REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 737/10

In the matter between:

FRITZ LETSONI MOHLALA	**Applicant**
and	
SOUTH AFRICAN POST OFFICE	**First Respondent**
COMMISSION FOR CONCILIATION	
MEDIATION AND ARBITRATION	**Second Respondent**
M.J. TSABANE N.O	**Third Respondent**

Heard: **18 January 2013**

Delivered: **10 June 2013**

Summary:

JUDGMENT

HAFFEGEE AJ

Introduction

[1] This is an application to review and set aside an arbitration award made by the third respondent ("the commissioner") dated 26 February 2010 in which the dismissal of the applicant was found to be both procedurally and substantively fair.

[2] The applicant started employment with the first respondent ("the Post Office") on 1 April 1999 and became a branch manager at the Menlyn Post Office since 1 December 2004.

[3] On 28 February 2006, a member of the public opened a savings account at the Menlyn Post Office in the name of a Mr GJ Ackhurst with an initial deposit of R50. Ms Selepi, a teller at the Menlyn Post Office processed the transaction to open the account. The account was opened fraudulently as the person who had opened the account was not Mr Ackhurst but one Mr Makgolo. Mr Makgolo used a false passport when opening the account and presented an invoice that had been tampered with to verify his address. On the same day, a cheque in the sum of R37 620 was deposited into the account. Ms Selepi processed this transaction too. The cheque was stolen and probably intercepted while on its way to Mr Ackhurst. A card was issued for the account by the Postbank division of the Post Office in Bloemfontein and sent to the Menlyn branch. The Post Office maintains that Ms Selepi acted in good faith and not dishonestly or negligently.

[4] On 22 March 2006, a withdrawal of R10 300 was made from the account. Another teller, P Mahlangu processed this transaction. The applicant authorised this transaction because the amount withdrawn required his authorisation.

[5] On 27 March 2006, Mr Makgolo, purporting to be Mr Ackhurst approached a teller at the Kelvin Post Office to withdraw R20 000 and indicated that he had lost his card. Investigations later revealed that the card had been cancelled on 24 March 2006 because of fraud related to

the cheque[1] deposited on 28 February 2006. Nevertheless, the branch manager, Mr T Bengu issued a new bankcard[2] and tried to process the withdrawal of R20 000. He could not because the branch did not have that much money on hand. Mr Makgolo was directed to the Rivonia Post Office.

[6] On 27 March 2006, Mr Makgolo also called at the Menlyn Post Office to attempt a withdrawal of R9 000. The applicant was assisting the tellers because it was busy. When he tried processing the withdrawal, the computer system reflected the card as lost even though Mr Makgolo had the card with him.

[7] According to the applicant, he called Postbank in Bloemfontein and discussed the matter with Ms Alicia Lombard. She indicated that the account was fraudulent and gave him reference number 121. When he returned to the counter, Mr Makgolo had disappeared. The applicant damaged the magnetic strip on the card and kept it with the withdrawal slip Mr Makgolo had handed to him. He also made a note ("the note") of the incident as follows:

> 'On the 27 March client come to do a withdrawal on the account number 2607026000003118 ID Number 4406025023081 then the system says the card lost. I phone Postbank and spoke to Alisha she says I must destroye the card because this a fraud account file no 121.' (sic)

[8] Mr Makgolo was apprehended when he returned to the Kelvin Post Office on 29 March 2006 when he again tried to make a withdrawal at the Kelvin Post Office. He was taken to the Menlyn Post Office where, according to the Post Office, he pointed out the applicant to Mr Butiki Josias Mnisi, employed in the security investigation department of the Post Office. Mr Makgolo said that the applicant had provided him with the false passport and had given him R100 to withdraw money from the account. The applicant produced the Postbank card, withdrawal slip and

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[1] The cheque, issued by the Compensation Commissioner in favour of Mr Ackhurst, was intercepted while *en route* to Mr Ackhurst.

[2] Due to a change in the type of cards issued, cards no longer had to be issued from Bloemfontein.

the note referred to above. The applicant and Mr Makgolo were arrested. The applicant was released on bail after spending a night in police custody.

[9] Mr Mnisi returned to the Menlyn Post Office on 30 March 2006 with another investigator. They found the damaged card, the withdrawal slip and the note referred to above under the applicant's desk pad. Mr Mnisi testified at the arbitration that the applicant 'played a significant role in the opening of the account and the issuing of the post bank card.'[3] The applicant was not present when his office was searched.

[10] The applicant returned to work after first going on leave for about a month. The Post Office did not take disciplinary action against the applicant. During June 2006, the Post Office handed the applicant a questionnaire relating to fraud at the Menlyn Post Office. He responded to the questionnaire on 15 June 2006 and an investigating officer collected the questionnaire on 6 July 2006.

[11] Criminal charges against the applicant were withdrawn during October 2006. The applicant was rearrested on 9 February 2007 and later released on bail of R5000.

[12] The Post Office suspended the applicant on 12 February 2007 to investigate misconduct in the form of fraud against the applicant. This was almost a year after the incidents of March 2006 and the applicant's initial arrest.

[13] The criminal charges against the applicant were once again withdrawn during September 2007. The applicant reported for work but was sent home by an area manager of the Post Office.

[14] On 29 November 2007, Mr Ngomane, the General Manager of Security and Investigations of the Post Office, questioned the applicant. During November 2007, Mr Ngomane also reallocated the investigation to Mr Barend Oosthuizen, a senior forensic investigator, because the initial

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[3] See para 48 (the first of the two paras numbered 48) of the Award.

investigator, Mr J Marais, had resigned.[4] Mr Oosthuizen completed his investigation and sent a report to Mr Ngomane on 19 December 2007.

[15] The Post Office charged the applicant with misconduct on 14 November 2008. The charges against the applicant read as follows:

> 'Charge 1
>
> Dishonesty in that during the period of 28 February 2006 and 29 November 2007 deliberately attempted to mislead/defeat the ends of justice the misrepresentation of facts by supplying management with false information/evidence (to disguise your involvement) with regard to the circumstances you handled and attempted Post bank fraudulent withdrawal of R9 000.00 at Menlyn on 27 March 2006 in account number 260702600003118 in the name of GJ Ackhurst.
>
> Evidence against you revealed that you were involved in the planning/execution of fraudulent activities which took place in the account of Mr Ackhurst during the period of 28 February 2006 and 27 March 2006 by assisting the suspect which where caught.
>
> You furthermore were aware of the fact that fraudulent activities had taken place in the account but failed to declare/report it and upon enquiry you then also supplied Management with false information by stating that you informed post bank of the incident while you have no proof of it.
>
> The company suffered loss of R10 300.00 due to your involvement in the case
>
> Alternative
>
> Gross negligence in that during the period of 28 February 2006 and 27 March 2006 at the Menlyn Post Office were Grossly Negligent by failing to comply with the standard of care expected from you with regard to the manner you handled a Post bank attempted withdrawal of R9 000.00 in account of Mr GJ Ackhurst. After the incident you realised that there

[4] It is not clear exactly when Mr Marias resigned.

were fraudulent activities in the account and then you deliberately failed to report/declare what has transpired

Evidence obtained against you revealed that you are involved in the execution/planning of fraudulent activities that took place in the account and that you attempt to mislead Management by deliberately providing false information to disguise your involvement.

The company has suffered a loss of R10 300.00 due to your involvement in the case

Charge 2

Misconduct G3

Prejudicial conduct in that you during the period of 28 February 2006 and 27 March 2006 at the Menlyn Post Office failed to ensure that the maintenance of good order and smooth running of the Post Office were exercised by you with regard to the manner you handled an attempted Post bank fraudulent withdrawal of R9 000.00 at Menlyn on 27 March 2006.

You realise that fraudulent activities are taken place and failed to declare/report the incident to management.

Evidence obtained against you reveal that you were involved in the execution/planning of the fraudulent activities that took place out of the account and that you assisted the suspect caught to make illegal attempted withdrawals out of the account. The company has suffered a loss of R10 300.00 due to your involvement in the case.

Upon enquiry you furthermore provided Management with false information to disguise your involvement.'[5]

[16] The applicant was dismissed on 6 February 2009 after the Post Office convened a disciplinary hearing. The letter notifying him of his dismissal refers to an attachment as the reason for his dismissal. The attachment is not part of the record. Neither the award of the commissioner nor counsel for either party could assist me with the precise reason for which

[5] Pages 102 -3 of the bundle of documents used at the arbitration.

the applicant was dismissed. In other words, it is not clear for which charge or charges the applicant was dismissed. Nevertheless, it appears that the applicant was dismissed for his alleged involvement in the fraud; for not reporting the matter; and for stating that he had reported the matter even though he had not.

Arbitration award

[17] The commissioner found:

> 'From the actual matrix of this case, the Respondent had succeeded in proving on a preponderance of probabilities the dismissal of the applicant was fair – procedurally and substantively. The probabilities are overwhelming against the applicant. The Respondent's testimony before me, which I accept is that an old man who apprehended attempting to make a fraudulent withdrawal from an account in which a stolen cheque was deposited pin pointed the applicant as the Menlyn branch manager who him a fraudulent passport and an amount of R100.00 to go a make a withdrawal of a large sum of money from the fraudulently opened account
>
> … Apart from having been pin pointed out by the old man from the street; the documents related to the fraudulent account were found in the applicant's office some two three days after the old man allegedly ran away form the Menlyn branch. This cannot be regarded as a mere coincidence and a simply congruent of events. It is far more than that. Why would the apprehended person pinpoint the applicant and no one else is beyond me. No reasonable explanation was given why only the applicant was pointed out to the police. The applicant's attempts to attempt to unconvincingly explain away that the old man was vindictive were unsuccessful.
>
> … The applicant's averments that he phone the post bank in Bloemfontein and spoke… Alycia Lombard who gave him reference number 121 is without merit and were not substantiated in any manner whatsoever. This is displaced by Ms Segalo's testimony who stated that number 121 is one of the authorisations that were allocated to her and she definitely did not speak to the applicant on the day in question. Ms

Segalo's testimony is further that there is no possibility at all for duplication of authorisation numbers. Ms Segalo remained steadfast and unshaken in her testimony despite being subjected to rigorous cross examination.

The applicant's averments that the Respondent inconsistent in meting out discipline are without merit and not substantiated in anyway whatsoever. Evidence adduced before me indicated that the teller who opened the account initially acted in good faith and there was nothing untoward with the opening of the account. Secondly, the staff members who re-issued the post bank card also did so in good faith as to them there was nothing suspicious. There is no reason to institute disciplinary action against these staff members.

It is accepted that the Respondent took inordinately long before instituting disciplinary action against the applicant. This, however, cannot be misconstrued to imply that the Respondent condoned the infraction as there is justification for it. There was the involvement of the SAPS in the matter conducting their own investigations; the Respondent's first investigating officer also resigned from the employ of the Respondent. Also, this is not a normal run of the mill case an it warranted thorough investigations. I am therefore satisfied with the reasons the Respondent advanced for the deal in laying charges against the applicant. It is my finding, therefore, that the dismissal of the applicant was procedurally and substantively fair. The dismissal of the applicant stands as I do not have any reason to disturb the Respondent's finding as well as penalty imposed.

… The applicant's conduct has irretrievably damaged the relationship of trust which is the hallmark of any employment relationship.' (sic)

<u>Grounds of review</u>

[18] The applicant's grounds of review can be summarised as follows:

18.1 The conclusion reached by the commissioner was not justifiable based on the evidence led at the arbitration hearing; and

18.2 The commissioner erred in concluding that the applicant's dismissal was procedurally fair given that the Applicant was subjected to "a separate interrogation" and the inordinate delay in taking disciplinary action against him.

Evaluation

[19] In terms of section 192(2) of the Labour Relations Act, the employer bears the onus to prove that a dismissal is fair. The employer is entitled to an award in its favour if the balance of probabilities favours it. However, if an inference on the probabilities can be made equally in favour of both parties, the employer would not have discharged the onus of proof and the dismissal will not be found to be fair.

[20] An arbitration award stands to be set aside only if the award is unsupported by any evidence, is based on speculation, is disconnected from the evidence or is made without appropriate consideration of evidence that may be considered unreasonable.[6]

Evidence linking applicant to fraud

[21] The commissioner found, on a balance of probabilities, that the evidence presented at the arbitration favoured the Post Office's version that the applicant had participated in committing fraud. The evidence he relied on for his conclusion is that Mr Makgolo had pointed out the applicant and that documents implicating the applicant were found in his office a few days after his arrest.

[22] Mr Makgolo neither testified at the disciplinary hearing nor at the arbitration because he was not to be found. Instead, Mr Mnisi testified that Mr Makgolo had pointed out the applicant through the glass window of the Menlyn Post Office on 29 March 2006 and implicated the applicant by saying that the applicant had given him the bankcard and R100 to withdraw money at the Kelvin Post Office. Mr Makgolo's claim that the

[6] See A Myburgh '*Sidumo v Rusplats*: How The Courts Deal With It' (2009) 30 ILJ 1.

applicant was instrumental in the fraud was not tested since it could not be subjected to cross-examination.

[23] The "evidence" of Mr Makgolo has to be approached with extreme caution on several grounds: the evidence was presented through another witness; it is the evidence of a single witness; and that of an alleged accomplice.

[24] In *R v Mokoena,*[7] the Court said

> 'The uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for conviction… but in my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect.'

[25] In *Daniels v General Accident Insurance Co Ltd,*[8] the court discussed the application of the cautionary rule relating to single witnesses in civil cases:

> 'It is of course competent for a court to find in favour of a party on the strength of the evidence of a single witness -…
>
> Evidence Act 25 of 1965, provides that judgment may be given in any civil proceedings on the evidence of any single competent and credible witness. In this… although there is apparently no 'cautionary rule' in civil cases as in criminal matters where proof beyond reasonable doubt is required, the single witness, more particularly where he is one of the parties, must be credible to the extent that his uncorroborated evidence must satisfy the Court that on the probabilities it is the truth.' (my emphasis)

Accordingly, I am of the view that at least some caution ought to have been exercised in this case.

[26] Similar caution ought to apply where the evidence relied upon is essentially that of an accomplice. Mr Makgolo, for the purposes of this

[7] 1932 OPD 79 at 80.
[8] 1992 (1) SA 757 (C) at 759J-760C.

matter, was a purported accomplice. The cautionary rule in relation to accomplices was set out as follows in *S v Hlapezula and Others:*[9]

> 'It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, <u>various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description – his only fiction been the substitution of the accused for the culprit</u>.' (my emphasis)

[27] The commissioner took no such caution. He found that the mere pointing out was sufficient to favour Mr Makgolo's implication of the applicant, through the testimony of Mr Mnisi, over the applicant's direct evidence denying that he had anything to do with the fraud. The commissioner not only failed to take any caution in considering whether Mr Makgolo was truthful in pointing out the applicant but also lost sight of the fact that he relied on Mr Mnisi's account of Mr Makgolo's version for concluding that the applicant was involved in the fraud.

[28] The commissioner goes further to state that the applicant provided no reasonable explanation why Mr Makgolo pointed out only him. This is not fair to the applicant. With no opportunity to cross-examine Mr Makgolo, the applicant could only venture an explanation. It appears as if the commissioner had shifted the evidentiary burden, if not the onus of proof, to the applicant when the grounds for doing the former were not convincing. Thus, instead of treating Mr Makgolo's 'evidence' with caution, the commissioner cast aspersions on the applicant's failure to explain why Mr Makgolo had pointed out only him.

[29] The commissioner placed strong emphasis on "documents related to the fraud account" being found in the applicant's office because "[t]his cannot be regarded as a mere coincidence and a simple congruent of events". There was no coincidence in the documents being in the applicant's

[9] 1965 (4) SA 439 (A) at 440D-F.

office. Even though the commissioner recorded the testimony of both Mr Mnisi and the applicant that the applicant had presented the documents to the police on 29 March 2006, he completely ignored this evidence. Additionally, he failed to apply his mind to a crucial piece of evidence: the note drafted by the applicant on 27 March 2006 recording the events of that day including that he had contacted Ms Lombard. There was no evidence before the commissioner to challenge the applicant's version that the note was drafted immediately after his discussion with Ms Lombard and as such amounted to a contemporaneous account of what had occurred.

[30] The existence of the documents, and the note in particular, support the applicant's version of events. The commissioner failed to consider the applicant's evidence that he had produced the documents in the presence of Mr Mnisi and the police and had then left the documents in this office on 29 March 2006.

Escalation of the matter

[31] The applicant contends that he contacted Ms Lombard at Postbank in Bloemfontein and that she allocated him reference number 121. The Post Office presented the evidence of Ms Segalo, a colleague of Ms Lombard. Ms Segalo testified that the number "121" had been allocated to her as an authorisation number and therefore Ms Lombard could not have furnished the applicant with the same number.

[32] The applicant relies on the note he had drafted on 27 March 2006 and on a record of telephone calls made from Menlyn Post Office on that day. The telephone records indicate that at least three calls were made to Bloemfontein on 27 March 2006. One call lasted for a little over eleven minutes.[10] The commissioner appears not to have applied his mind to this evidence at all.

[33] The commissioner found that the applicant's averments that he had called Bloemfontein and spoken to Ms Lombard are 'without merit and

[10] Page 83 of bundle of documents from the arbitration.

were not substantiated in any manner whatsoever.'[11] He relied on Ms Segalo's evidence to conclude that the applicant could not have called Ms Lombard on 27 March 2006 but ignored the evidence referred to above that phone calls were made to Bloemfontein on 27 March 2006 from the Menlyn Post Office and that Ms Lombard did not testify.

[34] According to the Post Office, Ms Lombard did not testify at the arbitration due to medical reasons. The arbitration record[12] indicates only a vague assertion that Ms Lombard could not testify due to medical reasons. No details are given about the nature or extent of Ms Lombard's condition or any attempt to present her testimony. Instead, the Post Office relies on a document it purports is an affidavit sworn to by Ms Lombard. The probative value of this document is highly questionable for several reasons, foremost of which is that a commissioner of oaths did not sign it. While Mr Oosthuizen's details appear as that of the commissioner of oaths, the document still had to be considered cautiously because Mr Oosthuizen himself is the source of much of the information contained in the 'affidavit'. Of even greater concern is the nature and contents of the document. Ms Lombard signed the document on 11 December 2007. According to the document, Mr Oosthuizen questioned her on 20 November 2007 about the incident of 27 March 2006. The statement vacillates between a failure to remember and apparent certainty on her part:

> 'I declare that I can't remember talking to the Branch Manager Menyn on 27 March 2006 and that I can't recall anything regarding this matter.
>
> I can also not remember that I told the Branch Manager, Menlyn to destroy the card and I can't remember that I gave him any file number and this is not recorded at out section.
>
> I was not informed by the Branch Manager that a client visited his office on 27 March 2006 with the card and that the cardholder attempted to withdrew an amount of R 9000.00 and that the client run away when the Brach manager seemingly phoned me.

[11] At para 86 of the award.
[12] At page 310 of the transcript.

> I will never under such circumstances request a Branch Manager to destroy a card as we all are aware that we should instruct the person who call to rather keep the card and passport/identity document as evidence.
>
> I did not record the incident as this is the first time that I was made aware of the concerns with regard to the account was when Mr Oosthuizen informed me on 20 November 2007.
>
> I confirm that I never had an enquiry relating to this incident and that I never spoke to the Branch Manager Menlyn regarding this matter.'[13] (sic)

[35] The statement, besides being contradictory in that Ms Lombard first states that she could not remember the incident but then confirms with some certainty that the applicant had not spoken to her, is of grave concern because, *inter alia,* Ms Lombard was not approached until more than one and half years after the incident. The inordinate delay in investigating the applicant's version that he had contacted Ms Lombard on 27 March 2006 supports Ms Lombard's statement that she "can't recall anything regarding this matter." While the commissioner appears not to have any regard for this document, the Post Office relies on it to challenge the applicant's version.

[36] Faced with the direct testimony of the applicant and corroborated with his contemporaneous note and the indirect testimony of Ms Segalo, the commissioner made conclusions without considering evidence that may be considered unreasonable.

<u>Inconsistent disciplinary action</u>

[37] In light of the above, it is not imperative to make a finding on whether the Post Office had taken disciplinary action against the applicant in an inconsistent manner. This is further complicated by the fact that it is not clear exactly for which charge or charges the applicant was dismissed.

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[13] At page 59 of the bundle of documents used at the arbitration

[38] If the applicant were dismissed for negligence, the Post Office would have acted inconsistently by failing to take any disciplinary action against other employees who had participated in opening the account; issuing a new bankcard; and processing withdrawal transactions. Based on the facts of this matter, I am not able to draw that conclusion with confidence. Still, the Post Office's contention that others had acted in good faith even though, in my view, they may also have acted negligently, is telling in the manner the Post Office investigated the matter and decided to take disciplinary action solely against the applicant.

[39] The issue of consistency is relevant in another context too: if the evidence led at the arbitration proceedings was not such that a reasonable decision maker would have concluded that the applicant was involved in the fraud, the applicant's conduct would not be distinguishable from the conduct of other employees. In other words, the only issues that distinguish the applicant from other employees are the pointing out; his alleged failure to escalate the matter; and the documents being found in his office. I have already addressed these issues, the latter of which, in my view, ought to have absolved him.

<u>Delay in instituting disciplinary action</u>

[40] The Post Office argues that the commissioner had dealt with this issue comprehensively in his award. This is not so. The brief sequence of events relevant to the delay is the following: the applicant was arrested on 29 March 2006. After being released on bail, he took annual leave and returned to work. The applicant responded to a questionnaire that the Post Office gave him during June 2006. The criminal case against the applicant was withdrawn on 20 October 2006. The applicant was not suspended during this time and continued working for the Post Office. The applicant was rearrested on 9 February 2007 and, once again, released on bail. The applicant was first suspended on 12 February 2007. The criminal charges against the applicant were withdrawn for second time on 27 September 2007. The applicant reported for work

during the beginning of October 2007 but was told to go home. The Post Office interviewed the applicant during late November 2007. It is unclear exactly when Mr Marais started the initial investigation or when he resigned from the employ of the Post Office. However, it appears as if the Post Office must have started its investigations as early as during June 2006.[14] Nevertheless, because Mr Marais resigned, the investigation was handed over to Mr Oosthuizen. He completed his investigation on 19 December 2007. Yet, the Post Office only took disciplinary action against the applicant on 21 October 2008!

[41] The Post Office's reasons for the delay (and the commissioner's acceptance of the reasons), namely, the involvement of the police, the original investigating officer resigning and the complexity of the case, are feeble. I have already indicated above that it is not clear when the initial investigator started investigating the case and when he had resigned. However, Mr Oosthuizen managed to investigate the matter from October to December 2007. No explanation is given for the delay even though the Post Office had asked the applicant to respond to a questionnaire during June 2006 and required him to attend an interview during November 2007. Mr Oosthuizen, whilst testifying at the arbitration, cannot explain why the Post Office only took disciplinary action against the applicant during October 2008 when he had completed his investigation during December 2007.[15]

[42] Similarly, the role of the police in delaying the matter is unsubstantiated. The applicant was first arrested on 29 March 2006. The charges against him were first withdrawn in October 2006. The applicant was not suspended and continued working for the Post Office during this time. He was rearrested during February 2007 and only then did the Post Office suspend the applicant. The criminal charges against the applicant were again withdrawn during September 2007. There is simply no explanation offered how the role of the police justified the Post Office taking disciplinary action against the applicant after so long. Mr Oosthuizen

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[14] When it asked the Applicant to respond to a questionnaire.
[15] Transcript at page 138.

testified that the Post Office's management had made a decision regarding the delay and that "they waited for the SAPS".[16] Since the criminal charges had already been withdrawn for the second time during September 2007, the involvement of the police cannot be a valid reason to delay the matter for more than a year.

[43] The Post Office's own disciplinary procedure states that disciplinary action must be taken even if the transgression is referred to a court of law. Mr Oosthuizen conceded during cross-examination in the arbitration that the Post Office "can continue with their case, even if there is a court case hanging".[17]

[44] The Post Office argued that the case was complex. The commissioner found likewise:

> 'Also this is not a normal run of the mill case an it warranted thorough investigations.'[18]

Neither the Post Office nor the commissioner set out the supposed complexities of the case to warrant a delay of over two years in instituting disciplinary action against the applicant. Mr Oosthuizen, after all, completed the investigation in less than three months. Moreover, no new or material evidence was presented at the disciplinary hearing or the arbitration that arose because of the 'thorough' investigation conducted.

[45] The commissioner did not heed any of the above evidence in accepting the reasons for the delay. Likewise, the commissioner paid scant regard to the fact that the applicant continued working for the Post Office from soon after his release during June 2006 until he was arrested a second time in February 2007 when considering that the trust relationship had broken down irretrievably. While he was suspended during February 2007, the applicant continued as an employee of the Post Office and was only charged during October 2008.

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[16] Transcript at page 138.
[17] Transcript at page 139.
[18] At para 88 of the Award.

[46] The Post Office argued that it had not waived its right to take disciplinary action against the applicant. There is some merit in the argument that when considering a case where the allegations of misconduct are particularly serious, waiver ought not to be easily assumed. Still, the Post Office provided no cogent explanation for the delay of almost one year in suspending the applicant and then a delay of more than another year before taking disciplinary steps. The Labour Appeal Court, in *Maluti Transport Corporation Ltd v Manufacturing Retail Transport and Allied Workers Union*,[19] addressed the issue of estoppel by election in the labour law context (albeit in the context of a strike ultimatum) and said that two basic requirements are to be met to retract an earlier election: a good reason and timeous notice. The Post Office gave no reason, let alone a good one, for taking disciplinary action against him so long after the incident.

[47] Even if it cannot be said that the Post Office had waived its right to take disciplinary action against the applicant, I am satisfied that the long delay was not fair. In *Union of Pretoria Municipal Workers and Another v Stadsraad van Pretoria*,[20] the employer took about a year and one month to commence disciplinary action against an employee. The employer's policy not to take disciplinary steps against an employee who had been charged criminally until the criminal prosecution was finalised was found not to be a valid reason for the delay. The court further concluded that while "delay is not, by itself, waiver" and even where waiver is not claimed or does not apply, "fairness, however, dictates that disciplinary steps must be taken promptly."[21] The passages quoted below are startlingly apt:

> 'The reason for the enquiry to be held promptly is discussed by Cameron 'The Right to a Hearing before Dismissal – Part One' (1986) ILJ 183 at 200:

[19] (1999) 20 ILJ 2531 (LAC) at para 36.
[20] (1992) 13 ILJ 1563 (IC)
[21] Ibid at 1568A and 1569A

> "But promptness, even short of the waiver or deemed waiver by the employer, is essential to ensure that the employee can present his case effectively since delay can lead to inadequate recall on the part of the employee or to the unavailability of his witnesses. Moreover, undue delay between the occurrence of the alleged misconduct in the employers' disciplinary response blurs the impact of corrective discipline. From the employer's point of view promptness is necessary for the additional reasons that dispatch of a disciplinary matter allows his enterprise to move forward unhampered by the anxieties, animosities and uncertainties which pending action may produce."

The correctness of Cameron's comments are demonstrated by the facts of this case. Witnesses were unable, because of the lapse of time, to recall the details of certain events which have an important bearing… The applicant continued to perform his duties for more than two years after the misconduct. How can it be said that his misconduct rendered the continued employment relationship impossible? The alleged misconduct in pending disciplinary hearing clearly caused anxiety animosity in the workplace.

Was the inquiry held promptly (timeously)? The enquiry commenced with the delivery of the charge, namely 5 July 1990. It took 11 months to complete the enquiry. That was caused by several factors including postponements at applicant's request. I therefore disregard that period. The period between the transgression and commencement of the enquiry was one year and one month plus some days. The inquiry would not have commenced promptly unless there is some valid reason for the delay. An enquiry would ordinarily not be held promptly unless it is commenced within days, or at the outside, a few weeks.

….

An employer may proceed with the company to disciplinary enquiry despite the fact that the employee has been charged criminally with an offence arising from the same incident or the police have launched criminal investigations (*Ncora Irrigation Scheme and FAWU* (1992) 13 ILJ 718 (ARB), *Nyalunga v P P Webb Construction* (1990) 11 ILJ 819

(IC) and the article ‘Criminal Trials and Disciplinary Inquiries’ in Contemporary Labour Law vol 1 no 2 at 22).

The respondent, secondly, delayed the commencement of the disciplinary enquiry after conclusion of the criminal prosecution for six months. The respondent gave no reason for that delay. The disciplinary enquiry was, by reason of that delay alone, not commenced promptly.

The failure to convene an enquiry promptly is in casu, even short of waiver or deemed waiver, so grossly unfair that it vitiates the decision to dismiss the applicant.

In this case justice delayed is justice denied….’[22]

[48] The delay in taking disciplinary action in the present case is even more than that referred to in the above case. The applicant was charged with misconduct more than two years and six months after the incident and about a year after the criminal charges were withdrawn for a second time. The disciplinary procedures expressly state that discipline may be taken against employees even where a criminal case is pending. Mr Oosthuizen confirmed this in his testimony but said that it was management decision. The reasons given by management for the delay are poor.

Other procedural issues raised on behalf of the applicant

[49] The applicant also complains about the search of his office and the “interrogation” sessions to which he was subjected. These complaints, while understandable given the circumstances that prevailed in this matter, are not sufficient to be regarded as inherently unfair. An employer is entitled to search its own premises and to question its employees.

Conclusion

[50] This Court is entitled to set aside an arbitration award if the commissioner’s decision falls outside a band of decisions to which a

[22] Ibid at 1569C – 1570E.

reasonable person could come on the available evidence.[23] It is not the correctness of the commissioner's decision that is relevant but whether the result of the arbitration proceedings is reasonable. I find that the decision of the commissioner that the Post Office had "succeeded in proving on a preponderance of probabilities that the dismissal of the applicant was fair – procedurally and substantively" was not a reasonable one on the basis of the evidence available to him.

[51] In the circumstances, I find that the conclusion reached by the commissioner was not justifiable in relation to the evidence before him and that the arbitration award falls outside of a band of decisions to which a reasonable person could come on the available evidence. The application to review and set aside the arbitration award, accordingly, succeeds.

<u>Relief claimed</u>

[52] In terms of the notice of motion, the applicant seeks the court to review, correct and set aside the commissioner's award and to remit the dispute to the Second Respondent. The Post Office argues that because the applicant has not specifically asked for the commissioner's award to be replaced, I am compelled to remit the dispute to the Second Respondent if the review is successful and the award is set aside. I disagree for several reasons. First, the notice of motion includes a prayer that the court corrects the award. Doing so, in my view, entails determining the dispute. Second, the relief claimed includes a prayer for further and/or alternative relief. Third, section 145(4) of the LRA entitles the court to determine the dispute in the manner it considers appropriate.

[53] Aside from reasons cited above, I do not believe that justice and fairness would be served if this dispute were remitted to the Second Respondent to be heard before a commissioner other than the third Respondent. In determining whether or not to substitute the award or remit the dispute back to the CCMA for a hearing *de novo*, considerations of fairness are

[23] See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others)* [2007] 12 BLLR 1097 (CC).

paramount bearing in mind the record of evidence available and whether there would be a purpose in remitting the matter back to the CCMA for re-hearing.[24] The LAC and this Court have held that a decision should be substituted or corrected rather than be referred back to the CCMA for a hearing *de novo* where:

53.1 the result is a foregone conclusion and it would merely be a waste of time to order the CCMA to reconsider the matter;

53.2 where a further delay would cause unjustified prejudice to the parties;

53.3 where the CCMA has exhibited such bias or incompetence that it would be unfair to require the applicant to submit to the same jurisdiction again; or

53.4 where the court is in as good a position as the CCMA to make the decision itself.[25]

[54] In addition to these factors, it is material whether a full record of the matter is available to the Court which places the Court in a position to apply its mind to the matter. In this matter, I am satisfied that a full record is available and that the factors under 53.1, 53.2, and 53.4 are present. It is, therefore, not appropriate that the matter be remitted back to the CCMA for re-hearing.

[55] Section 193(2) provides that the Court must require the employer to reinstate or re-employ an employee whose dismissal is substantially unfair unless the employee does not wish to reinstated or re-employed; the circumstances surrounding the dismissal are such that a continued employment relationship is intolerable; or it is not reasonable practical for the employer to reinstate or re-employ the employee. The applicant indicated in his referral of the dispute to the CCMA that he seeks

[24] See *Gauteng Gambling Board v Silverstar Development Ltd and Others* 2005 (4) SA 67 (SCA) at para 28.
[25] *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others* [2009] 11 BLLR 1128(LC) at para 33.

reinstatement.[26] The other factors do not apply. Accordingly, I consider reinstatement, without any loss of remuneration and benefits to be appropriate.

Costs

[56] The court has a broad discretion, in terms of section 162 of the LRA, to make an order for costs according to the requirements of the law and fairness. There are no reasons before me to suggest why costs should not follow the result.

Order

[57] Accordingly, I make the following order:

1. The arbitration award made by the third respondent under the auspices of the second respondent under case number GATW 2543-09 dated 26 February 2010 is reviewed and set aside.

2. The dismissal of the applicant was substantively unfair.

3. The applicant is reinstated with retrospective effect.

4. The First Respondent is ordered to pay the costs of the applicant.

Haffegee, AJ

Acting Judge of the Labour Court

[26] At page 107 of the bundle of documents used at the arbitration.

APPEARANCES

For the Applicant:	Advocate P Mokoena SC
Instructed by:	Msinkinya Attorneys and Associcates
For the Third Respondent:	Advocate A I Cook
Instructed by:	Howes Inc. Attorneys