

Anti-vaxxer - in legal tussle with Gold Rush Group to keep her job - sets her sights on review

 By [Katja Hamilton](#)

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A Commission for Conciliation, Mediation and Arbitration (CCMA) meeting recently culminated in favour of a company firing a staff member because she refused to be vaccinated.



Source: [Pixabay](#)

The award was made on January 21.

The landmark meeting was lauded by the CCMA as "fair" and was based on the premise that the employee, Theresa Mulderij, did not create a safe working environment for her workmates.

Mulderij started work as a business-related and training officer for the Gold Rush Group in 2018.

CCMA Commissioner, Lungile Matshka said: "In my own sense of fairness, I can only conclude that the applicant is permanently incapacitated on the basis of her decision to not get vaccinated and, by implication, refusing to participate in the creation of a safe working environment."

It is purported that Mulderij represented herself.

The Gold Rush Group said Mulderij had been given the opportunity to apply for exemption.

Gold Rush's policy of mandatory vaccinations began in 2021

The Gold Rush executive said they initiated their mandatory vaccination policy in 2021 with the aim of protecting their workers. They were consulted over three months, as were their unions.

Mulderij, who represented herself, said she could not be moved to another position in the company because her job entailed interaction with clients and co-workers.

She argued it was her Constitutional right to refuse the Covid-19 vaccination.

Reviewing the narrative

Lawyer Schalk van der Merwe, who has been following Mulderij's case, [said](#) the award given by the CCMA was not setting a precedent because Mulderij's meeting at the CCMA was an arbitration, and that only once the case is reviewed by a Labour Court could such a claim be made.

He said taking this case to the Labour Court would follow due process because "hundreds of cases are reviewed each year", and that this would be the next step for Mulderij to take if she so chose.

He said the award was "strange". "The Commissioner came to the conclusion that Mulderij is permanently incapacitated when she has no illness or did not fail in her duties as an employee," van der Merwe said.

"I don't think he understands the basics of dismissal law related to incapacity. If there is not a doctor's report - and usually there's a second opinion (and usually a report by the District Surgeon that a person is permanently incapacitated to perform their duties) - the Commissioner cannot decide that [Mulderij is incapacitated] because he is not an expert of the medical profession," Schalk said.

He respectfully disagreed with the Commissioner's findings.

Redefining physical incapacity

Van der Merwe said the Commissioner did not understand what the term "physically incapacitated" means. He said the "commissioner speaks of one hearing that was held, where the employee was found to be permanently incapacitated. You don't have hearings in capacity cases; it's a process. where an investigation is lodged, parameters are set for the worker and time is given for the worker to respond. A whole process is followed in incapacity," he explained.



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"A hearing also [allows us to] envisage that we're sitting with a disciplinary matter. You can never be ill disciplined and in the same process also be incapacitated, so you can't have a disciplinary hearing or hearing, and then find the worker incapacitated. They're two different processes.

"The commissioner did not understand what process was followed by the employer for dismissal," Schalk said.

"He erred grossly in his decision."

Setting the record straight

Schalk cautioned journalists and the public against saying a precedent had been set at this point in Mulderij's case. It would mean employers "can now think they can go around unbridled in dismissing their employees for physical incapacity because they're not vaccinated". He said promoting this narrative was highly irresponsible, because people would also believe medical exemptions are not successful, which is not the case."

He said he received many outcomes of exemptions yesterday.

Schalk made a public offer on his Facebook page to represent Mulderij.

"We'll take this to review and we can say with great certainty you will most probably win that case," he said.

"I will not charge one cent in a case like this, if you bring it to me," he added. "I'm not here to make money out of this; I'm here to serve my people."

Taking the next step

Mulderij has since accepted van der Merwe's offer. He said he would issue a press release which would be disseminated to the public next week.

He urged those interested in this case to go to [Schedule 8 of the Labour Relations Act](#), and to read the sections dealing with incapacity. He also recommended those interested read [192 Sub Section 2 of the Labour Relations Act](#) to see what the employer in Mulderij's case was supposed to have used as their reference.

"We'll make sure justice is served in this instance," van der Merwe said.

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ABOUT KATJA HAMILTON

Katja is the Finance, Property and Healthcare Editor at Bizcommunity.

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