IN LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Case no: PA3/17

Not Reportable

In the matter between:

BELINDA NEL	**Appellant**
and	
CONSTRUCTION EDUCATION AND TRAINING AUTHORITY	**First Respondent**
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**Second Respondent**
COMISSIONER JONATHAN N.O.	**Third Respondent**

Heard: **15 March 2018**

Delivered: **10 July 2018**

Summary: The appellant employee- dismissed by the respondent employer pursuant to a disciplinary hearing on allegations of dishonesty. It was alleged, for instance, that she failed to disclose that she was in possession of a gift card which had funds due to the employer.

The CCMA –finding that the employer failed to establish that the employee acted fraudulently- further finding- the dismissal to have been procedurally and substantively unfair.

On review to the Labour Court- the Court considering the application for condonation of the late filing of the review and the record of the arbitration proceedings – finding in respect of the late filing of the review that the employer had reasonable prospects of success. Finding in respect of the late lodging of the record- that the Registrar had not informed the employer of the availability of the record which, in any event, had not been filed out of time. On the merits- finding that the commissioner conducted the enquiry into the fairness of the dismissal in an incorrect manner and reached an unreasonable result. Resultantly - reviewing and setting aside the arbitration award.

On Appeal to the Labour Appeal Court- the Court finding no merit in the argument that the Labour Court did not exercise its discretion judicially in upholding the employer's application for condonation.

Held that - in a misconduct hearing one is not required to satisfy the criminal law requirements of wrongdoing- All that is required is to establish if an employee committed misconduct and the seriousness thereof.

Held further that - the employee misled the employer and deliberately concealed the existence of the gift card which had a credit balance due to the employer and made herself guilty of dishonest conduct. Held further that - the Labour Court's conclusion that the arbitration award did not fall within the band of reasonable decision could not be faulted.

The appeal was therefore dismissed.

Coram: Waglay JP, Phatshoane ADJP and Musi JA

JUDGMENT

PHATSHOANE ADJP

[1] This is an appeal against part of the judgment and order of the Labour Court (*per* Lalie J) handed down on 22 July 2016 reviewing and setting aside the arbitration award dated 06 July 2014 issued under Case No: ECPE 5733-13 by Commissioner Raymond Jonathan ("the commissioner"), the third respondent, under the auspices of the Commission for Conciliation Mediation

and Arbitration (the CCMA), the second respondent. The appeal is with leave of the Court *a quo*.

[2] Ms Belinda Nel, the appellant, was employed as a provincial administrator on 01 July 2000 by the Construction Education and Training Authority ("CETA"), a Sector Education and Training Authority established in terms of ss 9 and 13 of the Skills Development Act, 97 of 1998, the first respondent. It had been her duty to order office refreshments and utilities (cleaning materials). However, during 2013, CETA introduced a new procurement process in terms of which its supply chain management unit, situated in Midrand, Gauteng Province, would be responsible to procure goods and services for its regional offices. This office would select the best quotation from the suppliers for office groceries and deposit the required sum of money into the bank account of a chosen retailer. Following this process the regional office would send an employee to collect the groceries from the designated retailer.

[3] CETA sought a quotation from Pick 'n Pay William Moffett Hypermarket ("Pick 'n Pay"), Eastern Cape, following its procurement process around July 2013. On 31 August 2013 it deposited an amount of R6 093.38 into the bank account of Pick 'n Pay. On 04 and 05 September 2013 the appellant was instructed by Mr Xolisile Brian Fina, the Eastern Cape Provincial Coordinator of CETA and her supervisor, to collect the stock at Pick 'n Pay in accordance with the pre-approved standard list known to every administrator.

[4] On 04 September 2013, instead of collecting the items, the appellant loaded R5 000.00 onto a gift card with the last four digits: 4153, being the maximum amount that could be loaded on a card, and the remaining R1 093.38 onto a gift card with the last four digits: 6212. She purchased goods to the value of R4 031.77 with gift card 4153. She then returned some items in the afternoon in respect of which a refund of R1 102.49 was credited to a third gift card with the last four digits: 5774. She also returned long-life milk to the value of R2 015.68 which amount was credited to gift card 4153. She then used the whole amount of R1 093.38 on gift card 6212 to make further purchases leaving it with a zero balance.

[5] On 05 September 2013 she repurchased milk in the amount of R944.85; R503.92 and R566.91 using gift card 4153 leaving the card with a zero balance. She then used the third gift card 5774 to make further purchases to the value of R522.25 and R197.84 leaving this card with a credit balance of R381.84.

[6] During the shopping of 04 and 05 September 2013 the appellant used her smart shopper card, a Pick ‘n Pay loyalty programme used for the accumulation of points which can be converted into cash for further purchases. She also used her credit card to effect payment for some of the items purchased which CETA says was unnecessary as it had paid for its own goods.

[7] Mr Fina was at the head office in Johannesburg on 04 and 05 September 2013 when the appellant was collecting the office supplies at Pick ‘n Pay. On his return to the office, on 06 September 2013, the appellant reported to him that she collected the stock from Pick ‘n Pay and handed to him till slips; two gift cards ending with numbers: 4153 and 6212, which both had a zero balance; and photocopies of the grocery list. Mr Fina says that the appellant explained to him that she had been advised by a cashier at Pick ‘n Pay to load the amount allocated by CETA for the purchases onto two gift cards. He was surprised as there was no need for this but only the collection of the stock. He intimated that the appellant did not know why she had to use the gift cards but mentioned that her car was small (Hyundai Atos) and would have to do a number of trips to fetch the office supplies. Mr Fina says she further reported to him that at some stage the amount allocated for the purchase of stock was exceeded and therefore she used her master card to settle what was due. She also informed him that she had to return some of the items because she thought it was incorrect for her to use her own master card. She did not report to him that she used her smart shopper card in the course of her transactions.

[8] Mr Colin Frederick Sylvester, the branch manager of Pick ‘n Pay, intimated that the customer service manager of the store, Ms Maritsa Van Schalkwyk, drew his attention to certain anomalies she was uncomfortable with that occurred during appellant’s shopping escapades of 04 and 05 September

2013 at the refunds counter. It was reported to Ms Van Schalkwyk that the appellant, *inter alia*, objected to the cashier's cancellation of the refunded items on the till slips because this would be queried by her employer. She also requested a refund for the sugar because its packaging was damaged when this could have been replaced.

[9] Mr Sylvester says that the appellant's conduct made him suspicious. He then arranged to meet Mr Fina and showed him a video footage of the appellant transacting at the store. Fina says that he observed, on the footage, the appellant arriving at the store on two occasions wearing different clothing and had changed her hairstyle to conceal her identity. Fina further intimated that Mr Sylvester made him aware of the existence of a third gift card 5774 in respect of which the credit balance from the other gift cards had been transferred when the appellant was returning some of the items purchased. He was amazed because the appellant did not report that she had the third gift card.

[10] Mr Sylvester says that Pick 'n Pay will provide a gift card to a customer on the latter's request. This much was confirmed by Ms Van Schalkwyk who added that the appellant enquired if the funds paid by CETA could be loaded on the gift cards because she had a small car and would have to make several trips to transport the stock to her workplace. She denied that it was her suggestion that the money be loaded onto the gift cards or that it was preferable to do so.

[11] The appellant testified that CETA did not provide her with rules on bulk purchases or on the use of smart shopper cards by its employees. It was for the first time that she did bulk purchasing at Pick 'n Pay and was not familiar with their procedures. She had to do several trips to transport the stock because her car was small. Ms Van Schalkwyk gave her the option of loading the money onto the two gift cards. She says this was convenient for her because she would be able to control the expenses knowing that she would have to return some of the items in accordance with the discussion she had with Mr Fina prior to the collection of the stock. Mr Fina gave her permission to deviate from the pre-approved list. He also mandated her to exercise her discretion to purchase what was required and to exchange goods that were in

excess. She confirmed that during her shopping she exceeded the amount loaded on the gift cards and had to use her master card to settle the balance that was due because she was told that she would be reimbursed at the returns counter. She also, out of habit, used her Pick ‘n Pay smart shopper card when making purchases because the cashiers asked for it. She did not report to Fina on the third gift card.

[12] On 17 September 2013 the appellant was placed on mandatory special leave pending an investigation into allegations of her misconduct. On 21 October 2013 she faced charges of dishonesty, fraud, material breach of fiduciary duty, gross dereliction of duty, gross negligence, failure to exercise due care in the discharge of her duties, and contravention of CETA’s internal policies and procedures. She was found guilty on all the charges at an internal disciplinary hearing and dismissed on 29 October 2013. She then referred her dismissal dispute to the CCMA for conciliation and arbitration.

<u>The commissioner’s award</u>

[13] The commissioner found that the appellant did not receive any assistance from CETA’s supply chain unit and had no knowledge of how to make bulk purchases. He found it improbable that the appellant would request that the money be loaded on the gift cards. In his view, this was a proposal that was made by Ms Van Schalkwyk to the appellant. He was further of the view that Mr Fina could not authorise the appellant to open the gift cards since he was not *au fait* with the bulk purchases procedure.

[14] He held that the appellant did not discuss the third gift card with Mr Fina and therefore she did not make any representations to him. There was no evidence that Mr Fina enquired from the appellant about the remaining funds during her report. He accepted the appellant’s evidence that she had not yet concluded the shopping and therefore had not handed over the third gift card to Mr Fina. He found that the appellant had not used any of the remaining funds to her benefit but kept the card on the advice of her attorneys. Consequently, she could not be said to have defrauded CETA.

[15] The commissioner further found that the appellant was not guilty of gross negligence as this charge related to her several patronage of the store. Mr Fina took no issue that the appellant frequented the store because she had a small car and had always used it to transport the stock without any quibbles.

[16] The commissioner could not comprehend how the employee with 15 years of experience would be required to obtain authorisation from her manager to exchange items when this was in the best interest of CETA. He accepted that there were cogent reasons for the exchange of the items purchased by the appellant and found no dereliction of duty on her part.

[17] According to the commissioner, CETA had failed to establish that the appellant took points that belonged to it insofar as it was alleged that she used her smart shopper card. Although he was of the view that a smart shopper card was no more than a free gift, he acknowledged that it was improper for the appellant to swipe her smart shopper card. This notwithstanding, he found that she did not receive any points for presenting her card and therefore did not benefit from the transactions. He held that her action did not amount to fraud but, at best for CETA, amounted to failure to declare a gift which she received in the form of points. In any event, he held that CETA's disciplinary code did not provide for this type of an offence. He was of the view that, for this kind of a disciplinary infraction, a warning would have sufficed regard being had to *"the value of the possible gift, the service record of the applicant and the impeccable disciplinary record of the applicant*."

[18] The commissioner concluded that the dismissal of the appellant was both procedurally and substantively unfair and reinstated her retrospectively with back pay in the amount of R121 870.64.

<u>The proceedings before the Labour Court</u>

[19] Dissatisfied with the outcome of the arbitration, CETA filed an application to review and set aside the commissioner's award on 03 September 2014, 12

days out of time.[1] It had also defaulted in filing the record of the arbitration proceedings timeously anent the requirement laid down in para 11.2.2 of the Labour Court's Practice Manual which stipulates that, for purposes of Rule 7A (6),[2] the records of the arbitration proceedings must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received. This resulted in the review being deemed to have lapsed in terms of para 11.2.3 of the Labour Court's Practice Manual.

[20] On 28 August 2015, almost a year following the filing of the review, CETA applied for the reinstatement of the review and filed an application for condonation of the late institution of the review. In explaining the 12-day delay, Ms Sonja Pilusa, the CEO of CETA and its deponent, says that she was out of office towards the end of August 2013 on official business. CETA, which had no alternative suitable executive manager at the time to attest to the affidavit, sought an indulgence from the appellant's attorneys to file the review by 02 September 2013 on her return to the office.

[21] Regarding the late lodging of the record of the arbitration proceedings on 14 January 2015, which ought to have been filed on 03 December 2014, CETA explained that it did not receive any directive from the registrar sent on 15 September 2014 availing the record. It says it experienced difficulties in obtaining the complete record and details how it went about ensuring that the record was placed before the Labour Court. In amplification, it attached a number of correspondence exchanged between its attorneys in a quest to obtain the record.

[22] Upon receipt of the audio recording on 15 October 2014 same was sent to CETA's attorneys' preferred transcription service providers. CETA intimated that it also encountered problems in uplifting the full set of documents despatched by the CCMA to the registrar. The entire contents of the Court file

[1] Section 145(1)(a) of the Labour Relations Act, 66 of 1995, provides: "Any party to a *dispute* who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award- *(a)* within six weeks of the date that the award was *served* on the applicant…"

[2] Rules for the Conduct of Proceedings in the Labour Court - Published under GN 1665 in *GG* 17495 of 14 October 1996

could only be provided on 25 November 2014 but the documents were still incomplete. The preparation of the record was finalised on 08 December 2014, at the time which CETA's principal attorney was on annual vacation. On his return to the office on 12 January 2015 he verified the record and immediately forwarded same to his correspondent for service and filing which took place on 14 January 2015, just over one calendar month late.

[23] In the main, the appellant resisted CETA's applications for condonation because they were brought a year following the filing of the review.

[24] The Court *a quo* accepted that the legislature did not prescribe the time period within which an application for condonation had to be lodged. It found, in respect of the application to reinstate the review, that CETA may not be prejudiced due the registrar's fault because the latter failed to notify it of the availability of the record. Resultantly, it could not be said that the record was filed out of time. It was persuaded that CETA established good cause for the reinstatement of the review. It then considered the application for condonation of the late filing of the review and found: that the delay of 12 days was not substantial and that the explanation thereof was compelling; CETA had strong prospects of success; and refusing condonation would result in a miscarriage of Justice.

[25] On the merits, the Court found that the appellant had an opportunity to report the third gift card to Mr Fina but deliberately elected not to do so. She misled Mr Fina into believing that she spent all the money deposited by CETA into Pick 'n Pay's account. The Court was of the view that the explanation accepted by the commissioner, for the appellant's failure to disclose the existence of the third gift card, was a clear afterthought. It then drew an inference, on the basis of the appellant's non-disclosure of the third gift card, that she committed fraud. This was fortified by her buying pattern. The Court further found that the commissioner, in arriving at the conclusion that the appellant was not guilty of fraud, conducted the enquiry into the fairness of the dismissal in an incorrect manner and reached an unreasonable decision. The gravity of the irregularity vitiated his decision on the substantive fairness of the dismissal.

[26] The Court *a quo* further found that the record reflected that the appellant made herself guilty of serious misconduct which involved dishonesty. This destroyed the relationship of trust which is the cornerstone of the employment contract and justified her dismissal. It reviewed and set aside the commissioner's award and substituted same with an order that the dismissal was substantively and procedurally fair. The finding of the Court *a quo* on the procedural fairness of the dismissal is not assailed in the present proceedings.

<u>The grounds of appeal</u>

[27] To sum up, it was contended that the Court *a quo* erred in:

27.1 condoning the late filing of the review and reinstating it.

27.2 finding that the commissioner's determination was disconnected to the evidence. It was contended that the decision reached by the commissioner was one that the reasonable decision-maker could have reach on the material before him.

27.3 finding that the appellant had an opportunity to report the third gift card but deliberately elected not to do so. It was contended the Court did not take into account that the charges brought against the appellant were baseless as all the items purchased were accounted for and she still needed to purchase more items.

27.4 finding that the appellant misled Fina into believing that she had spent all the funds intended to purchase the stock. She kept the card as she was acting on the instructions of her attorney and returned it at a later stage without having spent the credit balance.

27.4 finding that the most plausible inference to be drawn from the facts surrounding the appellant's failure to disclose the existence of the third gift card was that she committed fraud. In any event, it was argued, CETA knew of the existence of the third gift card as Pick 'n Pay till slips revealed that there was a third card.

27.5 ignoring the evidence to the effect that Mr Fina gave the appellant permission to use her discretion with regard to the quantities of stock to be purchased and that he forwarded a text message to her knowing that she would effect changes to the groceries in accordance with her discretion. Based on the text message the appellant returned some of the goods she had purchased.

27.6 accepting CETA's argument that the commissioner overlooked the pattern followed by the appellant when purchasing the goods. It was contended that CETA failed to prove that the appellant acted fraudulently as all the goods were accounted for and she ought not to have been dismissed on mere suspicion of fraud.

<u>The analysis</u>

[28] The appellant's main objection to the reinstatement of the review and the application for condonation of the late lodging of the review is that CETA defaulted in bringing the application for condonation for a period of one year. Ms Ah-Shene, for the appellant, contended that CETA should have been aware that its review application was late by 15 December 2014, when the appellant brought an application in terms of s 158 (1)(c) of the LRA,[3] because it was drawn to its attention that its review was late. She argued that the Court *a quo* erred in concluding that the review application was filed two weeks out of time without considering the delay in filing the application for condonation itself. In respect of the reinstatement of the lapsed review, she contended that CETA has been reactionary in processing the review. The Court *a quo* erred in that it did not consider that the delay from 14 January 2015, when CETA filed the record of the arbitration proceedings, to 28 August 2015, when it lodged the application for condonation, was unexplained.

[29] An application for condonation involves an exercise of a judicial discretion upon a consideration of all the facts. The relevant considerations may include the degree of non-compliance with the rules, the explanation therefor, the

[3] This was an application to make the arbitration award an order of the Labour Court.

prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.[4] Condonation cannot be had for the mere asking.[5] It is an indulgence that the Court will, within the context of its power to regulate its own processes, grant to a party upon good cause shown for non-compliance with its rules.

[30] Ordinarily an application for condonation must be brought within a reasonable time as soon as a party is made aware of its default. The application for condonation, in this case, was brought one year following the filing of the review application. The Labour Court in determining the matter gave consideration to the fact that the review itself had been filed only 12 days out of time and that the record of the arbitration proceedings was filed just over a month late. The Labour Court took the view that CETA had demonstrated that it had every intention to prosecute the review. The Labour Court also gave consideration to the prospects of success which is often a critical factor that needs to be considered in the interest of justice.

[31] There is, in my view, no merit in the argument that the Court did not exercise its discretion judicially in upholding CETA's application for condonation and reinstatement of the review. In the circumstances there is no reason to interfere in that decision.

[32] On the merits, Ms Ah-Shene contended that CETA led no evidence demonstrating that the appellant was dishonest or acted fraudulently as there had been no misrepresentation on her part. In CETA's version, she argued, all goods were accounted for and the appellant could use her discretion to purchase more or less of the goods appearing on the approved quotation. She further argued that there was no rule at the workplace regulating bulk purchases. In essence, she contended, CETA's case amounted to mere suspicion of fraud and it, therefore, failed to discharge its *onus*.

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[4] *United Plant Hire (Pty) Ltd v Hills* 1976 (1) SA 717 (A) at 720E–G.
[5] *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) at para 23.

[33] It is important to commence this enquiry by reflecting on the *modus operandi* employed by the appellant on 04 and 05 September 2013, when she was instructed to collect the stock, to determine if she made herself guilty of any misconduct. The undisputed evidence was that if the funds were deposited into the bank account of the retailer, for the quoted bulk items, the customer could still purchase the goods without loading the money onto a gift card. The normal procedure was that the goods would be rung up at the till against a prior allocated voucher number and would be offset against the amount already paid into the retailer's account. It therefore appears that there was no reason for the appellant to have loaded the funds on the gift cards. Her version, that she agreed to the funds being loaded on the gift cards because she was requested to do this by the staff at Pick 'n Pay and she needed to control the expenditure as she would have had to make several trips to transport the large stock, lacks an element of truthfulness. Nothing prevented her from making purchases in accordance with the procedure described because she could still make numerous trips to convey the stock. I am persuaded to conclude that she requested that the money be loaded onto the gift cards for reasons that in my view were less than honest.

[34] Mr Fina testified that the appellant could not purchase more than what was on the approved list. However, where there was an over-supply of a particular item at the workplace, she could buy less of that item. The unrestrained shopping prerogative she professed to have had, by virtue of the position she held, and the so-called discretion she says Mr Fina gave her prior to her shopping expedition is negated by the text message she received from Mr Fina on 05 September 2013 which reads: *"Hi Belinda, I understand you are fetching the office supplies. Please do not make any change from what CETA has given us, except what we already have in great supply. Kindly note that no transaction of financial kind must take place during the exchange of goods with the retailer, CETA has already done that. We will discuss control measures of supplies when I get back as it is supposed to last for a very long time*." When confronted with this she sought to exculpate herself from any wrongdoing by saying that this was a new instruction from Mr Fina and she had already done the purchases and exchanges on 04 September 2013.

What is baffling is that she did not respond to this text message to question Mr Fina's alleged conflicting instructions.

[35] Mr Fina did concede that all the items purchased were accounted for. However, the insuperable obstacle the appellant faces is her own admitted failure to disclose the existence of the third gift card 5774. Her response for not reporting and handing over this card to Mr Fina on 06 September 2013 is puzzling. She said: "*he did not ask, I do not liaise with anybody regarding my transactions regarding(sic), until it is complete and I sent it to Danisa [from the head office of CETA] to logistics"*. She also could not give any rational explanation why she kept the third gift card and gave various reasons for doing so. She said that her attorney advised her *"to keep the gift card and the purchase slips as that was my defence that I had only used (sic) and had CETA's best interest and that was part of my defence*". During the arbitration an affidavit she attested on 28 January 2014 was placed before the commissioner wherein she stated, *inter alia*, *"My attorney at no stage advised me to return the gift card and R13.95 in cash to my employer."* She later sought to say she had not completed her shopping and therefore she did not return the card. What is remarkable is that she did not inform Mr Fina when reporting to him that she had not yet finished her shopping and that she was in possession of a card with a credit balance of R381.84.

[36] It bears repeating that on 06 September 2013 the appellant readily reported on the two gift cards: 4153 and 6212. Mr Fina categorically denied that on the information placed before him, on 06 September 2013 by the appellant, there was some indication of the existence of the third gift card. As he puts it "*there was no information referring to that card"*. The appellant said to him *"(T)his is it, zero, zero, everything balances. There are two gift cards, here are the invoices."*

[37] As found by the Court *a quo* the appellant had the opportunity to report the third gift card to Mr Fina when she handed over to him the two gift cards. She also failed to present the gift card in issue during her disciplinary hearing that was held in October 2013. Fina says that during that enquiry the appellant still denied the existence of the third gift card but only towards the end of the

hearing she admitted that it was at home. She decided to hand over the card around 28 January 2014, three months following the conclusion of her disciplinary hearing.

[38] The charges brought against the appellant during her disciplinary hearing were very widely framed. As already alluded to, she stood accused of dishonesty, fraud, material breach of fiduciary duty, gross dereliction of duty, gross negligence, failure to exercise due care in the discharge of her duties, and contravention of CETA's internal policies and procedures. In a quest to understand the nature of the charges the commissioner engaged CETA's representative to explain the particularity of each of the charges. In his award he limited his enquiry on the substantive fairness of the dismissal to the explanation given by CETA's representative with regard to the nature of the charges and did not bring his mind to bear on the totality of the evidence presented. The Court *a quo* was right in holding that the commissioner conducted the enquiry into the fairness of the dismissal in an incorrect manner.

[39] The Court *a quo* correctly concluded that the commissioner had failed to consider the pattern the appellant followed when purchasing the groceries. Having considered the evidence and the failure of the appellant to disclose the third gift card which had funds belonging to CETA, the Court *a quo* found that "*the most plausible inference to be drawn is that she had committed fraud*". Fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.[6] However, in misconduct hearings, one is not required to satisfy the criminal law requirements of any wrongdoing. All that is required is to establish if the employee committed misconduct, whether the misconduct was one of dishonest conduct complained of or something else, and the seriousness thereof. Labels are totally irrelevant, particularly to a criminal charge that is for the criminal courts to deal with. Here the appellant misled CETA into believing that all the monies had been spent on the groceries. The

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[6] See *S v Gardener and Another* 2011 (1) SACR 570 (SCA) para 29

evidence is overwhelming that she deliberately concealed the existence of the third gift card which had a balance of R381.84 and thereby made herself guilty of dishonest conduct.

[40] CETA is a public institution listed under Schedule 3A of the Public Finance Management Act, 1 of 1999, and must account for its management of public funds. The appellant, who at the time of the arbitration had 17 years of service with CETA, occupied a position of trust and had, by her own admission, been purchasing and collecting the groceries for over a period of 15 years. Her dishonesty had a direct impact on the substratum of the employment relationship which justified her dismissal regardless of her long period of service. In *Toyota SA Motors (Pty) Ltd v Radebe and Others*,[7] this Court pronounced:

> '[15]…..Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty. It appears to me that the commissioner did not appreciate this fundamental point.
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> [16] I hold that the first respondent's length of service in the circumstances of this case was of no relevance and could not provide, and should not have provided, any mitigation for misconduct of such a serious nature as gross dishonesty. I am not saying that there can be no sufficient mitigating factors in cases of dishonesty nor am I saying dismissal is always an appropriate sanction for misconduct involving dishonesty. In my judgment the moment dishonesty is accepted in a particular case as being of such a serious degree as to be described as gross, then dismissal is an appropriate and fair sanction.'

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[7] (2000) 21 *ILJ* 340 (LAC) at 344 paras 15-16.

[41] A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator.[8] The decision by the commissioner cannot be sustained on the facts. The Court *a quo's* conclusion that his award did not fall within the band of reasonable decision-makers cannot be faulted.

[42] Something should be said about the record of this appeal which runs into 16 volumes and was presented to us in a state of disarray. The pleadings were not placed sequentially making it difficult to wade through. The documentary evidence handed in during the arbitration is repeated and not cross-referenced to the transcript of the proceedings. There are also numerous irrelevant documents which ought not to have formed part of the record. This would be a case where a punitive costs order should be made against the appellant's attorneys for their failure to place a proper record before Court. However, such an order was not sought by CETA. Be that as it may, all things considered, I am of the view that the law and equity would not require that costs follow the result of this appeal. This is so because the Commissioner's award may have motivated the appellant to pursue this litigation up to this stage. In the result, I make the following order.

Order

1. The appeal is dismissed.

[8] *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA) at 2806 para 25.

MV Phatshoane

Acting Deputy Judge President - The Labour Appeal Court

Waglay JP and Musi JA concur in the judgment of Phatshoane ADJP

APPEARANCES:

FOR THE APPELLANT:	L Ah-Shene
	Instructed by Brown Braude & Vlok Inc
FOR THE FIRST RESPONDENT:	Mr N Voyi
	Instructed Ndumiso Voyi Inc.