IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

Case no: C471/2008

In the matter between:

ALFRED MANUEL Applicant

and

B. JORDAAN N.O. First Respondent

TRANSNET BARGAINING COUNCIL Second Respondent

TRANSNET FREIGHT RAIL Third Respondent

Date of hearing : 26 May 2011

Date of judgment : 07 June 2011

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JUDGMENT

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STEENKAMP J

*Introduction*

1. The applicant was dismissed for misconduct by the third respondent, Transnet Freight Rail. He referred an unfair dismissal dispute to the Transnet Bargaining Council (the second respondent). The arbitrator (Prof Barney Jordaan, the first respondent) upheld the dismissal.

2. Applicant has applied for the review, correcting and/or setting aside of the arbitration award dated 14 May 2008.

3. Applicant filed his review application on 15 July 2008, two weeks outside the time period prescribed in Section 145 of the Labour Relations Act, 1995 ("the LRA").

4. On 14 April 2009 Applicant filed the record of the arbitration proceedings in terms of Rule 7A (6) of the Labour Court Rules together with Applicant's supplementary founding affidavit. The Bargaining Council had filed the record on 25 August 2008. In terms of rule 7A(8), the applicant should have delivered his supplementary affidavit within 10 days after the registrar had made the record available. The supplementary affidavit was thus delivered some seven months late.

5. On 24 April 2009 Third Respondent filed its answering affidavit.

6. Applicant did not file a replying affidavit.

7. At the hearing of this application, the parties agreed that, insofar as I need to consider the applicant's prospects of success in the review application in order to consider his application for condonation, it would be sensible to hear full argument on the merits of the review application. Should I find that the applicant

is entitled to the relief sought on the merits, it would quite obviously mean that he had good prospects of success; and conversely, should I find that the application falls to be dismissed on the merits, his absence of prospects of success, viewed retrospectively, must be taken into account in considering condonation.

*Condonation*

8. Applicant's application is brought in terms of Section 158 (1) (g) of the LRA as read with Section 145 of the LRA.

9. Section 158 (1) (g) of the LRA does not provide a time period for the filing of review papers. The Labour Appeal Court has adopted the common-law rule that a review application must be brought in a reasonable time.[1]

10. It has been accepted – and the parties agreed -- that the six week period stipulated for bringing a review application in terms of Section 145 of the LRA should serve as a benchmark for what constituteS a ³reasonable periOd" in terms of Section 158  1) (g) of the LRA.[2]



[1] *Fidelity Guards Holdings (Pty) Ltd v Epstein NO and Others* [2000] 12 BLLR 1389 (LAC) at para 15 and *JDG Trading (Pty) t/a Bradlows Furnishers v Laka NO and Others* [2001] 3 BLLR 294 (LAC) at para 15-20

[2] *Lutchman v Pep Stores and Another* [2004] 4 BLLR 374 (LC) and *Rustenberg Platinum Mines Ltd v Monnapula and Others* [2003] BLLR 909 (LC) at para 34

11. Qpphicant’s aqpLicatim. for condonat)on$nor thm late nili.g on the review application must be assessed in iCco2dance with the gmnerally accapted rrincipLes for the gr!.tin' of sondonation,[2013] oaMel}:

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M11.3 apPlHca.t’s prospects in succeeding in obtaining the relief sought against Respondents; and

11.3 apPlHca.t’s prospects in succeeding in obtaining the relief sought against Respondents; and

11.4 Any other relevant factors, including the importance of the matter and prejudice to Respondents.

12. In terms of Rule 12 of the Labour Court Rules, condonation of non-compliance with any period prescribed by those rules may be granted on good cause shown.

13. In determining good cause, the Labour Appeal Court has held that the principles of good cause are to be interpreted as follows:

[3] *Melane v Santam Insurance Company Ltd* 1962 (4) SA 531 (A) at 532C-F

> "These facts are inter-related. They are not individually decisive… A slight delay with a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a longer delay. There is a further principle which is applied and that is without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused (cf *Chetty v Law Society, Transvaal* 1985 (2) 756 (A) at 765 A – C; *National Union of Mineworkers and Others v Western Holdings Gold Mine* (1994) 15 ILJ 610 (LAC) at 613).."[4]

14. Applicant's explanation for the late filing of his review application was that he sought to procure the services of his attorneys of record to assist him with this application and that he struggled to make the necessary financial arrangements to secure their services. He provides no further details as to when he instructed those at|orneys or ghat steps he@had!taken to turSue T e rev)ew application /n his owN nr through iis trade union, the$Souti Afzican Railways and$Harbours Workmrs nion (SARHWW)- of which he was the dePuty branch ch%irMan. NeithEr did`his attorney depo e0to a confirmato2y!ov suq5lementary affifAvit.

[4] *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 LAC at para 10

15. Third Resp/ndent /ppoSed Appli'ant’S applicatioo for ãoîdonation for the late filyng of his review applica4ion on the basis thatz

15.1)In the conte|t of the six week Period(prdsg2ibed in Sectaon 145 of the LRA being conwidered a “reasonable perIodô, a two week delAy in launching0a review applicatIon is substantial;

15.3 Applicant has not filEd a confirmatory affidavit from his attorney{ of record in support of his reasons for not complying with the presCribed time period (ine. A “reasonAble(peri/d”); and

1u.s Applic`nt has not explained why he dit Not file his review applIcation personally or with the assistance`of dhe SoutH African Railway Harboqr Union((“SArWHU”), of which he was the Deputy Chairperson of the Cape Town branch, prior to uhe ezpiry of the six weak0period.

16.

r *Coetzee*, for the applicant, submitted that two wmuks hs not a substanukal period. In the context of the period of six"weeos `ccepted as a “recsonacle period”`in whmch |o delivdr the rewiew application, I"do not afree. Tim de'ree

ob la4enews!is /ne thisd of the permod in which the apq|ication should jaVe been delivered. ThaT is a substantial dtlay.

17. R}le 7@(00) of the`Äabour C urt Rules(pro|ides!thau an`aq0licaot in review proceedings may file a replying affidavit to any issues raised in an answering affidavit that require explanation. Applicant has not filed a replying affidavit to address the shortcomings in his condonation application. I agree with Mr Cassells, for the third respondent, that his failure to do so can only be interpreted as an admission that Applicant has no explanation for not taking the necessary steps to ensure that his review application was filed within a reasonable period, alternatively, that as Applicant has refused the invitation to attach an affidavit from his attorneys of record confirming the correctness of the version relied upon in his founding affidavit (which Third Respondent has expressly challenged), the version relied upon by Applicant to explain his delay cannot be substantiated.

18. Despite the poor explanation for the delay, I will take into account the applicant's prospects of success. I do so by considering the merits of his application more fully hereunder.

19. The third respondent pointed out that, neither in Applicant's founding affidavit nor in his supplementary affidavit has Applicant linked any of his criticisms of the arbitration award that is the subject matter of his review

application to the grounds of review set out in Section 145 of the LRA or the Constitutional standard of reasonableness formulated in *Sidumo and Others v Rustenburg Platinum Mine Ltd and Others*,[5]. At the hearing, though, Mr *Coetzee* explained that the application is focused on the sanction confirmed by the arbitrator; and that, in the applicant's submission, the sanction of dismissal was so unreasonable that no reasonable arbitrator would have considered it fair.

20. Despite the excessive delay in delivering the supplementary founding affidavit and amended notice of motion once the Bargaining Council had delivered the record to the registrar, the third respondent did not oppose the application for the late delivery of those pleadings. The reason is that the third respondent accepted the applicant's explanation that there was a problem with transcribing the tapes, which had not been properly marked; and that the applicant had difficulty in obtaining funding to pay the transcription service and his attorneys. Despite my misgivings about extensive delays that remain unexplained, I have decided to grant the applicant condonation for this delay in the proceedings, given the generous stance of the third respondent.

*Legal basis for applicant's review application*

[5] (2007) 28 *ILJ* 2405 (CC)

21. As the arbitration was conducted under the auspices of the Bargaining Council and not the CCMA, the provisions of Section 158 (1) (g) of the LRA apply:

> "The Labour Court may, subject to Section 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law."

22. The grounds of review set out in section 145 are equally applicable to review applications brought under section 158 (1) (g) of the LRA. In terms of section 145 (2) of the LRA a defect in any arbitration proceedings that constitutes grounds for review means:

> "(a) That the commissioner-
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> (i) committed misconduct in relation to duties of the commissioner as an arbitrator; or
>
> (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
>
> (iii) exceeded the commissioner's powers; or
>
> (b) That an award has been improperly obtained."

23. The grounds of review set out in Section 145 (2) are suffused by the constitutional standard of reasonableness in terms of the Constitutional Court

judgment in *Sidumo and Another v Rustenberg Platinum Mines Ltd and Others*. The standard of reasonableness required by an arbitrator is whether the decision reached by the arbitrator was one that a reasonable decision-maker could not reach. The standard of reasonableness developed by the Constitutional Court is not an additional ground of review but rather the required standard by which the grounds set out in Section 145 of the LRA are to be interpreted. Relying on the reasonableness standard as set out in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*,[6] the Constitutional Court [per Navsa AJ] found in the *Sidumo* judgment that:

> "That scrutiny of a decision based on reasonableness introduced a substantive ingredient into review proceedings. In judging a decision for reasonableness, it is often impossible to separate the merits from scrutiny. However, the distinction between appeal and reviews continue to be significant."[7]

24. Again, in the *Sidumo* judgment the court held per Navsa AJ that:

> "(T)he better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: Is the decision reached by the commissioner one that a reasonable decision maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices but also to the right to

[6] 2004 (4) SA 490 (CC)
[7] Id at para 108

> administrative action which is lawful, reasonable and procedurally fair."[8]

25. In his judgment in *Sidumo***,** Ngcobo J (as he then was) interpreted the standard of reasonableness as follows:

> "The ultimate question in determining whether to interfere with a commissioner's award in an arbitral proceedings is whether the conduct of the commissioner falls into any of the grounds of review set forth in s 145 (2) of the LRA, namely, misconduct in relation to his or her duties, gross irregularity in the conduct of the arbitration proceedings, or acting in excess of his or her powers. These grounds of review must be interpreted in the light of the constitutional constraints referred to above and the primary objectives of the LRA. This is the interpretive injunction contained both in s 39 (2) of the Constitution and in the LRA. (footnote omitted)
>
> "Thus construed, the commissioners are required to act fairly in the determination of unfair dismissal disputes. If a commissioner fails to do so, he or she commits a gross irregularity in the conduct of the arbitration proceedings and the ensuing arbitral award falls to be reviewed and set aside. Similarly, if a commissioner makes an award which is inconsistent with his or her obligations under the LRA, he or she acts in excess of the powers conferred by the LRA and the award falls to be reviewed and set aside."[9]

[8] Id at para 110
[9] Id at paras 164 and 165

26. Ngcobo J formulated the test to be applied by commissioners conducting arbitration proceedings under the LRA as follows:

> "There can no question that the ultimate test that a commissioner must apply is one of fairness."[10]

27. Ngcobo J confirmed that "(t)he general powers of review of the Labour Court under s 158 (1) (g) are therefore subject to the provisions of s 145 (2) which prescribe grounds upon which arbitral awards of CCMA commissioners may be reviewed".[11]

28. The deficiencies in Applicant's application for review, to which I alluded earlier, are highlighted by the principles espoused by Ngcobo J:

> "The grounds of review in s 145 (2) (a) provide a cause of action for the review of commissioners' awards by the Labour Court. Whether an arbitral award should be interfered with under the provisions of s 145 (2) (a) will depend therefore on whether the conduct of the commissioner complained of falls under one or more of the grounds of review set forth in s 145 (2) (a). It is therefore for a party alleging defect in the arbitration proceedings to show that the facts alleged constitute gross irregularity or misconduct or how that the power conferred has been exceeded as the case may be. This will require litigants to specify the ground of review relied upon

[10] Id at para 168
[11] Id at para 189

> and the facts alleged as constituting the ground of review relied upon." [12]

*The arbitration award*

29. Applicant, a coach cleaner supervisor, was dismissed by Third Respondent on 11 March 2008 after being found guilty of seven offences in a disciplinary enquiry. These were:

29.1 Fraud, arising from Manuel signing an attendance register and receiving payment for days when he did not work.

29.2 Gross misconduct, in that Manuel indicated that he was "absent with authority" without providing the documentation authorising his absence.

29.3 Fraud, in that he marked himself present on the attendance register when he was off sick.

29.4 – 29.6: Gross misconduct arising from various periods of absence from work.

29.7 Serious misconduct in undermining the authority of a supervisor.

30. At arbitration, Third Respondent withdrew charge seven.

[12] Id at para 254

31. In his arbitration award, the arbitrator found that Third Respondent had proved charge 1, charge 4, charge 5 and charge 6.

32. In respect of charge 2, the arbitrator found that a technical rather than substantive form of misconduct had been proved, if it was misconduct at all. The arbitrator found that the infraction was not deserving of a formal sanction.

33. In respect of charge 3 the arbitrator found Applicant not guilty of the charge; but added that, to the extent that Applicant was guilty of the infraction, this was in all probability a mistake justifying at most a written warning.

34. In assessing the appropriateness of the sanction to be imposed for the charges that the arbitrator found were proven against Applicant, he found that Applicant's dismissal was substantively and procedurally fair. In doing so, he concluded that Applicant as a supervisor occupied a position of trust and that in that capacity and in his role as a trade union representative he could be expected to set an example. The arbitrator's finding was that he was in no doubt that Applicant was aware of the fact that he had been overpaid. However, instead of simply paying back what he was due, Applicant attempted to cover it up, compounding his error. For that reason, the arbitrator found that in respect of charge 1 dismissal was substantively fair.

35. In respect of charges 4 to 6 the arbitrator concluded that Applicant's absences were serious not only because it was disruptive for Third Respondent but also because it was repeated and quite wilful. For that reason, he found Applicant's dismissal on those charges substantively fair.

*Applicant's criticism of the arbitration award*

36. At the hearing of the application, Mr *Coetzee*, for the applicant, confined his argument to the question whether the arbitrator's finding on sanction was reasonable. In particular, he attacked the award on the basis that the arbitrator did not consider mitigating circumstances such as the applicant's length of service (20 years) and clean disciplinary record. However, he did not abandon the criticisms on the merits of the award set out in the pleadings altogether. I will therefore consider the arbitrator's findings with respect to those charges.

37. In respect of charge 1, Applicant criticised the arbitration award in his pleadings on these grounds:

37.1 He denied that he acted fraudulently;

37.2 The arbitrator ignored his evidence that he completed two separate variation forms to the effect that he would not be working on 1 and 2

December 2007 and 15 December 2007, which Applicant transmitted to Johannesburg;

37.3 The arbitrator found that Applicant's failure to provide corroborating evidence of the person to whom Applicant reported in Johannesburg to testify on his behalf was crucial despite the fact that Third Respondent did not and could not offer a contrary version in relation to Applicant's evidence that he had transmitted the variation forms in relation to the relevant period;

37.4 The arbitrator failed to take into account Applicant's evidence that he worked on 17 December 2007 but that he was not paid for that day. Instead, the arbitrator placed an undue emphasis on the fact that Third Respondent had not recovered the amounts that were paid in relation to 1, 2 and 15 December 2008;

37.5 The arbitrator's finding that Applicant "created" a document "after the fact", which "alone, in my view, constitutes a gross form of dishonesty" was speculative and not consistent with the record and the arbitrator's view that such (alleged) conduct constitutes a gross form of dishonesty and/or the facts that sustained it, bore no relation to the charges that were levelled against Applicant at the arbitration proceedings.

38. On a close reading of the award and the transcript of the record, these objections are not sustainable. I am satisfied that the arbitrator's arbitration award was one that a reasonable decision maker could make on the evidence presented at arbitration.

*Evidence in respect of Charge 1*

39. On a perusal of the arbitration award it is apparent that the arbitrator evaluated the evidence presented at the arbitration by Third Respondent's witnesses, Messrs McLeod (Operations Manager); Wakefield (Senior Administrative Official); and Benefeld (Shosholoza Mail, Western Region), as well as the evidence presented by the applicant regarding the procedures to be followed in recording days worked and the subsequent submission of variation forms in circumstances where those hours were not worked for whatever reasons.

40. The background evidence presented by Third Respondent's witnesses at arbitration in respect of charge 1 was as follows:

40.1 Third Respondent's employees complete an attendance register in advance for the period from the 16th of the month to the 15th of the following month setting out the days on which they expect to work overtime and Sunday time. As a supervisor, Applicant completed his own attendance register and signed that the information contained was a true statement of actual time worked or intended to be worked.

40.2 Actual time worked is recorded on a separate document which is countersigned by a fellow supervisor. That document is referred to as the sign-on document.

40.3 The purpose of recording in advance what overtime and Sunday work is to be performed is for Third Respondent to confirm that its employees do not exceed the agreed overtime and Sunday time.

40.4 If the overtime and/or Sunday time recorded by the employee on the attendance register is not worked, it is incumbent upon the employee to advise Third Respondent thereof by completing an amendment form indicating the time not worked.

40.5 Any payment of overtime and/or Sunday time reflected on the employee's payslip that is not worked is then deducted from the employee's next month's salary and is reflected on that payslip.

40.6 All amendments to estimated overtime and/or Sunday time are recorded on the List Employee Remuneration Info.

40.7 All amendment forms are ordinarily sent by facsimile to the local senior administration official, Wakefield, who then prepares a schedule of overtime and Sunday time due to employees in that region.

41. Although Applicant did not work overtime or Sunday time on 1 December 2007, 2 December 2007 and 15 December 2007, Third Respondent's head office did not receive any amendment form from Applicant recording that fact. Neither did Applicant submit amendment forms for those dates to the local senior administrative official, Wakefield, as was ordinarily done.

42. Applicant recorded in his attendance register for the period 16 November 2007 to 15 December 2007 that he would work the following overtime and Sunday time:

42.1 1 December 2007 from 07h00-12h00 (five hours);

42.2 2 December 2007 from 07h00-12h00 (five hours); and

42.3 15 December 2007 from 07h00-12h00 and 12h30-15h30 (8 hours).

43. Applicant was paid overtime or Sunday time for 1 December 2007, 2 December 2007 and 15 December 2007.

44. It is expected of Third Respondent's employees that upon receipt of their payslips a reconciliation of the overtime and Sunday time paid will be done to

ensure that no overpayments have been made in that regard. The correct procedure would then be to submit an amendment form to ensure that the overpayment is deducted from the employee's next month's salary.

45. Applicant was issued with a notification to attend a disciplinary enquiry on 4 March 2008, *inter alia* to address the allegation that he had committed fraud and that on 30 November 2007 he had signed the attendance register recording that he intended to work on 1, 2 and 15 December 2007 for which he subsequently received payment despite the sign-on register indicating that he was off duty on those dates.

46. At the disciplinary enquiry Applicant submitted a bundle of ten documents. He produced a facsimile transmission slip reflecting that ten documents had been faxed to Third Responeent's head ofæice on 5 December 2007. Thå discipminary enquirù commenced oo 7`March 200< and was finalised on 11 March 7008. The first`concern raised a4 the disciplinary enquiry regarding the bu.dle of documents submitted by Applicant was that, althougi the facsimile transmissaon smip indicated that ten documents had0been tvansmittel to Third Respondent's head office, the bundle ?f documents submitted by ApplicAnt con{isted of 91 docuMents. App|icant(was specifacalmy challenged as to whether the eleventh document was not the amendment form contained in the Records Bundle on page 49. Although Applicant contested that submission, he was not able to answer that question. A second concern raised at the

disciplinary enquiry was that Applicant's bundle of documents did not include an amendment form for 15 December 2007. At the conclusion of the first day's proceedings on 7 March 2007, Applicant took his bundles of documents back from the chairperson. On Tuesday 11 March 2007, Applicant produced a further facsimile transmission slip for a further page. Applicant also submitted three additional documents. The second facsimile transmission slip was presented by Applicant at the disciplinary enquiry to reconcile the fact that his bundle consisted of eleven documents and that the first facsimile transmission slip reflected that only ten documents were transmitted.

47. During the disciplinary enquiry Applicant was cross examined as to the fact that no amendment form had been submitted in respect of 15 December 2007 and Applicant's response was that he did not know what had happened relating to 15 December 2007.

48. None of the evidence as set out above presented by Benefeld at arbitration relating to the events of the disciplinary enquiry was challenged by Applicant in the arbitration proceedings.

49. At arbitration, Benefeld was referred to an amendment form[13]. Benefeld stated categorically that that document had not been presented at the disciplinary enquiry. It was put to him under cross examination that that document was the

[13] Contained at page 70 of the Records Bundle.

additional document that was transmitted by facsimile to head office on 5 December 2007. Benefeld denied that this was correct. Benefeld categorically stated that any reliance on that document as being the additional document was a lie as it post dated the facsimile sent on 5 December 2007.

50. The same version, which was not relied upon by Applicant at his disciplinary enquiry, was put to Third Respondent's McLeod, namely that the document in question (page 70 in the Records Bundle) was the additional document that was transmitted by facsimile on 5 December 2007.

51. Both Third Respondent's witnesses, McLeod and Benefeld, disputed the authenticity of the document (page 70 of the Records Bundle).

52. Applicant's version relied upon at arbitration regarding the submission of the amendment form for 15 December 2007 differed materially to his version submitted at the disciplinary enquiry.

53. Benefeld also testified that Applicant's conduct would constitute fraud if the amendment was not sent and if the overpayment of salary was not corrected, knowing that the overpayment had been made.

54. In his evidence, Applicant testified that he forwarded the amendment forms to Third Respondent's head office in Johannesburg to one Sello Pokwana,

also known as Reggie. Applicant failed to furnish any explanation for not calling Pokwana, who was a material witness to Applicant's case. Pokwana was a material witness as Third Respondent's version was that head office had no record of receiving Applicant's amendment forms, which is supported by Third Respondent's List Employee Remuneration Info and Applicant's payslips. To lend any credence to Applicant's version, it was therefore crucial that Pokwana give evidence on behalf of Applicant.

55. On Applicant's own version he retained the originals of the documents that he allegedly sent by facsimile to Third Respondent's head office on 5 December 2007 as he stapled the bundle together and filed it. At arbitration Applicant only produced a copy of the document in question, contained on page 70 of the Records Bundle.

56. As Applicant relied upon the document (at page 70) and Third Respondent's witnesses challenged the authenticity of that document, Applicant was required to produce the original of that document at arbitration. Applicant was unable to do so.

57. Initially in explaining why he did not have the original, Applicant stated that he found the copy produced at arbitration in one of the bundles in his office. This was in response to a question by the arbitrator. Thereafter in response to a question from Third Respondent's representative, Applicant confirmed that he

had made the copy from the original and that he had taken the original document to the union's office and had not collected it from the union's office in preparation for the arbitration. In the context of the explanation furnished by Applicant's representative to the arbitrator during cross examination of Third Respondent's witness Benefeld, Applicant had only collected the document from his office on the Tuesday prior to the arbitration (i.e. 4 March 2008). Applicant made no tender to obtain the original document from the union when challenged regarding the whereabouts of the original.

58. Applicant was challenged under cross examination whether he admitted the similarities between the amendment form allegedly submitted for 1 and 2 December 2007 and the alleged amendment form for 15 December 2007. Inexplicably, even though the similarity of the documents is clearly apparent to the naked eye, Applicant denied that the"documents were sioilar.

59. Specifically, it was put to`Applicant under cross examination that the document at page 70 of the Record was$a forged copy as`it had been tkppexed and altered. Applicant was not pRepared to make the nbvious concession.

60. At the erbitration, tle applicant was qtestioned by Third Respïndent's representative as to which documents in the bundle that Applicant submitted at the disciplinary enquiry, which were now containel in Third Respondent's bundle of documents for arbitration, were not part of Applicant's bundle at the

disciplinary enquiry. This question was put to Applicant as Applicant contended at arbitration that page 70 of the Records Bundle was part of the bundle of documents submitted to Third Respondent's head office on 05 December 2007. Applicant acknowledged that the bundle that he submitted at the disciplinary enquiry did not correspond with the bundle that he alleged at arbitration was the bundle of documents that were transmitted by facsimile to Third Respondent's head office and Applicant was not able to explain the discrepancies. Applicant was also not able to dispute Third Respondent's version that Applicant's bundle of documents had changed at the arbitration in order for Applicant to insert the document in order to manipulate his evidence at arbitration.

61. Applicant did not subsequently repay the overpayment of overtime and Sunday time despite a period of at least two months having elapsed from his receipt of that money. Applicant's response was that it was not his problem but that of Third Respondent's Human Capital Department. Applicant's further attempt to explain away his conduct in not taking steps to address the overpayment was that he did not have access to Third Respondent's premises and that he was not able to get access to his office. The futility of that explanation was exposed by the fact that Applicant was only suspended on 15 February 2008 and had had access to his office up to that date.

62. Third Respondent's witness Wakefield testified that on the Tuesday before the disciplinary hearing Applicant requested a blank amendment form,

which Wakefield refused. In his evidence, Applicant conceded that he done so and explained that he wanted to submit a blank amendment form to prove the procedures. When questioned by the arbitrator why he wished to explain those procedures with a blank amendment form to persons who already knew the procedures, Applicant responded that it was due to the fact that he was denied access to his office. The more probable explanation for Applicant's request for the blank amendment form was that put to Applicant in cross-examination, namely that he wanted to create the document and that when he could not get the blank form, he took the second best option, namely to forge it.

63. In his arbitration award the arbitrator recorded the evidence summarised above and concluded that the document in question was created after the fact and that in his view, that conduct constituted a gross form of dishonesty.

64. As set out in Third Respondent's answering affidavit, the arbitrator's finding that Applicant was guilty of charge 1 was a product of sound reasoning based on a proper evaluation of the evidence presented at the arbitration.

65. The arbitrator's finding that Applicant was guilty of charge 1 was a decision that a reasonable decision maker could make based on the evidence presented at the arbitration.

*Evidence in respect of charges 4 to 6*

66. In respect of charges 4 to 6, Applicant's criticism of the arbitration award is that:

66.1 The arbitrator failed to take into account Applicant's evidence to the effect that there was no practice that supervisors are required to work every alternate weekend and every weekend during peak seasons;

66.2 The arbitrator failed to take into account that in respect of charge 4, the applicant's colleague, Waterboer, had agreed to stand in for him;

66.3 The arbitrator's finding that there was overwhelming evidence of a long standing practice requiring supervisors to work every second weekend and every weekend during peak summer holiday periods cannot be sustained;

66.4 Although the charge sheet alluded to the fact that there was a roster for supervisors to work every alternate weekend and every weekend during peak seasons, no evidence was led at arbitration to the effect that such a roster exists.

67. The essence of charges 4 - 6 was the same, namely that Applicant was guilty of gross misconduct for failing to report for weekend duty when rostered to do so. Charge 4 related to the weekend of 20 and 21 October 2007, charge 5

related to the weekend of 29 and 30 December 2007 and charge 6 related to the weekend of 12 and 13 January 2008.

68. It was not disputed that Applicant did not work on the weekends referred in these charges.

69. As recorded by the arbitrator in his award, all of the witnesses called by Third Respondent (bar Benefeld) testified to the long standing practice of requiring supervisors to work every second weekend and every weekend during the peak summer holiday period.

70. The arbitrator also found that both the documentation before him and Applicant's own estimated work schedules supported the oral evidence of Third Respondent's witnesses.

71. Third Respondent's McLeod testified that:

71.1 There was an arrangement in place according to a roster which indicated that the supervisors would work every second weekend. This was to ensure that no employee exceeded the maximum budgeted overtime and Sunday time;

71.2 Applicant was expected to work every second weekend to look after the staff under his control;

71.3 In the event that a supervisor was not going to work, he was required to contact local management telephonically so that alternative arrangements could be made for supervisor to be on duty;

71.4 It was important for supervision to be present on the weekends as materials were involved in the cleaning of the trains and also to ensure that the trains were properly cleaned;

71.5 The fact that there was a roster recording that the supervisors would work alternative weekends was proven by the sign-on sheets of those employees;

71.6 During the period 1 December to 15 January the supervisors are required to work every weekend due to it being high peak period.

72. Wakefield testified that he worked the same weekend duties as Waterboer and his colleague Veldsman worked the same weekend duties as Applicant. These weekend duties were performed every second weekend.

73. Veldsman testified that:

73.1 He worked every second weekend with Applicant;

73.2 The practice of working alternate weekends has been in place for a long time;

73.3 During high peak period (December and January of each year) the number of trains increases from fifty two per month to approximately two hundred and twenty;

73.4 Applicant was supposed to work on 29 and 30 December 2007 and on 12 and 13 January 2008;

73.5 The procedure in the event that a supervisor was unable to work was that this was to be communicated to the other supervisors.

74. Waterboer testified that:

74.1 The document headed “Coach cleaning Culemborg yard” had been prepared by the previous manager Vorster to ensure that both Waterboer and Applicant knew what they must do;

74.2 The practice recorded on pages 33 to 35 (Records bundle) has been in operation since 1991 when Waterboer commenced his duties;

74.3 High peak period ran from 01 December until 15 January during which approximately three times as many trains operated;

74.4 During high peak period both supervisors are required to work each weekend and if a supervisor is unable to do so for whatever reason, it is expected of that supervisor to advise the administration official or his fellow supervisor telephonically of that fact. Applicant was aware of the roster schedules;

74.5 Waterboer and Applicant were instructed by their manager, Mlungisi Ndelela, to work as a team, to respect each other and to communicate with each other when dealing with the rescheduling of weekend duties;

74.5 The procedure if the scheduled supervisor was unable to work a particular weekend was to request the other supervisor to swop weekends.

74.6 During the high peak period, Applicant was in control on the weekends that he otherwise ordinarily would have been required to work.

74.7 Applicant did not work on 20 and 21 October 2007 but he could not recall any arrangement that Applicant had asked him to work in his place.

74.8 Applicant was supposed to work on the weekend of 29 and 30 December 2007.

74.9 He denied that Applicant had never agreed to work the weekend roster for the high peak period as the previous manager Vorster would have advised Waterboer if that was indeed the case.

74.10 In cross examination of Third Respondent's witnesses, Applicant's version was recorded as follows:

74.10.1 There was no roster;

74.10.2 Only one supervisor worked during December;

74.10.3 Applicant never agreed to work over weekends except to come in if Waterboer needed time off;

74.10.4 Applicant never agreed to work weekends during high peak period.

75. Applicant testified that:

75.1 He agreed with his previous manager Vorster to work overtime when requested, i.e. he would make himself available for overtime on request;

75.2 In respect of charge 4, Applicant followed procedures in that he contacted his manager and thereafter consulted with Waterboer who agreed to fill in for him;

75.3 Prior to the disciplinary enquiry proceedings, he had never seen the document entitled "Coach cleaning Culemborg yard";

75.4 He works over weekends if Waterboer is not able to take up the shift and he is requested to do so;

75.5 In respect of the weekends of 29 and 30 December 2007 and 12 and 13 January 2008, he did not work as no request was made and no consultation was held that he should work;

75.6 In previous years he had during high peak period worked for a number of weekends during December, continuously and without issue on the instructions of his manager;

75.7 Although he had done so, he denied that it was because the requirements of the operations were to have better controls and supervision during high peak period when four or five times more trains ran;

75.8 The reason he had not worked during high peak period in 2007/8 was that no meetings had been held with their manager and the request had rather come from their direct superior approximately two months before the commencement of the high peak period.

76. In evaluating this evidence, the arbitrator found that the evidence was overwhelming that there was indeed a long standing practice of requiring supervisors to work every second weekend and every weekend during the peak summer holiday period. The arbitrator further found that Applicant's absences for the periods referred to in charges four to six were conscious, deliberate, repeated and calculated and that Applicant's conduct therefore constituted gross misconduct. The arbitrator further found that Applicant's disregard of the instruction that had been given to the supervisors by their manager, Lungisi

Ndalela, to work together at local level and to respect one another had been disdainfully disregarded by Applicant.

77. Having had regard to the record of proceedings and the award, it is clear to me that Applicant's criticisms of the arbitrator's findings in respect of charges four to six are without foundation in that:

77.1 McLeod, Wakefield, Veldsman and Waterboer all testified to the longstanding practice that supervisors were required to work every second weekend and every weekend during high peak period. On the probabilities, the arbitrator preferred their version to the contradictory version relied upon by Applicant. That finding cannot be faulted.

77.2 Applicant's criticisms of the arbitrator's findings disregard that even if Applicant was not required to work every weekend in the high peak period, he would have been required to work on 29 and 30 December 2007 and 12 and 13 January 2008 as those weekends were Applicant's alternative weekends, which Applicant in any event did not work.

77.3 On his own version, Applicant's explanation for not working on 29 and 30 December 2007 and 12 and 13 January 2008 amounts to

misconduct as Applicant suggests that he was entitled to disregard that request on the basis that it was made by a supervisor and not a manager.

77.4 On his own version, Applicant has traditionally always worked all weekends during high peak period.

78. The arbitrator clearly made his findings in respect of charges four to six based on the evidence presented at arbitration. He took Applicant's evidence into account, but preferred the evidence of Third Respondent's witnesses in respect of the material issues. Given the analysis above, that was not unreasonable.

*Sanction*

79. At the hearing of this matter, Mr *Coetzee*, in his oral argument, attacked the reasonableness of the arbitrator's finding mainly on the basis that he did not consider mitigating factors in deciding whether the dismissal was fair. In order to consider this criticism, the evidence leading to the finding that the dismissal was for a fair reason needs to be considered:

79.1 At the commencement of the arbitration Applicant submitted that he was not guilty of the misconduct set out in charge 1;

79.2 Applicant acknowledged that Third Respondent has rules relating to dishonesty and that those rules were known and that the only issue in dispute was whether those rules were in fact broken;

79.3 Third Respondent's witness Wakefield testified that Applicant was in a position of trust;

79.4 Third Respondent's witness Benefeld testified that Applicant was in a particular trust relationship with Third Respondent and that he had breached his fiduciary duty to act in good faith in a material manner;

79.5 Applicant was a shop steward and the deputy chairperson of the Cape Town branch of the South African Railway and Harbour Union ("SARWHU") which also impacted on Applicant's proven misconduct.

80. In considering the fairness of dismissal as a sanction, the arbitrator took into account that Manuel, as a supervisor, occupied a position of trust. He found that, both in that capacity, and in his role as a trade union representative, he could be expected to set an example. He also took into account that the misconduct was repeated and wilful.

81. The arbitrator further took into account that Manuel had made himself guilty of a gross form of dishonesty.

82. When considering whether the sanction of dismissal is fair, the arbitrator should take into account the totality of circumstances. This should normally

include a consideration of all mitigating factors such as the employee's length of service and disciplinary record. In this case, Manuel had 20 years' service and a clean disciplinary record.

83. However, where dishonesty is an element of the misconduct, dismissal will in most instances be the appropriate sanction. As this court recently held in *City of Cape Town v SALGBC*[14]:

> "This court has also reviewed dishonesty in a serious light and has come to the conclusion in most instances that it results in a breakdown of the trust relationship between the parties. In *Hoch v Mustek Electronics (Pty) Ltd* 2000 (21) ILJ 365 (LC); [1999] 12 BLLR 1287 (LC) the court held the dismissal of an employee to be fair, where she had misrepresented her qualifications to her employer. The court held that this was sufficient to warrant dismissal notwithstanding the fact that she had a long service record and was honest in her work and notwithstanding the fact that she had misrepresented qualifications that were irrelevant to her position as a debtor's clerk. In *Toyota South Africa Motors (Pty) Ltd v Radebe and Others* (2000) 21 *ILJ* 340 (LAC) 344 D-G the LAC went as far as to hold that certain acts of misconduct were so serious that no mitigating factor could save the employee from dismissal. One example would be where the employee is guilty of gross dishonesty . . ."

[14] [2011] 5 BLLR 504 (LC) para [23]

84. In the case before me, the arbitrator found that the employee's misconduct constituted a gross form of dishonesty. His conclusion that dismissal was a fair sanction is not so unreasonable that no other reasonable decision maker could have drawn the same conclusion. The application for review cannot succeed.

85. It follows that the applicant had no prospects of success in his application for condonation. That aspect must be considered together with the substantial delay and his poor explanation therefor. The application for condonation must be dismissed.

*Costs*

86. Applicant has brought the review proceedings against Respondents in circumstances where the criticisms set out in Applicant's application have no merit and have not been linked to any of the grounds of review set out in Section 145 (2) of the LRA and, further, in circumstances where Applicant has persisted with his reliance upon a version which was found at arbitration to have been discredited.

87. Third Respondent has incurred significant costs in having to trawl through the lengthy record of the arbitration proceedings in order to address the various criticisms that Applicant has recorded against the arbitration award, none of which have been substantiated with reference to Section 145 (2) of the LRA or otherwise by reference to the record of the arbitration proceedings or relevant

case law. In oral argument, none of the criticisms of the award, other than sanction, was seriously pursued.

88. I am persuaded that this is an appropriate matter where costs should follow the result.

*Order*

89. I therefore make the following order:

1. The application for condonation for the late filing of the review application is dismissed.
2. The application for review is dismissed.
3. The applicant is ordered to pay the third respondent's costs.



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ANTON STEENKAMP

Judge of the Labour Court

For the applicant: Adv Andre Coetzee

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| Instructed by: | Swartz Hess attorneys |

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| For the third respondent: | Mr Glen Cassells |
| Instructed by: | Maserumule Inc. |