REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA,
JOHANNESBURG

Reportable

Case no: JA 56/10

In the matter between:

ESKOM HOLDINGS LIMITED **Appellant**

and

NP FIPAZA **First Respondent**

CCMA **Second Respondent**

COMMISSIONER L MAPONYA N.O. **Third Respondent**

Heard : 17 November 2011

Delivered : 3 October 2012

Summary: (1) Ordinarily no duty *ex lege* exists on job seeker to disclose in CV the reason(s) for termination of previous employment; (2) *In casu*, no duty of such disclosure proven even *ex contractu*; (3) Non-disclosure does not amount to misrepresentation; (4) Lack of dishonesty in misconduct militating against finding of irreconcilable breakdown in trust relationship.

JUDGMENT

NDLOVU, JA

Introduction

[1] This appeal is against the judgment and order of the Labour Court (Lagrange AJ, as he then was) handed down on 6 May 2010. The appeal comes before us with the leave of the Court *a quo*.

[2] The first respondent (Fipaza) referred an unfair dismissal dispute to the second respondent (the CCMA) against her former employer, the appellant. It was common cause that the alleged unfair dismissal occurred on 2 June 2008. Fipaza sought relief for retrospective reinstatement in the appellant's employ. When attempts at conciliation failed the dispute proceeded to arbitration before the third respondent (the commissioner) who, on 28 August 2008 or 10 September 2008,[1] issued an arbitration award declaring that the dismissal of Fipaza was substantively fair but procedurally unfair. The commissioner awarded compensation to Fipaza in the amount equivalent to her three months' salary, totalling R102 690. This award was taken up on review to the Labour Court by Fipaza, in terms of section 145 of the Labour Relations Act[2] (the LRA).

[3] To avert any possible confusion or misunderstanding in relation to the order of the Court *a quo*, which is the subject of this appeal, referred to hereunder, it is apposite to mention how the parties were designated at the level of that Court: The appellant was the first respondent; Fipaza was the applicant; the commissioner was the second respondent and the CCMA was the third respondent. On the basis of that designation, the judgment and order of the Court *a quo* appears as follows:

[1] It would appear that the award was prepared or completed on 28 August 2008 (see p.29 of the indexed papers) but only signed by the commissioner on 10 September 2008 (see p.33 of the indexed papers)
[2] Act 66 of 1995.

'1. The second respondent's finding in his award of 10th September 2008 that the dismissal of the applicant was substantively fair is set aside.

2. The matter is remitted to the third respondent to convene a hearing before the second respondent to consider and determine an appropriate remedy for the applicant's substantively unfair dismissal.

3. At the hearing before the second respondent, the applicant and first respondent must be given an opportunity to lead evidence relevant to determining an appropriate remedy and to present argument on the issue.

4. The first respondent is ordered to pay the applicant's costs of this application.'

It is against this judgment and order that the appellant appeals to this Court.

Factual Background

[4] Fipaza's employment with the appellant, the dismissal of which is the subject matter of this litigation, was the second stint of her employment relationship with the appellant. She was employed by the appellant in January 1994 and during or about July 2003, she and the appellant concluded a leave of absence agreement in terms of which she was released from duty to undertake post graduate studies in the United Kingdom. This sabbatical leave was to expire on 5 July 2006. It is not in dispute that, in the United Kingdom, she obtained a post-graduate diploma in management and a Master's degree in international banking and finance.

[5] When she failed to return to work on 5 July 2006, as arranged, the deadline was extended by the appellant to 5 September 2006. In a registered letter, the appellant warned Fipaza not to miss the extended deadline and further that her failure to report for work on that date would result in disciplinary action being taken against her

which could lead to termination of her employment. However, on 5 September 2006, Fipaza did not report for duty as instructed. She was then served with a notice of disciplinary hearing scheduled for 29 September 2008, whereby she was charged under what was referred to as 'Misconduct 14', namely, 'absent from duty without leave'.

[6] On the date of the enquiry, (i.e. 29 September 2008), Fipaza did not turn up but sent a letter acknowledging her receipt of the notice of the disciplinary enquiry and the date thereof. The hearing proceeded in her absence. She was found guilty, *in absentia*, of the misconduct charged and summarily dismissed. The chairman of the disciplinary enquiry noted, amongst others, that Fipaza's misconduct had 'destroyed the trust relationship' between her and the appellant. An email was dispatched to her whereby she was advised of the termination of her employment with the appellant.

[7] Fipaza unsuccessfully noted an appeal against her dismissal to the appellant's internal appeal structure. Significantly, in the written 'Outcome of Appeal',[3] addressed to her the following, amongst others, appears:

> '3.14 In the circumstances, you are advised that should a vacancy exist within Eskom for which your skills are required, kindly follow the normal recruitment process.
>
> 4. Kindly note that all Eskom vacancies are advertised on (appellant's website was indicated). Should you come across any vacancy which you feel that you are suitably qualified for, kindly follow the application process.
>
> 5. We trust that you find the above to be in order and we would like to take this opportunity to wish you well in your future endeavours.'

[3] See annexure NPF5, at 250 of the indexed papers.

[8] During or about April 2008, the appellant advertised the vacant position of 'senior advisor: measurement and verification - corporate services division' for which Fipaza submitted her application in accordance with the appellant's normal job recruitment process. She was interviewed by the appellant's interviewing panel consisting of the appellant's officials.

[9] On 25 April 2008, she was advised that her application was successful and offered the position at R410 760 per annum. She accepted the offer on 29 April 2008. In other words, the accepted offer assumed the status of the employment contract between Fipaza and the appellant (the contract). She was then due to assume duty on 1 June 2008. In the meantime, on 1 May 2008, she addressed a letter of resignation to her then employer, the Department of Minerals and Energy in Pretoria, in terms of which she advised that her last day of duty with the Department would be 31 May 2008.[4]

[10] However, by the letter dated 27 May 2008,[5] the appellant advised Fipaza of its intention to withdraw its offer of employment. The letter read, in part, as follows:

> '2. It has come to Eskom's attention that you were previously employed by Eskom… and that your employment was terminated on 29 September 2006… The reasons for your dismissal related to misconduct which resulted in the breakdown of the employment relationship between you and Eskom.
>
> 3. During the interview process, you failed to advise the interviewing panel of the fact that you were previously dismissed by Eskom, which is a material fact that should have been disclosed to the interviewing panel. Accordingly, the offer was made without this fact being disclosed.

[4] See annexure NPF9, at 274 of the indexed papers.
[5] Annexure NPF10, at 275 of the indexed papers.

4. After in depth and careful consideration of this matter, we believe that the reasons that led to your dismissal are of such a nature that had they been disclosed, they would have had a bearing on whether the offer would have been made to you.

5. You will appreciate that the position which has been offerd to you is a senior position within Eskom and which requires a high degree of trust, which in your case has been compromised by your previous dismissal from Eskom. The reasons for your previous dismissal are of such a nature that they will have a bearing on the position that has been offered to you.'

[11] Fipaza was, thereupon, invited to make representations why the appellant should not withdraw its offer of employment. On 29 May 2008, she submitted her written response in which she sought to explain her position, including the following:

> 'I was employed at Eskom from 1995 until September 2006 – I mentioned it duly in my curriculum vitae as well as during my interview.
>
> During September 2006 I was charged for 'misconduct 14 – absent from duty without leave'. My services were terminated due to the fact that I was not able to return timeously to Eskom after my sabbatical leave.
>
> There was no referral at any stage to a breakdown of the employment relationship between myself and Eskom.
>
> On my termination letter it was actually recommended that: "*In the circumstances you are advised that should a vacancy exist within Eskom, for which your skills are required, kindly follow the normal recruitment process. Should you come across any vacancy which you feel that you are suitably qualified for, kindly follow the application process." (italics inserted)*

> I followed the application process and went for an interview. I answered all questions honestly.
>
> I wish to state that I want to continue with my employment with effect from 1 June 2008.
>
> The reasons for my previous termination are not poor work performance or any fraudulent activities and I know that I will have a long and trusted relationship with Eskom.'

[12] As undertaken in her representations of 29 May 2008, Fipaza reported for duty on Monday 2 June 2008 at 08h00. After she completed the official attendance register she was instructed to attend the appellant's orientation course, which she did. However, at about 10h00 she was instructed by officials from the human resources department to leave the appellant's premises forthwith and await the appellant's response to her representations by 4 June 2008.

[13] Indeed, on 4 June 2008, she received a letter from the appellant in which she was notified of the appellant's withdrawal of its offer of employment to her. Thence she referred the unfair dismissal dispute to the CCMA.

The arbitration proceedings

[14] The appellant's officials who constituted the panel that interviewed Fipaza were Ms Refilwe Aphane, the recruitment practitioner and Mr Fanele Mondi, the line manager. They both testified for the appellant at the arbitration hearing. Fipaza testified in support of her case.

[15] Ms Aphane testified that Fipaza's reason for leaving the appellant's employ in 2006 was not reflected in her CV and further that she did not disclose this reason during her interview. However, Ms Aphane reaffirmed the appellant's employment policy in so far as it rendered

previously dismissed employees still employable at the appellant, albeit she sought to qualify her statement in this way:

> 'Eskom does not stop anybody from applying and going through the normal recruitment process. Of course that person's appointment, depending on whether the person declares all information (sic) and… [w]e also have in our letter that your appointment is (based) on conditions and (that) integrity assessments are done and Eskom has the right to withdraw and also (that) should we find any discrepancies. (sic). It does not stop you from applying.'[6]

[16] Mr Mondi stated that his duties entailed a combination of three areas, namely, contract management, project management and technical management. Fipaza would fall under his line management. He said that, as a result of Fipaza's failure to disclose the reasons for her leaving the appellant, he did not have confidence and trust in her that she would be honest in her dealings with the appellant's suppliers. On this basis, the circumstances rendered the continuation of employer/employee relationship intolerable.

[17] Fipaza testified that, when she applied for the position, she submitted her detailed CV in which she clearly indicated that she previously worked for the appellant. She also provided the particulars of two senior managers of the appellant as her references. During the interview, she answered all questions put to her fully and honestly. She submitted that she found it unreasonable to be expected to provide information during her interview which was not required or inquired from her. She felt that she had no duty to disclose in her CV the reasons why she left the appellant's employ. She submitted that, after all, the reasons of one's termination from previous employment had no bearing on one's prospect of future employability. However, she conceded that

[6] Arbitration record, at 69-70 of the indexed papers.

the members of the interviewing panel were not part of the appellant's administration during her previous stint with the appellant.

[18] She submitted that there was no breakdown in trust relationship with the appellant, particularly because (1) she was not dismissed for misconduct involving dishonesty and (2) in her letter of termination of service it was indicated that in future she could still apply for any suitable vacancy within the appellant.

[19] The commissioner found substantially against Fipaza. In his analysis and conclusion, the commissioner stated:

> 'It is my view that this principle of fraudulent non-disclosure may be extended to cases where an employee fails to disclose a previous dismissal when applying for another employment, where the employee would have not been employed had the true facts (been) known.
>
> The applicant admitted that she did not disclose in her CV or during the interview that she was previously dismissed by the respondent. Her justification being that she was never asked to provide reasons for her termination.
>
> It is my view that the applicant's misrepresentation was wilful and material, this is against the backdrop that the applicant did not want to jeopardize her chances of gaining employment with the respondent.
>
> The respondent would not have employed the applicant had the true facts (been) known that she was previously dismissed for an alleged act of misconduct. The applicant's justification that she was never asked to state reasons why she left the respondent does not mitigate against the materiality of the facts misrepresented in the present instance.

> In these circumstances I find that the respondent had discharged the *onus* placed on it and established that it had fair reasons to terminate the applicant's employment.'

[20] Hence, the commissioner found that Fipaza's dismissal was substantively fair. In light of the appellant's concession that the procedure followed in dismissing Fipaza was not a fair procedure, the commissioner formally declared that Fipaza's dismissal was indeed procedurally unfair. Given the fact that she had just been employed and not yet really assumed duties, the commissioner considered that compensation in the amount equivalent to three months' salary was just and equitable in the circumstances and he issued the award accordingly.

Proceedings in the Labour Court

[21] Fipaza alleged that the commissioner misdirected himself in a number of respects in his handling of the arbitration proceedings. She pointed out, for instance, that the commissioner noted in his award that he was required to determine whether or not her dismissal was substantively and procedurally unfair,[7] despite the fact that during the pre-arbitration meeting the appellant had conceded that the procedure followed in her dismissal was unfair and the pre-arbitration minutes were filed with the commissioner in this regard.[8] The commissioner also stated that it was common cause that the appellant withdrew its offer of employment on 2 June 2008, being the date of Fipaza's dismissal,[9] whereas the factually correct position was that this occurred on 4 June 2008.[10]

[22] She submitted that there was no evidence to suggest that she intended to misrepresent facts to the appellant by not disclosing in her CV or during her interview the reason why she left the appellant's employ in 2006. On the contrary, she had reflected in

[7] Para 3 of the award, at 29 of the indexed papers.
[8] Para (b)(3) of pre-arbitration minutes, at 19 of the indexed papers.
[9] Para 5 of the award, at 30 of the indexed papers.
[10] Para (b)(1) of pre-arbitration minutes, at 19 of the indexed papers.

the CV the fact of her previous employment with the appellant and, in addition, she had furnished the interviewing panel with her clock number which in turn provided a link to her detailed work history with the appellant. In any event, the commissioner ignored the fact that in the letter of her dismissal in 2006, the appellant had advised her that she could in future re-apply for any suitable position within the appellant through the normal recruitment procedure, which was exactly what she had done.

[23] Fipaza also averred that, apart from its mere say so, the appellant did not tender any evidence to substantiate that there was a breakdown in trust relationship which rendered her re-instatement not feasible.

[24] She contended that the commissioner failed to apply his mind properly to the matter before him in that he failed to deal with the credibility of witnesses and the analysis of the evidence and argument presented before him. She further submitted that the granting of compensation was irregular since she had only sought re-instatement. Consequently, so she submitted, the commissioner arrived at a decision which is not justifiable in relation to the evidence placed before him.

[25] According to the appellant, Fipaza had 'wilfully omitted' to disclose the fact that she was previously dismissed by the appellant for misconduct. This information only came to the attention of the appellant at a later stage. Had the appellant known about it earlier the appellant would not have offered the position to Fipaza. The appellant withdrew the offer because it could not trust Fipaza as its employee since she had misrepresented herself during the recruitment process by the non-disclosure aforesaid.

[26] The appellant acknowledged that Fipaza had indeed disclosed in her CV the fact of her previous employment with the appellant, but of serious concern was the fact that she had not disclosed, either in

her CV or during her interview that she had been dismissed by the appellant for misconduct. Even if she was not specifically asked about the reason(s) for leaving the appellant's employ in 2006, she had a duty to disclose the cause for leaving. Whilst she was not required to have disclosed every single move in her employment history with the appellant and the detailed reasons for such moves, it was expected of her to have disclosed the fact of her previous employment with the appellant, as well as the fact that her employment had been terminated for misconduct because the appellant required a certain level of integrity and trust from employees in higher positions such as the one that Fipaza had applied for. Since she had chosen not to openly disclose this fact during her interview, it was not unreasonable of the appellant not to want to continue the working relationship with her.

[27] The appellant submitted that it was not required of it to prove that Fipaza had intended to misrepresent facts to the appellant during the interview process. The enquiry was whether Fipaza disclosed to the interviewing panel the fact that her previous employment with the appellant was terminated in 2006 when she was dismissed for misconduct and, if she did not, whether Fipaza was reasonably expected to have disclosed this fact. In the appellant's submission, she was reasonably expected to make the disclosure as it would have had a bearing on the appellant on whether or not to make the offer of employment to her. It was, in the circumstances, reasonable for the appellant to infer that Fipaza had deliberately chosen not to disclose this fact during the interview process as it might have had a negative impact on the appellant's decision whether to offer the position to her.

[28] The appellant also pointed out that Mr Mondi testified during the arbitration proceedings that Fipaza had been employed in a high position of trust and since he (Mondi) would be Fipaza's line manager, he no longer had confidence that he could trust Fipaza to

be honest in dealing with suppliers after it became evident that she had failed to disclose such a material fact during the interview process. Therefore, it was not improper that the appellant did not substantiate or elaborate on its averment that its trust relationship with Fipaza had broken down. Where an employment relationship began on the basis of such a fundamental non-disclosure, it was not possible for any trust to exist between the parties or for continued employment relationship to be tolerable.

[29] It was the appellant's view that the commissioner had properly analysed the evidence and argument presented to him before reaching his reasoned conclusion that Fipaza's dismissal was substantively fair. The award showed that the commissioner applied his mind to the issues and his decision was one which a reasonable decision-maker could reach.

[30] On Fipaza's challenge of the commissioner's decision to grant her only compensation, the Court *a quo* found that it was not irregular for the commissioner to award compensation, even if this was not asked for by Fipaza, because the remedy for procedurally unfair dismissal (which the commissioner had found was the only aspect proven) was limited to compensation and the commissioner had the discretion in this regard in terms of the LRA.[11]

[31] Concerning the question whether the appellant established that its trust relationship with Fipaza had broken down, the learned Judge stated as follows:

> '38. On the evidence, even though Mr Mondi's evidence was not very coherent, there was at least some factual basis for the commissioner to conclude that Eskom would not have had sufficient trust in the applicant to hold the position she was appointed to, once the details of her previous dismissal became known and it was realised she had failed

[11] Section 194.

to disclose this. Consequently, the third mentioned ground of review must also fail.'

[32] On the commissioner's finding that Fipaza's non-disclosure amounted to fraudulent misrepresentation, the Court *a quo* stated that the only way that the non-disclosure could be characterised as a misrepresentation was if there was an obligation on the part of Fipaza to disclose the information concerned. The Court stated that whilst accepting the commissioner's conclusion that Fipaza's decision not to raise the issue of her 2006 dismissal was intentional on her part, she was nonetheless not, in the circumstances of this case, obliged to disclose any further information related thereto. In this regard, the learned Judge stated, in part:

'54. In this instance, the fact of the applicant's dismissal was not within her exclusive knowledge, even though it may have been a material issue. It may not have been within the knowledge of the members of the interview panel, but it can hardly be said they were not in a position to ascertain the circumstances in which the applicant's previous employment with Eskom ended either by simply asking the applicant, or by consulting Eskom's own records. Moreover, in its dealings with the applicant, Eskom gave no indication that it expected more information than it specifically requested.

55. When the commissioner found that the applicant had a duty to disclose her previous dismissal to Eskom, he did not give consideration to the proper legal principles applicable to determining when such an obligation arises in contract. As a result, he gave no consideration to the principle that there is no general duty on a contracting party to tell the other all she knows about anything that may be material, nor to the fact that the applicant's dismissal was not a matter within her exclusive knowledge in this case.

58. In this instance, the commissioner adopted the view that an obligation to disclose a previous dismissal arises where the applicant would not have been employed if that fact was known. He adopted this view without considering if it was also necessary that the information fell within the applicant's exclusive knowledge for the obligation to arise. Consequently the commissioner failed to consider Eskom's own ability to ascertain the reason for the applicant's previous termination from its records. The facts of the matter show Eskom did just that, demonstrating that it was able to ascertain the information without having to rely on the applicant. Applying the correct test to the facts would have led to the unavoidable conclusion that the applicant in this instance was not obliged to disclose her previous dismissal to Eskom. Accordingly, the applicant's non-disclosure of her previous dismissal could not have been a fair ground for her dismissal.'

The appeal

[33] The appellant's grounds of appeal were the following:

33.1 That the Court *a quo* erred in finding that there was no contractual duty on Fipaza to disclose the reasons for her previous termination of employment with the appellant.

33.2 That the Court *a quo* erred in finding that it was entitled to set aside the commissioner's award on the basis that the commissioner applied the incorrect test to determine Fipaza's obligation to disclose the reasons for her previous termination of employment with the appellant.

[34] Mr Boda, for the appellant, submitted that the commissioner's award was not reviewable for either of the following grounds: (1) the appellant had a contractual right to resile from the contract based on its terms; (2) Fipaza had a legal duty to disclose to the appellant the reason for her 2006 dismissal; or (3) the commissioner did not

make a mistake of law in his award and even if he did, it was not a reviewable mistake but may have been a ground of appeal, not a ground of review.

[35] He submitted that the Court *a quo* failed to have regard to the terms of the contract between Fipaza and the appellant. As a point of departure, he pointed out that a pre-employment agreement was concluded between the parties when Fipaza completed and signed the appellant's recruitment form[12] and, in this regard, Counsel referred particularly to the following caveat therein:[13]

> 'Read carefully before signing. I certify the information on this form is true and accurate to the best of my knowledge. I understand that false or incomplete information may constitute grounds for dismissal and an investigation may be made of my background and used relative to my employment status. I also authorize my former employers and any other persons or organizations to provide any information that they may have about me and I release all concerned from any liability in connection herewith.'

[36] Then the contract itself provided, amongst others, the following special condition:

> 'We are entering into this employment agreement with you based on the information you have provided relating, *inter alia*, to your skills, abilities, qualifications and job related personal details. This offer is subject to integrity assessments and a pre-employment medical (if not already concluded).
>
> Should any information prove to be materially incorrect, we reserve the rights to withdraw from this agreement and your services may be summarily terminated.'

[37] Mr Boda contended that, in the circumstances of this case, the specific terms both in the pre-employment agreement and the contract, referred to above, accorded the appellant a contractual

[12] Annexure NPF7, at 253-262 of the indexed papers.
[13] Ibid, at pages 255 and 256.

right to resile from the contract, even if Fipaza did not have a legal duty to disclose the information concerned, which the appellant did not admit. In other words, the appellant was entitled *ex contractu* to conduct investigations in relation to Fipaza's work background and if it was found that there was some materially incorrect information present surrounding her then the appellant reserved a right to withdraw the offer of employment. Indeed, that was what happened in this case, in that once the appellant found out that Fipaza was dismissed for misconduct in 2006 and she did not disclose this fact, the appellant exercised its right in terms of the contract and withdrew the offer.

[38] Therefore, Mr Boda further submitted, since the parties provided in the contract for their rights and responsibilities, the question of whether or not Fipaza had a legal duty to disclose the information concerned does not arise. It was a matter governed by the contract. It was also clear from the award that the commissioner took into account these contractual terms. In particular, counsel referred to the exchange between the commissioner and Fipaza during the arbitration hearing when the commissioner commented about the fact of Fipaza's non-disclosure having implications on her integrity, whose assessment the contract was subject to, after all. He said it was immaterial that the integrity aspect was not referred to in the letter of her dismissal.

[39] Mr Boda conceded that the recruitment form was completed fully by Fipaza and he could not point out anything in the form that was falsely completed by her. However, he submitted that the appellant's focus was on Fipaza's omission to disclose the information about her 2006 dismissal and the appellant's right to conduct investigation into her background.

[40] In further submission, Mr Boda stated that the members of the interviewing panel acted innocently when they did not ask Fipaza any questions about why she left the appellant in 2006. It was so

because they were not there during that time and, therefore, it was incumbent of Fipaza to volunteer the information.

[41] Mr Kirsten, appearing for Fipaza, submitted that the Court *a quo* correctly found that although Fipaza's non-disclosure was intentional it was nevertheless not fraudulent. Therefore, any case law related to fraudulent non-disclosure was not relevant here. Essentially, this was the case of a simple non-disclosure where Fipaza felt that the information in question was not necessary to disclose. She assumed that the appellant made the offer to her despite the appellant's knowledge of her previous dismissal and the reason thereof.

[42] He further submitted that the commissioner did not consider whether there was a contractual duty on Fipaza to disclose the information about her previous employment with the appellant. The commissioner applied a wrong test based on the concept of materiality, instead of a contractual duty.

[43] Mr Kirsten argued that the declaratory statement in the recruitment form[14] did not create a duty on Fipaza to disclose the information. Nor did the reservation clause in the offer in favour of the appellant create such duty.

Analysis and Evaluation

[44] It is trite that the test applicable in determining whether or not an arbitration award should pass muster of judicial review under section 145 of the LRA is that of a constitutional standard of reasonableness, namely the question: 'is the decision made by the commissioner one which a reasonable decision-maker could not reach?'[15] In other words, the decision reached by a CCMA commissioner must fall within the range of decisions that a

[14] At the bottom of pages 255 and 256 of the indexed papers
[15] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (LAC) at para 110.

reasonable decision-maker could make. The Constitutional Court further held, in *Sidumo,* that a commissioner was not given the power to consider afresh what he or she would have done, but simply whether or not the dismissal was fair and that in arriving at the appropriate decision the commissioner was required to consider all relevant circumstances and not to defer to the decision reached by the employer.[16]

[45] It is always said that the distinction between an appeal and a review is what a reviewing court ought primarily to remind itself of when dealing with the review of an arbitration award and this distinction is, in my view, inherently manifest in the *Sidumo* decision. Indeed, it will not be sufficient for the reviewing court only to state in its judgment that this distinction was taken cognisance of, but the court's approach and analysis of issues in a given case must demonstrate that the court indeed gave due recognition of the distinction.

[46] Giving a word of caution when applying the *Sidumo* test this Court (Zondo JP, as he then was), in *Fidelity Cash Management Service v CCMA and Others*,[17] stated:

> 'It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the court would interfere with every decision or arbitration award of the CCMA simply because it, that is the court, would have dealt with the matter differently…

[16] Ibid at para 79.
[17] [2008] 3 BLLR 197 (LAC) at paras 98 and 100.

> 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.'

[47] The appellant's case was that whilst it acknowledged that Fipaza disclosed in her CV the fact of her previous employment with the appellant, she had however not disclosed, either in her CV or during her interview that she had been dismissed by the appellant for misconduct. According to the appellant, even if she was not specifically asked about the reason(s) for her leaving the appellant's employ she had a duty to disclose the cause for leaving in 2006.

[48] It is apparent that the appellant offered the position to Fipaza on the strength, amongst others, of her academic qualifications; her appropriate work experience as outlined in her CV and the recruitment form; and her performance during the interview. It is also not in dispute that the offer was subject to certain conditions, including the following (which is already referred to above):

> 'We are entering into this employment agreement with you based on the information you have provided relating, *inter alia*, to your skills, abilities, qualifications and job related personal details. This offer is subject to integrity assessments and a pre-employment medical (if not already concluded).

> Should any information prove to be materially incorrect, we reserve the right to withdraw from this agreement and your services may be summarily terminated.'

[49] According to the dictionary meaning, a resume or curriculum vitae (the CV) refers to 'a brief account of one's life or career, esp. as required in an application for employment'.[18] In other words, it is generally not a requirement that a CV should provide reasons for leaving previous employment. It is a sort of document whereby a job seeker aims to advertise or market himself or herself concisely and succinctly to potential or prospective employers. In short, it is a personal advertisement for purposes of seeking employment. On this simple definition it would appear that the information provided by Fipaza in her CV was more than adequate for its purpose.

[50] Mr Boda conceded that Fipaza completed the recruitment form fully and correctly. She was only blamed for not disclosing the fact that, in 2006, she was dismissed by the appellant for misconduct. In other words, she was accused of wilful and/or fraudulent misrepresentation. Mr Boda submitted that the contractual terms obliged Fipaza to have disclosed the reason of her 2006 dismissal. However, I do not find the basis of this submission, both in the recruitment form (the so-called pre-employment agreement) and the contract itself. In any event, in *ABSA Bank Ltd v Fouche,*[19] the Supreme Court of Appeal (Conradie JA) stated as follows:[20]

> 'The policy considerations appertaining to the unlawfulness of a failure to speak in a contractual context – a non-disclosure – have been synthesised into a general test for liability. The test takes account of the fact that it is not the norm that one contracting party need tell the other all he knows about anything that may be material (*Speight v Glass and Another* 1961 (1) SA 778 (D) at 781H-783B). That accords with the general rule that where

[18] Shorter Oxford English Dictionary, Vol 1, Oxford University Press, 6th ed (2007) at 585.
[19] 2003 (1) SA 176 (SCA).
[20] Ibid at para 5.

> conduct takes the form of an omission, such conduct is prima facie lawful (*BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) at 46G-H). A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him 'would be mutually recognised by honest men in the circumstances' (*Pretorius and Another v Natal South Sea Investment Trust Ltd (under Judicial Management)* 1965 3 SA 410 (W) at 418E-F).'

[51] It seems to me that, in relation to the conclusion of the recruitment form, what would constitute the grounds of Fipaza's dismissal related only to the truthfulness, completeness and accuracy of the information that she furnished on the form. In terms thereof she, firstly, certified that the information was true and correct and, secondly, declared that she understood that if the said information was 'false or incomplete' it would constitute a ground for her dismissal. The form does not extend the grounds of dismissal to anything beyond the 'false or incomplete information' furnished and certified true and correct by Fipaza. It was common cause that, to the extent that the form required of Fipaza, all the information that she furnished was true, complete and accurate.

[52] Mr Boda also relied on the appellant's right to conduct an investigation post the offer. Indeed, the recruitment form provided the following declaration: '[A]n investigation may be made of my background and used relative to my employment status… I also authorise my former employers and any other persons or organisations to provide any information that they may have about me.' Mr Boda submitted that the employment of Fipaza was to be regulated by what would come out from additional information secured through the contemplated post offer investigation. It seems to me that this is only a self-serving interpretation of the contractual relationship between the parties. The recruitment form is clearly a

standard proforma used generally by the appellant in all recruitment instances. In my view, it is inconceivable to imagine and highly improbable to believe that the notion of 'former employers' being authorised to provide any information (to the appellant) that they might have about Fipaza, was intended by the parties to include the instance where the appellant was itself such former employer, since any information relating to the work history of Fipaza (as former employee) would have been in the appellant's possession. In other words, in such instance the appellant would have been the source of the information and would, therefore, not require to be authorised to provide the same information unto itself. It simply would not make any sense and would amount to absurdity.

[53] The contract (i.e. the accepted offer) also provided a similar caveat as the one in the recruitment form in relation to what would constitute ground(s) of dismissal. The relevant clause in the contract, relied upon by the appellant, also had to do with the information which Fipaza furnished to the appellant. I repeat this clause: '*'We are entering into this agreement with you based on the information you have provided… Should any information prove to be materially incorrect, we reserve the right to withdraw from this agreement and your services may be summarily terminated.'* (Underlined and italicised by me for emphasis). As stated, it was common cause that none of the information provided by Fipaza, either in her CV, in the recruitment form or during the interview, was incomplete, false or, 'proved to be materially incorrect' Instead, it is common cause that the opposite was the true position.

[54] The contract further provided that 'this offer is subject to integrity assessments…' However, the concept of 'integrity assessment' is not defined in the contract and it is clear that the parties are not *ad idem* as to its meaning in the current contractual context. According to the Oxford English Dictionary, the word 'integrity' means 'freedom from moral corruption; innocence, sinlessness (or)

soundness of moral principle; the character of uncorrupted virtue; uprightness, honesty, sincerity.[21] As Fipaza correctly stated in her representations, the reason for her dismissal in 2006 had absolutely nothing to do with dishonest or immoral behaviour on her part. In *Sidumo,* the Constitutional Court observed the significance of dishonesty or lack thereof in a misconduct charge, when it stated, amongst others, that '… the commissioner cannot be faulted for considering the absence of dishonesty a relevant factor in relation to the misconduct[22] simply because '[t]he absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal.'[23] Clearly, the commissioner did not bother to consider this aspect of the matter and in doing so he failed to apply his mind to the evidence presented before him.

[55] Indeed, the fact that Fipaza was dismissed for 'misconduct' did not justify a carte blanche conclusion that her integrity level was not up to standard. It is clear that the circumstances surrounding her failure to report for duty timeously were somewhat unique, although these did not serve to exonerate her from blame, hence she was charged for misconduct and convicted accordingly. However, without more ado, the fact that the misconduct did not involve dishonesty, this was a significant factor which, in my view, would tend to militate against the finding of an irreconcilable breakdown in trust relationship.

[56] In any event, it was clear that the integrity assessment was conducted before the offer of employment was made to her, despite Mr Boda having initially argued that such situation could not have been the case. He sought to persist in his submission that in terms of the contract, the appellant was entitled to conduct integrity assessment after the offer. Indeed, he appeared somewhat surprised when the Court referred him to the evidence of Ms

[21] Shorter Oxford English Dictionary, Vol 1, Oxford University Press, 6th ed (2007) at 1402.
[22] *Sidumo*, supra, at para 116.
[23] Ibid at para 117.

Aphane at the arbitration where, during her re-examination, she made this point clear. The following appears from the arbitration record:[24]

> 'RE EXAMINATION BY NORMAN REKOTSO: Yes. Refilwe (Aphane) the integrity assessment of the Applicant, when was it done? Was it done prior to the offer?
>
> MRS HAPANI (Wrongly spelt for Aphane): The reference checks.
>
> MR REKOTSO: Yes. Anything that deals with integrity assessment, the whole process that includes integrity assessment.
>
> MR HAPANI: It was done before the letter.
>
> MR REKOTSO: Before the offer letter?
>
> MRS HAPANI: Before the offer letter.'

[57] In other words, Fipaza was offered employment after the appellant was satisfied with her integrity assessment report. It is seriously doubtful that the appellant would have proceeded to offer her the position if the appellant was not so satisfied. Therefore, it appears to me that the condition in the contract in relation to the integrity assessment was adequately met to the satisfaction of the appellant.

[58] Be that as it may, the fact that in the letter of dismissal the appellant invited Fipaza to apply for any suitable vacancy in the future was, in my view, a further clear demonstration that, despite her 2006 dismissal, the appellant still regarded her as a person of integrity. Nothing was alleged or suggested – let alone proved - to have tarnished Fipaza's integrity during the period since she left the appellant in 2006 up to when she applied for the new position in 2008. Besides her failure to report back to work by the extended deadline, she was still of the same character and integrity as she was when she left in 2006, save that she was then possessed of

[24] Arbitration record, at 83-84 of the indexed papers.

better academic qualifications, experience and skills. These were characteristics and qualities in her favour, but which would benefit the appellant in its business operations.

[59] I am satisfied, accordingly, that the contemplated ground(s) of dismissal or withdrawal of the offer, as stipulated in the contract and the recruitment form, pertained either to any false or inaccurate information which Fipaza would have wilfully provided to the appellant by way of a positive act on her part or a failure on her part to provide true and accurate information as reasonably required of her in terms of the contract or the law, thus constituting a material non-disclosure justifying the appellant to resile from the contract. However, in my view, on the facts of this case, there was no legal or contractual duty on Fipaza to have disclosed the circumstances under which she left the employ of the appellant in 2006, either in her CV, in the recruitment form or during her interview.

[60] The commissioner's remark that the appellant would not have employed Fipaza had the fact been known that she was previously dismissed for an alleged act of misconduct cannot strictly be factually correct because this fact was all the time within the knowledge of the appellant. It was common cause that the work history records in possession of the appellant bore this information. It was only less than two years that Fipaza had left the employ of the appellant and further she had reflected both in her CV and in the recruitment form that the appellant was her previous employer. It was therefore unreasonable, ludicrous and disingenuous – to say the least - to claim that the appellant did not have knowledge of the fact that Fipaza was previously employed by it and that she was dismissed in 2006 for misconduct relating to her failure to return to work timeously after her sabbatical leave abroad.

[61] In *Local Road Transportation Board and Another v Durban City Council and Another*,[25] the Appellate Division (now the Supreme Court of Appeal) (Holmes JA) stated:[26]

> 'A mistake of law *per se* is not an irregularity but its consequences amount to a gross irregularity where a judicial officer, although perfectly well-intentioned and bona fide, does not direct his mind to the issue before him and so prevents the aggrieved party from having his case fully and fairly determined.'

[62] The commissioner's finding that Fipaza's non-disclosure of her 2006 dismissal amounted to a wilful misrepresentation suggestive of fraud is, in my view, a further mistake of law on the part of the commissioner. It ought to be recalled that Fipaza's previous employer was the appellant itself and not the members of the interviewing panel. Therefore, the fact that the interviewing panel, either through its sheer ignorance, incompetence or negligence, failed to question Fipaza about the reason why she left the appellant's employ in 2006, despite Fipaza having alluded to this issue in her CV and in the recruitment form, does not in my view, legally entitle the appellant to the defence of absence of knowledge about the information concerned. As the learned Judge *a quo* correctly found, the knowledge about this information was not within Fipaza's exclusive knowledge. In fact, the information was sourced in the appellant's personnel records to which the appellant had free and priority access. Further, the fact that the interviewing panel were not part of the relevant management or administration at the time (in 2006) and were therefore innocent role players in this saga, did not, in my view, serve to relieve the appellant from its duty to check its own records. Therefore, Fipaza's failure or omission to disclose the information in question did not, in the circumstances, amount to any misrepresentation at all, let alone a fraudulent one. It is apparent that the commissioner's contrary finding in this regard

[25] 1965 (1) SA 586 (A).
[26] Ibid at 598A.

was based on a material mistake of law and constituted a gross irregularity. The commissioner's wrong application of the law, in this instance, brought about a wrong decision in his award, which is accordingly rendered reviewable.

[63] It also seems to me that the facts of the appellant (1) being in possession of the information related to Fipaza's previous employment and dismissal in its archives and (2) inviting her to apply for a suitable vacancy in the future, served to demonstrate that the appellant did not regard the information concerned as of such high material importance as it now professes to be the case. Of course, it is so because her integrity was clearly not tarnished in the eyes of the appellant as at the time she left its employ, notwithstanding her dismissal and the reason thereof. There seems to be no doubt that if the appellant treated the matter so seriously and adversely towards Fipaza as the appellant now wants us to believe, the appellant would never, in the first place, have invited her to apply for a suitable vacancy with it again. Then, in any event, if she still applied, with or without invitation, the appellant would have ensured, based on the information she furnished in her CV and in the recruitment form about her previous employment with the appellant, that she was not offered the position.

[64] In my conclusion, Fipaza sufficiently complied with what was reasonably expected or required of her to do in terms of the contract and the law. She owed no further duty, either *ex contractu* or *ex lege*, to disclose to the interviewing panel that she was dismissed by the appellant for misconduct in 2006 because, as already stated, this information was not within her exclusive knowledge, but also within the knowledge of the appellant. To sum up, her 'failure' to mention to the appellant (as represented by the interviewing panel) anything about her 2006 dismissal did not, strictly speaking, amount to a material non-disclosure, as alleged by the appellant, but rather to a simple and immaterial omission on her

part to remind the appellant of that fact, which, after all, was not necessary or compulsory of her to do. The word 'disclose' means 'make secret or new information known…'[27] As I have alluded to earlier, in this instance there was simply no secret or new information pertinent to Fipaza's previous employment with the appellant which was to the appellant unknown and which, therefore, warranted Fipaza to disclose.

[65] Accordingly, I agree with the learned Judge's conclusion that 'the commissioner failed to consider Eskom's own ability to ascertain the reason for the applicant's previous termination from its records' and that had the commissioner considered this part of the enquiry it would have led to the unavoidable conclusion that Fipaza was, indeed, not obliged in law to 'disclose' her previous dismissal from the appellant's employ. On this basis, it cannot, in my view, be said that the so-called non-disclosure amounted to any form of misrepresentation on the part of Fipaza. The reason for Fipaza's dismissal by the appellant on 4 June 2008 was, therefore, not a fair reason.

[66] The primary statutory remedy for a substantively unfair dismissal is reinstatement of the dismissed employee;[28] that is, 'it is aimed at placing an employee in the position he or she would have been but for the unfair dismissal.'[29] However, an order of reinstatement is not appropriate where any of the conditions referred to in section 193(2)(a), (b) or (c) of the LRA are present.[30] The enquiry that determines the issue of whether or not reinstatement should be ordered has as its focal point the underlying notion of fairness between both the employer and the employee which 'ought to be

[27] Compact Oxford English Dictionary for Students, Oxford University Press, 3rd ed (2005), at 280-281.
[28] See section 193(1)(a) of the LRA.
[29] *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2008] 29 ILJ 2507; Also reported as [2008] 12 BLLR 1129 (CC) at para 36.
[30] *Mediterranean Textile Mills v SACTWU and Others* [2012] 2 BLLR 142 (LAC) at para 28.

assessed objectively on the facts of each case bearing in mind that the core value of the LRA is security of employment.'[31] Therefore, there should be a properly conducted enquiry at the arbitration hearing which seeks to determine whether or not the trust relationship between the parties has, indeed, been destroyed beyond repair.[32]

[67] It seems to me that in the present instance no proper enquiry was conducted to determine whether or not the trust relationship with Eskom had been irretrievably destroyed. The only glimpse of evidence pertaining to the aspect of trust relationship is that of Mr Mondi and it appears in the arbitration record during his evidence-in-chief as follows:[33]

> 'MR REKOTSO: How important is trust and confidence in that – in the nature of the job that the Applicant was supposed to do?
>
> MR MONDI: It is crucial. It is a crucial aspect.
>
> MR REKOTSO: Now that you know this information that the Applicant was dismissed, do you have trust and confidence in her?
>
> MR MONDI: No.
>
> MR REKOTSO: Do you think the element of trust and confidence between you as a Manager and her as an Applicant can be restored, after you have discovered this information that she was dismissed?
>
> MR MONDI: No.'

[68] In my view, the issue of the appropriate remedy was not properly canvassed during the arbitration proceedings. There is not enough information on the record to assist in the determination of this

[31] *Equity Aviation,* above, at para 39. See also *Billiton Aluminium SA Ltd v Khanyile and Others* 2010 (5) BCLR 422 (CC) at paras 26-27.
[32] *Edcon Ltd v Pillemer NO and Others* [2010] 1 BLLR 1 (SCA) at para 23, See also *Mediterranean Textiles,* above*,* at para 29.
[33] Arbitration record, at 91 of the indexed papers.

important aspect of the case. Both parties ought to be accorded the opportunity to present submissions thereon. The Court *a quo* was therefore not wrong, in exercising its discretion, to remit the matter to the CCMA for the determination of this issue.

[69] For these reasons, the appeal must fail. However, given the fact that the matter was remitted to the CCMA for determination of the appropriate remedy, in which case there is the reasonable possibility that the parties may still reconcile and restore their cordial working relationship, it seems to me just, reasonable and fair that there should be no order for costs to be granted against the appellant both in the Court *a quo* and in the appeal.

[70] In the result, the following order is made:

1. The appeal is dismissed, save that the order of the Court *a quo* granting costs against the appellant is set aside and substituted with the order that there shall be no order as to costs.

2. There is no order as to costs in the appeal.

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NDLOVU, JA

Judge of the Labour Appeal Court

Zondi AJA and Molemela AJA concur in the judgment of Ndlovu JA.

Appearances:

For the appellant:	Advocate FA Boda
Instructed by:	Deneys Reitz, Sandton.
For the respondent:	Advocate PH Kirsten
Instructed by:	Van der Merwe Du Toit Inc., Pretoria