



Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN**

Case No: **C99/2022**

In the matter between:

LANA GROENEWALD

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

S HARRIS N.O.

Second Respondent

TIMES SQUARE MARKETING (PTY) LTD

Third Respondent

Date of Set Down: 27 June 2024

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed on 6 February 2025.

JUDGMENT

VAN VOORE AJ

1. Lana Groenewald (**the applicant**) was previously employed by Time Square Marketing (Pty) Ltd, the third respondent. The applicant was dismissed by the third respondent. The applicant referred an alleged unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (the **CCMA**).
2. In an arbitration award under CCMA case number WECT 16020-2021 (**the arbitration award**) the second respondent (**the Commissioner**) determined that the applicant's dismissal was substantively and procedurally fair. The arbitration award is dated 22 January 2022.
3. The applicant launched an application under section 145 of the Labour Relations Act, 1995 (as amended) (**the LRA**) to, *inter alia*, review and set aside the arbitration award.
4. The stated grounds of review are the following:
 - 4.1 The commissioner committed misconduct in relation to the duties of the commissioner as arbitrator by failing to consider all the facts presented in the matter and by not reasonably applying her mind to these facts.
 - 4.2 Alternatively, the commissioner committed a gross irregularity in the conduct of the arbitration proceedings by failing to consider the weight of the submissions made [by the applicant] and for failure to reasonably apply her mind and consider all the relevant facts present in this case.
 - 4.3 The award is one that a reasonable decision maker could not reach.
5. The applicant was appointed as Office Manager of the third respondent's Claremont office with effect from 1 October 2021. The applicant commenced employment on 4 October 2021. This was subsequent to an application for the post and two interviews.

6. On 17 November 2021 the third respondent issued the applicant with a notice to attend a disciplinary hearing. The allegation levelled against the applicant was in the following terms:

“Gross dishonesty, in that on 20 September 2021 you made a false statement / representation regarding the validity of your Fidelity Fund Certificate.”

7. The disciplinary hearing took place on 22 November 2022. The applicant was found guilty of serious misconduct and was subsequently dismissed.
8. In the arbitration award the Commissioner records, *inter alia*, the following:

“28. The charge put to the applicant as per the notice to attend a disciplinary hearing was stated as follows:

“Gross dishonesty, in that on 20 September 2021, you made a false statement / representation regarding the validity of your Fidelity Fund Certificate.”

9. The Commissioner determined that the third respondent had discharged the onus to prove that the dismissal of the applicant was substantively fair. In the arbitration award the commissioner records the following: *“31. I find that the dismissal was procedurally and substantively fair.”*

The Arbitration Award

10. In the arbitration award and under the heading “ANALYSIS OF EVIDENCE AND ARGUMENT” the arbitrator records, *inter alia*, the following:

“28. The charge put to the applicant as per the notice to attend a disciplinary hearing was stated as follows:

“Gross dishonesty, in that on 20 September 2021, you made a false statement /

representation regarding the validity of your Fidelity Fund Certificate.”

*The respondent from the onset of the arbitration and throughout argued that the applicant was dishonest in that she did not disclose that she did not have a valid FFC. This argument was short-lived after the testimony of the respondent's second witness, who testified that the applicant was employed with the understanding that it would take her a few days to make her application for renewal of her FFC for 2021. This testimony was a clear indication that the respondent accepted that she did not have it but that she will make application to renew it, which according to her would only take a few days. This was certainly not the case. With this evidence I find that the applicant **was not dishonest when she said she did not it, but rather that she was not open and upfront as to why she did not yet have it. She also did not make the respondent aware of the challenges she was experiencing in finalising her business affairs, in order to get her FFC. This can certainly be seen as misrepresentation.***

29. The applicant did not dispute that she did not tell the respondent that her business affairs was not up to date and finalised. It was only after her appointment that it became known to the respondent. The applicant was aware of the importance of this document and in all probability knew that if she made her challenges known to the respondent, her chances of employment may be limited. On the day of her

*second interview / meeting, 21 September 2021, she became aware that her accountant passed away. She made no mention of this to the Manager. Surely the applicant would have known that this was going to cause a further delay in finalising her business affairs. The applicant with all her experience in the estate agency business knew the importance of the FFC document in order to comply with the EAAB regulations however chose not to inform the respondent about this at any of the two meetings she had with the respondent before she was officially appointed. **In this regard I find that the applicant withheld crucial information from the respondent that could very well have led to a different decision in respect of the offer made to the applicant. I find that the applicant misled the respondent when she stated that all she needed was to do a renewal of her FFC. This I find is tantamount to misrepresentation.***"

(emphasis added)

11. The facts that served before the arbitration proceedings included the following:
 - 11.1 The applicant attended an interview with the third respondent's Pieter Janse van Rensburg (**Janse van Rensburg**) and Graham Ross (**Ross**) on 20 September 2021 and a second interview with Ross on 21 September 2021. The interview of 20 September 2021 took place virtually.¹

¹ Transcript, Page 24, lines 18 – 25

- 11.2 During the interview of 20 September 2021, the applicant was asked whether she was in possession of a valid Fidelity Fund Certificate for 2021.
- 11.3 It is an inherent requirement of the position of Office Manager that the person appointed to that position has a valid Fidelity Fund Certificate. The duties and obligations associated with the position includes signing off on deeds of sale and lease agreements. In addition, the incumbent would operate as an agent, principal or manager.²
- 11.4 During the second interview of 21 September 2021, the applicant and the third respondent's Ross discussed the issue as to a valid Fidelity Fund Certificate. The applicant informed the third respondent that she was busy with the process of renewal in order to obtain a new certificate for the 2021 and 2022 year.³
- 11.5 The applicant was offered the position of Office Manager and commenced employment on 4 October 2021.
- 11.6 The applicant's information and credentials were sent to the third respondent's Adri Calitz (**Calitz**). Calitz assists the third respondent's employees in applications for Fidelity Fund Certificates. During the process of considering the applicant's information and credentials Calitz learned that the applicant's account with the Estate Agency Affairs Board of South Africa (**EAAB**) was blocked due to not submitting audits and for this reason the applicant did not have a valid Fidelity Fund Certificate.⁴
- 11.7 The third respondent was informed by the EAAB that it needs documentation: an affidavit furnishing reasons or circumstances for the applicant's non-compliance and reasons why the EAAB should issue the applicant with a Fidelity Fund Certificate; an Audit Report and Financial

² Transcript, Page 28, lines 23 – 25 and Page 29, lines 1 – 25

³ Transcript, Page 28, lines 1 – 7, lines 23 – 25; Page 29, lines 1 - 4

⁴ Transcript, Page 33, lines 17 – 25 and Page 34, lines 1 – 25; CCMA bundle, Page 199

Statement and a Tax Clearance Certificate of the company of which the applicant had been a principal.⁵

- 11.8 The third respondent was informed by the EAAB that its system records that the applicant was last issued with a Fidelity Fund Certificate in 2020 and that it, the EAAB, had no record that the applicant had renewed\ her Fidelity Fund Certificate for 2021.⁶
- 11.9 During various email communications between the applicant and the third respondent over the period 4 to 7 October 2021 the applicant informed the third respondent that her auditor and her accountant had passed away and that the applicant had to submit audits to the EAAB and that audits for a period of 2 years were outstanding.⁷
- 11.10 During the interviews that took place between 20 and 21 September 2021 the applicant did not inform the third respondent that her account with the EEAB relevant to a Fidelity Fund Certificate had been blocked due to outstanding audits and non-compliance with the EAAB's requirements.
- 11.11 During the period 4 to 7 October 2021, it became apparent that the process to be followed by the applicant as required by the EAAB for the issuing of a Fidelity Fund Certificate would take significantly more time than a few days.⁸
- 11.12 By November 2021 the applicant had not resolved her non-compliance with the EAAB requirements.⁹
- 11.13 The applicant has been in the industry for several years and knows the importance of being in possession of a Fidelity Fund Certificate.

12. The arbitration award in relation to evidence in the arbitration proceedings records, *inter alia*, the following:

⁵ CCMA bundle, Page 199

⁶ CCMA bundle, Page 199

⁷ CCMA bundle, Page 199

⁸ Transcript, Page 40

⁹ Transcript, Page 40, lines 1 – 25 and Page 41, lines 1 – 6

“6. The applicant was appointed as Office Manager following an interview process that was held via Zoom on 20 September 2021. Present at the interview was Mr Pieter Janse van Rensburg and Mr Graham Ross.

7. It was the respondent's case that at the interview process, the applicant was asked a series of questions which included her qualifications, past experience, history and background of herself including whether she was in possession of a valid FFC for 2021. It is the respondent's case that the applicant confirmed that she was in possession of a valid FFC for 2021. It further stated that they were satisfied with the interview.

8. On 21 September 2021, Mr Ross had another meeting / interview with the applicant, where he confirmed with the applicant that the respondent is happy with the outcome of the interview, and would like to offer her the position of Office Manager at the Claremont Branch. Mr Ross again reiterated that he asked the applicant again on that day about her FFC, to which she confirmed that it was just a matter of renewal. This renewal should be for 2022.

...

10. On 4 October 2021, the first day the applicant officially started, all her information and documents / credentials were emailed to Adri Calitz, (“Adri”) another Manager, for employee information capturing. Adri is also the dedicated employee for the respondent who assists with

applications for FFC's for all agents. It was through this process that it became apparent that the applicant was not in possession of a valid FFC for 2021.

11. On the same day Adri followed up further and contacted the EAAB and the response received was that the applicant did not have any pending registration / application under her FFC and that her account is blocked.

12. On the morning of 7 October 2021, after a call to the EAAB, Adri advises the applicant via email, that her account was blocked due to her non-compliance and that a number of documents and payments would be required before her account would be opened again in order for her to make application for renewal of FFC for 2021 and subsequently 2022. Adri offered to assist her.

13. It's the respondent's case that it is with this email that for the first time the applicant confirms / declares that she did not renew her FFC for 2021 and also then stated that her auditor and accountant had both passed on and that she will follow up on the finalisation of the documents she required in order for her to make application for her FFC for 2021. It was the respondent's case that the applicant at no point advised them of this therefore she was dishonest and misled the respondent.

14. Two weeks later, on 22 October 2021, after a follow up email from Mr Ross on the status of her renewal for FFC 2021, the applicant's response

continues to deal with the challenges she faces with the finalization of her previous audits and financials as a result of the passing of the auditor and accountant and the subsequent appointments of the new auditor and accountant. It was Mr Ross's case that when it first came to his attention on 4 and 7 October 2021, the applicant advised him that it will only take a few days to sort out. It now appeared that it could take a few months before it will all be sorted which renders the applicant unable to fulfill the tasks that she was initially employed for.

15. On 2 November 2021, another follow-up email to the applicant by Mr Pieter Van Rensburg, with regards to the applicant's renewal of her FFC for 2021, her response was very much on the same that the audits / financials were not yet complete and that there was a struggle to balance October 2020 at that stage. It was the respondent's case that if the applicant had complied with keeping her records up to date on a monthly basis, she would not be facing the challenges she was experiencing now. It was also the respondent's case that the extent of what has become apparent to it is the reason why the applicant was not open and honest about her full compliance in that she did not have a valid FFC for 2021. She was dishonest about it and at no point did she disclose the reason why she did not have it. The applicant was referred by Jennings Consulting, a reputable employment agency, therefore there was no reason for the respondent to suspect any dishonesty from the applicant. The applicant was a professional

person who for many years managed her own business. There was no reason to believe that she would withhold critical information from the respondent.

...

20. The applicant stated that at the interview she informed the respondent that she was not in possession of a valid FFC for 2021. She stated that she closed her company and confirmed that her FFC for 2021 will be in her company name and that her FFC in for 2022 will be in the name of the respondent as this will just be a matter of renewal.

21. The applicant further testified that on 21 September 2021, she again confirmed at a meeting with Mr Graham Ross, that she is not in possession of a valid FFC for 2021. It was also the applicant's case that at another meeting with the respondent after he appointment, Mr Pieter van Rensburg asked her to bring over agents from her company to which she responded that she would first need to wrap up all outstanding business including payments in order to get her FFC. It is the applicant's case that the respondent was fully aware of her FFC status at the time the respondent made an offer of employment to her. She was not dishonest and she declared that she was not in possession of a valid FFC for 2021. It was also not on her CV that she had a valid FFC for 2021, therefore it was her case that the employment agency was also aware that she did not have it.

22. The applicant further testified that she found it strange when a copy of her FFC was requested by the respondent's Adri. At this stage she thought that Mr Graham Ross had not advised her that she is not in possession of her valid FFC for 2021.

23. In the email responses to the respondent the applicant then explained that her account was blocked at the EAAB as they were waiting on the deregistration of her company. She further explains that her auditor and accountant had passed on during 2021 and that she is in the process of finalising her financials in order for her to renew her FFC for 2021 and 2022. It was her case that she told the respondent that she would have everything wrapped up and finalised, including having a valid FFC for 2021 by latest end of October 2021.

24. The applicant further argued that if the respondent attached so much weight to her being in possession of her valid FFC for 2021, why did they not ask her for a copy at the time of her interview. Why was a timeframe for her to get it not included in her contract of employment, in fact she argued why was she even offered employment while they were fully aware that she did not have it. It was her case that the reason for this was because they knew she did not have it and they were prepared to wait until end October 2021. It is for this reason that she believes that her dismissal was unreasonable and unfair."

13. The facts that served before the Commissioner include the following:

- 13.1 it is an inherent requirement for the position of Office Manager that the appointed person is in possession of a valid Fidelity Fund Certificate;
 - 13.2 during the interview process the applicant informed the third respondent that a renewal of her Fidelity Fund Certificate would take a matter of days;
 - 13.3 the applicant was not in fact in possession of a valid Fidelity Fund Certificate for the period 2021 / 2022;
 - 13.4 the applicant's account with the EAAB was blocked due to non-compliance;
 - 13.5 the applicant's non-compliance with the EAAB's requirements included that there were outstanding documents and information including audit reports and financial statements of a company of which the applicant had been a principal;
 - 13.6 the applicant was an experienced estate agent and appreciated that the delays in the winding up of the affairs of her previous company would impact on her ability to obtain a valid Fidelity Fund Certificate; and
 - 13.7 by November 2021 the applicant's non-compliance with the EAAB requirements had not been resolved.
14. Those facts were not in any serious dispute.

Relevant Legal Principles

15. The relevant legal principles are well known. Those principles were restated in ***Herholdt vs Nedbank Ltd and Congress of South Africa Trade Union*** 2013(6) SA 224 (SCA) [2013 (11) BLLR 1074 (SCA)]. In that matter the court held:

"In summary, the position regarding the review of CCMA awards is this: a review of a CCMA award is permissible if the defect in the proceedings falls in one of the grounds in S145(2)(a) of the LRA. For a defect in the conduct of the

proceedings to amount to gross irregularity as contemplated by s145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particulars facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if the effect is to render the outcome unreasonable. (paragraph 25)."

16. In the matter of **Nyathikazi vs Public Health and Social Development Bargaining Council and others** (2021) 42 ILJ 1686 and at paragraph 21 the Court held:

"[21] After the decision on Sidumo and another vs Rustenburg Platinum Mines Ltd and another 2008 (2) SA 24 CC and the further explication in Heroldt vs Nedbank Limited 2013 (6) SA 224 (SCA), it is clear that our law dictates that an award delivered by an Arbitrator will only be considered to be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before him or her. A material error of fact and the particular weight to be attached to a particular fact may in and of itself not be sufficient to set aside the award but will only be done if the consequence thereof is to render the ultimate outcome unreasonable".

17. In the matter of **Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mining) v CCMA and Others** [2014] 1 BLLR 20 (LAC) and at paragraph 21 the Court held:

“Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see Minister of Health and Another vs New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piece meal analysis. As soon as it is done in a piece meal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable – there is no room for conjecture and guess work.”

18. Under s138 of the LRA commissioners are enjoined to conduct arbitration proceedings in a manner they deem appropriate so as to determine the dispute fairly and quickly. Commissioners are to deal with the substantial merits of the dispute with the minimum of legal formalities.
19. In **CUSA v Tao Yang Metal Industries and Others** [2009] 1 BLLR 1 (CC) the Court held:

“64. Consistent with the objectives of the LRA, commissioners are required to “deal with the substantial merits of the dispute with the minimum of legal formalities.

65. *This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counterclaims and reach for the real dispute between the parties. In order to perform this task effectively commissioners must be allowed a significant measure of latitude in the performance of their functions. Thus the LRA permits commissioners to “conduct the arbitration in a manner that the commissioner considers appropriate. But in doing so, commissioners must be guided by at least 3 considerations. The first is that they must resolve the real dispute between the parties. They must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do”.*

20. It is in light of these principles that the commissioner’s award and the arbitration proceedings ought to be assessed.
21. The review test has been recently restated in the matter of ***Makuleni v Standard Bank of SA (Pty) Ltd & Others*** (2023) 44 ILJ 1005 LAC. In Makuleni the Court restated the review test as follows:

“[4] The import of these remarks demands a reflection in order to digest the essence of the exercise that a commissioner embarks upon. The court asked to review a decision of commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation is reserved for the court of appeal. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such

conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted.

...

[13] The Labour Court's view of the case differed from that of the commissioner. As shall be addressed hereafter there are serious flaws in the reasoning articulated in the judgment. However, what is immediately deserving of emphasis is that, even if the perspective of the Labour Court is plausible and reasonable, that is an insufficient reason to displace the award in terms of the review test addressed above. To meet the review test, the result of the award has to be so egregious that, as the test requires, no reasonable person could reach such a result. In our view, no material criticism can be advanced of the award that meets the threshold test for review."

22. In the matter of **Securitas Specialised Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others** (2021) 42 ILJ 1071 (LAC) the Court held:

"[19] The test for review is this: "Is the decision reached by the arbitrator one that a reasonable decision maker could not reach?" To maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the

arbitrator's reasoning is found to be unreasonable, the result is, nevertheless capable of justification for reasons other than those given by the arbitrator. The result will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.

[20] This court has eschewed a piecemeal approach to a review application by the Labour Court. The proper approach is for the Labour Court to consider the totality of the evidence in deciding whether the decision made by the arbitrator is one that a reasonable decisionmaker could make."

23. The Commissioner in her arbitration award does survey and reflect on the applicant's version and submissions. The Commissioner in her arbitration award then concludes as follows:

"I find that the applicant withheld information from the respondent that could very well have led to a different decision in respect of the offer made to the applicant. I find that the applicant misled the respondent when she stated that all she needed was to do a renewal of her FFC. This I find is tantamount to misrepresentation."

24. On the whole, the Commissioner understood the substance of the alleged unfair dismissal dispute and the allegations against the applicant.

25. The Commissioner's findings include that:

- 25.1 the applicant with all her experience in the estate agency business knew the importance of the FFC document in order to comply with the EAAB regulations however she chose not to inform the respondent about this at

any of the two meetings that she had with the respondent before she was officially appointed;

25.2 the applicant withheld crucial information from the respondent that could very well have led to a different decision in respect of the offer made to the applicant;

25.3 the applicant misled the respondent when she stated that all she needed was to do a renewal of her FFC; and

25.4 this amounted to misrepresentation.

26. There is no doubt, on the facts that served before the arbitration proceedings, that the applicant did not disclose material information to the third respondent during the interview process. That information was known to the applicant. That information was material to her suitability for employment as the Office Manager. The applicant ought to have disclosed that information to the third respondent. The applicant withheld material information from the third respondent. In doing so, the applicant misled the third respondent.

27. The applicant's grounds of review include that the Commissioner committed misconduct in relation to the duties of a commissioner by failing to consider all the facts presented in the matter and by not reasonably applying her mind to those facts. Alternatively, the Commissioner committed a gross irregularity in the conduct of the arbitration proceedings by failing to consider the weight of the submissions made and failure to reasonably apply her mind to consider the relevant facts present in the case. A further ground of review is that the award is not one that a reasonable commissioner could make.

28. The crux of the Commissioner's determination is that the applicant misled the third respondent and that the applicant's conduct amounted to a misrepresentation.

29. Whilst it is so that the Commissioner found that the applicant was not dishonest, the Commissioner nonetheless finds that the applicant withheld

information, that the applicant misled the respondent and that this amounted to misrepresentation.

30. The Commissioner determined as a fact that the applicant withheld information from the respondent. That finding of the Commissioner is properly grounded in the evidence that served before the arbitration proceedings.
31. The facts that served before the arbitration proceedings form a proper basis for the determination of the Commissioner that the applicant withheld material information from the third respondent. In those circumstances, it cannot reasonably be contended that the Commissioner committed a material error of fact.
32. Similarly, the facts that served before the arbitration proceedings determined that rather than a renewal of the applicant's Fidelity Fund Certificate taking a few days, the process could take several months, having already taken a few weeks.
33. The applicant's contention that at the time of appointing her the third respondent was aware that she was not in possession of a valid Fidelity Fund Certificate and that for that reason she was not dishonest and had not misled the third respondent is misguided. The facts that served before the arbitration proceedings establish the inherent importance of the possession of a Fidelity Fund Certificate and that the applicant had informed the respondent that a renewal of her Fidelity Fund Certificate would take a matter of days (a short period of time). The full and complete reasons for the applicant not being able to renew her fidelity fund certificate were not disclosed to the third respondent. Those reasons included that the applicant's financial affairs were in material respects not in order.
34. It cannot reasonably be contended that the Commissioner failed to consider the weight of the applicant's submissions on evidence and gave improper weight to the third respondent's submissions on evidence. The award itself surveys the applicant's version, her contentions and her submissions. The extent of the applicant's non-compliance with the EAAB's requirements was substantial. On the basis of the material that served before the arbitration

proceedings, it cannot be contended that the arbitrator gave it improper weight.

35. On a '*fair reading*' of the arbitration award, the applicant's contentions as to the Commissioner failing to consider the weight of her submissions and failure to give proper weight to her submissions are simply not sustainable. On the totality of the evidence that served before the arbitration proceedings, the arbitration award is one that a reasonable arbitrator could make.
36. The applicant has advanced no proper grounds to disturb the Commissioner's arbitration award. The arbitration award is well supported by the evidence that served before the arbitration proceedings.
37. In the circumstances I make the following order:

Order

1. The review application is dismissed.
2. There is no order as to costs.



VAN VOORE AJ
ACTING JUDGE OF THE LABOUR COURT

Appearances:

For the Applicant Attorney PR Nabal

For the Third Respondent Mr Kobus Hayward