

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Case no: JA18/05

In the matter between

Apron Services (Pty)Ltd

Appellant

And

**Commission for Conciliation,
Mediation and Arbitration**

First respondent

W Ferreira N.O

Second respondent

Nelson Mawelele

Third respondent

JUDGMENT

ZONDO JP

Introduction

- [1] This is an appeal against a judgment of the Labour Court in a review application that had been brought by the third respondent herein for the review and setting aside of an arbitration award that had been issued by the present second respondent under the auspices of the first respondent. The arbitration award related to a dispute between the current appellant and the third respondent

about whether the latter's dismissal by the appellant from its employ was fair. The second respondent's award was to the effect that the third respondent's dismissal was both substantively and procedurally fair. The order made by the Labour Court was that the arbitration award issued by the second respondent was unjustifiable and fell to be reviewed and set aside. The Labour Court took the view that dismissal was too harsh a sanction and ordered the third respondent's reinstatement and that he be given a final written warning on the condition that, if, within a period of twelve months, he was found guilty of a similar act of misconduct, he could be dismissed "**immediately**". It is against this order that the appellant now appeals. The appeal is with the leave of the Labour Court.

The facts

- [2] The appellant is a company that, at all times relevant to this matter, was responsible for the conveyance of passengers from the airport building to the aeroplanes they wish to board and from aeroplanes that have landed to the airport building. It was also responsible for the conveyance of passengers' luggage from the airport building to aeroplanes and vice versa. To do this it had a fleet of twenty five (25) buses. However, it normally used only about fourteen of them.
- [3] One of the appellant's employees was the third respondent. He had entered its employ in 1994, initially as a baggage handler, but had been promoted to the position of shift control officer by the 15th November 2000. He was ranked as a junior manager. The appellant

also employed bus drivers. The bus drivers drive the buses which are used to transport passengers from the airport building to the aeroplanes and vice versa. The third respondent had a number of employees including bus drivers under him. One of them was a Mr Doctor Khoza. The third respondent's immediate superior was a Mr Hlongwane.

[4] On the 15th November 2000 the third respondent was required to knock off at 22h00. It would seem that his being required to knock off at such time arose out of his agreement to work voluntary overtime. Mr Hlongwane, was away in East London and was going to arrive back in Johannesburg in the evening. Mr Hlongwane says that his flight from East London to Johannesburg was delayed and he telephoned the third respondent and informed him of this. However, the third respondent denies this and says that Mr Hlongwane never spoke to him on the 15th November 2000. I shall return to this later on.

[5] At about 13h00 or 14h00 the third respondent was informed that he was going to have to attend some workshop the following day. The workshop related, it would seem, to the appellant's business. At about 21h00 the third respondent asked Mr Khoza to stand in for him for the rest of the shift because he was knocking off. It is not disputed that effectively the third respondent had asked Mr Khoza to be in charge in his absence. Mr Khoza agreed to the third respondent's request. The third respondent proceeded to record in the relevant documents that he knocked off at 21h00. Accordingly,

this is not a situation where the third respondent intended to hide from his superiors the fact that he had knocked off at 21h00 that evening. It is common cause that the third respondent did not inform Mr Khoza of any delayed flight from East London. Of course, if nobody had informed him of such delayed flight, he would not have known of it and could, therefore, not have informed Mr Khoza thereof.

- [6] When the third respondent left work, there was nobody senior to him around from whom he could have asked for permission to leave work early. The reason that the third respondent gave why he left work early is that he wanted to prepare for the workshop the following day. That this was the true reason for the third respondent's decision to leave early does not appear to have ever been disputed. It does not appear to have ever been explained what the third respondent's preparation for the workshop the following day was going to entail. If, for example, in order for anyone to participate meaningfully or to benefit from the workshop he would have had to read documentation that required two or three hours' reading, knocking off at 21h00 rather than 22h00 may be very understandable. In such a case may be the third respondent would reach home after an hour and he would be required to work the following morning before going to the workshop. But, as I say, no explanation was given as to what the preparation entailed. That may be because both the third respondent and the appellant knew what the preparation entailed, particularly seeing that the appellant did not dispute this reason for leaving early.

- [7] Soon after the third respondent had left work, a number of bus drivers also left work. It is not clear whether they left because it was their knock-off time and had no obligation to work beyond that time or whether they were under an obligation to work beyond that time but had decided, in breach of their obligations, to knock-off earlier than they should have. Two aeroplanes subsequently landed. One of them was the one from East London in which Mr Hlongwane was travelling. In the subsequent arbitration proceedings Mr Hlongwane testified that, when he arrived at the airport, there was only one bus available to take 145 passengers from the aeroplane to the airport building. He said that some of the passengers had to wait for a long time in the rain while they waited for their turn on the one bus that had to make a number of trips to transport groups of passengers. He said that the passengers ran out of patience and walked in the rain to the airport building.
- [8] In subsequent arbitration proceedings Mr Khoza testified that the main reason for the failure to provide passengers with buses on the night of the 15th November 2000 was that his bus broke down. Mr Khoza testified that other buses were far away but that, when he offered to go and fetch one of the buses in order to expedite the transportation of passengers to the airport building, the passengers were not prepared to wait and began to walk to the airport building. The position seems to be that, apart from Mr Khoza, there was only one bus driver available as all the other drivers had left. Mr Khoza wanted to use the second bus to help convey the passengers but it

broke down. When he was asked why he did not get another bus because the appellant had many other buses, he said that the other buses were far away.

[9] The workshop that the third respondent was to attend the following day was going to start at about 08h00. The third respondent was informed at about 13h00 or 14h00 that he should attend the workshop the following morning.

[10] As a result of the events of the night of the 15th November the third respondent was called to a disciplinary inquiry. The allegations that he faced in the disciplinary inquiry were framed as follows:

“3.1 leaving the workplace without permission on 15 November and before the end of the shift;

3.2 failing to perform work to the required standard by failing to provide busses for flights SA 482 and SA 1734;

3.3 leaving a subordinate in charge with responsibilities that he could not carry out;

3.4 bringing the company’s name into disrepute by failing to meet service standards.”

The third respondent was found guilty of all four allegations of misconduct and was dismissed. There was an internal appeal which also confirmed the finding and outcome of the disciplinary inquiry. The third respondent was aggrieved by all this.

[11] With regard to the internal appeal, it is necessary to make two observations. The first one is that the finding that the third respondent was guilty of all four allegations that he had faced in the disciplinary inquiry was upheld. The second is that the chairman made the following two important statements with regard to sanction:

“Looking at charges 1 and 4 in isolation, it appears that the Company’s disciplinary code would require at most a written warning for a first offence. However, when adding charges 2 and 3, I believe that the picture changes significantly.”

He also set out a list of what he believed to be aggravating and mitigating factors. Later on in his reasons for his decision, the chairman said:

“Charges 2 and 3 relate to the neglect of duties, and according to the Disciplinary Code this categorised as a minor offence unless such neglect constitutes a major (dismissible) offence owing to the nature thereof. I believe that in this case the offence can indeed be considered as major, due to the very serious negative consequences) to the Company of Mr Mawelele’s actions on the night of 15/11/2000. The aggravating factors here outweigh the mitigating factors and the trust relationship between the company and Mr Mawelele has been broken...”.

He then said that he was, therefore, upholding the penalty of dismissal given for the acts of **“misconduct under charges 1-4.”** The chairman of the internal appeal was a Mr VC Botha. It may be important to note that Mr Botha was not called to testify before the commissioner to justify his conclusions including his conclusion

on the issue of sanction. Accordingly, the statements he made and the conclusions he reached have not been subjected to the scrutiny that only cross-examination can provide.

[12] A dispute then arose between the third respondent and the appellant about whether his dismissal was unfair and, if so, what should happen about it. The third respondent then referred the dispute to the Commission for Conciliation, Mediation and Arbitration (“**the CCMA**”), the first respondent herein, for conciliation. When conciliation failed to produce a resolution of the dispute, he requested the CCMA to arbitrate the dispute. The second respondent was assigned to arbitrate. In due course the arbitration was conducted and he issued an arbitration award in which he found that the dismissal was both procedurally and substantively fair. He effectively dismissed the third respondent’s claim.

[13] The third respondent felt aggrieved by the second respondent’s arbitration award. He brought an application in the Labour Court to have the second respondent’s award reviewed and set aside. The appellant opposed the review application. The Labour Court granted the review application and substituted for the second respondent’s decision a decision to the effect that the third respondent be given a final warning which would be on condition that if he was found guilty of a similar offence within a period of twelve months he could be dismissed immediately. The appellant was aggrieved by this order and, with the leave of the Labour

Court, now appeals to this Court.

The appeal

- [14] In order to better appreciate the issues in this appeal it is necessary to set out the main findings and reasons that the second respondent advanced in his award in support of his award as well as those advanced by the Court a quo for its decision to set the second respondent's award aside.
- [15] The second respondent identified the issue to be decided in the arbitration as being whether or not the third respondent's dismissal was procedurally and substantively unfair in terms. The second respondent went on to give what purports to be a summary of the third respondent's evidence, Mr Hlongwane's evidence as well as Mr Khoza's evidence. With regard to procedural fairness, except in regard to one argument, it is not clear from the second respondent's award what the grounds were on which the procedural fairness of the third respondent's dismissal had been challenged by the third respondent before him. The one argument appears in par 18 of the award. There the second respondent pointed out that the third respondent's union had argued that failure to perform according to a work standard is not a disciplinary matter but an incapacity matter in respect of which the third respondent should not have been disciplined but should have been counselled and trained. The second respondent rejected this argument on the basis that **“(t)he reason why the [third respondent] failed to perform according**

to the work standard was because of his misconduct in leaving his job without permission.” He went on to say that there was no need for the counselling and training of the third respondent. He said that this was not **“a poor performance issue but an issue of misconduct”**. He then went on to say that **“for this reason and the reasons above”** he found the dismissal procedurally fair.

- [16] In the subsequent review application the third respondent attacked the second respondent’s finding that the dismissal was procedurally fair. He did so in par 3.1 of his supplementary affidavit. The basis advanced for the attack was that the second respondent ought not to have found that failure to work according to a work standard was a disciplinary issue, because in argument before him, the parties had agreed that it was an incapacity issue. In par 3.1 of the supplementary affidavit, the third respondent said in part: **“At the arbitration, the representative of the [appellant], Mr Hlongwane (“Hlongwane”), agreed that failure to perform according to a work standard is incapacity or poor work performance. Given the agreement of the parties regarding this issue, the commissioner ought to have considered whether the failure to adhere to a work standard was deliberate, negligent or as a result of a lack of training.”**

- [17] In its answering affidavit the appellant does not deny the third respondent’s statement that its witness, Mr Hlongwane, agreed during his evidence that failure to perform according to a standard

is an incapacity issue and not a disciplinary matter. However, the appellant states that the commissioner was justified in concluding that the conduct constituted misconduct in view of Hlongwane's evidence that:

- **“(t)he [third respondent] previously failed to meet standards, and**
- **the [appellant] gave training to the [third respondent] and**
- **the [third respondent] knew what was expected of him”**

The appellant goes on to say that in view of all this the third respondent's conduct constituted misconduct and not incapacity. It says that the third respondent's conduct was clearly not a result of lack of training or understanding but **“of negligent or deliberate behaviour of the [third respondent].”** In the view I take of the complaint concerning the splitting of allegations of misconduct which I deal with later, this issue falls away and need not be decided.

- [18] On the question whether the dismissal was substantively fair, the commissioner referred to the matters listed in item 7 of the Code of Good Practice: Dismissal. With regard to the allegation of leaving work early without permission, the commissioner said that the third respondent testified that Mr Hlongwane had previously told him that he could leave before the end of his shift without the permission of his superior provided that he delegated his responsibilities to somebody else. The commissioner brushed this evidence off by saying: **“I am of the opinion that this must have**

been an isolated incident and that the [third respondent] should still have realised that there might be situations where it will be inappropriate not to inform his supervisor of his whereabouts.”

[19] Although it would appear that there were no managers senior to the third respondent in the evening from whom he could have asked for permission to leave work early in the absence of Mr Hlongwane, he neither explained nor was asked to explain why he did not ask one of them for permission before they knocked off because he knew as early as 13h00 or 14h00 that he would need to leave early to attend the workshop the following morning. I shall not use this against him as it would be unfair since he was not asked this and, therefore, did not get a chance to comment on it.

[20] Although Mr Hlongwane suggested under cross-examination that the third respondent should have asked for permission to leave early from other managers during the day before they could leave, he did not persist in this when it was put to him that the third respondent did not seek such permission because he had power to delegate his duties and leave. In response to this Mr Hlongwane said instead that the third respondent should have **“assessed the risk more especially we had ... [inaudible] whether on that day in question. Managers had to stay on until operation, everything is back to normal.”** In re-examination Mr Hlongwane was asked what kind of tasks the third respondent had power to delegate and whether he had absolute powers in this regard. Mr

Hlongwane's answer was **“Ja, absolute powers, but again he had to assess, evaluate the type of instruction given to his subordinate. For example, a supervisor will be delegated to go over and inform a driver to move from one parking bay to another, but something that involves crisis management like serious planning because of certain elements in that respect...”**

[21] When the third respondent was asked why he did not obtain permission to leave early from the managers who were present during the day, his response was initially that he had no way of communicating with such managers because he had no cellular telephone and the other telephones **“were not going out.”** However, when it was put to him that he could have used someone else's cellular telephone to communicate with those managers, his answer was that he did not see any need to do so because Mr Hlongwane had previously created a precedent in terms of which he could delegate his duties to someone else and leave. The third respondent said that this occasion was not the first time for him to leave early.

[22] With regard to substantive fairness or otherwise of the dismissal, the commissioner first dealt with **“charge 1”** which the third respondent had faced in the disciplinary inquiry. That is the allegation that the third respondent had left work early without permission. It is appropriate to remember that the third respondent left one hour earlier than he was supposed to do. It is also appropriate to remember that his leaving early was not for his own personal reason but was to enable him to go home rather early to prepare for the employer's own workshop. It is as well to remember that in leaving early he did delegate his responsibilities to someone that he knew Mr Hlongwane had had occasion to approve as somebody to whom he, that is the third respondent, could delegate his

responsibilities.

[23] The commissioner stated that, when Mr Hlongwane had previously said to the third respondent that the latter could leave the workplace before the end of his shift, that **“must have been and isolated incident and that the [third respondent] should still have realised that there might be situations where it will be inappropriate not to inform his supervisor of his whereabouts.”**

[24] The commissioner went on to say that he was of the opinion “that the [third respondent] abdicated his responsibilities on the day in question and did not delegate as alleged by him.” He pointed out that according to the appellant’s disciplinary code a first offence of this kind would attract the sanction of a written warning.

[25] Thereafter the commissioner went on to deal with the second charge. That was that the third respondent had failed **“to perform work according to work standard i.e. failing to provide buses for SA 482 (2125) and SA1734.”** I need to also refer to the third charge. The third charge was: **“leaving subordinate with responsibilities that he cannot carry out before shift end.”** The fourth charge was: **“bringing the company’s name into disrepute by failing to meet service standards.”**

[26] Mr Hlongwane conceded in his evidence that the third respondent had power to delegate his responsibilities to somebody else but he emphasised that the third respondent was required to carefully

assess his responsibilities, the situation and the person to whom he sought to delegate carefully. Mr Hlongwane did not anywhere specify any clear basis why he thought that Mr Khoza was not suitable as a candidate for the delegation of the third respondent's responsibilities either in general or on the particular night. In fact, for the third respondent to be guilty of misconduct as a result of delegating his responsibilities to Mr Khoza it could not have been enough for Mr Hlongwane to show that Mr Khoza was not suitable for the delegation of the third respondent's responsibilities. What would be required is either that the third respondent had been instructed not to delegate to Mr Khoza or that his power to delegate did not include power to delegate to a category of persons to which Mr Khoza belonged or it would have had to be shown that delegating to Mr Khoza was so obviously wrong that anybody in the third respondent's position, acting reasonably and exercising proper judgment, could not possibly have delegated such responsibilities to Mr Khoza. Mr Hlongwane's evidence did not reveal any of the three options. On the contrary it was proved that there was a precedent in terms of which the third respondent had delegated his responsibilities to Mr Khoza with Mr Hlongwane's knowledge and there were no complaints about how Mr Khoza had discharged such responsibilities in the third respondent's absence.

- [27] The commissioner found that the third respondent was guilty of all the four alleged acts of misconduct. I have already said that in respect of the first offence, the commissioner said that the disciplinary code provided for a written warning as a sanction if it

was a first offence. With regard to the second alleged offence the commissioner stated that the disciplinary code regarded it as a minor offence **“unless the nature of the offence constitutes a major offence.”** He did not say whether in this case it did or did not constitute a “major offence” nor did he indicate what sanction would be called for in regard to such offence.

- [28] With regard to the third offence the commissioner said that in terms of the disciplinary code it was also seen as a minor offence. He then stated that the third respondent had argued that he was entitled to delegate his duties and that he had delegated his duties to Mr Khoza. The commissioner expressed the view that as a manager the third respondent **“should have realised that he cannot delegate all his duties to other persons and that there will be situations where it will be improper to delegate. From the evidence it appears that the [third respondent] abdicated his duties and did not delegate as he alleges.”**

- [29] The commissioner provided absolutely no reason or basis for his opinion that the situation which prevailed on the night in question was a situation in which the third respondent should have realised that he should not delegate. He also provided no basis nor reason for his statement that the third respondent had abdicated his responsibilities on the night in question and that he had not delegated as he said that he had. In fact the commissioner’s statements in this regard are completely without any basis. Indeed, his statement that the third respondent did not delegate is contrary

to uncontradicted evidence that was given by not only the third respondent but, indeed, also by Mr Khoza that the third respondent did delegate his responsibilities to Mr Khoza. Indeed, even the appellant had accepted that the third respondent had delegated his duties to Mr Khoza. The third respondent asked Mr Khoza to in effect step into his shoes in his absence and Mr Khoza did precisely this.

[30] With regard to the fourth charge, the commissioner stated that the disciplinary code provided for a written warning as a sanction for such an offence. He did not say much about this offence.

[31] At this stage it is convenient to point out that one of the bases upon which the third respondent challenged the commissioner's arbitration award was that he had dealt with the matter on the basis of him being guilty of four acts of misconduct. He contended that this was a case of a splitting of charges. In this regard the third respondent referred to that part of the arbitration award where the commissioner said: **"If the charges are looked at in isolation it appears that written warnings would have been the appropriate sanction in the circumstances. However, if the charges are combined the situation changes significantly ... I cannot fault the employer for deciding to dismiss the applicant."** The third respondent went on to complain in the founding affidavit that **"(t)he commissioner furthermore did not consider whether the [appellant] acted fairly by charging me and dismissing me for several acts of misconduct in relation to**

a single act (i.e. leaving my workplace before the end of my shift, without permission).”

[32] The third respondent contended that the commissioner exceeded his powers or committed misconduct in relation to his duties as a commissioner and that his findings are unjustifiable on the evidence properly before him. In the supplementary affidavit the third respondent pointed out that Mr Khoza’s evidence had established that the main reason for the problems that occurred on the night in question after he had left was the breakdown of the bus. He stated that even if he was present at the time, there is not much he could have done which Mr Khoza could not do. He also pointed out that the commissioner said in his award that at the time of his dismissal the third respondent had been in the position in which he was for three years when in fact the evidence before him was to the effect that he had been in the position for three months. The third respondent submitted that this was evidence that the commissioner had not applied his mind to the evidence before him.

[33] A reading of the appellant’s answering affidavit reveals that the appellant is not able to put up a persuasive case against the third respondent’s criticism of how the commissioner dealt with the role in the case of the breakdown of the buses on the night in question. The third respondent pointed out in his affidavit that Mr Khoza had testified that, if his bus had not broken down, there would have been no delay in transporting passengers from the aircrafts to the airport building. That evidence by Mr Khoza was uncontradicted.

The commissioner deals with this point by saying that that is why the third respondent should not have left early. That reasoning is untenable. It is common cause that the third respondent was entitled to delegate his powers to a subordinate. Obviously he would delegate his powers if he was not going to be available or able to exercise such powers. Accordingly, if he delegates his responsibilities to someone else and while he is away a bus breaks down, you can not say that that shows that he should not have delegated his powers. If one says that, that would mean he should never delegate to someone else because, if something happens while he is away, it will be said that he should have been present.

- [34] In my view the correct approach which the commissioner ought to have adopted is to ask himself whether on the evidence before him the third respondent ought reasonably to have foreseen that, if a bus broke down, Mr Khoza would be able to take whatever steps that the third respondent could reasonably be expected to take in such circumstances. Quite obviously, the third respondent delegated his responsibilities to Mr Khoza because he had confidence in him that he could satisfactorily deal with any situation that could arise in his absence. If the third respondent had no basis for thinking that Mr Khoza would be able to deal with the situation, then he could be faulted. However, if the third respondent's confidence in Mr Khoza had a reasonable basis then the third respondent cannot be faulted for having delegated his responsibilities to Mr Khoza even if the latter ultimately did not perform as expected.

[35] In the arbitration proceedings no witness, including Mr Hlongwane, gave any evidence upon which it can be said that the third respondent's confidence in Mr Khoza had no basis or no proper basis. On the contrary the uncontradicted evidence was that not only had Mr Hlongwane previously approved the third respondent's delegation of his duties to Mr Khoza but also that there had been no complaints about Khoza's performance in this regard in the past.

[36] It was suggested that the third respondent should not have delegated his responsibilities to Mr Khoza because Mr Khoza had no power to stop drivers leaving at the time that they left. There are two answers to this. First, in delegating his responsibilities to Mr Khoza to do his job in his absence, the third respondent obviously also delegated – even if by implication – his authority, if he had any, to prevent the drivers from leaving at the time that they did. Mr Khoza was in the third respondent's shoes and should have stopped the drivers from leaving if he thought that that was necessary. Second, Mr Khoza's evidence clearly established that, had there been no breakdown of his bus, there would have been no delay in transporting passengers. This must mean that the fact that certain drivers had gone home at the time that they did ultimately had no bearing on the matter. This brings me to the issue of causation, namely, that what caused the delay in the provision of transport to passengers was not the third respondent's absence, nor the fact that certain drivers had left but that Mr Khoza's bus broke down. It must be remembered that Mr Khoza's uncontradicted

evidence was that, when he asked the passengers to wait while he went to fetch another bus, the passengers were not prepared to wait and they proceeded to walk or run in the rain to the airport building. There is no evidence to suggest that in this regard Mr Khoza acted less than diligently in his handling of the situation arising from the breakdown of the bus. Indeed, this was not put to him. In my view the commissioner's reasoning in regard to this important aspect of the matter is, indeed, irrational and his finding unjustifiable.

[37] I also agree with the third respondent's contention that his being charged with four charges in this matter constituted a splitting of charges. The one clear charge was the first charge, namely, that the third respondent left his workplace before the end of his shift without permission. However, the second charge, namely, failing to provide buses, could clearly not properly constitute a valid charge on its own against him because, obviously, if he was not at work, which flows from the first charge, he could not provide buses. Failure to provide buses might have simply been a consequence of his being absent from work. Accordingly, that charge should not have been put to him as a separate charge.

[38] The third charge, namely, leaving a subordinate with responsibilities that he could not carry out, can stand on its own. It relates to his obligation to exercise proper care or judgment in delegating his responsibilities. However, as I have already said, no proper evidence was presented that would justify a conclusion that

the third respondent acted unreasonably in choosing Mr Khoza as the person to delegate his responsibilities to on the night in question. In this regard the commissioner misconstrued the inquiry and failed to focus on the correct issue.

[39] The fourth charge, namely, bringing the company's name into disrepute by failing to meet service standards also relates to the fact that passengers were not provided with buses to transport them from the aircrafts to the airport building. That related to the same thing as the second charge. The third respondent should not have been charged separately with the fourth charge.

[40] From the above it is clear that the appellant could competently have charged the third respondent with two acts of misconduct, namely, the first and the third charges. I have already concluded above that there was no proper basis upon which the commissioner could justifiably have concluded that the third respondent was guilty of the third charge. That leaves us with the first charge. It is common cause that the third respondent left the work place one hour earlier. It is also common cause that he did not ask for permission from anybody to leave when he did. The issue is whether he was required to have asked for such permission. He says he did not have to because Mr Hlongwane had previously said that he could delegate his responsibilities to someone else. Mr Hlongwane admits that the third respondent had power to delegate his responsibilities but makes two other points. The one is that the third respondent was required to assess the situation properly before he could delegate. The second is that, even though he had power to delegate his responsibilities, he was still required to have sought permission from other managers who were present during

the day to whom the third respondent reported in Mr Hlongwane's absence. In response to this the third respondent's evidence is rather unsatisfactory. At one stage he said that at the time that he left, all those managers had left and he could not contact them because he had no cellular telephone and the telephones in the offices were "**not going out**". When it was suggested to him that he could have asked someone else to let him use his cellular telephone, he said that he did not need their permission to leave early anyway.

[41] I am inclined to think that the fact that the third respondent could delegate his powers and responsibilities to someone else did not necessarily mean that he could leave his workplace without permission. It must have meant that, when he was within the workplace but unavailable to perform some of his responsibilities, he could delegate or that when he was to be absent from the workplace with his superior's permission, he could delegate. It was not a licence for him to come and go as he pleased without permission. Accordingly, I am of the view that the commissioner's finding that he was guilty of the first charge is justifiable.

[42] The third respondent has criticised the commissioner for not also taking into account the fact that he was working voluntary overtime when he left one hour earlier. The appellant's reply to this is that the third respondent did not bring such fact to the attention of the commissioner during the arbitration and can, therefore, not now criticise the commissioner for not taking it into account. The

third respondent did not reply to this. In my view the appellant's point is a valid one.

[43] I have said above that the matter must be decided on the basis that the third respondent was telephonically informed that the flight in which Mr Hlongwane was going to be travelling was delayed. I did not necessarily say this because I found Mr Hlongwane's version more probable than that of the third respondent. I did so simply because Mr Hlongwane's evidence that this had occurred was not challenged under cross-examination. I wish the CCMA could urge its commissioners to please explain to parties who are not represented by legal practitioners, that when they cross-examine a witness, they must put to such witness their client's version to such witness in all material respects in so far as such witness may be able to comment thereon because, failure to so explain results sometimes in a party not putting its version to such witness which means it would be unfair to use such version when such witness did not have the opportunity to comment thereon.

[44] The next question is whether, with the third respondent being guilty of only the first charge, the sanction of dismissal was fair. The commissioner said in his award that the appellant's disciplinary code provides the sanction of a written warning for such offence. In his award the commissioner only concluded that dismissal was a fair sanction after he had said that, if the charges were considered in isolation, written warnings would have been appropriate but that if they were considered collectively, "the

situation changed significantly”. From this there can be no doubt that he would not have considered dismissal to be an appropriate sanction if the third respondent was guilty of only one of the charges, particularly the first charge.

[45] The Court a quo refused to consider the third respondent’s complaint that the commissioner had decided the matter on the basis of split charges because the third respondent had not raised such issue before the commissioner. This is one of those points which the third respondent was entitled to raise on review even if he had not raised it before the commissioner. Accordingly, I am unable to agree with the Court a quo that, because he had not raised it in the arbitration, the third respondent could not raise it on review. It is interesting to note that later in its judgment the Court a quo also expressed the view that the third respondent should have been charged with one act of misconduct and not four. In that sense it may be said that it ultimately dealt with the matter on the basis that there was only one offence.

[46] The Court a quo also said that the third respondent had no right to delegate his duties to Mr Khoza. This statement by the Court a quo is contrary to uncontradicted evidence by the third respondent as well as Mr Hlongwane’s own evidence. Accordingly, it cannot be sustained.

[47] The evidence about the third respondent’s disciplinary history is not very clear in the record. Indeed it is rather confusing. In the

view I take of the matter it does not appear that it is critical.

[48] I have earlier on referred to the fact that Mr Hlongwane and the third respondent gave conflicting evidence about whether or not the two of them spoke to each other that evening. It was never put to Mr Hlongwane that the third respondent would deny having spoken to him that evening or that day. The consequence hereof is that the matter must be decided on the basis that Mr Hlongwane did telephone the third respondent during the evening of the 15th November 2000 and did tell him that the aeroplane he was going to be taking from East London to Johannesburg was delayed. Even though the matter must be decided on the basis of the appellant's version on this point, I do not think that, when regard is had to all circumstances of the case as revealed by the evidence, this makes any difference. I say this because there is no suggestion that, if the third respondent had known that the aeroplane from East London was delayed, he would have been acting unreasonably if he left work at the time that he did having delegated his responsibilities to Mr Khoza or that it would have been unreasonable of him to delegate his responsibilities to Mr Khoza or that Mr Khoza would have been unable to cope with the situation if his bus had not broken down.

[49] In conclusion it seems to me that the third respondent's contention that the commissioner's decision that dismissal was fair in the circumstances of this case was unjustifiable is correct when regard is had to the fact that he was not guilty of four acts of misconduct and the commissioner failed to appreciate this and when regard is had to the facts of the case. Accordingly, the Court a

quo was correct in setting his award aside even though I do not agree with some of its reasons for that decision. The Court a quo also replaced the award of the commissioner with an award that included that the third respondent be given a final written warning and **“that should he commit a similar transgression in the next two years he may be dismissed immediately”**. I have doubt that such condition is warranted or even competent. However, the third respondent did not note a cross-appeal against that part of the order of the Court a quo and, that being the case, I shall say no more about it.

[50] In the order that the Court a quo made it did not, after setting aside the arbitration award, expressly replace it with an order of reinstatement. It only ordered that the third respondent be given a final written warning on the condition to which I have referred above. However, there can be no doubt that the Court a quo was of the view that the commissioner ought to have ordered the appellant to reinstate the third respondent. This flows from the fact that the Court a quo expressly stated that the correct sanction for the third respondent’s misconduct was a final written warning and that this had to be on condition that, if he was found guilty of a similar act of misconduct within twelve months, the third respondent could be dismissed immediately.

[51] What the Court a quo did not deal with in its judgment is whether or not the order of reinstatement that the commissioner ought to have made should have been one operating retrospectively and, if so, up to what date retrospectively. While it may be argued that an order of reinstatement is necessarily implied in the order that the

Court a quo made, it cannot be said that the reinstatement was ordered to be retrospective is also implied in the order of the Court a quo. Since the third respondent did not note a cross-appeal against the Court a quo's failure to make such implied order of reinstatement retrospective, I do not think that it is open to this Court to consider that issue. The retrospectivity that I am referring to does not relate to the period between the date of the issuing of the arbitration award and the date of the order of the Court a quo or indeed the date of this order. It relates to the period between the date of dismissal and the date of issuing of the award.

[52] In the light of this the reinstatement order that is implied in the order of the Court a quo as the reinstatement order that the commissioner should have made would have run from the date of the issuing of the arbitration award. I shall make an order that reflects this. That means that the third respondent would have lost out on remuneration covering the period from the date of the dismissal to the date of the delivery of the award.

[53] As to costs I am of the view that the requirements of law and fairness dictate that no order as to costs should be made on appeal. I note that in the Court a quo no costs were awarded.

[54] In the result I make the following order:

- 1. The appeal is dismissed.**
- 2. There is no order as to costs on appeal.**

3. The order of the Court a quo is set aside and replaced with the following order:

- (a) The review application succeeds.**
- (b) No order is made as to costs.**
- (c) The arbitration award issued by the commissioner in this matter is hereby reviewed and set aside and in its place the following order is made:**
 - (i) The applicant's dismissal was substantively unfair.**
 - (ii) The respondent is ordered to reinstate the applicant in its employ on terms and conditions no less favourable to him than the terms and conditions which governed his employment immediately before his dismissal;**
 - (iii) the order in (ii) above shall operate from the date of the issuing of this award;**
 - (iv) there is to be no order as to costs."**

Zondo JP

I agree.

Kruger AJA

I agree.

R Pillay AJA.

Appearances:

For the appellant	:	Mr A.N. Kruger
Instructed by	:	Cheadle Thompson & Haysom
For the respondent	:	Mr C Orr
Instructed by	:	Hofmeyr Herbststein & Gihwala inc
Date of judgment	:	15 June 2007