IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case No: C140/17

In the matter between:

NICO JOHN KHANA	**Applicant**
and	
LANGEBERG & ASHTON FOODS (PTY) LTD	**First Respondent**
COMMISSION FOR CONCILIATION	
MEDIATION AND ARBITRATION	**Second Respondent**
S. WRIGHT *N. O*	**Third Respondent**

Delivered: 12 December 2019

JUDGMENT

TLHOTLHALEMAJE, J

[1] With this application, the applicant seeks an order reviewing and setting aside the arbitration award dated 24 November 2016 issued by the third respondent (Commissioner) acting under the auspices of the second respondent, the Commission for Conciliation Mediation and Arbitration (CCMA). The Commissioner had dismissed the applicant's claim of an alleged unfair dismissal.

[2] The applicant also seeks condonation for the late filing of the review application. Both applications were opposed by the first respondent, who for the sake of convenience will be referred to as the Employer.

[3] The applicant (Mr Khana) was employed by the Employer effective from 11 February 2013 as a clerk. At the time of his dismissal on 18 March 2016, he held the position of Acting Team Leader. The Employer is a fruits and vegetables canning manufacturing company.

[4] The allegations against the applicant were that on 22 February 2016 during a stock take exercise, it was discovered that three pallets of export stock to the value R39 000.00 were reflected as having been moved to the designated waste area, to be written off. The allegation was further that the applicant's computer profile or password had been used to execute the purported movement of the stock.

[5] The applicant had denied the allegation that he had personally performed the movement of stock on the computer system. He alleged that as per common practice, his password was shared with other employees including his subordinates, and that any of these other employees could have executed the tasks on the computer system using his profile.

[6] The applicant was subsequently called to a disciplinary hearing to answer to the following allegations;

a) manipulating the stock management process under his care and;

b) sharing his *Oracle* password with other employees.

[7] At the conclusion of the disciplinary hearing, he was found guilty of the above charges and a sanction of dismissal was imposed. Aggrieved by his dismissal the applicant referred an unfair dismissal dispute to the CCMA. When attempts at conciliation failed, the matter came before the Commissioner for arbitration, who had then dismissed the applicant's claim.

[8] The review application was filed outside the stipulated timeframes. The arbitration award was issued on 24 November 2016, and the review application was launched on or about 21 April 2017. It was conceded on behalf of the applicant that the delay was about 112 days (Outside the statutory six weeks' period).

[9] The provisions of section 145(1A) of the LRA read with rule 12 of the Rules of this Court enjoins the Court with a discretion to condone the non-compliance with the prescribed timeframes on good cause shown. In determining whether good cause was shown, the Court must exercise its discretion upon a

consideration of all the relevant facts, including but not limited to the degree of lateness, the explanation therefor, the prospects of success, prejudice that may be suffered if the condonation is granted or refused and the importance of the case. Ultimately, the interests of justice, which involves a consideration of all these factors will dictate whether condonation ought to be granted or not[1].

[10] In explaining the delay, the applicant averred that;

10.1 Subsequent to the arbitration award being issued, he had every intention of pursuing the review proceedings, but did not have the necessary funds and support to do so as he did not belong to a union.

10.2 Although he was represented by Mr Scheepers of Solidarity at the arbitration proceedings, he was however not a member of the Union. Upon having received a copy of the arbitration award, he went back to Solidarity but was advised him to secure an attorney for himself if he wanted to pursue a review.

10.3 On 22 December 2016, he had further engaged Solidarity with a view of persuading it that his review had merits and that he should be assisted. Solidarity had allegedly undertaken to look into the matter, and had in fact, sent correspondence to Employer's senior manager,

[1] See *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC), where it was held;

"22. I have read the judgment by my colleague Zondo J. I agree with him that, based on *Brummer* and *Van Wyk*, the standard for considering an application for condonation is the interests of justice. However, the concept "interests of justice" is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

23. It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default."

Mr Schierhout, with a view of persuading him to reconsider the dismissal in the light of the evidence.

10.4 When Schierhout did not reply to the correspondence, the applicant had through Solidarity on 12 January 2017, addressed correspondence to Tiger Brand Ethics Line requesting them to investigate the circumstances of his dismissal.

10.5 In January 2017 he unsuccessfully sought assistance from the local ANC office. In February 2017, assistance was sought from another trade union (BAWUSA), which undertook to assist but failed to do so.

10.6 It was only in March 2017 that he became aware of a firm of labour consultants that could assist with the matter, and he had held first consultations with its official on 9 March 2017.

[11] The Employer opposed the application for condonation on the basis that;

11.1 The applicant attributed the blame for the lateness wholly on his financial circumstances, but in the same vein, had failed to act with the necessary haste in filing his review application once the necessary legal representation was secured.

11.2 It took the applicant an additional 36 days from his first consultation meeting with his legal representatives on 9 March 2017 to eventually deliver his papers in respect of the review application. This was also despite the fact that the founding affidavit was commissioned on 23 March 2017.

11.3 The applicant had failed to make any averments in regards to his prospects of success in the review application.

11.4 The Employer further took issue with certain documentation that was attached to the founding affidavits that it was averred was discovered for the first time in these proceedings.

11.5 It would suffer prejudice if the condonation application were to be granted on basis that it has continuously dedicated time and resources in defending this dispute; that the proceedings before this Court were frivolous; and the condonation application itself was flawed as the applicant did little to address the relevant requirements for condonation.

[12] Having had regard to the averments made in support of the application, it ought to be concluded that contrary to the contentions of the applicant, a delay of 112 days is excessive. It is correct as pointed out on behalf of the Employer that the applicant was required to show good cause by *inter alia*, giving an explanation for each period of the delay.

[13] As correctly pointed out on behalf of the Employer, the applicant appears to have attributed the delay to a lack of resources and access to legal representation. To the extent that he had approached Solidarity, which in any event was not obliged to assist him as he was not a member, that union ought to have been aware of the time periods within which the review ought to have been filed.

[14] Even if it was argued on his behalf that he was only able to secure legal representation from 9 March 2017, nothing much happened thereafter with a view of expediting the review application. As at March 2017, the *dies* for filing the review application had passed, and the labour consultants would have realised that fact and acted accordingly.

[15] It was conceded that at most, about 40 days went passed since the labour consultants agreed to take up the matter. Even on a generous consideration of the delay, and despite being aware that the time periods had lapsed, no effort was made to expedite the filing of the review application, and furthermore, no explanation whatsoever was furnished for the delay from March 2017 until the review was filed on 21 April 2017.

[16] In the end, even if it were to be accepted that the applicant, despite his financial constraints had made attempts to get assistance in pursuing the review, his explanation did not cover the periods of the delay, especially after

he had obtained legal assistance. Accordingly, the explanation is considered to be inadequate and unacceptable.

[17] The applicant's application for condonation however falls flat insofar as no averments were made in regards to his prospects of success. It was conceded that the prospects were not addressed, and the explanation was that since the review application was filed simultaneously, there was no need to burden the Court's papers as reference was made to the review application in the condonation application. This contention was however not supported by the pleadings, as nowhere in the founding affidavit was it indicated that the two applications ought to be read together.

[18] Even if the Court were to adopt a liberal or pragmatic approach as submitted on behalf of the applicant, and to consider the prospects of success, the invariable conclusion to be reached upon a consideration of the facts before the Commissioner and her conclusions, is that the review application has no merit for the reasons that appear below.

[19] The undisputed evidence before the Commissioner was that three pallets were transferred as a result of the manipulation of the stock, which had caused a loss of R39 000.00, as the stock was written off. The applicant's brother happened to be also employed in the waste section where he was responsible for sorting waste. The Employer's case was it had a policy in place, in terms of which the sharing of passwords amongst employees was prohibited. The stock in question was transferred on 5 January 2016.

[20] The evidence of the Employer's Oracle Clerk, Ms B Standvleidt, was that as part of her functions to check the bins during a stock take, she discovered that the stock in question was not in the bin despite the bincard having stated otherwise. Her investigations had established that the employee had indeed transferred the stock from the J area to K7 (with the latter being the waste sorting area, where the applicant's brother was employed as a waste sorter). Upon approaching the applicant and questioning him about the discrepancy, the latter responded in a crude manner by saying to her that; *"ek moet nie hom kak vra"* . Standvleidt had further testified that at some point, she had

overheard the applicant and his brother devising a plan to remove the stock in question.

[21] The applicant's testimony on the other hand was that the transfer of the goods to the waste area after being captured on the computer system, took place after he had obtained permission from his superior to allow his password to be used by other employees, and it was these other employees who could have been responsible for the incorrect transfer of the stock.

[22] The applicant's further testimony was that Standvleidt could have been responsible for using his password. He had however conceded to having responded to Standvleidt in the manner she had described when enquiries were made with him about the stock and the discrepancies. He had further accused the Employer of having acted inconsistently by merely issuing final written warning to other employees in regard to the sharing of passwords, whilst he on the other hand was dismissed.

[23] A witness on behalf of the Applicant, Mr Van Rooi, who was previously employed as Warehouse Controller confirmed having permitted the applicant to share his password with administration clerks. He was aware of the risks associated with this practice especially after one Schierhout had informed the employees to stop the practice.

[24] In the award, the Commissioner found that the dismissal of the applicant was procedurally and substantively on the basis that;

24.1. The evidence of Standvliedt insofar as she had enquired from the applicant about the stock, which enquiries were met with a crude response remained undisputed, and was an indictment on the conduct of the applicant in respect of the discrepancies complained of.

24.2. The applicant's version that the discovery and the subsequent reporting of the discrepancy was a form of vengeance perpetrated by Standvliedt in view of him having initiated disciplinary proceedings against her in the past, which had resulted with her being issued with a

final written warning was to be rejected as a lame attempt at bolstering his case.

24.3. Standvleidt's version that she had overheard the applicant devising a plan with his brother who was employed in the waste disposal section to write off the stock was found to be probable. This was particularly based on the applicant's brother's testimony on behalf of the Employer in the internal disciplinary hearing, which was confirmed by Matthews that indeed the applicant and his brother had a discussion in respect of writing off the material stock.

24.4. A negative inference was to be drawn from the fact that the applicant failed to call his brother to testify on his behalf to rebut Standvleidt's evidence. This was even moreso since the applicant's brother was present at the arbitration proceedings. The Commissioner concluded that on a balance of probabilities, it ought to be found that indeed such a plan was devised between the applicant and his brother to dispose of the stock.

24.5. It was immaterial whether the stock was erroneously moved by another person or the applicant himself in view of the uncontested evidence that it was brought to the latter's attention that certain items had been moved incorrectly or that there was a discrepancy.

24.6. The applicant had a positive duty to disclose the discrepancies and to correct it, and to further inform his superiors or the warehouse manager. Since the applicant failed to do so, his integrity was brought into question particularly in view of the fact that at the material time, he held the position of Acting Team Leader, and was entrusted with the assets of the Employer, and was further entrusted to execute his duties diligently and with honesty.

24.7. Nothing could be read into the applicant's evidence that it took Standvliedt almost a period of a month to report the discrepancy to the warehouse manager.

24.8. It was immaterial that the applicant contended that someone else might have erroneously moved the stock as a consequence of password sharing which was a common practice within the third respondent. In the Commissioner's view, what was material was the fact that the applicant became aware of the erroneous movement of stock and sought to conceal it, as subsequent formal investigations led to the applicant's conduct being discovered.

24.9. Even though it were to be accepted that password sharing was a common practice at the workplace, Mr Schierhout, a senior manager, had warned employees against such a practice on 22 September 2015.

24.10. In the Commissioner's view the fact that the applicant had adduced the evidence of the senior manager to show that there was a practice of sharing a password within the third respondent which did not assist his case in view of the fact that the applicant himself conceded under cross-examination that the instruction had been issued by Schierhout, a senior manager with final authority in respect of the matters in the production plant, that the practice of password sharing passwords must come to an end.

24.11. The Commissioner further held that it was uncontested that there was a pop-up message created by the IT department that encouraged employees to protect their password. Taking that into account, the Commissioner drew a negative inference on the credibility of Van Rooi's testimony on behalf of the applicant that he was unaware of an email which was sent to all employees including Van Rooi.

24.12. In respect of the applicant's contention that the disciplinary processes against him amounted to inconsistency, the Commissioner noted that the similar instances that the applicant had referred to had occurred prior to the instruction issued by Schierhout on 22 September 2015 and further that the cases referred to by the applicant in comparison to his case in which final written warnings were issued did not relate to the allegations of stock manipulation. Moreover, in the Commissioner's

view, it was trite that the chairperson of the disciplinary hearing cannot be bound by the findings and conclusions of another person who had reached a different outcome on sanction on similar facts in a different unrelated hearing. The Commissioner in regard concluded that inconsistency had not been shown.

24.13. The Commissioner further concluded that the evidence showed that the applicant was guilty of the charges preferred against him; that his wrongful conduct had been aggravated by the position he occupied; and further that he had attempted to conceal the erroneous movement of stock. The attempted concealment in the Commissioner's view amounted to an act of dishonesty which destroyed the trust relationship between the applicant and the Employer.

24.14. The Commissioner further held that the value of the stock in question was substantial, and that the applicant had not provided any compelling reason why the dismissal should be interfered with.

24.15. The Commissioner further considered the applicant's complaint that he was not afforded an opportunity to utilise a representative of his choice which resulted in his dismissal being procedurally unfair. In this regard, the Commissioner concluded that;

24.15.1 Although the applicant was not a member of Solidarity, he had nevertheless requested its official to represent him at the disciplinary proceedings, which request was only made at 06:00 in the morning of the hearing which was scheduled to commence at 08:00.

24.15.2 The request for the representation having been made outside the perimeters of reasonableness, the Commissioner concluded that the chairperson of the disciplinary hearing had not denied the applicant the right to a representation of his choice but in fact the chairperson had provided the applicant with a full opportunity to present his case. The Commissioner

concluded that there was no basis to concluded that dismissal of the applicant was procedurally unfair.

[25] The test on review is trite, and the enquiry is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach[2]. The applicant sought to have the arbitration award reviewed and set aside on a variety of grounds, including that the Commissioner failed to properly consider the issue of inconsistency; that there was no evidence to show misconduct placed before the Commissioner; and that the sanction was inappropriate.

[26] Having had regard to the conclusions reached in the arbitration award, there can be no doubt that the Commissioner was alive to the dispute and the issues that she was called upon to determine. She had applied her mind to those issues and the evidence presented, and came to a decision that fell within the bounds of reasonableness.

[27] In this regard, to the extent that the applicant had alleged that his password was used by other employees, that on its own is a concession that the misconduct complained of was committed. Worst still, the Commissioner had correctly concluded that even if the applicant was not responsible effecting the transfer on the system, he was aware of the discrepancies arising therefrom, and had despite his position and responsibilities, failed to raise alarm bells or take corrective action. His conduct in this regard clearly raised questions about his integrity as Acting Team leader and custodian of the Employer's assets.

[28] The undisputed evidence however was clearly that a standing instruction issued by Schierhout in September 2015 was in place, in terms of which all employees were advised to stop the practice of sharing passwords. The incident leading to the applicant's dismissal took place in January 2016.

[2] *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 ILJ 2405 (CC) at [110], where it was held;

> "….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 administrative action which is lawful, reasonable and procedurally fair.

Clearly the applicant was aware of that instruction, and his contentions that his superior had allowed him to share his password, even if to be believed, could not have been an excuse in the light of the standing instruction issued by a senior manager with the ultimate authority on the matter, and also given the risks associated with the sharing of passwords, which the instruction sought to mitigate.

[29] The alleged use of the applicant's password by other employees is secondary when the other evidence in respect of the charge of manipulating the stock management process is taken into account. Standvleidt had confronted the applicant about the discrepancies in the stock take. Rather than giving a reasonable and plausible explanation, particularly given the position he held and its concomitant responsibilities, the applicant's response to Standvleidt was rude, crude, demeaning and unwarranted, and the Commissioner correctly drew adverse inferences from that response. If ever there was any truth in the applicant's defence that other employees had used his password, or that he was given permission by another senior manager to allow his password to be used, that explanation would have been appropriate at that stage when Standvleidt made enquiries.

[30] If ever there was any doubt in respect of the seriousness of the second charge, Standvleidt had further testified that she had overheard the applicant devising a plan with his brother to manipulate the system in respect of the stock that was sent to the waste section. Evidence presented before the Commissioner was that the applicant's brother, who worked in the waste section had written off the stock in question, and was also dismissed.

[31] In my view, the applicant's case collapsed at the point of Standvleidt's evidence in regards to what she had overheard in respect of the plan, and the applicant's brother's evidence at the disciplinary enquiry, and the latter's refusal to testify at the arbitration proceedings. The applicant's brother had testified against him in the disciplinary enquiry and confirmed that such a plan was indeed devised between the two of them. The contention that there was no evidence that the applicant's brother had confirmed the plan between the two of them has no merit. This is so in that if indeed the brother had not given

such evidence at the disciplinary enquiry, nothing prevented him from testifying and refuting those allegations at the arbitration proceedings where he was present.

[32] Based on the evidence led by the applicant's brother at the disciplinary enquiry, which evidence the applicant had the opportunity to rebut at the arbitration proceedings and had failed to do so, clearly there was reason to conclude that he (applicant) had conducted himself in the utmost dishonest manner, which conduct completely destroyed a trust relationship between him and the Employer as the Commissioner had correctly found. I therefore fail to appreciate from the submissions made on behalf of the applicant, what other *'compelling evidence'* the Commissioner was required to consider in the circumstances, prior to concluding that the conduct in question had destroyed the trust relationship.

[33] The conclusions reached by the Commissioner in regards to the alleged inconsistencies pertaining to the application of discipline to the extent that the applicant had shared his password are equally sound, as she had taken into account the position the applicant occupied at the time, and the circumstances of comparators, which were clearly distinguishable from those of the applicant, whose misconduct on the other hand was gross.

[34] In regards to the procedural fairness findings made by the Commissioner, I further have no reason to interfere with them. Taking into account the principles applicable to procedural fairness of a dismissal, the applicant was notified on time about the disciplinary enquiry, which implies that he was given sufficient time to secure someone to represent him at that enquiry. It was clearly unreasonable for him to insist on being represented by Scheepers, when he had only informed management of his choice on the morning of the disciplinary enquiry. Scheepers obviously had to be excused from his workstation, and clearly the Employer was entitled to be informed on time in order to make contingency plans to accommodate the applicant. To simply not have warned the employer in advance and expected Scheepers to leave his workstation in order to represent him at the disciplinary enquiry was

unreasonable. On the whole, I am satisfied that the Commissioner's conclusions are unassailable.

[35] In summary, the applicant has not shown good cause for the late filing of the review application, and it follows that both applications ought to be dismissed. I have further had regard to the requirements of law and fairness insofar as the Employer sought a costs order, and I am not persuaded that the facts and circumstances of this case calls for a costs order.

[36] It further needs to be stated in conclusion that this matter was heard in the Cape Town Labour Court on 18 October 2018. Judgement was reserved and the Court's the file was then couriered to the Labour Court in Johannesburg. For reasons that are not clear despite enquiries with the courier service providers, the Court's file never found its way to Johannesburg. Attempts were then made to reconstruct the file, and the Court is grateful to both parties and the Office of Registrar in Cape Town in ensuring that the file was ultimately reconstructed. The Court further wishes to express its regret and the inconvenience caused as a result of the delays in the delivery of this judgment.

Order:

[37] In the premises, the following order is made;

1. The applicant's application for condonation for the late filing of the review application is dismissed.

2. The application to review and set aside the arbitration award issued by the third respondent under case number WECT875-16 is dismissed.

3. There is no order as to costs.

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E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Adv. C. A Kilowan, Instructed by H. K Law Consultants
For the third respondent:	Adv. M. Garces, Instructed by Gavin Weiner Attorneys