IN THE LABOUR COURT OF SOUTH AFRICA

(WESTERN CAPE LABOUR COURT, CAPE TOWN)

CASE NUMBER: C765/2014

DATE: 11 MARCH 2015

In the matter between:

MAGDALENA SUSANNA BAATJIES Applicant

and

CCMA First Respondent

GRAHAM PROCTOR N.O. Second Respondent

SHOPRITE CHECKERS (PTY) LTD Third Respondent

J U D G M E N T

STEENKAMP, J:

This is an application for condonation coupled with a review application pertaining to an arbitration award handed down by the Commissioner, Mr Graham Proctor, on 18 January 2014. It stems from an incident which is common cause where the applicant, Ms Baatjies, who was an employee of the third respondent, Shoprite Checkers, left a branch of that store in Beaufort West without having paid for six bags of chicken to the value of R209,99.

The six bags were in the undercarriage of her shopping trolley. She did ring up the one bag of chicken that was in the top of the trolley. On her version she told the cashier to scan it another six times which did not happen. It is only when she was phoned by a controller, Ms Jacobs, that the employee returned to the store to pay for the unpaid chicken.

Dealing with the application for condonation I shall consider the well known principles set out in Melane v Santam Insurance Company Limited 1962 (4) SA 531 (A) and also in the subsequent case of NUM v Council for Mineral Technology [1999] 3 BLLR 209 (LAC).

The extent of the delay, as Ms *Cornellisen* quite properly conceded, is excessive. The application is six months late despite the generous period of six weeks that is allowed for review applications.

The explanation for the delay, once again Ms *Cornellisen* conceded, is in her words, “scant”. Ms Baatjies simply says that she is a member of Legal Wise. She was initially sent by that company to Rabie Attorneys in March 2014 but they terminated their mandate because Legal Wise owed them money. She does not explain what happened to her previous attorney, Mr Wagenaar, who attempted to represent her at

arbitration, also on the instructions of Legal Wise.

For the next six months, between March and August 2014, all she says is that she "had to constantly contact the offices of Legal Wise to find out whether a new attorney had been appointed". She does not provide any detail of what those efforts were, nor does she provide any proof such as itemised bills from a telephone company or cell phone service provider or emails or letters or anything of this sort. As Mr *Van Zyl* pointed out, in NUM v Council for Mineral Technology (*supra*) the LAC held 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".

In the case before me the delay is excessive and the explanation is so poor as to be non-existent. The application should be refused for that reason alone. However, even if I take into account the prospects of success, those prospects are slim to say the least.

This is an application for review, not appeal. The arbitrator properly took into account all the evidence before him. He came to the conclusion that the employee had committed the misconduct complained of. In doing so he took into account the probabilities of the evidence before him and the discrepancies in the employee's own testimony.

He specifically took into account the principles set out in Sidumo v Rustenburg Platinum Mines (2007) 28 *ILJ* 2405 (CC). He then weighed up the mitigating and aggravating circumstances. He considered the applicant's considerable length of service of 23 years and noted that that weighed heavily in her favour. Against that, he noted that she denied that she was responsible for ensuring all her goods were declared. She continued to insist doing so despite convincing evidence to the contrary.

She was evasive. She refused to accept that she had a responsibility to ensure that all her goods had been declared. She showed no remorse for her conduct. She sought to place the entire blame on her colleague who was also dismissed. The arbitrator pointed out that her argument that she returned and paid for the goods did not mitigate her offence. The only reason she returned was because she received a phone call to advise her that the unpaid goods had been discovered. She

was aware of the problem of shrinkage faced by her employer. She was aware of the role she was required to play to combat such losses. She was in a position of leadership, she should have been an example to the cashiers, but she continued to refuse to accept her responsibility and failed to set that example. She showed that she could no longer be trusted to act in the employer's interest. It is in those circumstances that the arbitrator reached the conclusion that he did, coupled with the fact that there was a clear rule -- and it is common cause that this rule applied to all employees -- that states in plain language:

> "Employees must conduct themselves in a lawful, orderly and appropriate manner at all times, during and outside of normal working hours."

That rule is not only clear but is consistent with case law binding on this Court. As Mr *Van Zyl* pointed out, the Labour Appeal Court in Hoechst (Pty) Limited v CWIU (1993) 14 *ILJ* 1449 (LAC) held at that stage already, predating the 1995 LRA, that:

> "Where misconduct does not fall within the expressed terms of a disciplinary code, the misconduct may still be of such a nature that the

employer may nonetheless be entitled to discipline the employee."

Not only is that applicable but in the case before me, the company rules do in fact expressly contain the clause that I have just referred to. That principle was also recently confirmed by my brother Le Grange J in Dolo v CCMA (2011) 32 *ILJ* 905 (LC).

The conclusion reached by the arbitrator is not so unreasonable that no other arbitrator could have come to the same conclusion. Therefore the applicant does not have any prospects of success. Both parties asked for costs to follow the result.

THE APPLICATION FOR CONDONATION IS DISMISSED WITH COSTS.

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STEENKAMP, J

APPEARANCES

APPLICANT:	Z Cornelissen
Instructed by:	Parker attorneys
RESPONDENT:	C van Zyl (attorney).