⁵ At the heart of the charges was that Ms Fort had (allegedly) been involved in a relationship with Adnaan Ebrahim at the time of the appointments, that Talha Ebrahim is his brother and Ms Coetzer his cousin, and that Ms Fort had disclosed none of this during the selection interviews that she had participated in that led to the appointment of the two employees.

¹ The second respondent.

² The third respondent.

³ The applicant.

⁴ Safety, health, environmental and quality.

⁵ His full name is Muhammed Talha Ebrahim, but he was generally referred to by his second name during the arbitration.

- [3] Only the substantive fairness of Ms Fort's dismissal was in issue before the commissioner. The commissioner found for Ms Fort, and reinstated her with full retrospective effect. On review, the company seeks an order reviewing and setting aside the award, and the substitution thereof with an order that the dismissal of Ms Fort was substantively fair. Ms Fort opposes the review application.
- [4] In what follows, I deal with the following main topics: the factual matrix and chronology of the main events; the commissioner's award; the company's attack on review; relevant review principles; and my evaluation and findings.

The factual matrix and chronology of the main events

- [5] The company is a largely state-funded entity regulated by the PFMA.⁶ The company has two main functions: its primary function is to run the Coega deep water harbour and IDZ⁷ outside of Port Elizabeth, with a secondary function being the servicing of various construction and development programmes or projects around the country. The company is headed by a CEO (Mr Silinga), who has a number of executive managers reporting to him, including Mr Koza, the executive manager: operations business unit. Ms Fort reported directly to Mr Koza in her capacity as the unit head: SHEQ operations. She was a senior manager within the organisation earning around R1-million per annum, and had some 20 subordinates reporting to her.
- [6] On 25 June 2012, Ms Fort's ex-husband sent her the contact details of Adnaan Ebrahim (aka Tony Corleoni), who at the request of her ex-husband, Ms Fort had said she would help with some "environmental stuff". At the time, Ms Fort had been divorced for a couple of years, and was, according to her, dating Mr Du Plessis. (In substantiation of this, Ms Fort relied on a photograph of her and Mr Du Plessis taken at a Springbok rugby match on 23 June 2012, where she had introduced Mr Du Plessis to members of management as her

⁶ Public Finance Management Act, 1 of 1999.

⁷ Industrial Development Zone.

boyfriend. However, on Ms Fort's own version, their relationship ended on 30 June 2012.)

- [7] On 27 June 2012, Ms Fort contacted Adnaan Ebrahim telephonically. It transpired that his problem was that a service station owned by his family had been shut down, and he had been refused a licence to restart it and was unaware as to what was going on with the appeal against that decision. Ms Fort then set about attempting to assist Adnaan Ebrahim.⁸
- [8] Also in June 2012, the company advertised a vacancy internally for a document control officer (DCO), who was accountable to Ms Ford. The vacancy arose as a consequence of Mr Magotsi (a quality control manager) having been seconded to the CSS⁹ in Pretoria (a development programme), which resulted in Ms Bakker (who was then the DCO) being promoted (to an integrated management systems coordinator) and her position becoming vacant. The vacant position of a DCO was a so-called contractual position, and was linked to the duration of the CSS contractual period and paid for by CSS.
- [9] In early July 2012, and after the internal recruitment process proved unsuccessful, the company engaged a number of recruitment agents to provide it with their top two candidates by 10 July 2012.
- [10] From 27 June 2012 onwards, Ms Fort appears to have struck up at least a friendship or sorts with Adnaan Ebrahim. She first met him on 29 June 2012. Soon thereafter, on two occasions during her lunchtime, she accompanied him to his attorneys (JR Bester & Associates) and waited in reception while he attended a consultation. (She seems to have found this worthwhile as the two of them spent some time chatting in the car while travelling to and from the attorneys.)

⁸ This culminated in Ms Fort being advised by the relevant authorities on 28 August 2012 that the appeal had been successful.

⁹ Coega Strategic Solutions.

- [11] While waiting in reception at JR Bester & Associates, Ms Fort (on her version) witnessed Ms Coetzer working at the reception desk, and was impressed with her people skills. According to Ms Fort, she then gave Adnaan Ebrahim a copy of her business card, and said to him that the “next time you are in there, if that woman is interested, ask her to send her CV ... if she would be interested in maybe applying for a job at the CDC”.¹⁰
- [12] Before 10 July 2012, Mr Songongo (a recruitment consultant in the HR department), who was tasked with dealing with the recruitment of the DCO, held a discussion with Ms Fort about the status of the process. It was in this context that Ms Fort advised him that she “had in her possession” a CV of a candidate that she wanted to be considered for the position of a DCO. In response, Mr Songongo advised her that as long as the CV was forwarded before the deadline (on 10 July 2012), it would be considered together with other CVs received from recruitment agents.
- [13] On 12 July 2012, Mr Songongo provided Ms Bakker (who was in recruitment terms, the requesting line manager) with copies of the CVs he had received from recruitment agents by the closing date of 10 July 2012, which he had screened and determined met the requirements for the job of a DCO. After this, Ms Bakker compiled a shortlist and advised Mr Songongo of the candidates that she wished to interview.
- [14] Also on 12 July 2012, Ms Coetzer forwarded her CV to Ms Fort under cover of an email reading: “Please find my CV attached as per request from my cousin Tony” (“the first CV”). (The reference to Tony here is to Adnaan Ebrahim.)
- [15] On 13 July 2012, Ms Fort forwarded the first CV to Mr Songongo and requested him to “please retain for future positions in admin or finance”. The first CV was of a generic nature, and was not tailored to suit any particular position. Although referred to on the cover page as Christa Coetzer, in the body of the CV, Ms Coetzer recorded her surname as being Ebrahim.

¹⁰ An acronym for the company.

- [16] Between then and 25 July 2012, Mr Songongo reminded Ms Fort on numerous occasions that he had not received the CV that she had spoken about for the position of a DCO. In this regard, Mr Songongo went on to testify as follows:

“I recall at one point in her office she wanted to give me a hard copy of the CV, which she had in her possession, but then because the closing date had already passed, I was not comfortable with just accepting the CV without [Ms Bakker] being aware I had requested it, to put it down on email, so that [Ms Bakker] is also aware of when and how the CV came about ...”

- [17] It was in these circumstances that, on Wednesday, 25 July 2012, Ms Fort sent another CV of Ms Coetzer (“the second CV”) to Mr Songongo and Ms Bakker by email. For a reason that went unexplained, Ms Coetzer no longer went by the surname of Ebrahim in this CV. Ms Fort’s email covering message read: “This is the lady that I was talking about that I’d like to have included for Monday’s interviews (CV not brilliant but I think she’s excel [sic] in the position).” The CV was not forwarded from Ms Coetzer by Ms Fort, but instead the email reflects that the CV was sent directly by Ms Coetzer to Mr Songongo and Ms Bakker. On evidence before me, this appears to be the CV that Ms Coetzer had a hard copy of at the time of her exchange with Mr Songongo that is captured in the quotation above.

- [18] Different to the first CV, the second CV was specifically tailored to Ms Coetzer gaining employment as a DCO, with emphasis being placed on the document control responsibilities that she had both in her current position (of an office administrator at JR Bester & Associates) and in a number of previous positions. No mention of this had been made in the first CV, and a comparison of the two CVs reveals that the second CV was entirely reworked, and that time and effort was put into the task. The difference in the CVs can best be illustrated by focussing on how differently Ms Coetzer described her responsibilities at JR Bester & Associates in the two CVs.

- a) In the first CV, Ms Coetzer's responsibilities are described as follows:
 "Answering all debtor calls and queries, issuing estimated balances to debtors and explaining of the procedure of a settling file. Refunds of debtors, reduction of monthly instalments, rescissions of files, refund of distributions, explaining of ITC removals." (It will be noted that nothing whatsoever is said about document control.)
- b) By way of contrast, in the second CV, Ms Coetzer's *entire responsibilities* are described as "document control", with the following appearing under the heading "responsibilities":

"Document control:

developing of filing system in order to ensure rapid retrieval of *documentation*;
 formatting of *documentation*, both internal and for external clients;
 issuing of *documentation* to external clients;
 data capturing;
 preparation of court *documents*;
 liaising with clients with regards to *document* queries;
 training of clients with regard to *document* processes;
 communicating with clients and creditors with regards to account details;
 responding to telephonic, fax and email queries with regards to balance enquiries and settling of files;
 monitoring of client accounts". (Emphasis added.)

[19] Mr Songongo gave evidence about the differences between the two CVs. As far as he was concerned, on the face of the first CV, Ms Coetzer would never have been shortlisted for the position of a DCO. By way of contrast, he considered the second CV to have been tailor made for the position of a DCO. Under cross-examination, it was put to him that there was nothing untoward about Ms Coetzer having put in a general CV and then, having become aware of the position on offer, to have reworked her CV to emphasise her strengths for that specific position. In response, Mr Songongo testified that the problem was that the position of a DCO is not a generic position and that it was unique

to the company, with the result that unless Ms Coetzer had seen the advert or become aware specifically of what the requirements for the job were, she would not have been able to rework her CV. In response to this, the line adopted by Ms Fort's counsel at the arbitration appears to have been that Ms Coetzer had been able to fine tune her CV simply as a consequence of knowing that the job on offer was that of a DCO. No suggestion was made to Mr Songongo that Ms Coetzer had obtained the advert from anyone or that she had obtained any advice from within the company's HR department in compiling the second CV (see further below).

[20] Ms Fort said little about the second CV during her evidence in-chief, but it came to the fore during her cross-examination, with the thrust of the cross-examination having been around how Ms Coetzer had come to submit a CV tailor made for the position of a DCO. The following transpired:

- a) According to Ms Fort, when she received the pack of CVs in preparation for the selection interview, she noticed that Ms Coetzer's CV was not in the pack; although she knew that Ms Coetzer had sent her CV to her, she thought at the time that she must have forgotten to forward it to Mr Songongo; she accordingly got hold of Adnaan Ebrahim and said, "do me a favour, get hold of her again and ask her to re-send her CV through"; and she thereupon received Ms Coetzer's CV and forwarded it on. (This version is bristling with tensions, prime amongst them being why Ms Fort did not simply re-forward Ms Coetzer's first CV to Mr Songongo as she had it on her email, and the fact that Ms Coetzer did not resend her first CV, but completely reworked it.)
- b) Confronted then with the difficulty of how Ms Coetzer would have known that she should tailor her CV to fit the DCO position, Ms Fort testified that Ms Coetzer had told her that she had done so after phoning someone from HR at the company and getting advice around "the details of the position" and "what the job entailed". (There are five reasons why this version stands to be rejected: firstly, it is based on

hearsay (i.e. what Ms Coetzer told Ms Fort); secondly, Ms Fort did not call Ms Coetzer to confirm this version; thirdly, Ms Fort did not present this version at her disciplinary inquiry; fourthly, the version was not put to Mr Songongo under cross-examination, despite him having dealt in some detail with the differences between the two CVs; and, fifthly, this version is contrary to the version that was put to Mr Songongo under cross-examination, i.e. that Ms Coetzer worked things out simply on account of her knowing that the vacancy was for a DCO. In all these circumstances, this version smacks of a recent fabrication.)

- c) Faced then with the problem of how Ms Coetzer would have known in the first place that the position on offer was that of a DCO, Ms Fort testified that she assumed that she had said to Adnaan Ebrahim that she was “interviewing for a doc control position ... ask her to resend it”, and that this had been passed onto Ms Coetzer. (As dealt with below, this version is in conflict with, *inter alia*, what Ms Fort told Mr Gajjar (an internal auditor), namely that she had been in contact with Ms Coetzer and told her of the position on offer from the outset (she thus did not need Adnaan Ebrahim to relay to Ms Coetzer that the position was for a DCO). To my mind, as with the other aspects of her evidence on this issue dealt with above, this is illustrative of the fact that Ms Fort presented a contrived version of events, presumably with a view to masking her actual involvement in Ms Coetzer’s appointment.)
- d) Ms Fort even went so far as to state that she “never even looked at [the second] CV”, and had, upon receipt thereof, “just forwarded it” on by email to Mr Songongo and Ms Bakker. (But this cannot reasonably possibly be true for these reasons. Firstly, Ms Fort’s own covering email describes the CV as “not brilliant”, which implies that she must have read it (see further below). Secondly, Mr Songongo’s unchallenged evidence was to the effect that in the run up to Ms Fort emailing him the second CV, she was in possession of a hard copy thereof, and sought to give it to him. Thirdly, although not determinative, it again warrants mention that there was no email chain

reflecting that Ms Fort had forwarded on an email received from Ms Coetzer.)

- e) Ms Fort went on to testify under cross-examination that her email message that the CV was “not brilliant” was written on the assumption that the first CV and second CV (which she had allegedly not read) were the same.¹¹ (But in her interview with Mr Gajjar dealt with below, which was conducted after the selection interview at which Ms Fort would have studied the second CV, Ms Fort apparently made this comment with reference to the second CV. In addition to this, if Ms Fort’s contention was true, then it is noteworthy that she failed to alert the selection panel to the fundamental differences between the two CVs.)

[21] All the above notwithstanding, as Mr Songongo (and other witnesses) testified at the arbitration, there was nothing inherently wrong with employees of the company submitting CVs on behalf of other persons. He also testified that although the practice of submitting a CV outside the closing date (in this case, 10 July 2012) was not encouraged within the company, there was no absolute bar to the late receipt of CVs.

[22] On 30 July 2012, the selection panel interviewed five candidates for the position of a DCO – four of them having been sourced from recruitment agents and shortlisted internally, and the fifth being Ms Coetzer. The panel consisted of Ms Fort (who was effectively the recruiting line manager), Ms Bakker and Ms Knepscheld (the then HR coordinator). It was common cause at the arbitration that there was nothing wrong with the recruiting line manager sitting on the interview panel, but there was some controversy around whether, in the absence of consensus, the line manager could make the final call. Although this was the version proffered by Mr Songongo, and endorsed by Ms Fort, it was the evidence of Mr Luckman that, in the absence

¹¹ It is implicit in this that, on Ms Fort’s version, she had read the first CV, formed the view that it was “not brilliant”, and then assumed that the second CV was the same (having allegedly not read it), and thus made the comment that she did.

of consensus, advice would have to be sought from HR and / or the next level of management. (Mr Luckman was the acting HR manager at all material times, and was called as a witness by the commissioner.)

- [23] On aggregate, the selection panel scored Ms Winter as the best candidate, and Ms Coetzer as the second best candidate. But individually, Ms Winter was scored the best candidate by Ms Bakker and Ms Knepscheld, and the second best candidate by Ms Fort; while Ms Coetzer was scored the worst candidate by Ms Knepscheld, the joint second worst candidate by Ms Bakker, and the best candidate by Ms Fort.
- [24] During the interview, Ms Fort disclosed that she knew Ms Coetzer, in that she had seen her at work at a firm of attorneys. She did not disclose any form of personal relationship or dealings with Ms Coetzer, such as would typically have resulted in a panellist having to recuse him or herself from the selection process.
- [25] In circumstances where Ms Fort was impressed by Ms Coetzer's "people skills" during the interview and where there was apparently enough work for two DCOs (this in circumstances where Ms Bakker had been doing the work of three people while she was a DCO), Ms Fort raised with the panellists the possibility of also appointing Ms Coetzer as a DCO. According to Ms Fort, she had not thought of the idea before, and it came to light for the first time during the interview. While her fellow panellists were apparently not opposed to the idea, Ms Knepscheld advised Ms Fort that she should seek the approval of Mr Koza for the appointment of a second DCO. According to Ms Knepscheld, Ms Fort undertook to do so. Ms Fort's version was different – it being that the understanding was that Mr Koza's advice (and not approval) should be sought.
- [26] The advice given by Ms Knepscheld to Ms Fort accorded with clause 2.1(a) of the company's HR manual, which reads: "Recruitment is subject to the approval of the CEO or BU¹² executive manager, depending on the level of

¹² Business unit.

the position to be filled.” Two points of contention arose in this regard at the arbitration.

- a) Firstly, Ms Fort contended that Mr Koza had delegated the power of recruitment to her, and consequently that she was entitled to appoint Ms Coetzer without his approval. Mr Koza’s version, on the other hand, was that he had delegated the function to Ms Fort, but that she was obliged to get his approval before making any appointment.
- b) Secondly, Ms Fort contended that the aforesaid rule dealt with IDZ positions on the establishment, and not with contractual positions linked to programmes or projects (such as the DCO position in issue) which, on her version, do not affect the establishment headcount. In his evidence, Mr Koza expressed a contrary view. Mr Luckman also disputed that there were different rules for different types of recruitment. As far as he was concerned, neither Ms Fort nor anyone else in the organisation had carte blanche to determine the number of employees to be employed on contracts.

[27] Reverting to the chronology of events, according to Ms Fort, on either 30 or 31 July 2012, she raised the matter of the appointment of a second DCO with Mr Koza in his office, with him approving of the idea. On Ms Fort’s version, she raised the issue with Mr Koza not because she had to, but simply to keep him in the loop as a matter of courtesy. In his evidence, Mr Koza denied that the discussion had occurred, and stated that, if there had been a discussion, there would have been some sort of paper trail flowing from it (but there was none).

[28] Ms Fort subsequently reverted to Ms Knepscheld and advised her that she had secured the approval of Mr Koza. According to Ms Fort, she did so by way of email (but was unable to produce it), while it was Ms Knepscheld’s version that Ms Fort did so orally. Ms Fort also sent Ms Knepscheld an email on 31 July 2012 advising that “the new document control personnel will be

paid from the CSS project budget in return for CSS's use of the quality manager on their projects".

- [29] On 31 July 2012, a written offer of employment (signed by Mr Luckman) was made to Ms Coetzer, which she accepted the following day. The offer was for a three year fixed-term contract (ending on 31 August 2015) at a remuneration level of around R200 000 per annum (four times more than the R49 000 per annum earned by Ms Coetzer at her previous employer).
- [30] On 13 August 2012, Ms Bakker sent Ms Fort a proposal regarding how the responsibilities of a DCO could be split between Ms Winter and Ms Coetzer.
- [31] With effect from 1 September 2012, both Ms Winter and Ms Coetzer took up employment with the company. In his evidence, Mr Koza accepted that he became aware of Ms Coetzer's appointment in the latter part of 2012.
- [32] In her evidence, Ms Knepscheld testified that from the outset, the relationship between Ms Fort and Ms Coetzer "was just too close for comfort". The relationship was, as she put it, more personal than Ms Fort had made it out to be at the interview. She went on to testify that although she had raised the issue with the executive manager at the time, she had decided not to make reference to this in her written statement made during an internal investigation undertaken in July 2013 (see further below), because she did not consider her observations to be "absolutely conclusive".
- [33] Turning now to the appointment of Talha Ebrahim, according to Ms Fort, she first met him when he walked past a coffee shop where she was meeting with Adnaan Ebrahim and stopped to say hello to his brother. (By all accounts this would have been in early October 2012.) A conversation struck up, during the course of which Talha Ebrahim enquired whether there was any chance that he could get a job at the company. In response, Ms Fort advised him of the company's intern programme, and said that he should send her his CV and she would see what she could do.

[34] The events that ensued are captured in an email string sent and received during the period 11 to 30 October 2012. In summary, the string reflects the following:

- a) On 11 October 2012, Ms Fort sent Mr Davids (unit head: Vulindlela village) an email to which Talha Ebrahim's CV was attached. In the email, Ms Fort requested Mr Davids to consider Talha Ebrahim for appointment as a maintenance intern if he had an opening. She stated in this regard that "I feel sorry for him, hopefully an internship will give him a boost of confidence to enable a more permanent position within his field", and that "he comes across as bright, willing and eager". Ms Fort also mentioned that she had an intern finishing in November 2012, and that Mr Davids could "utilize that spot".
- b) Also on 11 October 2012, and following Mr Davids having indicated that he was prepared to take on Talha Ebrahim provided that everyone agreed and that the intern process was followed, Ms Fort advised Mr Davids that "you need to get a few more CV's, add him to the pile, shortlist for interviews and then choose".
- c) On 18 October 2012, Ms Fort sent an email to Mr Davids reading as follows: "I'm being stalked! What's happening with the intern interviews?" (According to Ms Fort, Talha Ebrahim had phoned her a few times to follow up on a possible job.)
- d) Also on 18 October 2012, Mr Davids replied as follows: "What date is your post available? Also he needs to include some maintenance related items on his CV. The fact that he does not have a degree might be a problem. You can sit with me on the interview selection panel. Thandi is not here and I need to find out who is in charge of interns."
- e) On 19 October 2012, Ms Fort replied: "The post is available immediately. He doesn't need to have maintenance experience as none of the interns are expected to have work experience. Zola is who

you speak to in Thandi's absence. I don't mind sitting on the panel if [you] want."

- f) On 30 October 2012, and after having enlisted the assistance of Ms Labercensie (an HR official) and advised her to include Ms Fort on the interview panel, Mr Davids sent Ms Labercensie an email reading: "I am still waiting to interview the interns. This position is available immediately and I would like to do it ASAP as there is a need in the village maintenance team."
- g) Also on 30 October 2012, Ms Labercensie replied as follows: "We have not been able to secure additional CV's hence the delay. We are sourcing from HCS¹³ and are awaiting feedback from recruitment. We will advise and forward additional CV's to you for perusal upon receipt."
- h) On the same day, Ms Fort (who had been copied on the above email) responded in the following terms: "Can we not just interview the one candidate then? If he's suitable then we can move with hiring?"

[35] It was in these circumstances that, on 31 October 2012 or shortly thereafter, the selection panel comprising Ms Fort, Mr Davids and Ms Labercensie sat and interviewed Talha Ebrahim alone. It would have been apparent to her fellow panellists that Ms Fort had met Talha Ebrahim before. He was duly appointed as an intern, and commenced work on 5 November 2012.

[36] On 18 April 2013, some 5 ½ months later, Ms Fort received an email from an unknown person, which recorded, *inter alia*, that Ms Coetzer and Adnaan Ebrahim were married, and that they had been using Ms Fort in "instigating matters of fraud".

[37] On 28 May 2013, Ms Fort had a discussion with Mr Sibandze (unit head: customs, logistics and security) about the email, which she forwarded to him the following day. During their discussion, Ms Fort stated, *inter alia*, that: (i)

¹³ Human Capital Solutions.

she was in a relationship with Adnaan Ebrahim, which had progressed to the point that there were discussions about marriage; (ii) she had met Ms Coetzer through Adnaan Ebrahim; (iii) when Ms Coetzer was introduced to her, she was introduced as Adnaan Ebrahim's cousin; (iv) Ms Coetzer had enquired about a job at the company; (v) "she had [Ms Coetzer] apply for and receive (inaudible) at CDC"; and (vi) Ms Coetzer "had run-ins with the law" and had changed her surname. In response to Ms Fort requesting assistance in getting to the bottom of the allegations in the email, Ms Sibandze agreed to look into the issue – this in circumstances where one of the allegations related to fraud against the company.

[38] Mr Sibandze subsequently obtained permission internally to appoint Mr Edwards of Simbi Investigating Services to conduct an investigation into the matter on behalf of the company. It was in these circumstances that, on 3 June 2013, Mr Edwards interviewed Ms Fort. It is of significance that Ms Fort herself was not the subject of any investigation at the time, and that the interview was aimed at exploring the allegation that Ms Coetzer and Adnaan Ebrahim had been engaged in fraud implicating the company.

[39] According to Mr Edwards, during the course of the interview, Ms Fort advised him, *inter alia*, that: (i) she had been involved in a relationship with Adnaan Ebrahim for about a year; (ii) Adnaan Ebrahim also went by the name Tony Corleoni; (iii) Adnaan Ebrahim and Talha Ebrahim are brothers; (iv) Adnaan Ebrahim and Ms Coetzer are cousins and lived in a flat together (2 Doria Court); (v) Ms Fort had met Ms Coetzer at the flat, and had been given her CV there; (vi) Ms Fort had suggested to Talha Ebrahim that he submit his CV with a view to securing an intern position; and (vii) Ms Coetzer and Talha Ebrahim had both secured jobs at the company. Mr Edwards took some basic handwritten notes of his interview with Ms Coetzer, which broadly captured what Ms Fort said (on Mr Edwards' version).

[40] On 5 June 2013, Mr Edwards submitted a formal report on his interview with Ms Fort to the company. Drawing on his notes and memory, he drafted the report either on 3 or 4 June 2013. The report records the points referred to

above. For present purposes, the following four paragraphs in the report are of particular significance:

- “Jackie Fort is divorced, the single mother of two kids, and lives in Providentia. She has converted to Islam and is a practicing Muslim. In this capacity she went in search of a partner via the internet, and linked up with Adnaan Ebrahim”
- “*Their relationship started about a year ago*, and Adnaan Ebrahim visits Jackie Fort’s house in Providentia, but never sleeps over. She visits his flat at 2 Doria Court, Fourth Avenue, Newton Park where he lives with his ‘cousin’ Christa Layla Coetzer.”
- “*According to Jackie Fort, she met Layla Coetzer at 2 Doria Court when Layla was working for a lawyer*, and earning a miserably low salary. Jackie herself suggested that Layla prepare and submit a CV to the CDC as there was a vacancy advertised. This she did, and was subsequently interviewed a few times at the CDC and obtained the job purely on merit and on her track record. Jackie did not influence the appointment in any way.”
- “Later on Jackie was discussing internships with Ridwaan [Davids] from the Coega Village and he was complaining that he was struggling to find suitable candidates. Again, Jackie suggested to Talha Ebrahim that he submit his CV to Ridwaan because he was a practical hands on type of candidate that may qualify for the internship. This turned out to be the case, and according to Jackie, Talha was appointed on his merits.” (Emphasis added.)

[41] Regarding the first paragraph quoted above, Ms Fort conceded under cross-examination at the arbitration that she had lied to Mr Edwards when telling him that she had met Adnaan Ebrahim on the Internet. Her motivation for having lied is that she did not want to get her ex-husband involved. Regarding the second and third paragraphs, the emphasised portions were contested by Ms Fort during the arbitration. According to her, while she had begun a romantic relationship with Adnaan Ebrahim in March 2013 and was involved in such a relationship at the time of her interview with Mr Edwards on 3 June 2013, she had not told Mr Edwards that their (romantic) relationship had

started a year earlier (i.e. in about June 2012).¹⁴ Ms Fort also contended that Mr Edwards' report and notes were wrong insofar as they recorded that she had first met Ms Coetzer at 2 Doria Court, and that she had suggested to her there that she prepare and submit a CV to the company. Ms Fort also disputed that she had made the aforesaid suggestion directly to Ms Coetzer, as opposed to having made it via Adnaan Ebrahim. According to Ms Fort, Mr Edwards had got his wires crossed.

[42] Reverting to the chronology of events, some weeks after Ms Fort had approached Mr Sibandze for assistance, she asked him to drop the investigation, but the company did not do so. According to Mr Sibandze, Ms Fort motivated her request on the following basis (which paints a remarkable picture):

"She indicated to me that it had been decided ... she had talked to her boyfriend. The family had decided that the email that had been sent, had been sent by the brother of [Adnaan], who worked in the village as an intern [i.e. Talha Ebrahim] and that he had sent the email because he was angry that Layla [Coetzer] had got a better job than him."

[43] During July 2013, Mr Mapoma (executive manager: corporate services) undertook a thorough investigation into the appointment of Ms Coetzer. During the course of the investigation, Ms Coetzer herself submitted a written response to a series of questions. Her responses included the following:

- "Ms Fort requested that I forward my CV to her, which I did in good faith, just as I have done to a number of other people and companies."
- "I did not respond to any particular position but rather to a request from Ms Fort to forward my CV."
- "Prior to my employment at CDC, I had no relationship with Ms Fort. I received her contact details from a client, who stated that Ms Ford had observed me at

¹⁴ Of course, if Ms Fort had been involved in a relationship with Adnaan Ebrahim in June 2012, then her involvement in the appointment of his cousin (Ms Coetzer) in July 2012 and his brother (Talha Ebrahim) in November 2012 would have been utterly irregular on this basis alone.

work and enquired if I would be interested in forwarding my CV for a possible position at the CDC.”

[44] What is remarkable about these statements by Ms Coetzer is that she makes no mention of her second CV, which was clearly tailored to suit a “particular position”, namely that of a DCO.

[45] As part of the investigation, Ms Fort also submitted a response to a series of questions. Here response included the following statement:

“Other than being present at her place of employment on two occasions which availed me of the opportunity to observe her interactions with clients, I had had no conversations or interactions with the said person prior to the interview except to request that she send me the CV.”

[46] On 18 July 2013, and apparently in the light of the appointment of Ms Coetzer, Mr Silinga (the CEO) sent an email to his senior management team, the first paragraph of which read as follows: “It has been brought to our attention that there may be systemic abuse of the authority that, in good faith, has been delegated to levels below EM’s¹⁵ regarding recruitment and appointment of personnel to the CDC.” (At the arbitration, Ms Fort placed reliance on this in substantiation of her contention that Mr Koza had delegated to her the authority to make appointments, with the result that she did not need his permission to appoint Ms Coetzer to a second DCO position. As mentioned above, Mr Koza’s version, on the other hand, was that he had delegated the function to Ms Fort, but that she was obliged to get his approval before making any appointment.)

[47] On 5 August 2013, five charges of misconduct were brought against Ms Fort. Charges 2 to 5 are relevant for present purposes, and are reproduced below.

¹⁵ Executive managers.

“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 interests of your employer for your personal gain and / or the personal gain of 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 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 interests to ensure that Christa Coetzer was interviewed and employed by your employer to the detriment of your employer’s interests.

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 Christa Coetzer into the second position of [DCO] 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*:

- Obtained and submitted the CV of one [Talha Ebrahim], caused him to be interviewed for the position of an intern at the construction village at the CDC. As a result of your dishonest actions, you, *inter alia*:
- Gave the said [Talha Ebrahim] an unfair advantage;
- Sought to unduly influence the ultimate decision of the interview panel, which you were a member of;
- Unduly preferred the said [Talha 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 interests of your employer for your personal gain and/or for the personal gain of [Talha Ebrahim], and/or deliberately failed to manage a conflict of interest in that, despite the fact that

you had caused the CV of [Talha Ebrahim] to be submitted and shortlisted and were therefore extremely compromised and/or conflicted, you agreed to partake and actually did partake in the interview process.”

[48] On 21 November 2013, and after having been found guilty of charges 2 to 5 at a disciplinary inquiry presided over by an independent attorney, Ms Fort was dismissed.

[49] At the ensuing arbitration presided over by the commissioner, the company called seven witnesses: Mr Songongo; Ms Knepscheld; Ms Bakker; Mr Mapoma; Mr Davids; Mr Edwards; and Mr Koza. Ms Fort then gave evidence in her defence. The last witness was Mr Luckman, who was called by the commissioner.

[50] Before the company closed its case at the arbitration, it was placed on record that the parties had reached agreement that the transcription of the evidence given by Mr Sibandze at Ms Fort’s disciplinary inquiry should be read as incorporated into the arbitration proceedings. (The facts set out above dealing with the interactions between Ms Fort and Mr Sibandze are drawn from this transcription.)

[51] It had also been agreed between the parties that the commissioner should have regard to the transcription of the interview that Mr Gajjar had conducted with Ms Fort around the appointment of Ms Coetzer – this following an anonymous tip off having been received by the company. The following statements made by Ms Fort during this interview are noteworthy:

- “I met her outside of 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.”
- “We didn’t get in the internal [recruitment process] hey, and then 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’.”

- “She was employed at the lawyers. I don’t know who she worked for. I can’t remember them now.”
- “Her CV wasn’t brilliant, you know – not very good at putting a CV together.”

[52] It should be clear by now that a number of the statements quoted above cannot be reconciled with the version advanced by Ms Fort at the arbitration about how she came to obtain Ms Coetzer’s CV. Taxed about this under cross-examination, Ms Fort contended that her inconsistent statements made to Mr Gajjar were wrong, and ascribed this to the interview with Mr Gajjar having been “very casual”. She went on to testify as follows: “I didn’t take it as a serious [investigation] into irregularities. I took it as being a formality because it is nonsense. I really was shocked that the CDC was wasting its time doing this” (These contentions are difficult to reconcile with the transcript of the interview, which reflects that the interview was by no means an informal affair. It was recorded, with the transcription running to 22 pages; the issue was formally introduced by Mr Gajjar at the outset; Mr Gajjar had obtained the “interview pack” (which contained the second CV) and asked Ms Fort a series of structured questions around the appointment of Ms Coetzer; at one stage the interview was adjourned in order to allow Ms Fort to produce a particular document; and the interview ended on the basis that Mr Gajjar would come back to her if he needed anything further.)

The commissioner’s award

[53] To begin with, the commissioner considered the issue of when Ms Fort had struck up a romantic relationship with Adnaan Ebrahim, which included a consideration of Ms Fort’s interview with Mr Edwards:

- “56. The charges against the applicant centre around claims of gross misconduct, conflict of interest and gross dishonesty. They are all very serious allegations, a finding of guilt of which would clearly result in a sanction of dismissal. However, in order to find guilt on such serious charges, I am of the opinion that there must be more substance to the charges before me. At the centre of all of the events is the alleged romantic relationship between the applicant and Mr Adnaan [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 recruitment process in order to secure low level appointments for two of his family members. I am not persuaded that this was indeed the case.

57. The evidence lead regarding the applicant's romantic involvement with Mr Du Plessis at the time that she was introduced to Mr Adnaan Ebrahim was convincing. There is no likely reason that the applicant would attend a work function before the events in question and introduce a man as her 'boyfriend' when he was not in fact so. To take this further, it makes the applicant's version that she only had a professional relationship with Mr Adnaan Ebrahim for some time more probable. On the balance of probabilities, I am not persuaded that the applicant was in anything but a professional relationship with Mr Adnaan Ebrahim at the time of the events in question, or that due to her relationship with him she manipulated appointments at the CDC for Ms Coetzer and Mr [Talha] Ebrahim.
58. Mr Edwards interviewed the applicant one year after the events in question. The focus of the discussion was on Ms Coetzer and the 'Ebrahim brothers', their connection with each other, and possible fraudulent activities against the CDC. The discussion, as the applicant stated, was in the present, and I accept that her answers were based in the present. I found Mr Edwards to be an unconvincing witness in regard to the accuracy with which he recorded and thereafter reported to the respondent the information provided to him by the applicant, as well as his recall at the arbitration of how the facts fitted together. By his own admission, he did not focus on the timeline of events, he made assumptions, and due to his prior knowledge of Messrs Adnaan and [Talha] Ebrahim who were the subjects of the investigation, he included inferred details in his report that the applicant would not have told him."

[54] Having found that there was no romantic relationship between Ms Fort and Adnaan Ebrahim at the time of the two appointments, the commissioner went on to find that Ms Fort had not acted irregularly during the recruitment process, including in relation to the second CV:

- "59. In the absence of a romantic relationship between the applicant and Mr Adnaan Ebrahim at the time in question, the possibility of a conflict of interest in charges two and five is substantially watered down. There is no

doubt that the applicant disclosed her prior knowledge for both Ms Coetzer and Mr [Talha] Ebrahim. None of the other panellists testified that they felt uncomfortable with the applicant's presence on the interview panel, and I have no reason to conclude that the applicant benefited in any way by their appointments. There is no evidence before me at all to show any detriment to the respondent's interests. In fact, it was the testimony of Mr Davids that Mr [Talha] Ebrahim had proved to be a useful intern on his team, and the only indication of Ms Coetzer's performance came from the applicant who stated that she was an asset to the organisation.

60. Furthermore, the respondent failed to prove the existence of any rule against submitting a CV and sitting on the interview panel. On the contrary, the respondent's witnesses testified that it was not uncommon at all. *Mr Songongo showed concern that the second CV submitted on behalf of Ms Coetzer spoke directly to the position of a [DCO]. The applicant had contradictory versions regarding whether she spoke to Ms Coetzer about the position or not. I find it far more probable that she did inform Ms Coetzer about the vacancy, but be that as it may, I cannot find any wrongdoing in this. Surely it is common practice for any applicant to tailor their CV to the requirements of the position for which they are applying.*" (Emphasis added.)

[55] In relation in particular to the appointment of Talha Ebrahim, the commissioner went on to find:

- "61. With reference to the appointment of Mr [Talha] Ebrahim, I can hardly agree with the respondent's argument on charges four and five that the applicant walked his application through the process. The person responsible for the interns showed no concern that the applicant had forwarded the CV to Messrs Davids and Mqhatu, and thereafter it was Mr Davids rather than the applicant who did most of the driving. In fact, the applicant told Mr Davids to get more CV's, add Mr [Talha] Ebrahim's to the pile, and only short list thereafter. I can find no dishonesty in the manner that the applicant obtained and submitted the CV, and neither am I persuaded that there was any conflict of interest in the fact that the applicant sat on the interview panel."

[56] The commissioner then dealt at length with the issue of whether Ms Fort had the delegated authority to appoint a second DCO and whether the

appointment of Ms Coetzer was in breach of any rule of authorisation. The commissioner found for Ms Fort, upholding both of her defences summarised in para 26 above.

[57] The commissioner also found in favour of Ms Fort in relation to the company's contentions that it was impermissible to advertise one vacancy and make two appointments (finding that the position was unclear with the result that Ms Fort could not be held liable) and that Ms Fort had not obtained the approval of Mr Koza (finding that Ms Fort had spoken to Mr Koza about the appointment of a second DCO).

[58] Dealing then with the issue of a conflict of interest generally:

"72. Central to the charges against the applicant was an alleged conflict of interest, which is based on the principal that an employee has to maintain good faith and further the interests 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 interests 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 – see [authorities omitted].

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." (Emphasis added.)

[59] Finally, regarding the issue of relief, the commissioner found that there existed no impediment to the reinstatement of Ms Fort. In the result, the commissioner reinstated her with full retrospective effect.

The attack on review

[60] On review, the company contends that the result of the commissioner's award was unreasonable. Both parties delivered comprehensive heads of argument, and in oral argument counsel highlighted their main points of contention, a summary of which follows.

[61] Mr Gauntlett SC (who appeared together with Mr Fourie for the company) made these submissions:

- a) Fundamentally, the commissioner failed to analyse the evidence, resolve factual disputes and make findings further to a proper evidentiary exercise, which would have included having to assess Ms Fort's credibility and the probabilities associated with her evidence. Instead, the commissioner undertook an assiduous and diligent summary of the evidence (acting, as Mr Gauntlett put it, as a stenographer) and then, in effect, simply preferred the account of Ms Fort over that of the company on key issues in her "analysis of evidence and argument".
- b) Furthermore, the commissioner's "analysis of evidence and argument" was lacking because she mixed up evidence and argument, and disregarded the evidence of Mr Sibandze (there being no reference to it).
- c) In paras 72 and 73 of the award, the commissioner construed a conflict of interest in the present context too narrowly, and thus misconceived the enquiry. As Mr Gauntlett put it, in her position, Ms Fort had to be ice cold, with any degree of interest in favouring one party being sufficient to create a conflict of interest. Allied to this, Mr Gauntlett

submitted that it amounts to nepotism and corruption to become involved in the recruitment process of people to whom you feel favourable, in circumstances where you do not make full disclosure.

- d) In para 56 of the award, the commissioner effectively decided the matter before engaging in her “analysis of evidence and argument”, in finding that in order for Ms Fort to be guilty, “there must be more substance to the charges before me”.
- e) Also in para 56 of the award (and elsewhere), the commissioner considered the absence of a romantic relationship between Ms Fort and Adnaan Ebrahim to have been dispositive. In so doing, she overplayed the point and unduly narrowed the enquiry. As Mr Gauntlett put it, the issue was not about dating or about how intense Ms Fort’s relationship with Adnaan Ebrahim was in July and October 2012, but rather about whether there was a personal connection between Ms Fort and Adnaan Ebrahim.
- f) In para 60 of the award, the commissioner missed the point about the CV having mutated – it being clear that Ms Fort was involved in this. Apart from the emphasis on document control in the second CV (it being mentioned 18 times), Ms Coetzer’s surname changed from Ebrahim to Coetzer in the second CV.
- g) Regarding the commissioner’s finding that there was nothing untoward about the appointment of Ms Coetzer, the decision would have been different if the commissioner had recognised that Ms Fort had helped Ms Coetzer prepare her second CV, and then punted her.
- h) It was common cause that Ms Fort lied to Mr Edwards during their interview about having met Adnaan Ebrahim over the Internet, but the commissioner did not consider this at all. Although the lie would not have meant that all of Ms Fort’s evidence stood to be rejected, the lie

was not immaterial. As Mr Gauntlett put it, it did not trigger a red light, but it triggered a dark orange one.

- i) Regarding the evidence of Mr Edwards, the commissioner erroneously rejected it on the basis of an adverse credibility finding alone, without having proper regard to the content of his evidence. As a professional investigator, it was unlikely that Mr Edwards would have made a mistake about what he had been told regarding when the relationship between Ms Fort and Adnaan Ebrahim had begun.
- j) With reference to aspects of the evidence relating to the second CV captured in the factual section above, Mr Gauntlett described the second CV as a landmine, which exposed the fact that Ms Fort acted favourably towards Ms Coetzer, placing her in a conflict of interest. Added to this, Ms Fort had not made a full disclosure to the interview panel – she had told the panel members that she knew Ms Coetzer professionally, but she had not told them that she had assisted her in preparing her CV. To make matters worse, but for Ms Coetzer's application having been enhanced by a co-adjudicator (Ms Fort), she would probably not have been appointed.
- k) What further exposed Ms Fort's favouring of Ms Coetzer was that she impressed her views of Ms Coetzer on the selection panel, and then came up with plan B – to appoint both Ms Winter and Ms Coetzer. While the other two panellists took the institutional line of recommending the best candidate, Ms Fort came up with a lateral solution to benefit Ms Coetzer. But, on a conspectus of the evidence, she needed the permission of Mr Koza to do so, and failed to obtain it (with the commissioner's findings to the contrary being unreasonable).
- l) Regarding the appointment of Talha Ebrahim, the email string referred to above demonstrated that Ms Fort procured the CV, justified Talha Ebrahim's lack of experience, pressed for the interview to be conducted on a non-competitive basis, and then took up the offer to sit

on the selection panel (which she did not need to do). According to Mr Gauntlett, Ms Fort could not be both a spin bowler and a wicketkeeper.

[62] In reply, Mr le Roux (who appeared for Ms Fort) made the following main submissions in oral argument:

- a) He highlighted the fact that the existence of a romantic relationship between Ms Fort and Adnaan Ebrahim had been the foundation of the company's case thus far, but that it was now contended that it made no difference.
- b) The commissioner had come to grips with the case, namely that Ms Fort had allegedly sought to secure employment for her boyfriend's relatives, and had summarised those aspects of the evidence that were functional to her analysis. Insofar as she dealt with both evidence and argument in her analysis, that was the heading to the analysis.
- c) While the commissioner's description of a conflict of interest may have been open to criticism, she asked the right questions and ultimately determined the dispute.
- d) The commissioner did not determine the controversy in relation to Mr Edwards' evidence on the basis of credibility alone, and her findings were supported by the evidence.
- e) Mr le Roux highlighted aspects of the evidence of Mr Songongo, Ms Knepscheld and Ms Bakker, including: Mr Songongo's evidence that it was not unusual for employees to forward CVs; Ms Knepscheld's evidence that Ms Fort had not punted Ms Coetzer, that there was consensus that Ms Winter was the preferred candidate, and that Ms Coetzer was entirely appointable; and Ms Bakker's evidence that she had been doing the work of three people and that there was thus a need for a second DCO.

- f) The commissioner's findings regarding Mr Koza's evidence were correct. Clearly, Mr Koza had delegated the authority to recruit to Ms Fort, and she thus did not need his approval to appoint Ms Coetzer as a second DCO. If she had needed his approval, then he would surely have taken disciplinary action against her when coming to learn of Ms Coetzer's appointment. When it came to the staffing of programmes (as opposed to staffing the establishment organogram), the position was informal and unclear at the time, which led to the CEO clamping down and clarifying the position in his email. But Ms Fort had done no wrong.
- g) The commissioner's findings regarding Mr Edwards' evidence were more than reasonable. It was likely that Mr Edwards had incorrectly recorded that he had been told that the relationship between Ms Fort and Adnaan Ebrahim had commenced a year ago (i.e. in June 2012), and that Ms Fort had first met Ms Coetzer at her flat and obtained the CV there.
- h) Essentially, the company sought to capitalise on the fact that, Ms Fort having met Adnaan Ebrahim for the first time on 29 June 2012, Ms Coetzer's first CV was received two weeks later (on 12 July 2012). But Ms Fort's evidence was clear that she only became romantically involved with Adnaan Ebrahim in March 2013. The company had no evidence to disprove this, other than for the evidence of Mr Edwards, which was correctly rejected.
- i) Ms Coetzer's email to Ms Fort on 12 July 2012 (to which the first CV was attached) recorded that she had been requested by Adnaan Ebrahim to submit the CV. This was consistent with Ms Fort's version about how she had come to receive the CV, and demonstrated that she would not have told Mr Edwards that she first met Ms Coetzer at her flat and obtained the CV there.

- j) Regarding Ms Coetzer's second CV, assuming that Ms Fort had told Ms Coetzer that there existed a vacancy for a DCO, this was not a basis to find her guilty of any of the charges of misconduct brought against her.
- k) Regarding the appointment of Talha Ebrahim, there was no relationship between him and Ms Fort, and thus no conflict of interest whatsoever.
- l) All in all, even if the commissioner's decision was open to criticism in certain respects, the result was reasonable on a conspectus of the evidence.

Relevant review principles

[63] When it comes to resolving factual disputes, it is well known by now that commissioners are required to undertake a balanced assessment of the credibility, reliability and probabilities associated with the evidence.¹⁶ In an often quoted passage, Van Niekerk J stated the position as follows in *Sasol Mining*:¹⁷

“One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him. As I have noted, this much the commissioner appears to have appreciated. What he manifestly lacked was any sense of how to accomplish this task, or which tools were at his disposal to do so. The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party's version. The commissioner manifestly failed to

¹⁶ *Stellenbosch Farmers' Winery Group Ltd & another v Martell et Cie & others* 2003 (1) SA 11 (SCA) (“SFW”) at para 5, which has been followed in a string of judgments both of this court and the LAC.

¹⁷ *Sasol Mining (Pty) Ltd v Commissioner Ngqeleni & others* [2011] 4 BLLR 404 (LC) at para 9.

resolve the factual dispute before him on this basis. Instead, he summarily rejected the evidence of each of the applicant's witnesses on grounds that defy comprehension."

[64] For present purposes, the enquiry into credibility warrants further explication. Recently, in *NUM v CCMA*, the LAC stated the position as follows:¹⁸

"A court's finding on credibility of a witness ordinarily depends upon a variety of factors such as a witness' candour and demeanour in the witness box, his bias, latent or blatant, internal contradictions in his evidence, external contradictions in what was pleaded or put on his behalf, or with established facts or with his own statements or actions outside the court; the probability or improbability of particular aspects of his version; and the calibre and cogency of his performance, compared to that of other witnesses testifying about the same incident or event."

[65] Also important for present purposes is the fact that commissioners are obliged to weigh *all* the relevant evidence and the probabilities before drawing inferences and making findings. Recently, in *Madikane*, the LAC stated this in the following terms:¹⁹

"The court *a quo* was at pains to point out that if it had been dealing with an appeal it would have been more inclined to say that the arbitrator's conclusion on the probabilities was wrong 'when all the evidence is properly weighed'. The court *a quo* seemed thereby to suggest, or imply that, because of the test for reviews (which is different to that of appeals) a failure to weigh all the evidence and probabilities, in deciding whether to draw inferences, was reasonable. That approach cannot be correct. *The failure to weigh all of the relevant evidence and the probabilities to draw inferences and make findings cannot be said to be reasonable. It is not only wrong not to take into account*

¹⁸ *National Union of Mineworkers & another v Commission for Conciliation, Mediation & Arbitration & others* (2015) 36 ILJ 2038 (LAC) ("*NUM v CCMA*") at para 14, where the LAC relied on *SFW*.

¹⁹ *Minister of Safety and Security & another v Madikane & others* (2015) 36 ILJ 1224 (LAC) ("*Madikane*") at para 46.

all of the relevant evidence but is also unreasonable and clearly what a reasonable decision-maker would not do.”²⁰ (Emphasis added.)

[66] While *Sasol Mining* and *Madikane* tells one how a commissioner is supposed to go about determining factual disputes, drawing inferences and making factual findings, a failure to do so – although possibly constituting a process error or misdirection – will not, in itself, constitute grounds of review, unless the effect thereof was to render the result of the award substantively unreasonable.²¹ This is essentially what was found in the SCA’s judgment in *Herholdt*²² and the LAC’s judgment in *Gold Fields*.²³

[67] Following these two important judgments, the LAC handed down an equally important judgment in *Mofokeng*, which draws on *Herholdt* and *Gold Fields*. The key passage in *Mofokeng* is this:²⁴

“Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. *Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator’s conception of the inquiry, the delimitation of the issues to be*

²⁰ While this judgment may appear to go against the tide of authority (see below) that process errors or misdirections alone do not give rise to unreasonableness, it should be read in the context of the fact that the LAC went on to find that the commissioner’s decision on the facts (being that the employee was not guilty of misconduct) was substantively unreasonable. In line with the authorities addressed below, the error or misdirection identified by the LAC – the failure to weigh all the evidence and probabilities in the process of drawing inferences and making factual findings – caused the result of the award to be substantively unreasonable, and was thus reviewable.

²¹ The test for reasonableness was set as follows in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) at para 110: “Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?”

²² *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA) (“*Herholdt (SCA)*”) at para 25.

²³ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* [2014] 1 BLLR 20 (LAC) at para 15.

²⁴ *Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC) (“*Mofokeng*”) at para 33.

determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination." (Emphasis added.)

[68] This *dictum* in *Mofokeng* says many important things about the review test. But for present purposes, it suffices to focus on the guidance it provides for determining when the failure by a commissioner to consider facts or relevant considerations will be reviewable. The *dictum* provides the following mode of analysis:²⁵

- a) the first enquiry is whether the facts or considerations ignored were *material*, which will be the case if a consideration of them would (on the probabilities) have caused the commissioner to come to a different result;
- b) if this is established, the (objectively wrong) result arrived at by the commissioner is *prima facie* unreasonable;
- c) a second enquiry must then be embarked upon – it being whether there exists a basis in the evidence overall to displace the *prima facie* case of unreasonableness; and

²⁵ See also, *Shoprite Checkers v CCMA* [2015] 10 BLLR 1052 (LC) at para 9.

- d) if the answer to this enquiry is in the negative, then the decision stands to be set aside on review on the grounds of unreasonableness (and *vice versa*).

[69] The shorthand for all of this is the following: where a commissioner misdirects him or herself by ignoring material facts or considerations (brought about by, for example, not engaging in proper analysis of the evidence as per *Sasol Mining* and *Madikane*), the award will be reviewable if the distorting effect of this misdirection was to render the award unreasonable.

[70] There is another issue that warrants some consideration for present purposes – what is the threshold for unreasonableness? Traditionally, the answer is that the decision must fall outside of a range of reasonable decisions. But this, in itself, is not particularly helpful, because how does one determine the range? To my mind, the issue turns on the intensity with which a review for reasonableness should be undertaken in the context of this court having been tasked (through its review powers) to supervise the reasonableness of CCMA awards²⁶ – the higher the intensity of the review, the narrower the range of reasonable decisions (and *vice versa*).

[71] In my view, on an overall assessment of the jurisprudence of the LAC (whose judgments are, of course, binding on this court and from which this court takes guidance), it adopts a relatively high intensity reasonableness review. As a

²⁶ There are a number of factors that serve to warrant this court (and the LAC) scrutinising CCMA awards with a relatively high degree of intensity. Firstly, CCMA arbitration awards implicate the constitutional right to fair labour practices, which is guaranteed to both employees and employers alike. This calls for heightened scrutiny review. Secondly, particularly in relation to the typical unfair dismissal case dealt with by CCMA commissioners, they do not process any specialist expertise which this court does not have and the range of relevant factors is not particularly complex, such as would otherwise serve as a basis for a low intensity review (i.e. where interference is limited). Thirdly, in the absence of this court (and the LAC) adopting a relatively high intensity approach to reviews, consistency (and predictability) in decision-making will be severely undermined, which would have serious implications for all concerned.

result of this, on my assessment, where an award is *obviously wrong*,²⁷ the LAC will typically set it aside on review on the grounds of unreasonableness – it does not have to be hopelessly wrong or absurd before it will do so (which is what the threshold in a lower intensity review might be).²⁸ Seen thus, the permissible margin for errors by a CCMA commissioner is between what is objectively right and what is obviously wrong.²⁹ Put differently, where a decision is obviously wrong, it falls outside of a range of reasonableness.

[72] In conclusion under this head, it is useful to reflect briefly on three recent judgments of the LAC (all reported in 2015) involving reviews going to guilt – *Madikane*, *NUM v CCMA* and *Mogale Gold*.³⁰

- a) In *Madikane*, the issue was whether the commissioner's finding that the employee (a member of the SAPS) was not guilty of being complicit in assisting a fellow employee in tampering with a blood sample was

²⁷ Amongst the important judgments of the LAC to this effect are *Goodyear SA (Pty) Ltd v CCMA & others* [2004] 1 BLLR 7 (LAC) at para 6, and *Herholdt v Nedbank Ltd* (2012) 33 ILJ 1789 (LAC) at para 55. In *Goodyear*, the LAC held: "Neither finding would have been so *obviously wrong* that it could be interfered with on the basis that it was irrational or unjustifiable. Whichever route he followed, the second respondent nevertheless concluded that the dismissal was unfair. Again, against the overall factual background, this conclusion was not so *obviously wrong* that it could be interfered with on the basis that it was irrational or unjustifiable" (emphasis added). In *Herholdt*, the LAC held: "Our experience in adjudicating reviews of awards issued in terms of the LRA and the controversy around this only demonstrate that the requirement of substantive reasonableness is practically necessary to deal with *obviously wrong* awards" (emphasis added).

²⁸ Review judgments of the LAC are replete with these sorts of findings that are consistent with the threshold for unreasonableness being that the award is obviously wrong: "this simply cannot be right" (*Shoprite Checkers (Pty) Ltd v CCMA & others* [2008] 12 BLLR 1211 (LAC) at para 26); the commissioner "clearly got it wrong" (*Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) at para 23); and there is "clearly no merit" in this (*Zono v Gruss NO & others* [2011] 9 BLLR 873 (LAC) at para 19).

²⁹ Practically speaking, I would suggest that the test of "obviously wrong" operates as follows. There might be two reasonable decisions at the end of a line of reasoning: for the commissioner to choose one and not the other is not unreasonable. If there was one *obvious* answer, but the commissioner reached another answer, this is unreasonable because it is *obviously wrong*.

³⁰ *National Union of Mineworkers & another v Mogale Gold, A Division of Mintails (SA) (Pty) Ltd* (2015) 36 ILJ 2815 (LAC) ("*Mogale Gold*").

reasonable (this court had found that it was and thus dismissed the review application). Following a thorough analysis of the evidence, the LAC found that the most natural and plausible inference to be drawn was that the employee was guilty, and that the commissioner's acceptance of the employee's version that he was ignorant of his fellow employee's intentions was unreasonable when "considered in the light of all the evidence and the probabilities". The appeal was thus upheld and the award set aside.³¹

- b) In *NUM v CCMA*, the issue was whether the commissioner's finding that the employee was not guilty of being an accomplice to or involved in the theft of precious metal was reasonable (this court had found that it was unreasonable and thus set aside the award on review). Again, there was no direct evidence of misconduct. In dismissing the appeal, the LAC held that the employee's version was full of obvious contradictions and omissions, that apart from this, his explanations for aspects of his evidence were improbable, and that a "cumulative look at the evidence and analysis thereof lead one to the conclusion (on the balance of probabilities) that [the employee] was indeed involved in theft". Regarding the commissioner's finding of not guilty, the LAC held that this conclusion "was not a reasonable one if proper regard is had to all the evidence led at the arbitration".³²
- c) In *Mogale Gold*, the issue was whether the commissioner's finding that the employee was not guilty of having colluded with two other employees in the theft of gold was reasonable (this court had found that it was unreasonable and thus set aside the award on review). Again, there was no direct evidence of misconduct. In upholding the appeal and thus restoring the award, the LAC again embarked on a thorough analysis of the evidence. The conclusion reached by it was that it was inclined to accept that the most plausible inference to be

³¹ *Madikane* at para 60.

³² *NUM v CCMA* at paras 15, 17 and 18.

drawn was that the employee must have had knowledge of the theft, but that it was “unable to say that the arbitrator’s decision [to the contrary] was one that a reasonable decision maker would not reach”.³³

[73] In summary, in all three judgments: the LAC engaged in a thorough analysis of the evidence; determined for itself what the objectively correct decision was (identifying process errors and misdirections made by the commissioner along the way); and then determined whether the contrary decision by the commissioner was, nevertheless, reasonable. In two of the judgments, it was held that it was not reasonable, and in the third that it was reasonable. (In effect, the mode of analysis was similar to that formulated in *Mofokeng*.)

Evaluation and findings

Ms Coetzer’s second CV

[74] Given that the focus of the company’s attack on the reasonableness of the award relates to the commissioner’s failure to appreciate that Ms Fort (so it was contended) enhanced Ms Coetzer’s CV and then did not disclose this to the selection panel, an analysis of the evidence in relation to the receipt of the second CV and the events leading thereto is called for.

[75] As a point of departure, the first issue relates to the circumstances under which Ms Fort and Ms Coetzer met, and how the first CV came about. Ms Fort’s evidence was contradictory on this issue.

- a) At the arbitration, Ms Fort’s version was, in effect, that she only witnessed Ms Coetzer working at JR Bester & Associates in reception, and had not spoken to her before receiving her first CV – having allegedly received it in response to Ms Fort having given her business card to Adnaan Ebrahim.

³³ *Mogale Gold* at para 32.

- b) This version is inconsistent with Ms Fort's statement to Mr Sibandze that she was introduced to Ms Coetzer as Adnaan Ebrahim's cousin, that Ms Coetzer had enquired about a job at the company, and that "she had [Ms Coetzer] apply for and receive (inaudible) at CDC".
- c) It is also inconsistent with what Ms Fort told Mr Gajjar, namely that: "I met her outside of 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." And further that: "We didn't get in the internal [recruitment process] hey, and then I said to her, I said: 'Listen, we didn't get anybody internally for this position [i.e. a DCO] that I am looking for. Don't you want to give me your CV and I will add it to the pile'."
- d) It is also inconsistent with Mr Edwards' version that Ms Fort had told him during their interview that she had met Ms Coetzer at her flat and that the CV arose from discussions there. (But Ms Fort disputed that she had said this.)

[76] The commissioner did not apply herself to this issue, and thus did not consider the inconsistencies referred to above (save for the interview involving Mr Edwards). To my mind, on an analysis of the evidence, one would be hard pressed to accept Ms Fort's allegation that what she stated to Mr Gajjar during their interview was wrong – this for the reasons stated in para 52 above. In addition, the version stated to Mr Gajjar is broadly consistent with what Ms Fort had stated to Ms Sibandze. In the result, I am inclined towards the view that Ms Fort's version at the arbitration was false, and that she probably interacted directly (and substantially) with Ms Coetzer in procuring the first CV.

[77] The next issue relates to whether Ms Fort had any dealings whatsoever with Ms Coetzer in procuring her second CV. On this score, Ms Fort's version is again problematic.

- a) At the arbitration, Ms Fort gave another entirely benign version: she had no dealings with Ms Coetzer at all over the issue, and had procured the second CV via Adnaan Ebrahim – having asked him to get Ms Coetzer to resend her CV to her.
- b) In the first instance, once Ms Fort's benign version regarding how she came to obtain the first CV is considered false, a question mark hangs over the veracity of this version.
- c) But, in any event, this version is again inconsistent with the forthright approach that Ms Fort adopted to the possible recruitment of Ms Coetzer as relayed to Mr Gajjar.
- d) Furthermore, as set out in para 20 (c) above, Ms Fort's version about the message she gave Adnaan Ebrahim – particularly that she was interviewing for the position of a DCO and that this is how Ms Coetzer came to learn of this – was clearly contrived.

[78] Different to the first issue, the commissioner did make a finding on this issue. In dealing with the second CV, she found that:

“[Ms Fort] had *contradictory versions* regarding whether she spoke to Ms Coetzer about the position or not. I find it far more probable that she did inform Ms Coetzer about the vacancy” (Emphasis added.)

[79] What is remarkable about this finding is that having rejected Ms Fort's version at the arbitration on account of her evidence having been “contradictory”, the commissioner failed to consider the impact of this on her credibility as a witness. In fact, an analysis of Ms Fort's credibility as a witness is glaringly absent from the award (see further below).

[80] The next issue is why Ms Fort procured the second CV after the first CV had already been submitted. Here, too, Ms Fort's evidence was unsatisfactory.

- a) It will be recalled that, at the arbitration, Ms Fort explained this on the basis that she had a memory lapse: at the time of receiving the pack of CVs in preparation for the selection interview, she realised that Ms Coetzer's CV was not in it; although she recalled that Ms Coetzer had sent her CV to her, she mistakenly³⁴ thought that she had forgotten to send it to Mr Songongo; and she thus asked Adnaan Ebrahim to ask Ms Coetzer to resend the CV.
- b) On an analysis of the evidence, this is a strange explanation for what is an important decision on the part of Ms Fort in this case. Firstly, it appears improbable that Ms Fort would have forgotten that she had sent the first CV to Mr Songongo – this in circumstances where she had procured it, read it (it having been her version that she had done so) and then forwarded it to Mr Songongo by email under cover of a message. Secondly, it went unexplained at the arbitration why Ms Fort did not simply resend the first CV to Mr Songongo from her email box – this in circumstances where she had received it by email from Ms Coetzer. Thirdly, given that it was Mr Songongo's unchallenged evidence that he had reminded Ms Fort on a number of occasions between 13 and 25 July 2012 to submit the CV that she had told him she wanted to submit, it is unlikely that Ms Fort could have had the memory lapse in question. (Having regard to the sequence of events, it appears probable that Ms Fort always intended to procure the second CV after the first (inadequate) one had been submitted.) Fourthly, and suspiciously, the message allegedly sent to Ms Coetzer via Adnaan Ebrahim, allegedly as a consequence of a memory lapse on the part of Ms Fort, did not result in Ms Coetzer resending her CV, but instead resulted in her completely reworking it (see further below).
- c) In the light of the above, and considering the credibility of Ms Fort's evidence and the probabilities associated with it, it seems to me that

³⁴ The mistake was that she had, in fact, sent the first CV to Mr Songongo.

Ms Fort's alleged memory lapse was a ruse aimed at legitimising the calling for a second, and improved, CV.

[81] As appears from the award, the commissioner did not engage at all with Ms Fort's explanation about why she had procured the second CV after the first CV had already been submitted. This is a serious misdirection.

[82] The next issue that arises is whether, accepting that Ms Fort had interacted with Ms Coetzer directly in procuring the second CV, she had assisted her in compiling it. On this issue, too, the evidence stacks up against Ms Fort.

- a) At the arbitration, Ms Fort settled on the version that Ms Coetzer had obtained advice from the company's HR department in drafting her second CV. On Ms Fort's version, the second CV (which was, as I have found, tailor made for the position of a DCO) was the product of this advice.
- b) Accepting that Ms Coetzer would probably have needed some assistance to produce a tailor made CV – certainly of the quality of the one produced – the question is who advised her? Two possibilities presented themselves in evidence – an unnamed HR official or Ms Fort.
- c) Ms Fort's version that she was told by Ms Coetzer that she had obtained advice from an HR official stands to be rejected for the five reasons stated in para 20 (b) above. The version was clearly a recent fabrication. (But, in any event, it would seem to me that, in order to produce a tailor made CV of the sort produced by Ms Coetzer, she would probably have needed more advice than that allegedly given to her by an HR official over the telephone.)
- d) Turning then to whether Ms Fort assisted Ms Coetzer, in circumstances where, as I have found, Ms Fort interacted directly with Ms Coetzer in procuring both the first and second CVs – and was untruthful in her

denial of this, and in her 'defences' that she had called for the second CV on account of a memory lapse and that Ms Coetzer had told her that she had got advice from an HR official in compiling her second CV – the spectre of Ms Fort herself having given advice on the second CV looms large.

- e) It is at this point that Ms Fort's further 'defence' that goes directly to whether she assisted Ms Coetzer in compiling the second CV stands to be considered – it being that, according to Ms Fort, she did not so much as look at the second CV and simply forwarded it to Mr Songongo and Ms Bakker by email upon receiving it from Ms Coetzer. For the reasons mentioned in paras 20 (d) and (e) above, the defence is also probably untrue. In my view, this was another attempt by Ms Fort to disguise the actual extent of her involvement – something which she did from the beginning to the end in relation to the CVs.
- f) In the circumstances of this matter, it appears to me that Ms Fort was under an evidentiary burden to explain how the second CV came about and what her involvement was in relation thereto, and that she failed to acquit herself thereof, from which an inference of misconduct can be drawn.³⁵ But even if Ms Fort was not under a formal evidentiary burden, it is, nevertheless, permissible to draw an inculpatory inference from the weakness of her evidence on this issue.³⁶

[83] In summary, with reference to the analysis undertaken in paras 75 to 82 above, Ms Fort's evidence was filled with obvious contradictions, omissions and untruths – this to the extent that she was not a credible witness (regard being had to the relevant factors set out in *NUM v CCMA* dealt with in para 64 above). In addition to this, Ms Fort's explanations for several material

³⁵ See, for example, *Nampak Corrugated Wadeville v Khoza* [1999] 2 BLLR 108 (LAC) at para 35, where the LAC held: "It was Khoza who had to furnish that explanation. In the absence of any credible explanation, the inference that he deliberately neglected to perform his duty is irresistible."

³⁶ *NUM v CCMA* at para 7.

aspects of her evidence were improbable. To my mind, a cumulative view and analysis of the evidence leads one to the conclusion (on a balance of probabilities) that Ms Fort was involved in assisting Ms Coetzer in compiling the second CV, and thus enhancing her application. In my view, this is the most plausible or probable inference to be drawn on the proven facts.

[84] Turning now to compare this as against what the commissioner found on the change in the CVs, the full text of her finding warrants repetition:

“Mr Songongo showed concern that the second CV submitted on behalf of Ms Coetzer spoke directly to the position of a [DCO]. The applicant had contradictory versions regarding whether she spoke to Ms Coetzer about the position or not. I find it far more probable that she did inform Ms Coetzer about the vacancy, but be that as it may, *I cannot find any wrongdoing in this*. Surely it is common practice for any applicant to tailor their CV to the requirements of the position for which they are applying.” (Emphasis added.)

[85] To my mind, it is apparent from this that the controversy again passed the commissioner by. The company’s case at arbitration was not just that Ms Fort had told Ms Coetzer that there was a vacancy for a DCO, but also that she had procured the second CV from Ms Coetzer and assisted her in tailoring it. Indeed, it was put to Ms Fort under cross-examination that, unless Ms Fort had given her “inside information”, the content of Ms Coetzer’s second CV was “quite a coincidence”. Furthermore, the finding that Ms Fort was not guilty of any wrongdoing in relation to the second CV is the product of the series of errors and misdirections on the part of the commissioner addressed above.

[86] Turning to the *Mofokeng* mode of analysis (see para 68 above), the following:

- a) To my mind, the commissioner went wrong in failing to grasp the various issues at stake, failing to take into account all of the materially relevant evidence, and failing to undertake a proper evaluation of the evidence – including, critically, an assessment of Ms Fort’s credibility – and thereby properly resolve the factual disputes. (This all in conflict

with both *Sasol Mining* and *Madikane* dealt with in paras 63 and 65 above.)

- b) But for these errors and misdirections on the part of the commissioner, she would, in my view, probably have concluded that Ms Fort was guilty of having enhanced Ms Coetzer's application – this on the basis set out above. In the result, the commissioner's decision is *prima facie* unreasonable.
- c) Turning then to the enquiry whether the commissioner's wrong (and *prima facie* unreasonable) decision is, nevertheless, capable of reasonable justification, I do not believe that it is. To my mind, if proper regard is had to all the relevant evidence, the commissioner's decision was not just wrong, but was obviously wrong and thus unreasonable (see para 71 above). Put differently, being obviously wrong, the decision falls outside a range of reasonable decisions. In my view, this case is similar to *Madikane* and *NUM v CCMA*, where the findings of not guilty by the commissioners were found to be unreasonable on a conspectus of the evidence. And I consider this case distinguishable from *Mogale Gold*, where, on my assessment, the case in favour of the employee not having been guilty was far more plausible than the case herein – put differently, the commissioner's decision in that matter was not obviously wrong. (See para 72 above.)
- d) In short, the distorting effect of the errors and misdirections committed by the commissioner in her treatment of the evidence was such as to cause the commissioner unreasonably not to conclude that Ms Fort assisted Ms Coetzer in enhancing her application.

[87] Having found that Ms Fort assisted Ms Coetzer in enhancing her application and that the commissioner's failure to find so was unreasonable, the next issue is what the consequences of this are for the purposes of this review application. The answer to this lies in a consideration of what then transpired.

Ms Fort's non-disclosure at the DCO interview and the consequences thereof

- [88] The commissioner's conclusion in her award in relation to the issue of a conflict of interest was this: "I cannot find anything in [Ms Fort's] conduct that constitutes a conflict of interest." For the reasons that follow this is, to my mind, unreasonable.
- [89] That Ms Fort was under an obligation to make a full and frank disclosure to her fellow panellists about her dealings with Ms Coetzer in the run up to the selection interview is not controversial. On her own version, Ms Fort disclosed only that she had seen Ms Coetzer at work. It follows from the findings that I have made above that Ms Fort failed to disclose that she had been active in procuring Ms Coetzer's second CV (replacing the first one), and that she had assisted Ms Coetzer in compiling the second CV (thus enhancing her application). If Ms Fort had made such a disclosure, it seems to me that, inevitably, she would have been required to recuse herself. In failing to make such a disclosure and recuse herself, Ms Fort placed herself in a conflict of interest with her employer. As Mr Gauntlett submitted, Ms Fort could not be both a spin blower and a wicketkeeper.
- [90] To exacerbate matters, as often occurs where employees fail to disclose a conflict of interest, this was, on my assessment of the facts, done purposefully by Ms Fort, and thus deviously and with deception (i.e. dishonestly).³⁷
- [91] Things then went from bad to worse. Not having recused herself, Ms Fort participated in the interview, scored Ms Coetzer as the best candidate (there being a significant disparity in her scoring and that of Ms Bakker and Ms Knepscheld), and then came up with the idea for the first time of appointing two DCOs, which ultimately resulted in Ms Coetzer's appointment (at a salary four times higher than she had been earning at JR Bester & Associates). Whether or not these were operationally justifiable decisions is not the issue – none of this should have happened because Ms Fort ought not

³⁷ See, for example, *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer* [2015] 4 BLLR 394 (LAC) at para 17.

to have been involved in the interview in the first place, with the result that this was all a perpetuation of the conflict of interest that had arisen, and the deception that lay behind it.

- [92] Seen thus, I do not consider it particularly material whether Ms Fort was dating Adnaan Ebrahim at the time of the interview – it thus being unnecessary to determine whether the commissioner's findings regarding Mr Edwards' evidence were reasonable. What is clear is that, as Mr Gauntlett submitted, there was a personal connection between Ms Fort and Adnaan Ebrahim at the time. But whatever motivated Ms Fort, she choose to treat Ms Coetzer favourably by enhancing her application and did not disclose this to the selection panel, which gave rise to a very serious conflict of interest.
- [93] I agree with Mr Gauntlett that, given the seniority of her position and the role that she played on the selection panel, Ms Fort was required to be ice cold, and that it amounts to serious misconduct for someone in her position to treat a candidate with any degree of favouritism, without making full disclosure to the selection panel. Put differently, it amounts to serious misconduct to become involved in the recruitment process of people to whom you feel favourable, in circumstances where you do not make full disclosure. It goes without saying that such conduct is to be deprecated, particularly where public funds are involved.
- [94] Where a senior manager is entrusted with the appointment of personnel in a largely state-funded entity and breaches that trust in the circumstances which occurred herein (which included an element of deception), the sanction of dismissal is more than warranted. Indeed, the commissioner herself recognised in her award that a finding of guilty on the charges brought against Ms Fort, which included a charge of a conflict of interest, "would clearly result in a sanction of dismissal". To put the issue beyond doubt, not only was Ms Fort guilty of serious misconduct, but she went on to present a disingenuous defence at both her disciplinary inquiry and at the arbitration, and showed no remorse.

[95] To my mind, a reasonable commissioner could not have come to a different conclusion in all the circumstances of this case. Why the commissioner did so is because she unreasonably failed to find Ms Fort guilty of having placed herself in a conflict of interest by way of her failure to make a full and frank disclosure to the selection panel. And this failure on the part of the commissioner was caused by her having unreasonably failed to find that Ms Fort had assisted Ms Coetzer in enhancing her application. In short, the result of the award is unreasonable, which equates to the commission of a gross irregularity on the part of the commissioner.³⁸

Other issues

[96] In my view, there are no other issues that need to be determined for the purposes of this review application. Even if the commissioner's determination of the controversy regarding whether Ms Fort had to obtain the approval of Mr Koza for the appointment of a second DCO, and whether she did so, is reasonable, this does not detract from my findings made above. The same applies to the commissioner's findings regarding the appointment of Talha Ebrahim. I would, however, mention that given what occurred in relation to Ms Coetzer, the contention (accepted by the commissioner) that everything was above board in relation to Talha Ebrahim appears somewhat improbable. But this is not an issue that I need determine.

Costs

[97] Both parties sought costs in the event of them being successful, with the company seeking the costs of two counsel. Fundamentally, this application was necessitated by the fact that the commissioner produced an unreasonable award. Ms Fort ought not to be held liable for this, which would be the result of a full order of costs being made against her. But through her election to oppose the application (which she was entitled to do), she put the company to added costs, which I can see no reason why she should not bear

³⁸ *Herholdt (SCA)* at para 25.

– the risk being inherent in the opposition of any proceedings in this court which fail.

[98] Although the length of the record in this matter is prodigious, the issues are not particularly complex, and I thus do not intend to order the costs of two counsel. To give practical effect to Ms Fort only being liable for the costs occasioned by this becoming an opposed motion, I intend to order her to pay the costs from the time that she delivered her answering affidavit onwards.

Order

[99] In the premises, the following order is made:

1. The arbitration award issued by the second respondent on 9 November 2014 under case number ECPE5722-13 is reviewed and set aside;
2. The arbitration award is replaced with an order that the dismissal of the third respondent by the applicant was substantively fair;
3. The third respondent shall pay the costs from the time of the delivery of her answering affidavit onwards, which shall include the costs of only one counsel.

Myburgh, AJ

Acting judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the applicant: Adv JJ Gauntlett SC and Adv GA Fourie (instructed by Shepstone and Wylie Attorneys)

On behalf of the third respondent: Adv FE le Roux (instructed by Chris Unwin Attorneys)

LABOUR COURT