THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 384/13

CASTOR AND LADDER (PTY) LTD	Applicant
And	
NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA	First Respondent
NUMSA obo RAMUSHI JOHN & 17 OTHERS	Second Respondent
METAL AND ENGINEERING INDUSTRIES BARGAINING COUNSEL	Third Respondent
ADVOCATE L C SHANDU N O	Fourth Respondent

Heard: **8 July 2015**

Delivered: **16 July 2015**

JUDGMENT

HULLEY, AJ

Introduction

[1] This is an application to review and set aside an arbitration award issued by the fourth respondent on 21 December 2012 under the third respondent's case number MEGA36092.

[2] In terms of that award the fourth respondent found that the dismissal of the employees by the applicant was "not for a fair reason" and ordered the applicant to reinstate them to the position which they occupied "without any change to their conditions of service" and to do so within 21 days of the award.

[3] In addition, the applicant seeks condonation for the late delivery of (a) the review application, (b) its Rule 7A(8) notice and (c) the record.

[4] The first and second respondents, in turn, have applied to dismiss the review application. The two matters were set down and heard simultaneously. There is no need to consider the application to dismiss the review: if the review succeeds, the latter application must be dismissed; if the review fails, the latter application is unnecessary.

Principles relating to condonation

[5] The principles applicable to applications for condonation are settled: the courts have a wide discretion which must be exercised judicially on a consideration of all the facts of each case.[1] In exercising its discretion the court must do so within certain recognised principles.[2]

[6] Certain factors are generally considered relevant, but the weight to be afforded to each factor is dependent upon the particular circumstances of each case.[3] The factors considered relevant are the extent of the delay and

[1] *Nature's Choice Products (Pty) Ltd v Food & Allied Workers Union & others* (2014) 35 ILJ 1512 (LAC), at 1515C – E
[2] *Britten v. Pope* 1916 AD 150, at 157
[3] *Federated Employers' Fire & General Insurance Co. Ltd v. McKenzie* 1969 (3) SA 360 (A), at 362G/H

the explanation therefor, the prospects of success and the importance of the case,[4] the prejudice suffered by the respondent and its interest in finality, the convenience of the court and the avoidance of delay in the administration of justice[5].

[7] No single factor is individually decisive but each must be weighed against the others[6]. A slight delay and a good explanation may make up for poor prospects[7]. On the other hand, the importance of the matter and good prospects may compensate for a long delay[8].

[8] In a case where the delay is lengthy the explanation must cover the entire period of the delay.[9]

[9] Since I am obliged to consider the prospects of success as part of the enquiry into condonation, I intend considering the merits first. I will deal with the remaining issues below.

The arbitration proceedings

[10] At the arbitration hearing the applicant was represented by its Group HR Manager, Mr Peter Dixon, and the employees by a union official, Mr Frans Mathekga.

[11] In his opening address Dixon explained that the employees were all guilty of derivative misconduct and that they had been charged with stealing of finished goods from the company. Various bundles were handed up to the arbitrator. The relevant portions of the charge sheet read as follows:

"**DERIVATIVE MISCONDUCT**

IN THAT ON OR ABOUT: RECENTLY

IT IS ALLEGED:

[4] *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A), at 532C – D
[5] *Federated Employers v. McKenzie*, *supra*
[6] *Melane*, *supra*,
[7] *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720E – G
[8] *Melane*, *supra*,
[9] *Ethekwini Municipality v Ingonyama Trust* 2014 (3) SA 240 (CC), at 247C

- **THAT YOU PARTICIPATED IN A SYNDICATE INTEND OF (*sic*) STEALING FINISHED GOODS AND / OR MATERIAL FROM THE COMPANY AND DISPOSING [OF] IT FOR YOUR OWN BENEFIT.**
- **OR THAT YOU WERE AWARE OF OTHERS IN THE COMPANY WHO HAS (*sic*) BEEN STEALING.**"

[12] The applicant called a single witness, Mr Rudolph van der Wielen and the employees called three witnesses, all of whom were former employees and part of the group constituting the second respondent: Messrs John Ramushu, Morgan Motaung and Bheki Mkhaliphi.

[13] Van der Wielen testified that he was the applicant's production manager. He had taken over the management of the despatch department in January 2012 from Mr Andre Cronje who had passed away in November 2011.

[14] According to Van der Wielen the company performed stocktakes bi-annually, once in September and once in March of each year. The September 2011 stocktake revealed that substantial stock losses had been incurred. As a result, new security measures were introduced: an additional security company was placed at the loading base, the CCTV cameras were updated and a so-called mini stocktake was performed in January 2012 to determine whether these measures had proved effective. They had not and that the substantial stock losses persisted.

[15] Van der Wielen testified that the company received information regarding the theft of its stock from four different sources:

15.1 In the first instance, from the employees on the factory floor. (The factory floor was located alongside the despatch section).

15.2 Secondly, a member of the public, Ms Moshaahlana Abegail Monyitshwane, made a statement to the police under oath.

15.3 A member of the sales department.

15.4 Two employees who had been dismissed.

[16] Van der Wielen handed in the statement deposed to by Monyitshwane. In the statement Monyitshwane indicated that she had resided in Tembisa since February 2008 together with her boyfriend at the time, one Aaron Satekge. She was aware that he worked for the company and alleged that he frequently brought the company's stock, consisting of stepladders, curtain rails, burglar doors, burglar proofing and safes (presumably to their home) and acted together with three of his colleagues. She identified the three colleagues as Jimmy Mpenga, King Mbonxa and John Ramushu. She stated that the four would sell these various items to the community in Tembisa.

[17] According to Van der Wielen a person from the sales department was requested to work in despatch in order to "keep an eye" on the activities. He testified that she "did not last very long" and became increasingly uncomfortable and requested to be returned to the sales department. He did not indicate what it is that she observed.

[18] Van der Wielen alleged that the applicant had lost as much as R620 000.00 between the September stocktake and the mini stocktake in January 2012.

[19] He also testified that two of the employees who had been dismissed asked for their jobs back and indicated that while they knew about what was transpiring they were not prepared to divulge names because they were too afraid.

[20] None of the persons who had direct knowledge of the thefts were called to testify. Van der Wielen indicated that Monyitshwane had disappeared and a security guard who had observed what had transpired "vanished off the earth". The security guard was employed by an outside security firm and when the applicant contacted the company for assistance it indicated that it was unable to find the security guard.

[21] Arising from the aforesaid disciplinary proceedings were instituted against all persons employed within the despatch department on the basis that they had participated in a syndicate intent of stealing finished goods and/or material from the company and disposing of it for their benefit, alternatively, for being aware of others within the company who had been stealing (and failing to report it).

[22] Employees were afforded the opportunity to submit to a polygraph test and those who passed the test were not dismissed. (There was some dispute as to whether the employees were properly informed of the purpose of the polygraph test, but I do not think that this is of any relevance to this matter).

[23] Van der Wielen testified that after the first team of despatch staff was dismissed a new team was brought in and a clean stocktake with no losses was recorded. He later, under cross-examination, stated that a small loss of R32 000.00 was recorded in the September 2012 stock-take.

[24] Under cross-examination Van der Wilen conceded that a person by the name of Bheki may have been transferred from a different department in the very week in which the dismissals took place and that he was somehow subsumed among the other employees in despatch.

[25] He further conceded that it was possible that the employees had not been informed of the purpose for the stocktaking in September and January 2012. He testified that the CCTV footage was inconclusive as it merely demonstrated people removing stock but was unable to determine whether they were entitled to do so legitimately.

[26] When cross-examining Mathekga posed various questions to Van der Wielen relating to the hearsay character of some of his evidence, and in particular to the statement of Monyitshwane. He suggested to Van der Wielen that the persons implicated by Monyitshwane did not live in Tembisa but as far afield as Hammanskraal. (It appears that the contention was that they were unlikely to have travelled to Tembisa).

[27] A few questions were posed to Van der Wielen regarding a discrepancy in the value of the stock loss given at the disciplinary hearing and the value given at the arbitration. He explained that the amount provided at the arbitration proceedings was after a final audit had been conducted, whereas that given at the disciplinary enquiry was before the final audit had been done.

[28] Essentially, each of the witnesses called on behalf of the employees denied any knowledge of stock theft.

[29] Ramushu was the only one of the four employees implicated by Monytshwane who testified. He was a driver in the despatch department. When cross-examined about the stock sheets for April to December 2011 in respect of all stock returns, Ramushu stated that the book in which he kept that information had been lost when the vehicle in which it was kept was taken into the panel-beaters following a car accident. Upon further cross-examination it turned out that the accident took place in 2010 and the only book he was able to hand up related to 2011, but did not include the period for April to December 2011. Eventually, upon further probing, he stated that "maybe I must have misplaced it after I was dismissed".

[30] Motaung testified that he was an assistant driver. He too denied the charges. Under cross-examination he claimed that it was not the practice for drivers or assistant drivers to consider the invoices and compare it with the amount of stock before loading vehicles. He acknowledged, however, that the drivers had to consider the invoices when making deliveries in order to determine precisely how much stock ought to be delivered to clients.

[31] Kalepe testified that he was a forklift driver who worked in the storeroom and that in January 2012 he was transferred to despatch. He had only been in the department for a very short while before he too was charged and ultimately dismissed. He testified that he had taken over from the regular forklift driver in despatch. His evidence that he was transferred from a different department was challenged under cross-examination.

The arbitration award

[32] In finding that the dismissals were unfair, the fourth respondent, after referring to the decision of the Labour Appeal Court in *Chauke and others v Lee Service CC t/a Leeson Motors*[10], noted that in order for an employer to successfully rely upon derivative misconduct to hold employees liable the employer must present credible evidence to demonstrate that (1) there was original misconduct being perpetrated against it, (2) the employees charged knew of the original misconduct, (3) the assistance of the employees in

[10] (1998) 19 ILJ 1441 (LAC)

detecting the misconduct had been sought; and (4) they had unreasonably refused to offer such assistance.

[33] The arbitrator concluded that the applicant had "failed to prove that any of these features were present with regard to these employees". Noting that it was "possible" that the perpetrators were among the employees dismissed he pointed out that it was "also very possible that there are no perpetrators of the misconduct among all the dismissed employees hence the employer continues to suffer stock losses".

[34] In coming to these conclusions the fourth respondent made the following critical findings:

34.1 No evidence was presented to show that all the employees at despatch "were in cahoots" in respect of the thefts.

34.2 The affidavit of Monyitshwane was disputed by the employees and "was never put to any of the employees that testified".

34.3 The results of the stocktake demonstrated that the thefts continued even after the dismissal of the employees. This, he said, tended to prove that they may not have been involved in the thefts. In coming to this conclusion the arbitrator stated that "it is worth noting that the stock loss for the six-month period up to September 2011 is much less than that of the 2012 financial year end when the employees had long been dismissed" and that the applicant had not supplied a comparison between the 2011 and 2012 financial year ends.

34.4 The applicant had "presented no evidence" to prove that the employees had been made aware of the problem of theft prior to being charged.

Consideration of the grounds of review

[35] The essence of the grounds of review raised by the applicant relates to the alleged failure of the arbitrator to deal properly with the principles outlined in

the *Chauke* case. In particular, the applicant contends that the evidence presented on its behalf resulted in the onus shifting to the employees to demonstrate that they were innocent of the misconduct with which they had been charged. It contended that only three of the employees were called to testify and that in terms of the principles enunciated in *Chauke* each employee had testify in order to exculpate himself or herself. The applicant also pointed out that insufficient weight was given to the evidence of its witness.

[36] This calls upon me to analyse the *Chauke* case and the legal principals developed around so-called group misconduct.

[37] In the *Chauke* case the court was called upon to determine whether the dismissal of all workers in a particular section of the employer's business was substantively fair. The evidence showed that there had been several acts of malicious damage to the property of clients (the company was a panel-beating and spray-painting business). Despite various attempts on the part of the company to ascertain the identity of the perpetrators, it was unable to do so. The company provided several warnings to the whole workforce that any further acts of sabotage to any vehicle where it was unable to identify the culprit would result in the dismissal of *every* worker in that section. A further act of sabotage was perpetrated and the company was unable to identify the culprit. It proceeded to dismiss all the workers in each of the sections dealing with the vehicles.

[38] In *Chauke*, Cameron JA examined the jurisprudential basis for derivative misconduct. The learned judge pointed out that there were two possible 'lines of justification for a fair dismissal'[11]:

> 'The first is that a worker in the group which includes the perpetrators may be under a duty to assist management in bringing the guilty to book. Where a worker has or may reasonably be supposed to have information concerning the guilty, his or her failure to come forward with the information may itself amount to misconduct. The relationship between employer and employee is in its essentials one of trust and confidence, and, even at common law,

[11] *Chauke*, *supra*, at 1447 A – B

> conduct clearly inconsistent with that essential warranted termination of employment (*Council for Scientific & Industrial Research v Fijen* (1996) 17 ILJ 18 (A) at 26D-E). Failure to assist an employer in bringing the guilty to book violates this duty and may itself justify dismissal.'[12]

[39] In support of this the learned judge referred to the case of *Food and Allied Workers Union and others v Amalgamated Beverage Industries Ltd*.[13] In that case a large group of workers had assaulted a scab driver leaving him severely injured. The employer was unable to prove which of those present at the workplace at the time actually perpetrated the assault and accordingly proceeded to charge every one of those employees who had clocked in and was in the vicinity of the incident when it occurred. None of the workers came forward at the workplace hearings to affirm their innocence or to volunteer any evidence about the perpetrators. The Labour Appeal Court (per Nugent J, as he then was) held that –

> 'In the field of industrial relations, it may be that policy considerations require more of an employee than that he merely remain passive in circumstances like the present, and that his failure to assist in an investigation of this sort may in itself justify disciplinary action.'[14]

[40] With reference to that *dictum*, Cameron JA noted that:

> 'This approach involves a derived justification, stemming from an employee's failure to offer reasonable assistance in the detection of those actually responsible for the misconduct. Though the dismissal is designed to target the perpetrators of the original misconduct, the justification is wide enough to encompass those innocent of it, but who through their silence make themselves guilty of a derivative violation of trust and confidence.'[15]

[41] In these circumstances, the failure by 'any of the workers concerned' to give evidence justified the inference, said the learned judge 'that all those present at the workplace on that day either participated in the assault or lent it their support'.

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[12] *Chauke*, *supra*, at 1447B – D
[13] (1994) 15 ILJ 1057 (LAC)
[14] *FAWU v ABI*, *supra*, at 1063B
[15] *Chauke, supra,* at 1447 H – I

[42] In the *Chauke* case Cameron JA was of the view that the evidence demonstrated the direct involvement of all the employees who had been dismissed and that it was not necessary to rely upon derivative misconduct.

[43] Since *Chauke* there have been several other cases dealing with the concept of derivative misconduct or, independently of team misconduct. In *Foschini Group Ltd v Maidi and others*[16] Revelas AJA endorsed the view that:

> 'if employees in a small store are unable to give an explanation for stock losses in that store to the effect that it was beyond their control, the only possible inference is that they are guilty.'[17]

[44] This court has also recognised group misconduct in the context of so-called "team misconduct"[18].

[45] In *True Blue*[19] Shai AJ stated that:

> 'What is clear to me is that in the case of 'team misconduct' just as in the case of derivative misconduct and common cause purpose there is no need to prove individual guilt. It is sufficient that the employee is a member of the team, a team the members [of] which have individually failed to ensure that the team meets its obligations, in our given case, to ensure that there was no stock loss.'

[46] In that case the learned judge pointed to the fact that various measures taken to prevent the stock loss had all failed and the employees had on several occasions been warned of the stock loss and told that they would have to accept responsibility for such losses. The learned judge noted that the employees 'neither gave evidence at the disciplinary hearing nor filed answering affidavits herein to explain themselves or counter the evidence of the applicant' and that the version of the applicant was the only version before court.[20]

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[16] (2010) 31 ILJ 1787 (LAC)
[17] *Foschini Group*, *supra*, at 1800A
[18] *True Blue Foods (Pty) Ltd t/a Kentucky Fried Chicken v Commission for Conciliation, Mediation and Arbitration and others* (2015) 36 ILJ 1375 LC at 1382H – 1383E
[19] *True Blue Foods (Pty) Ltd t/a Kentucky Fried Chicken v Commission for Conciliation, Mediation and Arbitration and others* (2015) 36 ILJ 1375 LC at 1383D – E
[20] *True Blue*, *supra*, at 1383I

The test for review

[47] Where an application for review is brought on the basis of a challenge to the findings made by the arbitrator in light of the evidence presented, the applicant for review takes upon himself the responsibility to demonstrate that the decision arrived at by the arbitrator is one which no reasonable commissioner or arbitrator could have arrived at.[21]

[48] In *Gold Fields*[22] Waglay JP noted that when assessing an award:

> '[15] …it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard a failure by the arbitrator to consider all or some of the issues albeit material as rendering the award liable to be set aside on the grounds of process related review.
>
> [16] In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.'[23]

[49] The Judge President noted that in considering the evidence a holistic approach should be adopted and 'the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make'.[24]

Consideration of the award

[50] There are a number of indications in the award which suggest that the arbitrator misunderstood the nature of the inquiry.

[51] First, having satisfied himself that the employer's case was based upon derivative misconduct or team misconduct, the arbitrator held that there was no evidence presented to demonstrate that all employees at despatch "were in cahoots". It is clear from the passages referred to in the *Chauke* and other judgments dealing with derivative misconduct that there was no requirement

[21] *Sidumo and another v Rustenburg Platinum Mines Limited and others* 2008 (2) SA 24 (CC)
[22] *Gold Fields Mining SA (Pty) Limited (Kloof Gold Mining) v Commission for Conciliation, Mediation and Arbitration and others* (2014) 35 ILJ 943 (LAC)
[23] at 949C – D
[24] at 949F – G

that the employees should be “in cahoots” with each other. If they were in cahoots, there would be no need for application of the principle of derivative misconduct to their cases. Each of the cases dealing with group misconduct made it clear that an employee’s culpability derived not from the fact that he or she made common cause with or was “in cahoots” with the actual perpetrator, but rather from his or her failure to identify or assist the employer in identifying the wrongdoer (derivative misconduct) or in his or her failure to ensure that the team as a whole did not suffer losses (team misconduct).

[52] In the case of derivative misconduct the principal reason for holding each individual liable derives from the breach of the trust and confidence reposed in him by the employer. An employee who is aware of wrongdoing, especially in the form of theft or corruption on the part of a colleague, cannot stand idly by. Such employee owes an obligation towards the employer to ensure that sufficient information is supplied to the employer to assist in the investigation of the wrongdoing. Where the employee fears for his or her safety or wellbeing, the information can be supplied on an anonymous basis.

[53] Secondly, the arbitrator pointed to the fact that the affidavit of Monyitshwane was not put to any of the employees who testified. With respect, this proposition is not only exaggerated in the present case, it is misplaced.

[54] In *President of the RSA v. SARFU*[25] the Constitutional Court after dealing with the nature and extent of the obligation to cross-examine, stated:

> “[64] The rule [that one was obliged to put every aspect of one’s case to the opposing witnesses who had personal knowledge thereof] is of course not an inflexible one. Where it is quite clear that prior notice has been given to the witness that his or her honesty is being impeached or such intention is otherwise manifest, it is not necessary to cross-examine on the point, or where 'a story told by a witness may have been of so incredible and romancing a nature that the most effective cross-examination would be to ask him to leave the box'.

[25] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC)

> [65] These rules relating to the duty to cross-examine must obviously not be applied in a mechanical way, but always with due regard to all the facts and circumstances of each case. But their object must not be lost sight of.'

[55] There are a number of issues relating to the statement of Monyitshwane which the arbitrator ignored:

55.1 Only one of the employees implicated in that statement, Ramushu, testified on behalf of the employees; the statement could not be put to any of the other employees who testified.

55.2 The statement had been introduced during the testimony of Van der Wielen, so Ramushu had received prior warning of the fact that his integrity would be challenged and the basis thereof.

55.3 No cross-examination had ensued on the statement save in limited respects relating to its hearsay nature and the possibility that some of the employees implicated lived far away. However, when he testified Ramushu provided no evidence to support the version put to Van der Wielen.

55.4 Importantly, there was no suggestion during cross-examination of Van der Wielen that any aspect of the statement was false. It was, for instance, not suggested that the employees implicated therein denied knowing the deponent or that Mr Satekge denied ever having had a relationship with her. Nor was it suggested that any of the implicated employees would deny that they had ever been to Monyitshwane's house in Tembisa.

55.5 Satekge did not testify and Ramushu who did testify, and had been given advance warning of the challenged to his integrity, did not contradict any aspect of Monyitshwane's statement.

[56] Thus, by the time both parties had closed their case, the employer had produced a statement which implicated several employees and none of them had contradicted it. What was to be made of that? The arbitrator provided no answer to that question.

[57] Now, it is undoubtedly so that the statement, without the testimony of Monyitshwane, was hearsay. However, the obligation remained upon the arbitrator to consider whether to admit the statement and, if so, what weight to attach to it. Of course, the arbitrator ought to have determined the question of admissibility of the statement at the close of the employer's case and assess its value and weight at the end of the hearing.[26] The arbitrator in this case did none of this.

[58] Thirdly, the arbitrator's finding that "the content" of the affidavit had not been disputed is simply wrong. As pointed out above, it had *not* been disputed. What was disputed was its hearsay character. There were veiled suggestions that the content may be challenged, but such a challenge never materialised.

[59] Fourthly, the arbitrator's finding that (a) the employer continued to lose stock even after the employees were dismissed, and that (b) this fact supports the inference that the employees may not have been the wrongdoers is a surprising one. Van der Wielen had testified that there were no stock losses in the subsequent stocktake, but, in re-examination, pointed out that a R32 000.00 stock loss was recorded in the final audit in September 2012.

[60] The thrust of Van der Wielen's thesis was that by dismissing the entire department, the applicant had managed to root out the culprits. In cross-examination there was no serious challenge to the figures presented by Van der Wielen nor his thesis. The loss of R32 000.00 suffered subsequent to the departure of the employees was certainly substantially lower than that suffered previously. Clearly, something must have changed between the date when the first and subsequent stocktakes were. The only evidence produced to explain this massive difference was the dismissal of the employees. There may have been other explanations for the differences, but none of these were suggested in cross-examination or explored when the employees testified.

[61] Fifthly, the arbitrator's finding that the employer had presented no evidence to prove that the employees had, prior to being charged, been informed of the

[26] *S v Ndhlovu* 2002 (6) SA 305 (SCA), at 317F – 319G; *Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety & Security* 2012 (2) SA 137 (SCA)

problem of stock theft must, on the evidence, be accepted as correct. But that is not, with respect, the extent of the enquiry. The employees have an opportunity, even at the disciplinary inquiry, to come forward and assist the employer in identifying the culprits or demonstrate that he or she is entirely unaware of the misconduct that was perpetrated.

[62] In some of the cases to which I have referred the employers had informed the employees of the consequence of their silence and had sought their assistance *prior* to any disciplinary inquiry. There was, however, no suggestion in any of those cases that the opportunity could not be provided to the employees for the first time *at* the disciplinary inquiry. In *True Blue* the court pointed to the failure of the employees, even in the Labour Court, to provide evidence under oath to challenge the employer's version.

[63] I can see no reason in principle why an employee who has been informed of the purpose of seeking his or her assistance, would not, once he or she is informed at the disciplinary inquiry, be under a duty to come forward with information and avoid disciplinary sanctions.

[64] In the present case, the evidence demonstrated that the employees were aware at least by the time they got to the disciplinary enquiry of the applicant's case. This appeared from the charge sheet itself. Moreover, those employees who did testify made it clear that they were aware at the disciplinary enquiry of the true nature of the employer's case. It was also suggested by Mr Mathekga during cross-examination of Van der Wielen. Notwithstanding such awareness, they elected not to testify, and elected not to assist the employer.

[65] Finally, the arbitrator's suggestion that it was possible that the thief or thieves were not among the employees dismissed is against the weight of the evidence. The evidence presented by the employer was that several persons had identified the culprits as having emanated from the despatch department. This evidence was hearsay, but the arbitrator was bound to consider its admissibility and, if admitted, the weight to be attached to it. He did not do so.

[66] It was clear from all the evidence that the despatch department had direct access to the stock. There was no suggestion that persons from any other departments had access to the stock and if so, had the means of removing the stock from the company. The members of the despatch department had delivery vans and accordingly had obvious means to remove the stock.

[67] In all the circumstances, it is apparent that the arbitrator did not apply his mind properly to the evidence and the issues which were before him.

[68] Had he approached the matter in this fashion, the arbitrator would then necessarily have realised that each of the employees who had been dismissed and who were part of the despatch department was under an obligation to testify in order to exculpate him or herself. Three people took advantage of this, Messrs Ramushu, Motaung and Mkhaliphi. The arbitrator, however, did not assess their evidence and did not explain whether he considered their evidence to be persuasive. I have in some parts highlighted some difficulties with the evidence presented on behalf of the employees as I have with the evidence of the applicant. In light of the route I intend adopting, I do not propose going through all the evidence in too much detail.

[69] Kalepe is the one exception, on his version he had only arrived at the department when the disciplinary notices were issued. It was conceded by Van der Wielen that this may be correct. In my view, he was wrongly dismissed and his dismissal was accordingly unfair.

The condonation applications

[70] I turn now to consider the remaining aspects of the condonation applications. As previously indicated the applicant seeks condonation for the late delivery of (a) the review application, (b) its Rule 7A(8) notice and (c) the record. For the sake of convenience I shall refer to these as the first, second and third applications for condonation, respectively.

[71] With regard to the first application for condonation, s. 145 of the Labour Relations Act requires a review application to be brought within six weeks of service of the award on the applicant.

[72] It is unclear whether the award was served on the applicant, but it is apparent from its own affidavit that it acquired knowledge on 9 January 2013. The review papers were served on 13 March 2013, meaning that the application was 21 days out of time.

[73] The delay in launching the review application is not slight but is also not excessive. Six of those days are probably attributable to the delay in transmitting the papers to the deponent and in arranging for him to depose to it before a commissioner of oaths.

[74] In his affidavit in support of the first condonation application Litschka explained that he needed to provide the attorney with all relevant information in order to prepare the application. It appears that he was unable to obtain all the relevant information and documentation timeously to allow for the finalisation of the founding papers within the requisite time period.

[75] There are disconcerting aspects to the manner in which the first condonation application was dealt, but in light of the fact that the respondents have not suffered any prejudice, I am inclined to grant condonation.

[76] With regard to the second condonation application, Rule 7A(8) requires an applicant seeking to review an award must within 10 days after the Registrar has made the record available, either amend, add to, or vary its notice of motion together with any supplementary affidavit or file a notice confirming that it stands by its original notice of motion.

[77] According to the applicant the transcript was “served” on the applicant on 27 February 2014. (It is unclear who served it on the applicant. As I understand the replying affidavit and the affidavit in the third condonation application, transcribers provided the transcript to the applicant on that date). The applicant accordingly had until 13 March 2014 to take either of the steps contemplated in Rule 7A(8). A notice in terms of Rule 7A(8)(b) was served on 28 May 2014. It is accordingly 48 (court) days out of time.

[78] The affidavit in the second condonation application was deposed to by the applicant’s attorney of record, Mr John Dua. In this affidavit Dua explained

that he had perused and considered the transcript after receipt thereof on 27 February 2014 and then prepared a notice in terms of Rule 7A(8)(b), but due to what he describes as a "secretarial / administrative error" the notice was not sent to the attorney's correspondent for service and filing, alternatively, was sent but was not received by the correspondent. He stated that he was unable to expand upon this issue because the secretary who had previously dealt with the matter had left the firm and there was no proof of transmission on the office file.

[79] In opposing the two applications for condonation the first and second respondents submitted that the dilatory manner in which the applicant acted was indicative of a general lack of interest.

[80] With regard to the second application for condonation the respondents pointed to the provisions of paragraph 11.2.2 and 11.2.3 of the Practice Directive of this Court. Paragraph 11.2.2 requires that a record be filed within sixty days of notification by the registrar that the record "has been received" and in terms of paragraph 11.2.3 if the record is not filed within that time period the application is "deemed" to have been withdrawn unless the applicant has "within that period of time" requested the consent of the respondent and, if not granted, approached the Judge President for condonation. This was not done, and the application was accordingly, so they contended, defective. (I deal further with this aspect when considering the third condonation application).

[81] I have several difficulties with the application for condonation in respect of the late filing of the Rule 7A(8) notice. No indication is given by Dua of the identity of the secretary, when she left the firm, where she presently works or resides, or whether efforts were made to obtain an explanation or an affidavit from her. Nor was a copy of the notice which was allegedly prepared at that point in time attached. Instead, the only notice attached to the papers was that signed on 27 May 2014. No explanation is provided for why the earlier notice was not attached, whether it was still in existence and if not, why not. In fact, no explanation is provided as to the date on which the first notice was

prepared. The broad and general manner in which the condonation application is dealt with is most unsatisfactory.

[82] In reply Dua explained that he was not aware until 3 October 2013 that the bargaining council had in fact submitted the record and compact discs to the registrar of this court. He explained that upon confirmation that the record had been filed with the registrar "immediately a request was made for the transcription of the record". He stated that when requesting the transcription of the record the Johannesburg correspondent attorney had not realised that a deposit was required resulting in the delay in the completion of the transcript.

[83] The delay is substantial and has not been explained with the degree of specificity demanded by this court. There is, however, no suggestion that the explanation provided is false and I would be reluctant to make such a finding especially where the explanation is provided by an officer of this court.

[84] The essence of the explanation provided is that the notice in terms of Rule 7A(8)(b) was prepared but was never served on the other side. This demonstrates an intention to comply timeously.

[85] In any event, no prejudice has been suggested and the prospects of success (as set out above) are good. I am inclined to condone the late filing of the Rule 7A(8)(b) notice.

[86] In so far as the third condonation application is concerned, Rule 7A(6) requires the applicant in review proceedings to provide each party and the registrar with copies of the record or portion of the record, as the case may be. It does not specify the time period within which this is to be done. The reason is obvious when one considers both sub-rules (5) and (8).

[87] Rule 7A(5) requires the registrar to make available to the applicant the record which is received (from the person whose decision is being reviewed). The applicant must then make copies of such portions of the record as are necessary for the review. Rule 7A(8) requires the applicant within 10 days after the registrar has made the record available, to either amend, add to or

vary its notice of motion together with any supplementary affidavit or file a notice confirming that it stands by its original notice of motion.

[88] No time period is prescribed for the filing of the record after it is received by the applicant because the applicant has a mere 10 days from the date of receipt of the record to the date of compliance with Rule 7A(8).

[89] Practically, however, what the CCMA or bargaining council files with the registrar is not a transcribed record, but merely the recordings which are captured on tape or compact discs.[27] Thus, what was filed initially by the bargaining council or CCMA, as the case may be, was not "the record" (which implies a document), because it was not in a format that could properly be considered by the reviewing court. Once the record is transcribed and made available to the applicant, the 10-day period prescribed by Rule 7A(8) commences.

[90] Paragraph 11.2.2 of the Practice Manual, in recognition of the practical difficulties, prescribes that the record be filed within sixty days of the date on which the applicant "is advised by the registrar" that the record has been received (from the bargaining council or CCMA). The reference to "days" in the Practice Manual is to court days. In terms of this provision the time period commences once the applicant receives the advice from the registrar and not once the record is filed.

[91] In its affidavit in support of the third application for condonation the applicant alleged that it had received no notice that the bargaining council had filed its notice in terms of Rule 7A(8). It only became aware on 3 October 2013 that the recordings had been filed and immediately arranged for its transcription. It states that the record was filed 148 days out of time.

[92] No opposing papers were filed in response to the third condonation application, but comments were made by the first and second respondents in their affidavit opposing the second condonation application. I have set these out in my consideration of the second condonation application.

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[27] *Public Servants Association of SA on behalf of Khan v Tsabadi NO & others* (2012) 33 ILJ 2117 (LC), at 2123B – C

[93] As noted previously, the record was in fact filed on 27 February 2014. On my calculation, the record was filed 48 days out of time, and not 148 days as alleged. It appears that the applicant's calculations may have been based on the assumption that it was calendar rather than court days.

[94] At any rate, the delay is substantial. The essence of the explanation is that the delay was caused by the period taken to transcribe the record and a further delay was caused because of a failure to pay the deposit to the transcription company.

[95] Once again, there is no suggestion of any prejudice and I am inclined to grant condonation.

Conclusion

[96] The applicant has sought an order reviewing and setting aside the award, but has not in its notice of motion requested this court to substitute that award with its own finding. In my view such a request could in any event not be acceded to. The arbitrator failed to make any findings on the admissibility of various hearsay statements at the conclusion of the applicant's case; but had he done so, the respondents' representative may well have elected to call all the employees.

[97] Insofar as the question of costs is concerned, I am of the view that it would be fair in the circumstances if each party were to bear their own costs.

[98] In all the circumstances I grant an order in the following terms:

98.1 Condonation is granted in respect of the late delivery of the review application, the record and the notice in terms of Rule 7A(8).

98.2 The award of the fourth respondent under case number METS2331, dated 21 December 2012, is hereby reviewed and set aside except in respect of Mr Bheki Kalepe.

98.3 The unfair dismissal dispute in respect of the remaining employees is remitted to the third respondent for allocation to a

commissioner other than the fourth respondent for a hearing *de novo*.

98.4 There is no order as to costs.

Hulley, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:	Adv. D L Williams
Instructed by:	John Dua Attorneys
On behalf of the Respondent:	Ms Prudence Gqobo NUMSA union official