# REPUBLIC OF SOUTH AFRICA

**IN THE LABOUR COURT OF SOUTH AFRICA, AT DURBAN**

**JUDGMENT**

Not Reportable

Case no: D135/10

In the matter between:-

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| **ZANELE DLADLA** | **Applicant** |
| and | |
| **EMPANGENI CASH AND CARRY** | **First Respondent** |
| **COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION** | **Second Respondent** |
| **COMMISSIONER S KILLIAN N.O** | **Third Respondent** |

**Heard** : 28 February 2013

**Delivered** : 02 May 2013

**Summary** : Condonation for late filing of record – factors considered - whether explanation for delay on affidavit constitutes an application for condonation. Delay excessive – not fully explained. Prospects of success considered – breach of rules – whether sanction of dismissal too harsh. Application dismissed.

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**JUDGMENT**

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CHETTY AJ

[1] This is an application in terms of s 145 of the Labour Relations Act 66 of 1995 ("the Act") for the reviewing and setting aside of the decision of third respondent ('the commissioner') following upon an arbitration award handed down on 17 December 2009 in terms of which the dismissal of the applicant, Ms Zanele Dladla (hereinafter referred to as 'the applicant') was found to be procedurally and substantively fair. The applicant seeks an order declaring her dismissal

from employment to be unfair and that she be reinstated with retrospective effect to the date of her dismissal on 8 May 2009.

[2] The applicant was employed as a cashier at Empangeni Cash and Carry, the first respondent herein, in August 1995 and earned R3202 per month at the time of her dismissal. The applicant was charged with two counts of misconduct where she was alleged to have committed fraud on 7 April 2009 when she placed in her till a credit card voucher to the value of R1240.00 that she received from Siphiwe Biyela without a valid transaction having taken place. It was alleged that this was done in order to 'cover up' a potential shortage in her till. The second charge was that she breached the company rules in that on 7 April 2009 she exchanged cash for a credit card voucher.

[3] The applicant was duly informed of the charges and a disciplinary enquiry was held on 29 April 2009. The chairperson of the enquiry found that the applicant had fabricated a version to cover-up for a potential shortage in her till on the 7 April 2009. The chairperson further found that the applicant had acted in breach of the first respondent's policy in allowing credit card vouchers to be exchanged for cash. She was found guilty of both charges against her. In mitigation, she pointed out that she was employed by the first respondent for 14 years without any form of disciplinary infraction and pleaded to be given a written warning as she was the sole bread winner in her family. The first respondent contended that her conduct had caused a breakdown of the trust relationship between the parties, and that the charges were considered to be very serious. The chairperson of the enquiry considered her conduct to be sufficiently serious to warrant her dismissal.

[4] With the assistance of her union, the United Chemical Industries Mining Electrical State Health and Allied Workers Union ('UCIMESHAWU'), the applicant referred her dismissal to the CCMA on 14 May 2009, in which she challenged the fairness of her dismissal and sought her reinstatement. The CCMA was unable to resolve the dispute and the matter was referred to arbitration before the third respondent, who eventually confirmed the dismissal of the applicant as being substantively and procedurally fair. The arbitration award was handed down on 17 December 2009.

[5] In terms of s 145(1)(a) of the Act, the applicant was obliged to bring her review application within six (6) weeks of the award being served on her. Accordingly, the six (6) week period for the filing of a review application would have expired on 28 January 2010. The application for review was filed in this Court on 4 March 2010. At the time when the application was filed, the applicant was being represented by Shanta Reddy Attorneys, and an affidavit in respect of proof of service of the review application was deposed to by Mr. Geldenhuys, who now appears for the applicant. He was, at the time of the filing of the review, in the employ of Shanta Reddy Attorneys. There is no application for condonation for the late filing of the review application. I point out that the first respondent did not take issue with the late filing of the review application. That however does not excuse the applicant from non-compliance. Accordingly, the applicant is approximately 35 days late in the filing of the review application, for which no explanation is tendered.

[6] That however is not the end of the applicant's non-compliance with the time periods prescribed in the Act and in terms of the Rules. Upon the filing of the review application, the second respondent wrote to the applicant's then attorneys, Shanta Reddy Attorneys, advising on 5 March 2010, that in compliance with Rule 7A(3) of the Rules of the Labour Court, the CCMA had dispatched a record of the proceedings before the CCMA to the Registrar of the Labour Court. The CCMA further drew to the attention of the applicant's attorneys that they were required to make the necessary copies of portions of the record which they intended to rely on for the purpose of the review application.

[7] In terms of Rule 7A(6) the applicant's attorneys were required to furnish the Registrar of the Court and the parties to the review application with a copy of the record. On 16 March 2010 the CCMA made available to the Registrar a compact disc containing a record of proceedings before the CCMA as well as a bundle of documents. In terms of the Rules, the applicant is required to ensure a transcription of the record of proceedings or handwritten records, or such portions of the records as may be necessary and relevant to the review. The applicant, through her attorneys at the time, was accordingly advised by the

Registrar on 16 March 2010 that the tapes were available to be uplifted and transcribed.

[8] A perusal of the file reflects that a letter was sent by Mr. Geldenhuys of Shanta Reddy Attorneys on 18 August 2010 to the Registrar advising that a transcribing service, Valens Transcripts, had uplifted the tapes from the Court, but noticed after transcribing the tapes, that only half of the proceedings were recorded and that they were endeavouring to find out the whereabouts of the remainder of the proceedings. The aforementioned letter from the applicant's attorneys came almost five (5) after the record became available for collection. At about the same time, a letter dated 16 August 2010 was sent from the first respondent's attorneys to the applicant's then attorneys setting out the following

> 'We have received a communication from the Labour Court to the effect that you have not adhered to the Rule 7A(5) Notice dated 6 March 2010.
>
> You will know that we have written to you on several occasions requesting a progress report with regard to your obligations.
>
> In the circumstances, we presume that your client intends to proceed no further in this matter and we would be grateful if you would confirm such because you will note that if outstanding pleadings or procedures have not been completed by the 20th August 2010, you will be obliged to show cause as to why the matter should not be dismissed.
>
> Accordingly, we look forward to hearing from you by return.'

[9] No further steps were taken by the applicant's attorneys. What is apparent though is that the transcript of the record had been completed by Valens Transcripts CC on 4 February 2011, in terms of the transcriber's certificate. For reasons which are not apparent, the record was not uplifted. The next step in terms of the chronology of events is a notice of appointment as attorneys of record on 2 November 2011 by Mr Gleldenhuys of Tomlinson Mnguni James, the present attorneys for the applicant. On 5 April 2012, some five (5) months after having been appointed as attorneys of record for the applicant, the applicant's attorneys filed a supplementary affidavit. In an attempt to provide an explanation for her inaction since the filing of her review application almost two

(2) years ago, the applicant states that her union UCIMESHAWU had instructed Shanta Reddy to proceed with the review application but that the attorneys firm subsequently closed down and her present attorneys were only appointed in November 2011. She further states that she did not have the necessary funds to transcribe the record, which funds she eventually was able to raise in mid-2011.

[10] The supplementary affidavits set out in some detail the basis for the attack against the third respondent's decision, with reference to the transcript. The first respondent's attorneys subsequently pointed out on 18 April 2012 that they were prejudiced in having to file a reply to the supplementary affidavit as they had not been served with a copy of the Record contemplated in Rule 7A(6), referred to and relied upon by the applicant in her supplementary affidavit. This was then served on the first respondent's attorneys on 25 April 2012.

[11] On 23 May 2012 the first respondent's attorneys again wrote to the applicant's attorney's drawing to their attention that the record appeared to be incomplete. According to the applicant's attorneys, the transcription prepared and lodged with this Court is a full record of all that was furnished by the CCMA. An email from the transcribers to Mr Geldenhuys on 18 August 2010 confirmed that the record had been transcribed and presented the attorneys with the invoice for the transcript. The email further records that the evidence of Ms Ungerer, Ms Dladla, Mr Msane and Ms Biyela's had been recorded and transcribed. When the matter came before me, both parties were in agreement that although the record was incomplete, it nonetheless contained sufficient portions of the evidence that could enable the Court to deal with the review application. The record in any event contained the evidence of witnesses called by both parties as well as their cross examination. It was never contended by either party that a deficiency in the record prejudiced their case.

[12] In light of the 'problems' with the record, the first respondent filed its replying affidavit in opposition to the review application on 1 July 2012. In this affidavit, the first respondent also sought condonation for the late filing of its reply, attributable to the delay in the applicant's attorneys filing of the record, in the first instance, followed by the delay in ascertaining whether the record was

complete. I am satisfied that good cause has been set out for the delay, which in any event was only 10 (ten) days late.

[13] The application for review was opposed, and Ms Smart who appeared for the first respondent, correctly submitted that before this Court could entertain the merits of the review application, it is obliged to deal with the delay occasioned in the filing of the records of the proceedings before the CCMA. It is common cause that the third respondent handed down the award on 17 December 2009 The application for review was filed on 4 March 2010. As set out earlier, there is no explanation for the lateness of 35 days in the filing of the review application.

[14] Insofar as the record is concerned, the notification by the Registrar to the applicant, issued in terms of Rule 7A(5), was sent on 16 March 2010. The transcript of the record had been completed by 4 February 2011. The applicant concedes that the filing of the record and her supplementary affidavit in April 2012 was nineteen (19) months late. This is an inordinately long period for the transcription of a record that was 102 pages in extent. For reasons which are not readily apparent, the applicant filed an affidavit setting out an "*explanation for the late filing of the record*" as opposed to an application for condonation. This Court has the power to condone non-compliance with any time periods for the filing of any document in terms of s 158(1)(f) of the Act, read with Rule 12. It is trite that an applicant for condonation must establish good cause.

[15] Notwithstanding the absence of an application for condonation I considered her affidavit in the same light. The explanation proffered by the applicant for the delay is that she was unemployed and did not have the necessary funds to pay for the transcription of the arbitration proceedings. At the same time, her affidavit suggests that her union UCIMESHAWU was still involved in prosecuting the review application inasmuch as they informed her in October 2010 that Shanta Reddy Attorney's had closed in August 2010, and that her file had been handed over to her present attorneys, Tomlinson Mguni James. The only reasonable inference to be drawn, as contended by the first respondent, is that the union was still funding the applicant's review at this stage. If that were the case, it does not follow that the delay in transcribing the record would have been due to lack of funds. There is also no mention in any of the letters from

her attorneys at the time that the applicant lacked the necessary funds to diligently prosecute the review and to obtain the record timeously.

[16] Accepting for the moment that the applicant was unemployed and unable to afford the costs of the transcription of the record, there is no explanation for many of the extensive delays that occurred in securing a copy of the record. On her own version, by 3 May 2010 she reached an agreement with Shanta Reddy Attorneys regarding payment for the costs of the record. The Court is not informed what this arrangement was, but presumably there was no impediment after May 2010 in securing the record. Even if the last portion of the evidence of the arbitration proceedings had been lost, and the arbitrator's notes had to be obtained and transcribed, this omission became apparent in May 2010. Shanta Reddy Attorneys wrote to the first respondent's attorneys on 5 May 2010 indicating that they would attempt to address this matter.

[17] Although the applicant says that she contacted her attorneys to check up on progress in the matter, she does not say who she spoke to between May and August 2010 and what the reason for the delay was. Only after three (3) months, in August 2010, did she speak with Mr. Geldenhuys who informed her that the last portion of the record was missing. This takes the applicant's explanation no further as her attorneys were aware of this position three (3) months prior thereto. A perusal of the transcript does not reflect that the handwritten notes were used in the reconstruction of the record, and at best for the applicant, Valens Transcripts were in possession of all the evidence available as at 16 August 2010 for the record to be transcribed.

[18] Bearing in mind that an applicant seeking condonation is required to give a full and proper account of the reason for the delay in respect of the entire period for which condonation is sought, the applicant's explanation for the parts that she does account for, is unconvincing. In respect of those parts where no explanation is tendered, the delays are significant. On her own version, after the closure of Shanta Reddy Attorneys in August 2010, her union informed her that her file, together with a number of others, had been transferred to Mr. Geldenhuys who was now practicing under the name of Tomlinson Mguni James Attorneys. There is no explanation for why she could not consult earlier

with Mr. Geldenhuys than on 1 November 2010. Again, a delay of approximately three (3) months is unexplained. Even at the time of consulting with Mr. Geldenhuys, she does not say what the "problems" that he was facing with her matter, nor does he depose to an affidavit in this regard. These "problems" were hardly likely to fall within the realm of attorney client privilege but even if they did, that much is not stated.

[19] The arbitration award of the commissioner reflects that the applicant called two witnesses to testify on her behalf – Ms. Biyela and Mr. Mati. The latter's evidence is missing from the transcript. His evidence, as recorded by the arbitrator, is that he represented the applicant at the disciplinary enquiry and he contended that he was not given an opportunity to cross examine the first respondent's witnesses, nor did he know of the rule that credit card vouchers could not be exchanged for cash or of the meeting on 25 March 2009 when this rule was apparently brought to the attention of staff at a meeting. Importantly in relation to Mr. Mati's version, the arbitrator recorded in her award that the witness explained that it was a cheaper or cost efficient means for a person to exchange a credit card voucher for cash rather than to withdraw cash via the automatic teller machine from one's credit card account.

[20] Even if the evidence of Mr. Mati were not available, the issue arises whether it would not be possible to determine the review application without his evidence. A glance at the founding and supplementary affidavits of the applicant, places no reliance on the missing aspect of the record nor was any reliance placed on this when the matter was argued. The situation worsens, in that, despite applicant consulting with Mr. Geldenhuys in November 2010, the attorney only filed a notice of appointment as attorney of record on 9 November 2011, a full year after being instructed by the applicant. Other than a reference to "*several enquiries to the CCMA between February 2011 and July 2011 to locate the missing recordings*" no explanation for the delay. Other than writing to the CCMA in February 2011 to locate the missing tapes, there is no evidence of any other steps taken by the applicant's attorneys to prosecute the matter expeditiously. The applicant refers to correspondence between her attorneys and that of the first respondent, and numerous telephone calls between the two

on the issue of the missing portion of the evidence. There is no confirmatory affidavit filed by the applicant's attorney nor any annexures from which it can be gleaned what the extent of the problem was or what prevented the attorney from filing the record in the form that it was.

[21] The applicant however states in her affidavit that the delay in serving and filing her supplementary affidavit on 5 April 2012 was not due to any fault of her own. She does not say whom the fault should be attributed to. Clearly, this is a matter where the applicant's attorney, or the applicant, was responsible for the delay. The explanation tendered for parts of the delay are, in my view, unconvincing and do not come close to establishing good cause. The applicant's current attorney had dealt with the matter when he was employed by her erstwhile attorneys. Notwithstanding, her present attorneys filed a notice of appointment a year after consulting with the applicant. The supplementary affidavit was only filed in April 2012, approximately fourteen (14) months after the record had been transcribed.

[22] I have considered the explanatory affidavit of the applicant very much as an application for condonation, despite there being no formal application for condonation. That being so, it is trite that condonation must be sought as soon as a party is aware that they have not been able to comply with a time limit imposed by legislation or the Court. Again, there is no explanation why the applicant's attorney waited a further six (6) months after the filing of her supplementary affidavit, to file a further affidavit explaining the delay. In *CUSA v Tao Ying Metal Industries & others*[1] Ngcobo J commented on the rationale for expedition in bringing labour disputes to finality. The Court stated that

> 'Any delay in resolving a labour dispute could be detrimental not only to the workers who may be without a source of income pending the resolution of the dispute, but it may, in the long run, have a detrimental effect on an employer who may have to reinstate workers after a number of years.'[2]

[23] In determining whether or not to grant condonation, a good explanation for the lateness may assist an applicant in compensating for weak prospects of

[1] [2009] 1 BLLR 1 (CC).
[2] Above, para 63.

success. Similarly strong prospects of success may compensate for an inadequate explanation and a long delay. Good cause is established by the applicant giving an explanation that shows how and why the delay occurred. In this case, the explanations provided by the applicant are for short periods of the overall delay of nineteen (19) months, and do not articulate any satisfactory or reasonable explanation for the excessive delay in filing the record or the supplementary affidavit. After several months of delay, occasioned supposedly because of an incomplete record, nothing of significance turned on that part of the record that the transcribers were unable to locate. No reliance was placed on Mr. Mati's evidence by the attorney representing the applicant.

[24] It is well established that in the absence of a reasonable and acceptable explanation for the delay, an enquiry into the prospects of success is rendered immaterial. In *NUM v Council for Mineral Technology*[3] the Court affirmed the well established principle that the discretion in deciding such applications must be exercised judicially, upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. The Court went on to add that

> 'A slight delay and 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 long delay. There is a further principle which is applied and that is that 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.'[4]

[25] The applicant was not only late in the filing of her review application (by approximately 35 days), she was also late in the filing of her supplementary affidavit and filing of the record (by approximately 19 months) as well as the filing of her heads of argument outside the time periods set out in the Practice Directive. In respect of the last mentioned, the first respondent filed its heads of argument without having had sight of the applicant's heads. It is therefore not an isolated instance, but a pattern of lateness, for which neither the applicant nor her attorneys accept responsibility. In the context of individual dismissal

[3] [1999] 3 BLLR 209 (LAC).
[4] Above, at 211G-I.

cases, the Court in *Queenstown Fuel Distributors CC v Labuschagne NO and Others*[5] held that:

> '. . . condonation in the case of disputes of individual dismissals will not readily be granted. The excuse for non-compliance would have to be compelling, the case for attacking a defect in the proceedings would have to be cogent and the defect would have to be of a kind which would result in a miscarriage of justice if it were allowed to stand.'[6]

[26] The period of delay is excessive and the applicant's "explanatory affidavit" does not establish good cause for the period of delay. As Miller JA in *Chetty v Law Society, Transvaal*[7] held that

> 'An unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits. In the light of the finding that the appellant's explanation is unsatisfactory and unacceptable it is therefore, strictly speaking, unnecessary to make findings or to consider the arguments relating to the appellant's prospects of success.'[8]

[27] If the applicant was inadequately represented by her first legal representative then she fared no better with the second. Steyn CJ in *Saloojee & Another v Minister of Community Development*[9] held that

> 'In *Regal v African Superslate (Pty) Ltd.,* 1962 (3) SA 18 (AD) . . . this Court came to the conclusion that the delay was due entirely to neglect of the applicant's attorney, and held that the attorney's neglect should not, in the circumstances of the case, debar the applicant, who was himself in no way to blame, from relief. I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity.'[10] (My emphasis.)

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[5] [2000] 1 BLLR 45 (LAC).
[6] Above, at 53H-I.
[7] 1985 (2) SA 756 (A).
[8] Above, at 768B-768D.
[9] 1965 (2) SA 135 (A).
[10] Above, 141A-D.

The Labour Appeal Court in *Superb Meat Supplies CC v Maritz*[11] stated that

> 'It has never been the law that invariably a litigant will be excused if the blame lies with the attorney. To hold otherwise might have a disastrous effect on the observance of the rules of this court and set a dangerous precedent. It would invite or encourage laxity on the part of practitioners.'[12]

See too *A Hardrodt (SA) (Pty) Ltd v Behardien & others*[13] where the Labour Appeal Court stated the following in relation to a delay of four and a half months

> 'The catalogue of events reveals negligence, incompetence and gross dilatoriness by the appellant's legal representatives. It is difficult to see how that constitutes a good cause condonation with convincing reasons as laid down in the *Queenstown Fuel Distributors CC* case.'[14]

[28] In light of the facts set out above, I am not satisfied that there has been a reasonable, adequate or acceptable explanation for the delay occasioned in bringing the review application and thereafter in filing the record and the supplementary affidavit. In *Moila v Shai N.O. & others*[15] Zondo JP considered the plight of an applicant who filed a review application a year after the expiry period of six (6) weeks. The Court noted

> 'I do not have the slightest hesitation in concluding that this is a case where the period of delay is excessive and the appellant's purported explanation for the delay is no explanation at all. I accept that the case is very important to the appellant. However, the weight to be attached to this factor is too limited to count for anything where the period of delay is as excessive as is the case in this matter and the explanation advanced is no explanation at all. If ever there was a case in which one can conclude that good cause has not been shown for condonation without even considering the prospects of success, then this is it. Where, in an application for condonation, the delay is excessive and no explanation has been given for that delay or an "explanation" has been given

[11] (2004) 25 *ILJ* 96 (LAC).
[12] Above 100I-J.
[13] (2002) 23 *ILJ* 1229 (LAC).
[14] Above, para 14 (per Nicholson JA); followed in *Arnott v Kunene Solutions & Services (Pty) Ltd* (2002) 23 *ILJ* 1367 (LC).
[15] (2007) 28 ILJ 1028 (LAC).

> but such "explanation" amounts to no explanation at all, I do not think that it is necessary to consider the prospects of success.'[16]

[29] Both counsel were in agreement that I should determine both the issue of condonation and the merits of the review. I was in agreement with that approach. The applicant was dismissed after being found guilty of fraud, in that she placed a credit card voucher in the amount of R1240.00 in her till, which she received from another cashier, Siphiwe Biyela, without a valid transaction having taken place. It was contended that the transaction was effected in order to cover up a shortage on her till. Secondly, the applicant was charged with breaking a rule of the company prohibiting the exchange of a credit card voucher for cash. It was contended on behalf of the applicant that the decision of the third respondent was not a decision which a reasonable decision maker could come to as it was not supported by the evidence before him.

[30] Before dealing with the arbitrator's finding regarding the events on 7 April 2009, the arbitrator analysed the evidence of the witnesses regarding the meeting on 25 March 2009. The company's administration manager, Ms Ungerer testified that prior to March 2009, cashiers were allowed to exchange credit card vouchers, which were swiped and produced at the tills, in exchange for cash. In effect, without having to purchase goods from the first respondent, cashiers would be able to effect a transaction against the use of a credit card for a supposed purchase, but in effect the card was being used to obtain cash. Ungere's testimony was that due to fraud, a rule was introduced that no cash could be issued in exchange for a credit card voucher without a valid transaction taking place.

[31] A meeting was held on 25 March 2009 the version of the company's witnesses is that the above mentioned rule was explained to all staff, including the applicant. The applicant denies that she was present at the meeting. Both Ungerer and Msane testified that the meeting did take place on 25 March 2009 at which all staff were present, including the applicant. From the record, it would appear that no attendance register was kept of the meeting. As to whether the applicant was present, the applicant's version is that this was a meeting for

[16] Above, at para 34.

"front end staff" and she was accordingly not required to be present. This version was never put to Ungerer in cross examination and the arbitrator was correct in concluding that Ungerer's version was left unchallenged. What the applicant's representative did contend at the arbitration is simply that no meeting took place on 25 March 2009, and the change in the rule regarding the exchange of credit card vouchers for cash was never conveyed to staff.

[32] The applicant relies on the absence of a register at the meeting on 25 March 2009 to support her contention that she was not present at the meeting or that the meeting ever took place, and accordingly she had no knowledge of the rule being broken when she gave her sister an amount of R1240.00, and replaced this amount by way of a credit card transaction. Both Ungerer and Msane testified that all of the cashiers, including the applicant, were present at the meeting. It is not disputed that the applicant clocked into work at shortly past 07h30. Ungerer's evidence is that the store opens every Wednesday at 08h30, as it is customary for the company to have a meeting with its staff. There is no evidence of what the applicant did during this time whilst all other staff were at the meeting.

[33] In analysing her evidence, the arbitrator accepted the version of the company's witnesses that a meeting on 25 March 2009 did take place. That conclusion, in my view, is a reasonable decision that could be reached in the circumstances based on the evidence before the arbitrator. The arbitrator found no reason to reject the evidence of the company's witnesses. On the other hand, while the applicant's version is that the meeting was for "front-end staff only", her witness, Ms. Biyela, testified that no meeting took place on 25 March 2009. The arbitrator correctly found, on the basis of the evidence before him, that there was a contradiction in the evidence of the applicant and her witness. Either there was a meeting, only for "front end" staff, as the applicant contended or there was no meeting at all, as contended for by Biyela. Biyela, it must be borne in mind, was also charged for the same misconduct as was the applicant.

[34] Mr. Geldenhuys who appeared for the applicant, conceded that if I were to accept the version of the first respondent that the arbitrator acted reasonably and rationally in concluding that a meeting was held on 25 March 2009, then

the only inference to be drawn, is that staff were informed of the change of rules against the exchanging of credit card vouchers for cash. The inevitable conclusion is then that the applicant had knowledge of the rule and acted contrary thereto. Even if the arbitrator arrived at a decision that no reasonable decision maker could have arrived at, regarding the meeting of 25 March 2009, there is still the evidence of Ungerer that the knowledge of the new rule against exchanging credit card vouchers for cash was prohibited was communicated personally to the staff, as well as the rule being printed and placed alongside the credit card machines used by the cashiers. Her testimony was that the notice clearly stated that

> 'No person is allowed to use the credit card machine without any supervisor assistance. Supervisor assistance only authorize sales on credit card machine. Identification required for credit card or debit card purchases done on the credit card machine.'

[35] The thrust of the applicant's attack against the decision of the arbitrator was that the arbitrator had found the applicant guilty of fraud when there had been no loss sustained by the company, nor was there any basis to prove that there had been a misappropriation of monies. It was further submitted that applicant had no intention to commit fraud, evidenced by her conduct of inserting a credit card voucher in her till, and that the decision of the arbitrator was outside the range of reasonableness, in terms of the outcomes that could have been reached. I agree with Mr. Geldenhuys that the award of the third respondent does not set out in any detail why she found that the applicant was guilty of fraud and of breach of the rule. However, this in itself is no reason to find that the decision of the arbitrator should be set aside.

[36] In *Fidelity Cash Management Services v Commission for Conciliation, Mediation & Arbitration & others*[17] Zondo JP articulated the test as follows

> 'It seems to me that, even if there may have been a debate under *Carephone* and prior to *Sidumo* on whether a commissioner's decision for which he or she has given bad reasons could be said to be justifiable if there were other reasons based on the record before him or her which he or she did not

[17] (2008) 29 ILJ 964 (LAC).

> articulate but which could sustain the decision which he or she made, there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend – at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision-maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.'[18]

[37] On behalf of the first respondent, Ms Smart pointed to the evidence of Ungerer as the basis for the foundation that the conduct of the applicant not only amounted to a breach of a rule, but also to fraudulent behavior. She submitted, and correctly with regard to *Fidelity Cash Management Services*, that the test as to whether the arbitrator's decision is reasonable, must be determined objectively with due regard to the facts before him or her. The evidence which was before the arbitrator was that a meeting was held on 25 March 2009 where the new policy regarding credit card vouchers was explained to staff. The applicant's version is that she arrived at work that morning prior to the meeting, but she did not attend, or that she was not required to attend, must be weighed up against the evidence of the company's witnesses who stated that it was customary to have a meeting with staff every Wednesday morning.

[38] The company's witnesses further testified that the policy of no credit card vouchers being exchanged for cash was reduced to writing and cashiers alerted to its operation in the form a notice placed next to the card machines. The new policy significantly changed the past practice where cashiers could 'withdraw' cash from their tills against a credit card transaction to the same value, even without a valid transaction for the purchase of goods. Against this evidence, the

[18] Above, at para 102.

applicant denied that she knew of the new rule - that she asked her co-worker Siphiwe Biyela to process a credit card transaction for R1240.00, which she placed in her own till and that she gave her sister the money as she and her family were starving and had no money.

[39] The applicant denied that notices were issued drawing her attention (and that of other cashiers) to the new policy or that one-on-one cashier meetings were held where she was informed of the new rule. No other cashiers were called to testify in supportr of the appellant's contention. In response to the argument of the applicant's representative that the first respondent had failed to establish that fraud had been committed, Ms Smart responded that irrespective of whether the misconduct constituted fraud or the breach of a rule, the sanction of dismissal was reasonably justifiable for either offence. That may be an answer to the reasonableness of the sanction imposed, but is no answer to the complaint of the applicant that she is not guilty of fraud and that the third respondent accordingly misdirected herself by coming to the conclusion that the applicant was guilty of fraud. Mr. Geldenhuys submitted that on the facts before the third respondent, the latter could never have come to the conclusion that dishonesty or fraud had taken place. The arbitrator provides the following reasoning for the conclusion she reached

> 'The applicant on her own admission gave the money to her sister and, that in itself constitutes misappropriation of funds. Furthermore, in my view it was of a fraudulent nature. The harm caused goes to the heart of the trust relationship between the applicant and respondent.'[19]

[40] The applicant's representative criticised the third respondent's conclusion that the applicant had perpetrated fraud. In Ungerer's evidence, she articulates the company's view of why they considered the conduct of the applicant to be fraudulent

> 'Due to fraud that we had in the past, we brought a rule out and it came from the credit card as well, that no sales are to be done without a transaction, a

[19] Record: Arbitration award, pages 19-20.

> legal transaction. Therefore we couldn't cash any credit card slip in the store at all.'[20]

Ungerer further testified that the company experienced occasions in the past where customers would enter the store and swipe their credit cards and withdraw cash. In some instances, fraudulent credit cards were used. She further indicated that two customers were imprisoned for fraudulent use of their credit cards. For these reasons, the credit card companies had requested that the practice of swiping credit cards in exchange for cash be stopped. On 7 April 2009 at about 10h58, Ungerer indicated that she decided to carry out a spot check on the applicant's till. This was a random check to ascertain that the cashier was following the rules and procedures, and particularly that there was no "rolling over" of cash. When Ungerer reviewed the list of transactions, there was no transaction which could be linked to a purchase of R1240.00, although there was a credit card voucher for this amount in the till. A perusal of the credit card slip indicated that the transaction took place at 08h29 on 7 April 2009, and on Ungerer's version the transaction was processed at Biyela's till so that the applicant could get sufficient cash to make good a cash shortfall in her till, presumably from the money that she gave her sister.

[41] Ungerer was unable to provide a clear definition of what she understood by fraud in relation to the conduct of the applicant, but related it to use of the credit card without a valid transaction taking place.[21] She said that in the past this type of transaction had been allowed, especially where customers had "robbed" cashiers, which I assume related to the earlier example of fraudulent credit cards being used to access cash other than via a bank auto teller machine. This practice of making good shortfalls and the use of credit cards on tills without any purchases, was barred by the first respondent's Head Office. According to Ungerer's investigations at the time of the spot check, if one tallied the cash in the applicant's till and excluded the credit card voucher, the applicant would have had a shortfall of R1239.00. The credit card transaction

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[20] Record: page10, lines 8-11.

[21] In the *South African Criminal Law and Procedure* by Hunt and Milton (1982, Juta &Co Ltd, Vol 2, 2ed ) at p.755 'fraud' is defined as follows:
"*Fraud consists in the unlawful making with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudice to another."*

effected by the applicant was for the amount of R1240.00. It is perhaps for this reason that the third respondent accepted the first respondent's witnesses' evidence that the applicant was guilty of fraud in that she carried out the transaction only to mask the cash shortage in her till.

[42] In my view, the award of the arbitrator, even though it may be unsatisfactory in certain respects, and perhaps the third respondent could have articulated her views with more clarity as to why the applicant was guilty of fraud, the award when viewed objectively against the evidence, is not so unsatisfactory as to fall foul of the applicable grounds of review. The third respondent concluded, and reasonably so, that the conduct of the applicant did amount to fraud. Even if the applicant was not guilty of fraud, Ms Smart submitted that it was clear that the applicant knowingly breached a rule introduced to stem fraudulent conduct by customers. For the reasons I have set out above, I am satisfied that the third respondent's conclusion that the applicant knew of the rule and breached it on 7 April 2009, is a decision that another decision maker, acting reasonably, could have arrived at. For that reason, and despite any shortcomings in the decision, the ultimate conclusion reached by the arbitrator should be allowed to stand. Zondo JP in *Fidelity Cash Management Services* noted that

> 'Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues were that were before him or her. There is no reason why an arbitration award or a finding or decision that, viewed objectively, is reasonable should be held to be unreasonable and set aside simply because the commissioner failed to identify good reasons that existed which could demonstrate the reasonableness of the decision or finding or arbitration award.'[22]

[43] Insofar as the sanction of dismissal is concerned, Ms Smart argued that the penalty of dismissal is fair and reasonable, and is the penalty applicable to either of the charges of which the applicant was found guilty. The arbitrator in her award considered the applicant's length of service and the impact that a dismissal would have on her. This was weighted up against the company's

[22] Above 17, page 997G-J.

*"prerogative to set rules in regard to what an appropriate sanction should be. Taking into account all the facts of this matter I am of the view that the misconduct renders the dismissal fair*." The arbitrator also found the applicant to be dishonest and the misconduct that she was found guilty of, to be of a serious nature. In employment law a premium is placed on honesty because conduct involving moral turpitude by employees damages the trust relationship on which the contract is founded. See S*appi Novoboard (Pty) Ltd v Bolleurs*[23]*.*

[44] In this regard, I should point out that while the applicant attributed the credit card transaction to her efforts to help out her sister who was suffering from not having any food, when she was initially questioned about the shortfall she said that a customer came into the store and ordered 15 bags of cement. After she had swiped his card and processed the transaction, the customer did not want the goods but rather the cash. This version was later changed to indicate that the transaction was done to assist her starving sister.

[45] Another important feature ascertained from the record is that the other cashier involved in this transaction, Ms Biyela, was also charged with misconduct for her part in the events on 7 April 2009. There can be no suggestion that the applicant was singled out for any selective prosecution, or that the penalty handed out to her was disproportionate. The third respondent correctly considered that the dismissal fell within the range of reasonable options available to the chairperson of the enquiry.

[46] I accordingly find no reason to interfere with the finding of the commissioner on both the finding on the merits and sanction. Although this is a case where costs should follow the result, no purpose would be served by mulcting the applicant with costs of this failed review. She is unemployed and in all likelihood an order of costs against her would not be recoverable. .

[47] In the result, I make the following order:

1. The applicant's application for condonation for the late filing of her review Application, condonation for the late filing of the Rule 7A notice and the record, is dismissed;

[23] (1998) 19 ILJ 784 (LAC).

2. The application for review and setting aside of the decision of the third respondent, is dismissed.
3. No order as to costs.

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Chetty, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant: Mr E Geldenhuys.

Instructed by Tomlinson Mnguni James.

For the Respondent: Adv CSA Smart.

Instructed by Goodrickes.