

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: ~~YES~~/NO.
- (2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
- (3) REVISED.

26/09/2024  
DATE

  
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**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case No: JR2521/2021

In the matter between:

**COMPANIES AND INTELLECTUAL PROPERTY  
COMMISSION (CIPC)**

**Applicant**

and

**COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION**

**First Respondent**

**MAPUTLE MOHLALA N.O.**

**Second Respondent**

**KARABO FAITH MATSHIKA**

**Third Respondent**

Heard: 12 June 2024

Delivered: 26 September 2024

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**JUDGMENT**

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**ADAMS, AJ**

Introduction

- [1] The Applicant is an employer that seeks an Order reviewing and setting aside an award in terms of which the dismissal of an employee, the Third Respondent (the Respondent) was found to have been unfair.
- [2] The commissioner found that the sanction of dismissal was too harsh and imposed the sanction of a written warning valid for six months from the date of the award and that the Applicant's reinstatement should not be retrospective but that she should be compensated for only three months.
- [3] In the event that the Court reviews the award, the Applicant seeks an Order dismissing the Respondent forthwith.
- [4] The Respondent opposes the review application.

#### Background facts

- [5] The Applicant was employed by the Respondent on 1 April 2013.
- [6] At the time of her dismissal on 18 January 2021, she occupied the position of Deputy Director: Budgets and earned R90 886.92 per month.
- [7] The events that gave rise to the Respondent's dismissal are not contentious and I say this mindful of the fact that the Respondent has not filed a review against the award, with the consequence that the commissioner's findings against the Respondent's version on certain aspects therefore stand.
- [8] On 30 September 2020, the Applicant proffered two charges of misconduct against the Applicant.
- [9] These charges were as follows:

#### **'CHARGE ONE: FALSIFIES RECORDS OR ANY OTHER DOCUMENTS**

The employee is guilty of serious misconduct by prejudicing the administration and efficiency of the employer by failing to perform the functions of your office in good faith, diligently, honestly and in a transparent manner by failing to act in the best interests of the employer and in such a way that the credibility and integrity of the employer are not compromised.

**IN THAT** on or about 12 August 2019 you received an email from Dumisani Ntuli (Ntuli of Ayandza (Pty) Limited with a quotation of R242 190 (Two Hundred and Forty Two Thousand One Hundred and Ninety Rand), you then altered the quotation to an increased amount of R270 940 (Two Hundred and Seventy Thousand Nine Hundred and Forty Rand) and on or about 16 August 2019 you scanned the altered quotation using the employer's property and sent it back to Dumisani Ntuli and further advising him on what to say when submitting the quotation to the employer.

#### **CHARGE 2: UNAUTHORISED USE OF EMPLOYER'S PROPERTY**

The employee is guilty of serious misconduct by prejudicing the administration and efficiency of the employer by failing to perform the functions of your office in good faith, diligently, honestly and in a transparent manner by failing to act in the best interests of the employer and in such a way that the credibility and integrity of the employer are not compromised.

#### **IN THAT**

On or about 4 July and 7 August 2019 you received an email from Dumisani Ntuli of Ayandza (Pty) Limited requesting you to print RFQ34/2019 and RFQ44/2019 he had received from the employer. You printed out the document for him using the employer's printer without the employer's consent, in doing so you abused your position as manager: Budget Finance Unit.'

- [10] It is common cause that the Respondent is an official of the Applicant holding the position of Deputy Director: Budget.
- [11] It is further common cause that the Respondent and Ntuli were once married as husband and wife and that Ntuli was doing business with the Applicant whilst the Respondent was employed by the Applicant as Deputy Director: Budget.
- [12] It is further common cause that the Respondent was required to disclose a conflict of interest in terms of the position that she held, and her relationship with her husband (at that time) who was doing business with the Applicant, whilst the Respondent was so employed by the Applicant.

- [13] At the conclusion of the disciplinary hearing, the Respondent was found guilty of the two charges by the Chairperson, Mr Sibusiso Masando and was dismissed.
- [14] Thereafter, the Respondent referred the matter for conciliation and then arbitration. This was done on 24 March 2021.
- [15] It is common cause that the commissioner was required to determine whether the dismissal of the Respondent was fair or not, and only to the extent of the harshness of the sanction.
- [16] It is common cause that the Respondent conceded that she had committed the offences in question and that this was not an issue to be determined by the Commissioner.

*Evidence in the arbitration proceedings*

- [17] In terms of the Applicant's case in the arbitration proceedings, same was as follows:
- 17.1 The code of conduct for public servants enjoins the Respondent to refrain from favouring relatives and friends in work related activities. *In casu*, the Respondent abused her position in favour of her husband. She received the quotation from him, altered it upwards and sent it back to him and re-submitted it as his own work;
- 17.2 Similarly, the code of conduct requires the Respondent to be honest and accountable in dealing with public funds and use the public services property and other resources effectively, efficiently, and only for authorised official purposes;
- 17.3 It was undisputed that the Respondent had altered Ayandza's quotation using her official computer and scanned it back to her husband using the public services property being the scanner;
- 17.4 The Respondent's defence was that she was not aware that making the copy or using the Applicant's facility was an offence since it was

common practice at the CIPC to use the facility of the Applicant. It was argued that her ignorance of the law was no excuse;

- 17.5 The Respondent held a managerial post and a position of trust. She ought to have known her basic rules of engagement as in the code of conduct. She ought to have known that certain conduct was still unlawful regardless of whether it was common practice or not as she was employed in a position of responsibility where she was entrusted with the responsibility to manage the budgets and expenditures of the Applicant;
- 17.6 The trust relationship between the Applicant and Respondent had broken down irretrievably;
- 17.7 The Applicant had lost all of the trust and faith in the Respondent;
- 17.8 The dismissal of the Respondent should be confirmed as her misconduct was very serious in that she was a senior person in the Applicant's organisation. Government is beset by the cancer of corruption where procurement practices are corrupted by some public servants for their own benefits or the benefits of others;
- 17.9 The Respondent must have been aware of the amount budgeted for the tender and by agreeing to assist her husband, her conduct was not too different from insider trading;
- 17.10 The Applicant accordingly submitted that the sanction of dismissal should stand and that it fitted the Respondent's conduct, the interests of the Applicant and the public at large.

[18] The Respondent's case during the arbitration proceedings revealed that the following evidence was led in this regard:

- 18.1 The Respondent did not in any way downplay the seriousness of the charge and acknowledged her action after a careful and wide consultation;

- 18.2 According to her she was assisting her then spouse like any other person would have done;
- 18.3 The Respondent did not contest the material facts of the charges but had shown remorse and taken responsibility for her actions;
- 18.4 It was the Respondent's first offence and first appearance in a disciplinary hearing in her fourteen years of service to the Applicant;
- 18.5 The Respondent testified that the charge that she was found guilty of was not any of the examples mentioned in the Code of Good Practice;
- 18.6 There was no damage suffered by either party as the project was not awarded to the Respondent's ex-spouse;
- 18.7 The quotation was still going to the Marketing division for further handling and the Respondent's ex-spouse was still going to compete with other quotations;
- 18.8 The Respondent had no direct influence on information about other suppliers;
- 18.9 The Respondent and her ex-spouse had filled out the declaration form stating their relations before the ex-spouse could submit his quotation;
- 18.10 At the time of submission of the quote, the submission date had yet to close. The fact that the Respondent requested a quotation did not necessarily mean that the ex-spouse was awarded the deal or contract;
- 18.11 The Respondent saw nothing wrong with assisting her ex-spouse as she had declared the conflict of interest. She was assisting her ex-spouse on his request and not influencing any decision on the awarding of the contract;
- 18.12 The Respondent was not aware that helping her spouse in that manner was in contravention of the Applicant's rules or policy;

18.13 The Deputy Director is not a senior managerial position but middle management and therefore the decision to approve the quantum did not lie with the Respondent but with other directors within procurement;

18.14 The Respondent had been in the Applicant's employ for fourteen years and throughout that period her ex-spouse's business of ten years had never had business with the Applicant;

18.15 There was no malice intended as the Chief Financial Officer, Mohammed Jasat's advice was sought whilst all of it was taking place and he had advised that the declaration of conflict of interest be made, which was done;

18.16 The Respondent testified, and it was argued on her behalf that the sanction was shockingly harsh, and she prayed that she be retrospectively reinstated.

[19] The commissioner accepted that the Respondent was guilty of the first charge. In terms of the second charge, however, no mention was made therein whatsoever. To the contrary, reference was made in his judgment that the Respondent was acquitted on the second charge, however, the evidence does not demonstrate this.

[20] In terms of the sanction, the commissioner expressed concerns with regards to the sanction imposed by the Applicant, which I summarise below:

20.1. Item 3(2) of the Code of Good Practice: Dismissal<sup>1</sup> provides that the Courts have endorsed the concept of corrective discipline. Item 5 also provides that when deciding whether or not to impose a penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal

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<sup>1</sup> (Schedule 8) of the Labour Relations Act

circumstances), the nature of the job and circumstances of the infringement itself;

- 20.2. Item 7(b)(iv) provides that any person determining whether a dismissal for misconduct is unfair should consider if a rule or standard was contravened, whether or not the dismissal was an appropriate sanction for the contravention of the rule or standard;
- 20.3. A dismissal is not applied mechanically, but for an employer to reach a decision to terminate an employee's employment, the employer must have considered certain factors. This is despite whether the offence has been committed;
- 20.4. The circumstances of the infringement involve a consideration of how the offence was committed. The question to be answered is whether there is anything that, despite the commission of the offence, excuses the employee from a harsher sanction. If the answer is in the negative, the sanction of dismissal is appropriate and vice versa;
- 20.5. According to the Commissioner, in this case the circumstances of the infringement did not point out any malice or bad intention or dishonesty on the part of the Respondent. The Respondent had assisted her ex-spouse in altering the quotation in situations where she had no clue about quotations of other bidders and where it could be said that she was manipulating the quotation to give her ex-spouse a competitive edge or advantage over other bidders;
- 20.6. The Respondent merely assisted her ex-spouse in altering the quotation at his request. It would have been different if she had insight of the quotations of other bidders and on that basis altered her ex-spouse's quotation to give him a competitive advantage. The Respondent had merely sought to assist her ex-spouse in altering a quotation without any inside information that could have suggested a dishonest act on her part;



- 20.7. The Respondent assisted her ex-spouse in circumstances where it was not a secret to the CIPC that she had a relationship with the ex-spouse. The relationship was declared as part of the declaration on conflict of interest and the Applicant knew of that relationship. It would have been malicious and dishonest on the Respondent's part if she had not declared the relationship. This was not the case;
- 20.8. The Respondent was open about the relationship, and it could have been the Applicant who should have advised her of her limitations in terms of assistance to her ex-spouse;
- 20.9. In events where employees have declared their conflict of interest, it is up to the employer to issue conditions under which the employee who has declared and has to deal with the business of the person she relates to in terms of bids solicited by the employer;
- 20.10. The Commissioner did not find anything in the submissions that suggested that the Applicant had set limits to the Respondent in terms of how she had to deal with her ex-spouse regarding the request for the quotation in question. Accordingly, the circumstances under which she assisted him could not, in fairness, point to malice on her part regarding her assistance to her ex-spouse;
- 20.11. Whilst the commissioner agreed that the Respondent held a managerial position, he did not agree that her action was such that it destroyed the trust employment relationship. This was as a result of her having declared the conflict of interest to the Applicant on the bid, was not privy to the quotations of other bidders and did not act to influence the decision through the altering of the quotation and was not influential in the quotation process;
- 20.12. The Respondent innocently assisted her ex-spouse like any other spouse would have done under the circumstances;
- 20.13. While the Respondent's position involves budgets, nothing points to the fact that she knew the intricacies of the budget for the request for

quotation process in question. The request for quotation emanated from another section and she had no clue about budget limits for this request. It would be different if she did as her actions would have amounted to a dishonest attempt to influence the process in favour of her ex-spouse and thus indirectly benefiting therefrom;

20.14. The Respondent has a clean disciplinary record. Her personal circumstances are very critical. She is now unemployed with a child with special needs. The special needs of the child require money to ensure that the child survives in life as a human being. The comfort of the child provides a better life for the child and the parents. It would be unfair that the child suffers hugely because of a genuine mistake that was committed by her mother in extenuating circumstances;

20.15. The personal circumstances and other factors call for fairness in terms of reinstatement of the Respondent into the same or similar position;

20.16. The Respondent had served the Applicant for fourteen years with an unblemished disciplinary record and had shown genuine remorse for her otherwise innocent mistake. To hold this against her to an extent that she is denied her livelihood in the circumstances would constitute gross unfairness;

20.17. Though the Respondent's hands are not clean, they are not entirely muddied. Had the Respondent exercised her discretion of doing things differently, for example, by asking her ex-spouse to visit a printing shop for the quotation alteration, she would not have been in this situation.

[21] The commissioner ordered the Respondent's reinstatement with three months' compensation, coupled with a written warning valid for six months from the date of the award. As recorded above, the Applicant seeks an Order reviewing and setting aside the award and substituting it with an Order that the dismissal was fair.

[22] Before dealing with the grounds for review, I set out the relevant legal principles.

#### Legal principles

[23] Pre *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*<sup>2</sup> (*Sidumo*), there was a debate on how sanctions should be approached when determining the fairness of a dismissal. Whilst some case authorities found that an arbitrator is not at large to substitute what she or he considers to be a fair sanction, other authorities stated that an arbitrator ought to independently consider what sanction they would have imposed. *Sidumo* finally resolved that debate, and the relevant portions of the judgment are reproduced below.

[24] The Court in *Sidumo* commenced by looking at the position under the Labour Relations Act 28 of 1956, and the relevant case authorities decided in terms of that Act. For present purposes, the relevant principles can be summarised thus:<sup>3</sup>

24.1 The Court's (or Commissioner's) view as to what is fair is the essential determinant in determining the ultimate question;

24.2 The Court passes a moral judgment of a combination of facts and opinion;

24.3 The Court is called upon as an impartial adjudicator to determine fairness;

24.4 Fairness comprehends that regard must be had not only to the position and interests of the worker but also those of the employer, in order to make a balanced and equitable assessment;

24.5 Determining the fairness of a dismissal requires that an objective approach is followed;

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<sup>2</sup> [2007] ZACC 22; (2007) 28 ILJ 2405 (CC).

<sup>3</sup> At para 63 onwards.

24.6 The reasonable employer test must not be applied;

24.7 The decision to dismiss belongs to the employer but the determination of fairness does not. Ultimately the Commissioner's sense of fairness must prevail, and this approach promotes labour peace;

24.8 There must be no deference to the employer.

[25] After setting out the above general principles, among others, the Court stated as follows:<sup>4</sup>

[78] In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal...

[79] To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'

[26] In *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others*<sup>5</sup> (*Fidelity Cash*), the Court stated as follows:

'Once the commissioner has considered all the above factors and others not mentioned herein, he or she would then have to answer the question whether dismissal was in all of the circumstances a fair sanction in such a case. In answering that question he or she would have to use this or her

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<sup>4</sup> *Sidumo supra* at paras 78 - 79

<sup>5</sup> [2007] ZALAC 12; (2008) ILJ 964 (LAC) at para 95.

own sense of fairness. That the commissioner is required to use his or her own sense of justice or fairness to decide the fairness or otherwise of dismissal does not mean that he or she is at liberty to act arbitrarily or capriciously or to be *mala fide*. He or she is required to make a decision or finding that is reasonable.' (own emphasis added)

[27] The Court went further and said the following:<sup>6</sup>

'The test enunciated by the Constitutional Court in *Sidumo* for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision-maker could not have made but I also do not think that it will be rare that an arbitration award of the CCMA is found to be one that a reasonable decision-maker could not, in all the circumstances, have reached.'

[28] In *Palaborwa Mining Co Ltd v Cheetam and Others*<sup>7</sup> (*Cheetam*) the Court states thus:

'[4] ... The standard is-

"... the one in *Bato Star*: is the decision reached by the commissioner one that a reasonable decision-maker could not reach?"

... Despite the fact that decision-makers, acting reasonably, may reach different conclusions, the LRA has given the decision-making power to the commissioner and there it rests, unless it be concluded that a reasonable decision-maker could not reach such a conclusion. Indeed, read together with *Bato Star*, upon which the majority decision in *Sidumo* so strongly relies, the judgment has the clear effect that the courts, and, in particular, the

<sup>6</sup> Ibid at para 100.

<sup>7</sup> [2007] ZALAC 11; (2008) 29 ILJ 306 (LAC) at paras 4 – 5.

Labour Courts, must defer (but not in an absolute sense) to the decision of the commissioner. In the minority judgment of Mgcobo J, it is noted that the intention of the LRA is that:

“... as far as is possible, arbitration awards would be final and would only be interfered with in very limited circumstances.”

It needs to be emphasised that, although different paths of reasoning were followed in the differing judgments of the Constitutional Court dealing with this particular case, the court was unanimous as to the order which should be made. Lest there be any doubt, it is this:

“... the commissioner’s award is restored.”

[5] ... Despite robust criticisms of the commissioner’s reasoning, the Constitutional Court restored the commissioner’s award.’

[29] Finally the Court in *Cheetam* concluded as follows:<sup>8</sup>

‘*Sidumo* enjoins a court to remind itself that the task to determine fairness or otherwise of a dismissal falls primarily within the domain of the commissioner. This was the legislative intent and as much as decisions of different commissioners may lead to different results, it is unfortunately a situation which has to be endured with fortitude despite the uncertainty it may create. I have to remind myself that the test ultimately is whether the decision reached by the third respondent is one that a reasonable decision-maker could reach at all in the circumstance. On this test I cannot gainsay the decision of the third respondent. I therefore concur with the conclusion and order by Willis JA.’

[30] In *Bestel v Astral Operations Ltd and others*,<sup>9</sup> the LAC considered the limited scope possessed by this Court to review an arbitration award and accepted that an arbitrator’s finding will be unreasonable if the finding is unsupported by any evidence, if it is based on speculation by the arbitrator, if it is disconnected from the evidence, if it is supported by evidence that is

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<sup>9</sup> *Ibid* at para 13.

insufficiently reasonable to justify the decision or if it was made in ignorance of evidence that was not contradicted. The LAC held that:

‘...the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.’

[31] The review test to be applied *in casu* is a stringent and conservative test of reasonableness. The Applicant must show that the arbitrator arrived at an unreasonable result.

[32] I now turn to the grounds for review.

#### Grounds for review

[33] From a reading of the Applicant’s Founding Affidavit insofar as the grounds of review are concerned, it would seem that the grounds for review are premised on, *inter alia*, the following:

33.1. The Commissioner was unreasonable in finding that there was no dishonesty on the Respondent’s part;

33.2. The Commissioner was unreasonable when he said the CIPC should have issued conditions under which the Respondent who had declared her interest should conduct herself in the conflated work;

33.3. The Commissioner relied on evidence that was not before it - this with regard to finding that the Respondent as a Manager: Budget did not participate in formulating the budget for the programme in question;

33.4. The Commissioner’s findings were arbitrary, capricious, unreasonable and unfair in that the Commissioner only looked at the

circumstances of the Respondent and ignored those of the Applicant in his award;

33.5. The Commissioner ignored material evidence in terms of the Applicant's contentions that none of the circumstances in terms of the totality of circumstances were taken into account in totality by the Commissioner being: the importance of the rule that had been breached, the reason the employer imposed the sanction of dismissal, the basis of the employee's challenge to the dismissal, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and whether the relationship between the employer and the employee had not been tarnished;

33.6. The Commissioner's award is unreasonably shocking to an extent that it shocks one's sense of fairness when one considers that the Commissioner did not take the following into account:

33.6.1. The Respondent admitted to the charges which is a clear indication that there was malice, bad intention and in fact, dishonesty when she assisted her then husband in manipulating and changing the figures in his quotation from R242 190.00 to R270 940.00;

33.6.2. The Respondent was responsible for the budget of the Applicant including the budget for the program in question which sought the requests for quotations;

33.6.3. There was clearly a conflict of interest between the Respondent's work as a Manager: Budget and her assisting her husband to bid for the work in her employment. To that extent she was dishonest;

33.6.4. There was no evidence before the Commissioner to suggest that the Respondent did not participate in formulating the budget for the program in question;



- 33.6.5. The Respondent having declared any conflict of interest does not suggest that she can therefore, or is, therefore, permitted to conflate her position at the Applicant and the interest of her husband at the Applicant. The Respondent having declared her interest in the tender meant that she should have stayed away from anything involving such tender;
- 33.6.6. The misconduct which the Respondent committed is very serious and did not warrant the Commissioner to consider whether she had a clean disciplinary record or not. There was clear corruption on the part of the Respondent which cannot be tolerated;
- 33.6.7. The Respondent abused her position of trust by changing the quotation sent by her husband because a person in her position knew and had access to how much was budgeted for a particular program.

[34] It would seem from a reading of the Applicant's Founding Affidavit that its main ground for review pertains to the Commissioner having ignored material evidence and having applied the law incorrectly in terms of making a determination on sanction.

The Commissioner ignored material evidence

- [35] The Applicant has submitted that the Commissioner ignored the fact that the Respondent as a Deputy Director: Budget was responsible for the budget and by necessary implication was or should have been aware of the budget for the programme that her ex-husband was bidding for, and therefore adjusting the quotation for her husband was wrongful enough for her to be dismissed.
- [36] The Applicant has further submitted that over and above this, the Commissioner ignored the fact that when the Respondent admitted to the charges, that was a clear indication that there was malice, bad intention and

in fact, dishonesty when she assisted her ex-husband to manipulate and change figures in his quotation from R242 190 to R270 940.

[37] In his findings, the Commissioner found as follows:

'In this case the circumstances of the infringement do not point out any malice or bad intention or dishonesty on the part of the Applicant. The Applicant had assisted her ex-spouse in altering the quotation in situations where she had no clue about quotations of other bidders where it could be said that she was manipulating the quotation to give her ex-spouse a competitive edge or advantage over other bidders. She merely assisted her ex-spouse to alter the quotation at his request. It would have been different if she had insight of the quotations of other bidders and on that basis altered her ex-spouse's quotation to give him competitive advantage. She had merely sought to assist her ex-spouse to alter a quotation without any inside information that could have suggested a dishonest act on her part.'

[38] In my view, I agree that the Commissioner ignored material evidence given and particularly that the Respondent was found guilty, in terms of Charge One of falsifying records, failing to perform the functions of her office in good faith, diligently, honestly and in a transparent manner. Further to this, the Respondent was found guilty of having advised Ntuli on what to say when submitting the quotation to the Applicant. This formed part of Charge One which the Respondent was ultimately found guilty of, and no further determination was required to be made by the Commissioner in this regard.

[39] Despite this, the Commissioner made the finding that the infringement did not point out to any malice or bad intention or dishonesty on the part of the Applicant.

[40] I further agree that the Commissioner ignored further material evidence with the Respondent being a Deputy Director: Budget who was responsible for the budget and therefore should have been aware of the budget for the programme that her ex-husband was bidding for. If this were not the case, the Respondent would not have been required to disclose a conflict of interest as she had testified to during the course of the arbitration proceedings.

- [41] In terms of the second charge, the Commissioner did not take any evidence into account in terms of this charge, despite the fact that the Respondent had been found guilty in relation to Charge Two as well. It is unclear on what basis the Commissioner absolved the Respondent from this charge when one considers the evidence led and facts on this matter. They should have also been used to determine the substantive fairness or otherwise of the dismissal which was imposed on the Respondent.
- [42] Evidence was led by the Applicant that the misconduct committed by the Respondent was very serious. Further evidence was led that there was clear corruption on the part of the Respondent which could not be tolerated by the Applicant as she had abused her position of trust by way of her misconduct.
- [43] This evidence was not taken into account in the determination ultimately made by the Commissioner.
- [44] I believe that these factors should have been taken into account in terms of the evidence to be considered by the Commissioner in determining the sanction and accordingly there is merit to this ground of review.

Material error of law committed

- [45] The submission in this regard is two-pronged. The Applicant has contended that the Commissioner should have taken into account the totality of circumstances, should have considered the importance of the rule that had been breached, should have considered the reason the employer imposed the sanction of dismissal, as he must have taken into account the basis of the employee's challenge to the dismissal, should have considered the harm caused by the employee's conduct, should have considered whether additional training and instruction may result in the employee not repeating the misconduct, should have considered the effect of dismissal on the employee and should have considered whether the relationship between the employer and the employee has not been tarnished.
- [46] Whilst the Commissioner dealt with these aspects briefly in his arbitration award, in addressing the parties' contentions and evidence led in the

proceedings, it is clear from the analysis of the parties' submissions and arguments that these factors were not taken into account in the determination on sanction.

[47] Conradie JA in *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation & Arbitration & others*<sup>10</sup> stated:

'... Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.'

[48] It does not seem, on a reading of the award, that the Commissioner took into account the reasoning behind the Applicant having dismissed the Respondent, in terms of its organisation and operational requirements of its enterprise in light of the seriousness of the misconduct.

[49] It has already been set out that the approach to be adopted in terms of *Sidumo* is that a Commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision, a Commissioner is not required to defer to the decision of the employer what is required is that he or she must consider all relevant circumstances.

[50] Whilst a Commissioner is required to use his or her own sense of justice or fairness to decide the fairness or otherwise of dismissal does not mean that he or she is at liberty to act arbitrarily or capriciously or to be *mala fide*. He or she is required to make a decision or finding that is reasonable.

[51] When one considers the facts of this matter in totality and the evidence led as per the transcripts, it cannot be said that the decision reached by the Commissioner is one that a reasonable decision-maker could reach.

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<sup>10</sup> (2000) 21 ILJ 1051 (LAC); [2000] ZALAC 10 at para 22.

[52] Furthermore, the finding of the Commissioner that the circumstances of the infringement do not point out any malice or bad intention or dishonesty on the part of the Applicant, which was used in determining the sanction, does not accord with the evidence that was presented during the arbitration proceedings.

[53] The Labour Appeal Court in its judgment in *Nampak Corrugated Wadeville v Khoza*,<sup>11</sup> the Court relied upon the judgment in *British Leyland UK Limited v Swift*,<sup>12</sup> and adopted the reasonable employer test. In this regard the Court found that:

[33] The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable...'

[54] In ascertaining that the dismissal wasn't fair, the Commissioner did not take into account that the Respondent as a Deputy Director: Budget was responsible for the budget and should have thus been aware of the budget for the programme that her ex-husband was bidding for. This much is clear with the Respondent being required to declare a conflict of interest.

[55] The Commissioner further failed to take into account that the Respondent had been found guilty of falsifying documentation, failing to perform the functions of her office in good faith, diligently, and honestly in a transparent manner. The Respondent had furthermore been found guilty of prejudicing the administration and efficiency of the employer by failing to perform the functions of her office in good faith, diligently, honestly by utilising company property to print tender documents which the Respondent herself

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<sup>11</sup> (1999) 20 ILJ 578 (LAC).

<sup>12</sup> [1981] 1 IRLR 91.

acknowledged she had a conflict of interest. These charges and the finding of guilt for such charges were not challenged by the Respondent in her referral to the CCMA, it was the sanction that was challenged by her.

- [56] The applicant transgressed in a manner that can be commonly described as constituting a conflict of interest and/or breaching fiduciary duties towards the Applicant as her employer. This when one considers the charges against her and the context of such charges. These concepts are described in *National Union of Metalworkers of SA on Behalf of Nganezi and Others v Dunlop Mixing & Technical Services (Pty) Ltd and Others (Casual Workers Advice Office as Amicus Curiae)*<sup>13</sup> as follows:

'Fiduciary duties are duties that apply to persons who have access to, or power in relation to, the affairs of a beneficiary. These duties must be exercised for the sole purpose of promoting the beneficiary's interests. The two core fiduciary duties are the no-conflict duty to avoid all potential conflict of interest situations and the no-profit duty which prohibits fiduciaries from obtaining any unauthorised profit for themselves that has not been properly disclosed or consented to by the beneficiary ...'

- [57] The Court in *Phillips v Fieldstone Africa (Pty) Ltd*<sup>14</sup> stated that '*... there is no magic in the term "fiduciary duty". The existence of such a duty and its nature and extent are questions of fact to be adduced from a thorough consideration of the substance of the relationship and any relevant circumstances which affect the operation of that relationship ...*'. The Court then elaborated on this duty in the following manner:

'The rule is a strict one which allows little room for exceptions ... It extends not only to actual conflicts of interest but also to those which are a real sensible possibility ... The defences open to a fiduciary who breaches his trust are very limited: only the free consent of the principal after full disclosure will suffice ... Because the fiduciary who acquires for himself is deemed to have acquired for the trust, ... once proof of a breach of a

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<sup>13</sup> Id at para 61.

<sup>14</sup> (2004) 25 ILJ 1005 (SCA) at para 27.

fiduciary duty is adduced it is of no relevance that (1) the trust has suffered no loss or damage ... the fiduciary acted honestly and reasonably ...'

[58] However, the position can hardly be better described than by referring to the following *dictum* in *Sappi Novoboard (Pty) Ltd v Bolleurs*<sup>15</sup> where it was held as follows:

'It is an implied term of the contract of employment that the employee will act with good faith towards his employer and that he will serve his employer honestly and faithfully: ... The duty which an employee owes his employer is a fiduciary one 'which involves an obligation not to work against his master's interests' ... If an employee does 'anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him ...'

[59] It is thus in my view clear that the misconduct of the Respondent in this case was of the magnitude and seriousness, especially considering her senior position as the Deputy Director: Budgets, to justify her dismissal by the Applicant.

[60] The above view is fortified by similar instances in which this Court, and the Labour Appeal Court, have found dismissals to be fair in similar circumstances. In the matter of *Head of Department: Sport, Arts, Recreation and Culture, Free State v National Educational Health and Allied Workers Union on Behalf of Masekoa and Others*<sup>16</sup> the Court considered the provisions of the SMS Handbook in the Public Service which provided that senior managers "must exhibit the highest ethical standards in carrying out their duties", that senior managers have the duty to alert their employer of any actual or potential conflict of interest, be it financial or otherwise, and no employee is to engage in any action or transaction that is in conflict with or

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<sup>15</sup> (1998) 19 ILJ 784 (LAC) at para 7. This dictum has been consistently applied in the LAC and in this Court – see *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO and Others* (2017) 38 ILJ 881 (LAC) at para 26; *Unilever SA (Pty) Ltd v Mbekwa N.O* (DA 15/2012) [2015] ZALAC 66 (13 February 2015) at para 27; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation & Arbitration and Others* (2013) 34 ILJ 945 (LC) at para 45; *Fipaza v Eskom Holdings Ltd* (2010) 31 ILJ 2903 (LC) at para 46; *Bogoshi v Commission for Conciliation, Mediation and Arbitration and Others* (JR 1106/16) [2021] ZALCJHB 186 (2 August 2021) at para 109.

<sup>16</sup> (2023) 44 ILJ 147 (LAC)

infringes upon the execution of his or her official duties.<sup>17</sup> In that case, the employee had been charged with securing an accommodation contract with a business that she had an interest in, which the employer contended contravened the above summarized provisions of the SMS Handbook. Even though there was no specific provision in the SMS Handbook prohibiting the employee from securing such a contract for her private business, the Court nonetheless accepted that this was a material conflict of interest. Importantly, the Court held that, ‘...Employees have a duty of good faith towards their employers. They are required to advance the employer’s interest and not their own in situations where their interests and those of the employer may clash...’<sup>18</sup>

- [61] The Court accepted that the transgression was serious enough to justify the employee’s dismissal and held that, “she was in a position of trust and breached that trust.”<sup>19</sup>
- [62] The comparisons to the matter in *casu* are clear. The Respondent held a senior position, one of trust. She was bound by the Code of Conduct of the Applicant, which she violated when she committed the misconduct in which she was ultimately found guilty. The Respondent, furthermore, breached her position of trust in doing so.
- [63] In *Coega Development Corporation (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*<sup>20</sup> the issue concerned an alleged conflict of interest on the part of an employee, in that the employee submitted the CV of prospective employees to the employer’s interview panel for appointment, where the employee had a personal relationship with those prospective employees. The employee then also participated in the interview process to ensure the appointment of those prospective employees. In this context, the Court held:

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<sup>17</sup> See para 6 of the judgment.

<sup>18</sup> *Id* at para 27

<sup>19</sup> *Id* at para 35

<sup>20</sup> (2016) 37 ILJ 923 (LC).



'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.

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 enquiry and at the arbitration, and showed no remorse.'

- [64] One can compare the above matter to the matter in *casu*. Whilst the matter *in casu* did not involve interference by an employee when it came to the appointment of employees and the Respondent had disclosed the conflict of interest, the Respondent attempted to interfere in the bidding/tender process when she falsified documents and acted in a dishonest and non-transparent manner when amending her husband's quotation upwards and then used company property to scan and email the documentation back to her husband with advice on what to say when submitting the quotation to the Applicant. This, in circumstances where the Respondent knew that she was conflicted

in doing so, and was aware that there was a conflict of interest in having had to disclose such conflict to the Applicant.

[65] The Applicant did this clearly to attempt to benefit her husband and this worked against the interests of her employer, the Applicant. As a senior manager, and using the words as referred to in *Coega*, the Respondent should have been 'ice cold' and should not have been involved at all. This conduct justified dismissal by the Applicant.

[66] A further example of a case involving a conflict of interest and misconduct surrounding this conflict, was the matter of *Impala Platinum Ltd v Jansen and Others*<sup>21</sup> whereby an employee promoted the business of his wife to a supplier of the employer. The following was held insofar as the employee's conduct was concerned:

'The commissioner rightly found that Jansen's conduct went to the root of the employment relationship deserving of the severest sanction. This cannot be faulted. In fact, it would be unfair to expect the appellant to retain Jansen in its employ where Jansen had not only displayed gross misconduct in failing to comply with statutory regulations but also contravened the duty to act in good faith by promoting his wife's business to appellant's service providers thereby compromising fairness and honesty within the appellant's business relationships. In the circumstances, there was no need to lead any evidence of a breakdown in the relationship, as it was obviously the case.

...'

[67] The Applicant *in casu* held a senior managerial position. She had a duty to the Applicant to act in good faith and with honesty and to serve the Applicant in a manner that could not in any way be seen to constitute a conflict between her own interests and those of the Applicant, and not to commit any conduct

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<sup>21</sup> (2017) 38 ILJ 896 (LAC)

which works against the interest of the Applicant. The Respondent's conduct fell short of this.

- [68] As held in *Malaka v General Public Service Sectoral Bargaining Council and Others*:<sup>22</sup>

'In an employment relationship, it is an implied term of the contract of employment that the employee will act in good faith towards, and serve, her employer with honesty...'

- [69] Furthermore, whilst the Commissioner found that it was for the Applicant to have issued conditions under which the Respondent who had declared her interests, to conduct herself in the work in a certain manner, this is not in accordance with the law or the authorities. What was actually required of the Respondent is neatly articulated in *ABSA Bank Ltd v Naidu*<sup>23</sup> as follows: '*... it followed that she owed a fiduciary responsibility vis-à-vis the appellant towards ensuring that, at all times, she acted and performed her duties in a manner that was in the best interests of both the appellant and its clients...*'

- [70] The Respondent, by virtue of declaring a conflict of interest, ought to have known the manner in which she was to conduct herself as a result of such conflict of interest. The Commissioner, in finding that the Respondent had assisted her ex-husband in altering the quotation in situations where she had no clue about the quotations of other bidders, does not accord with the evidence that was presented during the hearing of the matter. This was a factor that was, furthermore, not taken into account in determining whether the sanction was too harsh, and does not accord with the evidence led.

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<sup>22</sup> (2020) 41 ILJ 2783 (LAC) at para 33.

<sup>23</sup> (2015) 36 ILJ 602 (LAC) at para 54.

- [71] It is also clear from the arbitration award that the Commissioner acknowledged that the Respondent held a managerial position, however, found that her actions did not destroy the trust relationship with the Respondent when there were no grounds to make such a finding when one considers the evidence that was led during the arbitration proceedings in this regard and the authorities already referred to above.
- [72] It is also clear from the finding made by the Commissioner that more weight was put on the Respondent's mitigating circumstances, little weight was put on the gravity of her actions, and no weight was put on the importance of the rule that had been breached, the reasons for the Respondent's dismissal, the harm caused by the Respondent's conduct in terms of her employment relationship with the Respondent and whether the employment relationship between the Applicant and Respondent was tarnished.
- [73] The charges with which the Respondent was charged with are serious charges involving falsifying of documents, acting dishonestly and failing to act in a transparent manner.
- [74] Item 2 of the Code of Good Practice: Dismissal<sup>24</sup> provides *inter alia* that:
- '... whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty.'
- [75] Item 3(2) provides that the Courts have endorsed the concept of corrective discipline. Item 5 also provides that when deciding whether or not to impose a penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employees' circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.
- [76] When one considers the evidence led it is clear that the Commissioner did not take the reasonableness of the sanction into account in failing to address

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<sup>24</sup> (Schedule 8) of the Labour Relations Act.

these factors which were addressed by the Applicant in justifying the dismissal of the Respondent.

[77] I accordingly find that the Commissioner acted arbitrarily or capriciously or *mala fide* in making the finding that was ultimately made and that the finding that was made is not a decision that a reasonable decision-maker could reach.

[78] In the circumstances, there is merit in this ground of review.

### Conclusion

[79] The approach of the Commissioner was therefore unreasonable, bearing in mind the case authorities cited above where the Courts made it clear that a Commissioner must decide if the sanction is according to their own sense of fairness and must consider whether what the employer did was fair. Where a Commissioner does not do this, a reviewing court is able to interfere with the decision in limited circumstances and I find that there are limited circumstances justifying interference with the Commissioner's award in this matter.

[80] There is merit to the grounds for review raised by the Applicant and I therefore would grant the review application for the reasons set out in the judgment.

[81] I do not believe that it is necessary to remit the matter back to the First Respondent for a hearing *de novo* with the necessary evidence being before me in the transcript of proceedings.

[82] In the premise I make the following Order:

### Order

- 1 The Order made by the Second Respondent dated 19 October 2021 under case number GATW1364/21 is reviewed and set aside.
- 2 The arbitration award is substituted as follows:

- 2.1 The Applicants (Third Respondents) dismissal is substantively fair;
  - 2.2 The Applicant's (Third Respondents) case is dismissed.
- 3 There is no Order as to costs.

*RAdams*

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Adams

Acting Judge of the Labour Court of South Africa

Representatives

For the Applicant: Advocate Hugh Mbatha

Instructed by: Ngwako Mangokowa Attorneys

For the Third Respondent: L Khumalo Morare

Instructed by: L Khumalo Attorneys