IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 793/2007

In the matter between

NUM obo WINSTON BUSISWE MANGANYE	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION	**1st Respondent**
MATTHEW RAMOTSHILA N.O.	**2nd Respondent**
ESKOM HOLDINGS (PTY) LTD	**3rd Respondent**

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JUDGMENT

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LAGRANGE, J

Introduction

1. The applicant wishes to review the arbitration award of the second respondent in which the

arbitrator found that his dismissal was both procedurally and substantively fair. The third respondent ('Eskom') had also filed an application to dismiss the review application because of the applicant's tardiness in prosecuting the matter.

2. The applicant was formerly employed by the third respondent, Eskom as an investigator in its Protective Services Division. He was dismissed in 2003 after being found guilty of eight counts of misconduct. Following extensive internal disciplinary proceedings, including a full appeal hearing.

3. The arbitrator found that the employer had succeeded in proving that the employee had committed various acts of misconduct for which dismissal was an appropriate sanction. Essentially, the arbitrator accepted the evidence of the employer's witnesses that the applicant had been acting in cahoots with persons involved in eagerly connecting members off the public with the power distribution network. The applicant's role involved, among other things, providing equipment to those involved in making the legal connections and taking payments from members of the public. The arbitrator found that consequently the applicant had committed misconduct in a number of respects, namely:

3.1. he conducted himself in an improper or disgraceful manner or behaved in a manner which harmed the image of Eskom ;

3.2. he used Eskom' the Labour materials transport or equipment and access to his own advantage or to the advantage of others;

3.3. he was in the unauthorized possession or attempted removal off property from Eskom;

3.4. he accepted compensation in cash, without the written consent of his employer resulting from the above arrangements, and

3.5. more specifically, during December 2002 and September 2002 he entered into an agreement with persons that illegally did installations and connections for customers . In terms of these agreements the employee received money from them in order not to arrest them. He sold equipment including meter cables stolen from Eskom to be used in the illegal connections and arranged with prospective customers to have them connected illegally and demanded and received money from them.

4. It is evident from the charges that the last mentioned charge effectively includes the factual foundations of all the previous ones, even though each one of the other charges of which the applicant was found guilty could stand as a charge on its own.

5. In his evaluation of the evidence the arbitrator largely discounted the character evidence of the applicant's witnesses as a proper counterweight to the evidence of the employer's witnesses,

because the applicant's witnesses' evidence did not challenge the evidence of the employer's witnesses relating specifically to the charges.

6. The arbitrator referred to the witnesses of P Malaudzi and B Vukea who testified that the applicant had effectively agreed to not to prosecute them in exchange for his involvement in their illegal activities. They and another witness T P Malongwe gave evidence that on the 16 September 2003 the applicant was arrested after selling a prepaid meter and related equipment to one of them for R 1500. Although there was video footage relating to the transaction, the arbitrator based his findings heavily on the oral evidence of the witnesses which was not successfully challenged in his view.

7. The arbitrator also found that there was unchallenged evidence that the applicant supplied materials to the persons involved in making illegal connections, which the arbitrator found was tantamount to theft. There was also evidence of customers from whom the applicant had quite irregularly collected money from them without issuing any receipts, which the arbitrator took to be evidence of his improper conduct whilst on duty, which harmed the image of his employer.

The prosecution of the review application

8. Before considering the merits of the review application, it is necessary to deal with the application to dismiss it on account of the delays by the applicant in prosecuting the matter. The employer raises a number of problems about the applicant's prosecution of the review application. Firstly, it complains that the original founding affidavit ought to have been filed on 27th of March 200,7 but was only filed on 4 April 2007 making it six days after the time in terms of the six week time limit prescribed in section 145(1)(a) of the Labour Relations Act ('the LRA'). No condonation application was filed by the applicant for this late submission, as required by section 145(1A) of the LRA.

9. Secondly, the employer points out that the applicant served and filed the transcribed record of the arbitration proceedings on 13 March 2008 and in terms of rule 7 A(8) of the Rules ought to have filed its supplementary notice of motion and affidavit within 10 days thereafter. However, this was only done on 5 February 2009 almost a year later. The employer argues that, as in the case of the original founding affidavit, this late filing of the supplementary affidavit required a successful condonation application before it could be said to be properly before the court.

10. For its part, the employer filed its opposing affidavit on 19 February 2009, but the applicant only filed its replying affidavit on the 20th of April 2009 which was some seven weeks late, and again without seeking condonation from the court for not complying with the time periods in the court rules.

11. Lastly, the employer points out that the applicant did not respond timeously to the directive's of the court registrar to file his heads of argument and only did so 19 days out of time.

12. On the 20 October 2008, the employer filed its application to dismiss the review. The applicant filed a notice of opposition to this application but did not file any answering affidavit. The applicant eventually filed his supplementary affidavit over three months after that, without any attempt to explain his delays in prosecuting the review. The only occasion, when he proffered an explanation on oath is when he filed his replying affidavit in the main review application. Before considering the explanation offered in that reply, it is useful to summarize the key points of the chronology above.

13. The review application was filed in mid April 2007. By 25 April 2007, the CCMA had advised the parties that tapes and the records had been filed with the registrar of the court. A couple of weeks later, the employer's attorneys inquired whether the applicant was in the process off transcribing the tapes and the applicant's attorneys confirmed on the same day that this was indeed what they were doing. On 5 June 2007 the CCMA lodged another twelve tapes, and on 12 July 2007 lodged a further six tapes and a video recording.

14. The applicant’s current attorneys of record at the time withdrew from the matter. After receiving the notice of the withdrawal, the employer's attorneys wrote to the applicant’s union asking for information on the progress of the review application and threatened to bring an application to dismiss the matter if no response was received. A similar letter was sent to the applicant’s new attorneys of record on 29 October 2007, which they acknowledged receipt of and advised they would revert on shortly. Four months later, the transcript of the proceedings was filed on 13 March 2008. A few days after filing the transcript, the applicant's attorneys advised that the applicant would supplement his founding affidavit, but owing to the complexity of the record they would only be in a position to do so on or before 4th April 2008

15. However, instead of filing the supplementary affidavit as promised, the applicant's attorneys advised the respondent late in April 2008 that they had consulted with senior counsel, who has advised that the applicant ought to bring a substantive application to the CCMA to re-open the

applicant's case based on new evidence, which the applicant alleged had emerged during the course of the criminal proceedings relating to the same alleged illegal activities for which he had been dismissed. The purpose of the letter was to seek the employer's consent to the substantive application following which the applicant would withdraw his review application so the matter could be reopened at the CCMA. Within a week of receiving the proposal, the respondent advised that it was not acceptable. There was no further communication about the proposal after this.

16. Accordingly, on 3 June 2008 the employer's attorneys inquired of the applicant's attorneys whether or not the application was still proceeding, and again reiterated the previous warning that it would bring an application to dismiss the matter. There was no reply to this letter and a follow-up letter was sent to the applicant's attorneys on the 30th of July 2000. Having heard nothing further, and not having received a supplementary affidavit, the employer launched the application to dismiss the review on 20 October 2008.

17. As mentioned previously, it was only on 5 February 2009 that the applicant filed its amended supplementary affidavit. Thus, the last communication to the company's attorneys from the applicant prior to filing his supplementary affidavit about nine months later, was the letter of 24 April 2008, proposing the reopening of the matter. The applicant failed to respond at all to any of the further correspondence from the third respondent, it even when the third respondent threatened to launch the application to dismiss the review. All the applicant did was to file a notice of opposition to the dismissal application and made no attempt to expedite the filing of its supplementary papers.

18. The applicant's explanation for the delay in filing of the record, which was admittedly voluminous, is that his attorneys of record were waiting for funds from his union, which were only forthcoming in January and February 2008. As far as the subsequent delay in filing the supplementary affidavit is concerned, the applicant contends in the replying affidavit that his union had further discussions with the employer in May 2008 with a view to trying to settle the dispute. Whatever transpired in those discussions, they had failed by 1 July 2008 when the employer sent a letter to the union advising it that it wasn't prepared to reinstate the applicant and believed that the legal process should run its course. From this, it would appear that a parallel process of communication might have been taking place between the company and the union during June 2008, but it did not extend beyond that month. When the employer's attorneys wrote to the applicant again at the end of July 2008, asking them to advise what was happening with the review application they were simply unresponsive. In its replying affidavit, the applicant and

the union make no attempt to explain the failure to respond to the employer's attorneys, though it is apparent from the account of the backdoor stratagem which the applicant's attorneys were pursuing as to why they never responded as they should have. This is recounted below.

19. Nearly six weeks after receiving the letter from the third respondent's attorneys asking about the progress of the review, the applicant's attorneys unilaterally approached the Commissioner, and requested him to vary his award in the light of what was established in the criminal proceedings in which the applicant had been acquitted. The applicant was not advised of this approach to the CCMA. On 19 December 2008, the CCMA responded to this letter, by which stage the applicant contends his attorneys' offices were closed. It was only a month into the following year that the applicant and filed his supplementary affidavit.

20. The applicant and his attorneys knew that the third respondent was expecting a response on the progress of the review application, but instead of being candid and replying that he wanted to first exhaust efforts to reopen the matter with the CCMA, they said nothing and proceeded on an *ex parte* basis with the alternative strategy. Two things may be inferred from the conduct of the applicant in this regard. Firstly, he had placed all his hope on reopening the case and only revived his pursuit of the review application, when the backdoor approach to the CCMA failed. Secondly, the applicant and his attorneys acted in bad faith in this regard. It is clear that they did not respond to the third respondent's inquiries about the progress of the review application because they were busy pursuing an alternative strategy and did not want to alert the third respondent to this. Thirdly, it was improper for the applicant's attorneys to have approached the CCMA to re-open the matter without keeping the third respondent fully advised of all the steps it was taking in this regard. It is obvious, that the third respondent had no inkling of this approach, and was putting the applicant on terms regarding the finalization of the review application.

21. In answering the question whether or not the applicant diligently pursued the review application, I accept that a reasonable but not entirely satisfactory explanation was offered for the delay in filing the transcript of the proceedings, which consisted of some 2278 pages and which would have cost a significant sum to transcribe.

22. The same cannot be said for the delay in filing the supplementary affidavit. The applicant's attorneys were well aware when this should have been filed originally, but failed to meet even the extended deadline which they had set themselves. Even if some legitimate delay might have been justified when they approached the third respondent's attorneys with a proposal to re-open

the matter, they received a firm rejection of this proposal by the end of April 2008. If some further allowance is made for the period during which the union was trying to negotiate a settlement with the employer, those discussions had run their course by the end of June 2008. Thereafter the applicant pursued a backdoor strategy of having the matter re-opened without advising the respondent what was happening and without responding to its enquiries about the long awaited supplementary affidavit. Even if he had wanted to approach the CCMA to re-open the matter before having to file his supplementary affidavit, his attorneys should at least have asked the respondent not to oppose the late filling of his affidavit on account of any delay caused by that application. Instead, the applicant simply decided to do nothing about it until after hearing from the CCMA. In the new year the applicant should have acted with more haste in filing his affidavit, given the length of the delay by that time.

23. The principles governing the dismissal of review applications for lack of diligent prosecution are now well established. In **Associated Institutions Pension Fund & others v Van Zyl & others 2005 (2) SA 302 (SCA)**, Brand AJ set the principle out thus:

> *"[46] It is a longstanding rule that courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a review application if the aggrieved party had been guilty of unreasonable delay in initiating the proceedings. The effect is that, in a sense, delay would 'validate' the invalid administrative action (see eg Oudekraal Estates (Pty) Ltd v City of Cape Town & others 2004 (6) SA 222 (SCA) ([2004] 3 All SA 1) at para [27]). The raison d'étre of the rule is said to be twofold. First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions (see eg Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 41).*
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> *[47] The scope and content of the rule has been the subject of investigation in two decisions of this Court. They are the Wolgroeiers case and Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie, en 'n ander 1986 (2) SA 57 (A). As appears from these two cases and the numerous decisions in which they have been followed, application of the rule requires consideration of two questions:*
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> *(a) Was there an unreasonable delay?*

(b) If so, should the delay in all the circumstances be condoned?

(See Wolgroeiers at 39C - D.)

[48] The reasonableness or unreasonableness of a delay is entirely dependent on the facts and circumstances of any particular case (see eg Setsokosane at 86G). The investigation into the reasonableness of the delay has nothing to do with the Court's discretion. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of that case, the delay was reasonable. Though this question does imply a value judgment it is not to be equated with the judicial discretion involved in the next question, if it arises, namely, whether a delay which has been found to be unreasonable, should be condoned (see Setsokosane at 86E-F)."[1]

24. I am satisfied that the delay from June 2008 to February 2009 was unreasonable and in view of the fact that nothing prevented the applicant from filing his supplementary affidavit while his attorneys followed a questionable backdoor stratagem at the CCMA while keeping the applicant in the dark, the failure to file the supplementary affidavit in June or at the very latest July 2009 is unjustified.

25. The last thing that needs to be considered in order to determine whether or not the application to dismiss the review should succeed, is the applicant痴 prospects of success on review. As will become apparent from the discussion below on the merits of the application, even if I am wrong, in dismissing the review application, on account of the applicant痴 delay in prosecuting the matter to dismiss the review application on its merits

The merits of the review application

1 See also cases dealing with unreasonable delays in prosecuting reviews before the Labour Court, viz: ***Sishuba v National Commissioner of the SA Police Service*** **(2007) 28 ILJ 2073 (LC);** ***Bezuidenhout v Johnston NO & others*** **(2006) 27** ***ILJ*** **2337 (LC);** ***Ivor Michael Karan t/a Karan Beef Feedlot and Another v Randall*** **(JS347/06) [2009] ZALC 120 (22 July 2009)** unreported; ***Nedcor Bank Ltd v James George Harris & others (unreported case no. JR 927/01 dated 14 December 2009), and Suricate Security v K Rambuda and others (JR 902/06 dated ???)***

26. In the applicant's amended affidavit he lists a number of the typical grounds of review relied on these type of proceedings. Thus, he says the arbitrator committed a host of irregularities including failing to apply his mind to the evidence, making findings of fact that could not be supported on the evidence before him, admitting irrelevant evidence and giving undue weight to it, and failing to consider or impermissibly rejecting relevant and competent evidence that was placed before him. As with many applications for review stated in these terms, it is difficult to consider grounds which are so broadly stated. An applicant must set out the specific factual basis for which it makes these submissions in the founding papers, as amended by any supplementary affidavit.

27. However, the applicant does raise some specific factual instances of the arbitrator's allegedly reviewable conduct and these are set out in summary below.

Reliance on unreliable evidence

28. The applicant argues that the arbitrator failed to apply his mind to evidence presented by the employer's witnesses or, alternatively, relied on the testimony of unreliable witnesses. The applicant is referring here to the testimony of B Vukea and other witnesses who admitted they had been engaged in making illegal electricity connections for a long time.

Failure to consider evidence of certain witnesses

29. THE EVIDENCE OF COMMUNITY LEADERS FROM THE NHLABENI AREA RELATING TO ILLEGAL ELECTRICITY CONNECTIONS AND THE INFLUENCE WHICH WAS BROUGHT TO BEAR ON THE COMMUNITY BY THE PERSONS INVESTIGATING ILLEGAL CONNECTIONS WAS IGNORED.

30. So, too the applicant claims that the arbitrator completely ignored the evidence of his witnesses, namely P Phooko, L P Maimela, F Sebatjane and S Manyane.

31. Phooko testified that it was B Vukea who collected money from persons paying for illegal connections and that when the applicant started working for the employer, he curtailed white collar crime at Eskom and arrested employees and third parties resulting in some employees being fired. He also testified that the applicant had told him that he was arrested because people wanted to frame him. Phooko testified also that an amount of R 8900-00 allegedly stolen by the applicant was banked by him.

32. Maimela testified that illegal connections were being done by B Vukea and that the latter admitted in a meeting that he had done them. Maimela also said that a Mr Maluleke confirmed Vukea's illegal activity in the presence of D Van Wyk. Maimela also confirmed that he discovered in the course of his investigations that the applicant was not involved in illegal connections.

33. Sebatjane stated that he discovered that one D Rasecabe was involved in making illegal connections and that he had heard Vukea mention that he intended to frame the applicant.

34. Manyane, who was the applicant's immediate supervisor confirmed that it was proper for the applicant to write his cell number and name on fines he issues to persons found to have connected their electricity illegally and that he had mandated him to do this.

35. The arbitrator ignored the applicant's reason for putting his name and cell number on the fines, namely so that the persons fined could contact him if they discovered other persons who were illegally connecting to the electricity supply. His openness in putting his name and number on the fines should have counted in his favour and not against him.

36. The arbitrator ignored the applicant's evidence that he recovered many stolen meters for the company and returned them to it after reporting to the police.

37. The applicant complains that the arbitrator also ignored his own evidence that other employees conspired against him or did not like him, in particular P Malogwe who refused to give him keys to his office.

38. The arbitrator also ignores the fact that once of the witnesses who testified that he had come to her house on numerous occasions to collect money for illegal connections identified the arbitrator as the person who had visited her.

39. There was no evidence led that the applicant had actually been seen making illegal connections or that he had been caught with Eskom's material in his personal possession.

40. The arbitrator ought not to have considered the evidence of D Van Wyk who presented a detailed report which the arbitrator admitted and accepted as evidence. The applicant submits this was a serious misdirection on the part of the arbitrator because Van Wyk's evidence was inadmissible hearsay evidence.

41. The applicant takes issue with the arbitrator's finding that he was involved in the misappropriation of the employer's property, which was tantamount to theft. Apart from the fact that he contends the elements of theft were not established, he argues the arbitrator could not have relied on Muthelo's evidence that the applicant was working in cahoots with him because Muthelo never testified to this effect.

42. The applicant argues that the arbitrator's award is not rationally connected to the evidence before him and failed to consider if the applicant had been fairly dismissed on the remaining charges of misconduct, being charges 1, 2 and 26. He also contends that it is not clear from the award which of the employer's reasons were found to be acceptable and warranted his dismissal.

43. The arbitrator also failed to deal with contradictions in the evidence of P Mulaudzi and B Vukea regarding the amounts paid to them according to the applicant.

44. Lastly, the applicant submits that if the matter is remitted back to the CCMA for reconsideration, then the arbitrator should consider the contradictory evidence given by the employer's witnesses in the criminal case relating to the same issues. In particular, the applicant relies on the findings of the magistrate who found much of the testimony of the employer's witnesses who also testified for the prosecution to have been unreliable. He contends that if the arbitrator was aware what had transpired in the criminal proceedings he would not have placed so much reliance on the testimony of some of the witnesses.

Analysis

45. For convenience, it will be easier to address the applicant's various contentions relating to the evidence of Malaudzi and Vukea together. Essentially, the complaint in regard to these two

witnesses is that the arbitrator ought not to have relied on the evidence, because they were implicated in illegal connection activities themselves, their evidence was contradictory in some respects, and Vukea had been heard to say that he intended to frame the applicant.

46. The first point that needs to be made is that it appears that the arbitrator was well aware of the involvement of these two witnesses in the illegal connection activities, so it cannot be said that he ignored their role. It is also apparent from the evidence that Vukea played an important role in a sting operation in which the applicant allegedly supplied a meter box in exchange for a payment off 1500. In that sense it might well be the case that Vukea could have said that he was involved in framing the applicant. However, the alleged statement by Vukea about the frame up was never put to him in cross-examination for him to comment on or to clarify.

47. It is a well established accepted rule in the evaluation of evidence that the evidence of accomplices must be treated with caution.[2] Obviously, such witnesses have might be predisposed to try and minimize their involvement in the joint illegal activity and to implicate others as the prime instigators. In this instance, a major difficulty in evaluating the evidence is that the applicant did not put a contrary version to Vukea and Malaudzi when they testified about their involvement with him in the illegal practice of connecting electricity users to Eskom's power distribution system.

48. In particular, there is no evidence provided by the applicant or his witnesses which directly contradicts the evidence which they gave of their activities on a particular day in the Mcetheni district where Vukea and Malaudzi went with the applicant to the area and effected approximately twenty unlawful connections. They said they also collected money in amounts of R 1000 and R 1500 from the households they had connected and the money collected was subsequently divided between the applicant and themselves. The two witnesses' account of that day does not seem inherently implausible and the fact that they could not recall exactly the same amounts of money which passed hands in circumstances where there were a number of transactions does not detract materially from the importance of their evidence, in my view, even if they were accomplices. The value of their evidence acquired greater weight, when one considers the applicant's failure to put an exculpatory version to them under cross-examination, and his similar failure to even present a contrary version in any comparable detail when he testified.

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2 See ***S v Hlapezula & Others*** **1965 (4) SA 439 (A) at 440D-H**

49. Moreover, when Vukea gave evidence of the transaction involving the pre-arranged illegal purchase of an electricity meter from the applicant, he was also not cross-examined in any detail about what transpired on that occasion. In his own account of what happened the applicant said that Vukea had told him when they met at the pre-arranged venue, that he was going to show him the people who were trying to frame him. The employer's witnesses to that event testified that an arrangement had been made to meet the applicant to buy an electricity meter from him. This transaction had been set up when independent investigations had led Eskom to discover the involvement of the Vukea and Malaudzi in the illegal connection racket. In turn, Vukea had implicated the applicant in the activity and the 'sting' operation was set up essentially to test the claim that the applicant was involved in supplying equipment for illicit connections. It was common cause that the meeting between Vukea and the applicant, which was videotaped, had taken place. In the circumstances, it was vitally important for the applicant to test Vukea about his own version of why the meeting took place and what transpired when the two of them met.

50. The applicant never gave any context to explain why Vukea would have wanted to show him that people that were trying to frame him in such an elaborate setup, other than the fact he had previously fined him in connection with illegal connections. More importantly, the applicant never the challenged Vukea's version about how he (Vukea) came to be in the possession of the electricity meter immediately following his prearranged meeting with the applicant.

51. Regarding the evidence of Van Wyk, it is true that the applicant challenged the evidence of Van Wyk as hearsay, but that was in the context of asking him whether he had personally seen the applicant make any illegal connections. Van Wyk gave extensive evidence based on the detailed forensic report he had been directly involved in compiling and this evidence was not addressed in any depth in cross-examination.

52. It must also be mentioned that Van Wyk's evidence also detailed the procedure to be followed when fines are imposed on consumers making use of illegal connections. Van Wyk provided the analogy of a traffic policeman who issues a fine to a motorist: the policeman does not collect the fine personally, and is not involved in handling any monies. He further testified that it was the investigator's responsibility to make sure the illegally installed meters were removed and to return them to Eskom's stores.

53. Two items of circumstantial evidence stand out from his report. Firstly, only 47% of the 210 fines issued from the fine books in the applicant's possession were received by Eskom.

54. Although the applicant claimed that he was hiding nothing by putting his name and number on the written fines issued to the offending consumers, his evidence could not explain why he was collecting money in the first place, nor why of the fines issued in the fine books under his control had not been received. While the applicant's immediate supervisor, S C Manyane, defended the applicant's practice of putting his name and cell phone number on the fine, even though it was possible to identify who issued the fine from the fine number, he never testified that it was normal practice for the investigator to receive payment for the fine. Interestingly, Manyane did not confirm the applicant's evidence that the purpose of putting his name and number on the fine was so that the offenders could advise him if they became aware of other consumers who had illegal connections. The evidence that it was not the practice for investigators to collect cash fines remained essentially uncontested, which meant that the applicant bore an evidentiary onus of explaining away why the witnesses who said they had paid him money would have done so.

55. The second aspect of the report that formed part of Van Wyk's evidence which is noteworthy concerns electricity meters that ought to have been removed from premises in respect of which fines were issued and for which the applicant was responsible.

56. When the number of 'fines' issued by the applicant were compared with the meters handed in, 150 of the 210 meters that ought to have been removed when the fines were issued had not been returned to Eskom. Investigations were launched to determine if some of the missing meters had simply not been removed or had been reinstalled. An inspection of premises where the meters had originally been installed revealed that: in 19 premises the meters had either never been removed or had been reinstalled; in 27 other instances they could not identify if the meter described in the fine had been removed at the time of issuing the fine, and at 26 of the premises in respect of which fines had been issued could not be located. Accordingly, the investigators accepted that in 72 of the 150 cases of meters which had not been handed in they could not be sure the applicant had removed the meters.

57. In 10 other premises where the applicant had issued fines the meters were no longer installed. As the applicant should have taken custody of the meter after the fine is issued, and it was unlikely that the illegally connected users would have removed the meters themselves, the probabilities pointed to the applicant as the most likely possessor of the missing meters.

58. In 12 other instances, missing meters from premises where the applicant had issued a fine, were found installed at other premises where he had also issued a fine. The report contains details of each of these 'meter swaps' and in half the cases, Van Wyk personally interviewed persons at the premises. While his evidence of the residents' explanations of the applicant's involvement is hearsay, the circumstantial evidence of these two groups of missing or swapped meters, which were the applicant's responsibility, directly implicated him and cried out for a response or innocent explanation by the applicant. None was forthcoming. The fact that the investigators could not say they had personally seen him removing meters does not diminish the significance of the missing explanation on the applicant's part as to the whereabouts of the missing meters and in particular how meters, which had been removed from one group of premises, were being used in illegal connections in other premises.

59. Similarly, even if there was animosity towards the applicant by some employees, that evidence does not explain away the evidence pointing to his direct involvement in facilitating illegal connections and selling Eskom equipment for that purpose. The same may be said of the evidence relating to the interactions between the Nhlabeni community and the investigative team. To the extent that the evidence of what transpired in the community meeting was evidence implicating Vukea in the practice of making unlawful connections that merely confirms his own illicit activity, and that he ought not be readily trusted when seeking to exonerate his own role, but the problem remains that the applicant never provided any meaningful evidence in rebuttal of the account of his involvement. There was also no evidence that his accomplices were in any way favoured for having given evidence against him.

60. It is true that one of the employer's witnesses who claimed that the applicant had demanded money from her under threat of reporting her to a magistrate, after he had removing a meter from her premises, was unable to identify the applicant up at the arbitration hearing because of the poor eyesight. Nonetheless, there were other witnesses who confirmed paying various sums of money to the applicant, and the applicant in cross-examination did not materially challenge their versions of those transactions.

61. What emerges from the above analysis is that the applicant did not seriously contest significant evidence implicating him in the collection of funds, the installation of illegal connections, and the resale of confiscated electricity meters. While the arbitrator does not specifically mention the evidence which the applicant claims he ignored, those criticisms of the arbitrator's reasoning are insufficient in my view to have displaced the weighty evidence implicating the applicant. His criticisms of the arbitrator's reasoning, for the most part do not

address the most relevant evidence pointing to his guilt.

62. The fact that the arbitrator did not deal with every charge on which he was previously found guilty is neither here nor there given that he found that the applicant was indeed guilty of enough serious misconduct to justify his dismissal. It is not necessary for the arbitrator to deal with each and every original charge for which the applicant was originally dismissed in these circumstances. It is also apparent from the award which charges he found the applicant guilty of so there does not seem to be a basis for arguing that it is unclear which reasons the arbitrator found justified the dismissal. It may be that his comments about theft were superfluous, but this does not affect his finding on the charges he considered.

63. The applicant's complaint that the arbitrator ignored the evidence of his witnesses, is largely met by the arbitrator's own observation that much of their evidence was evidence of the applicant's good character or previous good record as an effective investigator with integrity. Their testimony did not make any serious inroads into the evidence relating to the facts of the applicant's alleged misconduct, provided by management's witnesses.

63. The applicant's acquittal in the subsequent criminal proceedings and the adverse findings of the magistrate on the evidence of the employer's witnesses also do not assist the applicant. Firstly, the fact of an acquittal in criminal proceedings relating to the same conduct with which an employee is charged in disciplinary proceedings does not mean the employee could not be found guilty in the disciplinary proceedings, because of the different standard of proof which is applied, even if the evidence was identical. So too, if the magistrate made findings about the credibility of witnesses in the criminal proceedings, those findings would have been made on the evidence before him, and not what was before the arbitrator. His conclusions cannot bind the arbitrator.

65. Having said this, if the criminal proceedings had been concluded before the arbitration proceedings, then the applicant might have obtained a transcript of those proceedings and confronted witnesses with their evidence in the criminal proceedings. In review proceedings the question before the court is whether the arbitrator in those proceedings on the evidence before the arbitrator at the time committed reviewable misconduct. The court cannot fault the arbitrator's findings on that evidence because his findings might have been different if other evidence had been before him at the time he issued his award , which only became available later.

66. The applicant did apply in the alternative for an order directing the matter to be referred back to the arbitrator for hearing of further evidence, but did not seek to set aside the ruling by the

CCMA not re-open the matter.

67. If the applicant has any recourse in respect of re-opening the case, that could only follow from a successful review of the CCMA decision not to re-open the matter, which is quite distinct from the arbitrator's award which is the subject matter of this review. Whether or not it is possible to re-open arbitration proceedings once an award has been handed down, particularly where the request to do so was made *ex parte*, or what requirements would have to met is something that is beyond the scope of these proceedings, and is not necessary to determine for the purposes of reviewing the award.

Conclusion

68. Although the award could have been more expansive, the fundamental reasoning of the arbitrator for his findings remains sound and rational. I am not persuaded that he necessarily failed to consider the evidence raised by the applicant on review, because it is apparent he was persuaded by the weight of the evidence pointing to the applicant's involvement in the illicit electricity connection activities, which none of the other evidence served to effectively rebut. Moreover, even if that evidence were taken into account, it would not have made a significant impact on the arbitrator's findings, because it was not materially weighty enough to displace the inferences he drew.

69. On the basis of my assessment of the merits, I am satisfied that taken together with the unreasonable delay in prosecuting this matter and the failure to provide a reasonable explanation for the delay, the third respondent is entitled to the dismissal of the review application. Even if I am wrong in this finding, and if the review application should not be dismissed on account of the applicant's dilatoriness in prosecuting the application, a consideration of the review application solely on its own merits ought not to succeed in my view for the reasons stated in the analysis above.

Order

70. Accordingly, in the light of the findings above –

70.1. The application to review and set aside the arbitration award issued by the second respondent on 13 February 2007 is dismissed.

70.2. The applicant is ordered to pay the third respondent's costs

ROBERT LAGRANGE
JUDGE OF THE LABOUR COURT

Date of hearing: 10 June 2010
Date of judgment: 8 December 2010

Appearances –
For the applicant: M A Chauke instructed by BK Msimeki Attorneys
For the third respondent: G N Moshoana of Mohlaba & Moshoana Attorneys