REPUBLIC OF BOTSWANA

IN THE HIGH COURT OF THE REPUBLIC OF BOTSWANA HELD AT MAUN

Case No: **MAHMN-000040-21**

In the matter between:

Keitshupile Moleleke **Applicant**

And

Alicia Mokone **1st Respondent**

(In her capacity as the Permanent Secretary,

Ministry of Transport and Communications)

The Attorney General **2nd Respondent**

(Representing the 1st Respondent)

Mr K. Kebonyemodisa for the Applicant

Ms E.L. Mokgwathi for the Respondents

J U D G M E N T

Maripe J

Introduction

1. The proceedings herein were commenced through a Notice of Motion purportedly drawn in terms of Order 61 as read with

Order 12 of the High Court Rules. The relief sought in the main was to have reviewed and set aside the 1st respondent's decision to dismiss the applicant from his employment in the public service, and that the disciplinary proceedings that were commenced after approximately a year post the alleged commission of the offences warranting dismissal of the applicant from her employment be reviewed and set aside. There is also the usual prayer for costs.

2. The background to this application, which is largely not in dispute, is captured in the Founding affidavit deposed to by the applicant himself. Prior to his dismissal the applicant was employed by the Government of Botswana under the Ministry of Transport and Communications as a Senior Transport officer and stationed in Maun. The trigger to these proceedings was the commencement of preliminary investigations against the applicant on allegations of his having committed or been involved in corrupt practices. It was alleged that the applicant, on or about the 19th December 2018, received an amount of P200.00 from one Gaotlhophe Moje as an inducement to the

applicant not to charge the said Moje with violations of the Road Transport Permits Act and the Road Traffic Act.

3. The investigation was carried out by a panel appointed by the Director of the Department of Road, Transport and Safety (DRTS) under which the applicant was employed. It comprised two members. The investigation ran from the 2nd-6th March 2020. The panel interviewed a number of officers including the applicant himself, an officer from the Directorate of Corruption and Economic Crime (DCEC), and Mr Moje, who was apparently the whistle blower. It concluded by finding that indeed the applicant received P200.00 from Mr Moje and recommended a disciplinary hearing.

4. By letter dated 11 March 2020, the Director of DRTS demanded that the applicant show cause why disciplinary action should not be taken against him. He was given 14 days within which to do so. The letter is annexed to the founding affidavit. On the 19 March 2020 the applicant responded to the 'show cause' letter. Far from answering the substantive allegations of receiving P200.00 from Mr Moje as a forbearance

against possible action against him (Mr Moje) for violating the Road Transport Permits Act and the Road Traffic Act, the applicant, who had apparently received legal advice, only challenged the Director on the delay in taking disciplinary action against him. In his letter not only does he raise legal argument against delayed disciplinary action, he also refers to statutory provisions and case law in support of his position. His response comes very little short of Heads of argument.

5. On the 2nd June 2020, the Director of DRTS preferred charges against the applicant. There were two counts, both founded on the Public Service Act No. 30 of 2008. The first is habitual or 'negligent of duty.' I think this was meant to be Neglect of duty. The second is offering or receiving a bribe. Both are in respect of the applicant's dealings with Mr Gaotlhophe Moje. The applicant says he received the charges on the 9th June 2021, but I think this is an error as the date on which he received the charges is reflected on the annexure as the 9th June 2020. The letter in which the charges were embodied also communicated that a disciplinary hearing would be held on a specified date and at a specified venue. His rights were also

spelt out. In the absence of the record, and no averment from either party, I would not know when the disciplinary hearing was commenced and or concluded. As this was from the beginning an issue the importance of which was apparent to both parties, the absence of an averment in that regard by either party is strikingly amazing. The respondents aver, in their heads of argument, that the disciplinary hearing was held on the 23rd June 2020.

6. Notwithstanding that the record of proceedings of the disciplinary hearing is not attached, the applicant says, and the respondents do not dispute, that the outcome of the proceedings was adverse to him as he was found guilty. In consequence, he was, through a letter the 8th April 2021, under the hand and signature of the 1st respondent dismissed from the Public service with immediate effect. The dismissal letter refers to the applicant's pleas in mitigation which include his position that there was a delay in bringing proceedings against him.

7. In June 2021, the applicant served a Statutory notice in which he gave notice of his intention to challenge his dismissal in court. There are basically two bases for challenge. Firstly, he says the hearing was not conducted promptly and that the employer had waived its right to discipline him. Second, he complains of the enhancement of punishment from the initial recommended sentence of a written warning on the basis that he was neither allowed representations nor to present any mitigatory circumstances against the intended enhancement of sentence. On the 27th August 2021, the applicant commenced these proceedings. All subsequent pleadings and heads of arguments were duly filed and the parties appeared in court and presented oral submissions.

The Issue (s)

8. In the founding affidavit, the applicant raises basically one ground upon which he challenges the decision of the respondents. It is that the period taken by the respondents in instituting disciplinary proceedings against him was unreasonably long, in circumstances where the 1st respondent had waived the right or power to institute disciplinary

proceedings him. In his heads of argument, the applicant has presented the issue more broadly. He presents it thus:

Whether the 1st respondent's decision of 8th April 2021 to dismiss the Applicant from his employment is reviewable and subject to be set aside on the premise that the 1st Respondent acted unreasonably, irrationally and or un-procedurally in respect of the impugned decision therefore reviewable.

Whether the Applicant is entitled to the orders he seeks.[1]

9. The respondents on the other hand have stated the issues more expansively as follows:

   a) Whether the delay in disciplining the applicant amounted to a waiver to discipline the applicant;

   b) Whether there was a valid reason for dismissing the applicant;

   c) Whether the respondents followed correct and lawful procedure in terminating the applicant's employment, and

   d) Whether the dismissal was lawful.[2]

10. The last three issues identified by the respondents are usually described in industrial or employment law parlance as issues

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[1] Paragraphs 12.1 and 12.2 of the applicant's heads of argument.
[2] Paragraph 2 of the respondents' heads of argument.

of 'substantive fairness.'[3] However, the applicant has not raised any complaint against the substantive fairness or otherwise of his dismissal. He has elected, as he is entitled to do, to rely only on the procedural aspect relating to the delay in taking action against him. In this he has taken a risk in that if he does not succeed, then he will not have the opportunity to challenge the decision on the merits.

The applicable law on judicial review

11. The grounds on which challenges of decisions on review are based are well known. Those are illegality, irrationality and procedural impropriety. One need only refer to Lord Greene's definition of the concept of unreasonableness in the famous *Wednesbury*[4] case, the 'catalogue' drawn out by Lord Reid in the *Anisminic*[5] case, Lord Diplock's formulation in the *GCHQ*[6] case, and that of Corbett JA (as he then was) in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd.*[7] The broad principles laid down in these cases have found expression in

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[3] See the case of *Phirinyane v Spie Batignolles* [1995] BLR 1.
[4] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223
[5] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, [1969] 1 ALL ER 208
[6] *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374
[7] 1988 (3) SA 132 (A), 152.

the jurisprudence of Botswana through several decisions including *Attorney General and Another v Kgalagadi Resources Development Company (Pty) Ltd*[8] which expressly adopted those principles.

12. Relying on the cases of *Raphethela v Attorney General*[9] and *Ian Khama v Attorney General and Others*[10] the applicant argues that the commencement of disciplinary proceedings more than a year of the occurrence of the event which supposedly constitutes misconduct amounts to procedural impropriety. It seems to me as well that inasmuch as the applicant submits that the disciplinary action was not held promptly as required by Section 39(1) of the Public Service Act, and to that extent a violation thereof, he is in effect also raising an issue of illegality.

13. What must be determined now is whether the disciplinary process, and the eventual dismissal, was held promptly. This falls to be determined on the basis of the time taken between

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[8] *Attorney General and Another v Kgalagadi Resources Development Company (Pty) Ltd* [1995] BLR 234 (CA)
[9] [2003] 1 BLR 591.
[10] MAGHB-00446-19 (unreported)

the occurrence of the conduct on the basis of which charges were framed, and the actual conduct of the disciplinary process.

Applicable legal principles on the promptness of decisions

14. Section 39(1) of the Public Service Act provides:

> Disciplinary action against an employee who commits an act of misconduct shall be prompt and in accordance with the rules of natural justice.

The General Orders, which have legal effect and are applicable to the Public service, require, in terms of G.O. 46.1, that "All disciplinary proceedings are to be taken as promptly as is practicable in the circumstances of the case.' There is no definition of the concept of 'prompt' action in the Act nor in the General Orders. It therefore remains to be construed according to its ordinary meaning or as defined by the common law. In ordinary parlance prompt action means one that is taken without delay. The extent of the delay which is inimical to promptness of action will depend on the circumstances of each case, and will usually vary from one case to another. The General Order referred to above confirms

the position that it is the circumstances that will dictate whether prompt action has been taken in any one case. It requires though that such action must be taken as soon as it is practicable in the circumstances. The courts of Botswana have not attempted to define the concept of prompt action. They have however, determined whether, in the individual cases that came before them for determination, disciplinary action for misconduct was prompt. From a reading of the cases, even Court of Appeal decisions interpreting Section 39(1) of the Public Service Act, place significant reliance on the Industrial Court decision in *Kgarebe v National Food Technology Centre.*[11] Now, that case was not decided on the basis of the Public Service Act. Neither was it decided on the basis of the Employment Act (Section 26) which the judge expressly held not to be applicable. It was rather decided on the basis of contractual terms and the principles of fairness. Clause 16.4 of the Conditions of Service which were embodied in the applicant's contract provided as follows:

Disciplinary action to be taken promptly

[11] [2006] 1 BLR 57, 71 (IC).

> The objective of disciplinary action is to bring about a change in undesirable behaviour, and it follows, therefore, that action on the part of supervisors must be taken promptly.

15. Relying on *Molato v Barnett's Furnishers,*[12] another decision of his in the Industrial Court, Dingake J said:

> I take it to be trite law that it is essential for an employer to hold disciplinary enquiry as soon as possible after becoming aware of the misconduct committed by an employee.

In *Molato*, the learned judge had held that:

> Upon a charge or allegation being preferred against the employee, the hearing must take place within a reasonable period after the allegations of the commission of the disciplinary offence become known to the employer.[13]

In both cases Dingake J emphasised the principle that the promptness of the employer's action will depend largely on how soon after becoming aware of the employee's offensive conduct the employer takes disciplinary action. In the *Kgarebe* case, the court held that disciplinary action taken

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[12] [2003] 1 BLR 25 (IC).
[13] At page 35.

after four and half months of the commission of the alleged misconduct was not prompt and therefore in violation of the Conditions of service embodied in the contract of employment between the parties, and that the employer had in the circumstances waived its right to take disciplinary action.

16. In *Motlhanka v Ministry of Youth Empowerment, Sport and Culture Development and Another,*[14] the Industrial Court said:

> In the Public Service Act prompt disciplinary action means that:
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> (i) Disciplinary action must be instituted against a public service employee as soon as is reasonably possible after the commission of the misconduct;
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> (ii) Reasonableness is not a subjective judgment of an employer or employee, rather it is the province of a reasonable person who must consider all the relevant circumstances surrounding the hearing. Upon duly considering all relevant circumstances a reasonable person would be able to tell whether the disciplinary action was prompt or not. Of course two or more reasonable persons may disagree on whether or not the hearing was prompt. But if none of these reasonable

[14] ICF 06/18 (unreported).

persons agrees that the disciplinary hearing was prompt then it was not prompt'[15]

17. As we all know, the concept of a reasonable person, which transcends many, if not all areas of the law, is one modelled around a hypothetical individual who approaches any situation with the appropriate degree of caution and then sensibly takes action or makes appropriate decisions. It is a fictional construct depicting a person of sober senses who approaches situations free from influences and general predilections, whose assessment and judgments are considered the best in the circumstances. To identify what that fictional construct would have adjudged to be the best decision or action to take is no mean feat, but is doable on an application of an objective assessment of the situation.

18. The broad precepts laid down in the Industrial Court jurisprudence were adopted by the High Court and the Court of Appeal in determining whether disciplinary action against an employee was prompt as required by Section 39(1) of the

[15] Page 39, per Baruti J.

Public Service Act. In *Kobedi and Another v Director, Regional Operations (Kgatleng) and Others,*[16] Kebonang AJ (as he then was) relied on *Kgarebe*, in particular the view held by Dingake J to the effect that the word 'promptly' assumed a much higher standard than acting 'within a reasonable time'[17] In Kebonang AJ's own view:

> 'prompt could never have been intended to be read or mean "reasonable time." The phrase suggests to me that what the framers of the Act had in mind was an immediate or a fairly short time frame.'[18]

19. I agree that in the broader scheme of the Public Service Act, and the ends of good and harmonious work place relations, disciplinary action must be taken swiftly, without delay and soon after misconduct is committed. I however have a slight misgiving about the formulation by my brethren Kebonang AJ and Dingake J above on the distinction they seek to draw between acting 'promptly' and acting 'within a reasonable time.' This is because in the absence of any definition of the term 'prompt' the inquiry as to whether action has been taken

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[16] [2016] 2 BLR 587.
[17] Page 72 thereof.
[18] Page 592.

promptly would usually depend on how soon after learning of the misconduct the employer takes action, and whether such period is reasonable in the circumstances. They are not mutually exclusive. Reasonableness is a component of promptness, and their full import may not be separated into compartments as if they are capable of standing independently of each other. This is why Section 26(1) of the Employment Act which provides for termination of employment for misconduct on the part of the employee requires action to be taken 'within a reasonable period in all the circumstances after becoming aware of the misconduct in question.' This goes to reasonable time.

20. I have already sketched out above what Baruti J, in *Motlhanka*, said about what Section 39(1) requires. He said it requires that action be taken 'as soon as is reasonably possible after the commission of the misconduct.' Again this goes to reasonable time. To the extent that Section 26(1) of the Employment Act and Section 39(1) of the Public Service Act convey, albeit in different words, the same broad objective of taking disciplinary action without delay, it cannot, in my view, be seriously argued

that the difference in language used was meant to convey a difference in consequences. Carrying the argument to its logical conclusion, it cannot, in my view, be seriously argued that the legislature intended better protection for employees governed by the Public Service Act than those subject to the Employment Act. In my view whether one says prompt action or action taken with a reasonable period in all the circumstances after being aware of the misconduct is a question to be decided on the basis of the prevailing circumstances and ultimately what a reasonable employer would have done in the circumstances.

21. In *Kutlo Kalanke v Attorney General and Others,*[19] a case in which the Public Service Act was in issue, the employer was informed of the misconduct on the 13th February 2017. The applicant was suspended on the 28th February 2017 and charged with the offence on the 20th December 2017, some 10 months later. The hearing commenced on the 22nd January 2018 and the decision to dismiss was made on the 5th September 2018. The High Court, per Tau J (as she then was)

[19] MAHGB-000066-19 (unreported, judgment delivered on the 22 May 2020).

held that there was a delay in carrying out investigations, charging the applicant, conducting the hearing and ultimately dismissing her. The employer, it was held, had not acted promptly.

22. Finally, I need to discuss two decisions of the Court of Appeal in which Section 39(1) of the Public Service was in issue. The first is *Mudongo v Attorney General and Another.*[20] In finding meaning to Section 39(1) of the Act, Rannowane AJA said:

> What is required by Section 39 (1) is that the disciplinary process must be expedited or conducted without delay but must always factor in the practicalities and the circumstances of each case.[21]

What is to be taken from this decision is the recognition that a disciplinary hearing is not an event but a process. In this regard the learned judge said:

> It must be noted that a disciplinary hearing is a process. It does not comprise a single unitary act but separate and conjoined stages beginning with the employer becoming aware of the commission of the disciplinary offence and culminating with the award of punishment at the extreme end in cases where there was a conviction.

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[20] [2016] 3 BLR 108 (CA).
[21] At page 111.

> It is therefore necessary, I would suggest, that where the employee complains of a violation of his right to a prompt hearing, he be specific and point out which stage of the disciplinary process was delayed, or if his complaint relates to the process as a whole, clearly state so in his pleadings.[22]

In this case the appellant's attack was in respect of the time taken between the conclusion of the disciplinary hearing and the decision to dismiss him. That period was a little over two months. The court took into account that the hearing was conducted in Maun and that it would require some time to transmit the record of the disciplinary hearing to Gaborone where the final decision would be made. Having received the record, the Director General of Economic Crime and Corruption, the decision maker, by letter dated the 1st August 2013, wrote the employee inviting him to make representations on mitigation. Those were presented through the employee's letter dated 13th August 2013. The decision to dismiss was made by letter dated 21st August 2013. The Court of Appeal held that at no point did the matter lie dormant but was at all times under active consideration, and the time taken could not in the

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[22] At page 112.

circumstances be considered to amount to undue delay. There was therefore no violation of the employee's right under Section 39 (1).

23. The second is *Tselane Temeki and Others v Kenneth Tsalaile.*[23] The misconduct was committed on the 11th May 2017. The process started when the employee was written a letter by his supervisor on the 16th May 2017, which required him to show cause, within 14 days, why disciplinary proceedings should not be instituted against him culminating in a letter of dismissal letter dated the 14th November 2017. Having assessed the circumstances, that the Chairperson of the Disciplinary hearing was from a different school, that the record had to pass through several offices in the chain of command, postponements that were granted at the instance of the employee, and those made by consent and never objected to, it could not be said that Section 39 (1) was violated. The court relied on the *dicta* by Dingake J in *Kgarebe*, and that of

[23] CACGB-222-20.

Rannowane AJA in *Mudongo*, holding that the latter reflects the legal position on the subject.[24]

Was the disciplinary process held promptly?

24. Following on the exhortations in *Mudongo* and *Temeki,* the applicant has dutifully spelt out the stage of the disciplinary process that he is complaining about. He complains of the delay between the commission of the conduct which is the subject of the charge, and the time the respondent began to act on that conduct. The Notice of motion expressly seeks an order to the effect that:

> The disciplinary proceedings that were commenced after approximately a year post the commission of the alleged offences warranting dismissal of the Applicant from her (sic) employment be hereby reviewed and set aside.'

25. As has already been pointed out above, the offence for which the applicant underwent a disciplinary process was committed in December 2018. The investigations started in February 2020. This is apparently in reference to internal investigations in the office of the DRTS where the applicant was employed.

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[24] Per Lesetedi JA at page 6 of the cyclostyled judgment.

Otherwise there were prior investigations by the office of the Directorate on Economic Crime and Corruption (DCEC) which were commenced the same day the offence was committed and involved the office of the DRTS in the same month.

26. The applicant has limited his attack on the lack of promptness by the respondents to the period between the commission of the offence, which is 18th December 2018, and the commencement of investigations, which is February 2020. He alleges that throughout this period the respondents were aware of that conduct and lay supine without justification for a period in excess of a year.

27. The cases above all require that prompt action be taken soon as is reasonably practical after the employer becomes aware of the employee's conduct which warrants disciplinary action. It is not the requirement that action be taken soon after the commission of the offence, but soon after the employer becomes aware of that conduct. If the employer is not aware of that conduct he cannot be expected to take action until it is brought to his attention. Until it is brought to his attention,

from the standpoint of the employer, there is no misconduct. So, the question is whether the employer acted promptly after learning or becoming aware of the applicant's misconduct.

28. From the narration above, the Director of DRTS wrote the applicant a show cause letter on the 11th March 2020, having commenced preliminary investigations in February 2020. In my view, the commencement of preliminary investigations is the time that the employer took action. That is February 2020. In his response to the 11th March 2020 letter, the applicant, in his letter dated the 19th March 2020, stated the only 'cause' as being that by reason that prompt action had not been taken, the employer had waived his right to take disciplinary action against him. As said, above he took a shield on statutory provisions and relevant case law.

29. What is also significant from that letter, which is annexed to his affidavit, is the following statement which explains why he believes the employer had waived his right. It is captured at Paragraph 3.4 of that letter. It reads: '

'This is because the Complainants being the Principal Administration Officer, Mr. Richard Malose, the Station Manager

Mrs Ntshadi Mosie, and most importantly my immediate supervisor the Principal Transport Officer, Mrs. Onalenna Monyatsi knew about the alleged misconduct from DCEC officials and failed to institute a disciplinary proceeding's within a reasonable period of four consecutive months effective from the December 2018, early January 2019.'

30. Quite remarkably, there was no substantive but only a passing response to this significant standpoint. Instead there was next a letter from the Director, DRTS, dated 2nd June 2020, which formally charged the applicant. In this letter, the Director referred to his letter of the 11th March 2019 (the 'Show cause' letter) and noted the applicant's response of the 19th March 2020. Reference to 11th March 2019 was clearly a typographical error as the Show cause letter was authored on the 11th March 2020. No attempt at all was made to respond to the applicant's position as expressed in his response, but only to state that the Director had decided to proceed with the disciplinary hearing anyway. In the event a hearing was held which led ultimately to the applicant's dismissal *vide* letter of the 1st respondent dated the April 2021.

31. By reason that ultimately the resolution to the parties' rival contestations will turn on the pleadings, I deem it prudent to reproduce the pleadings to the extent necessary. The applicant avers, and thus anchors his case at Paragraphs 13 to 15 of his Founding affidavit as follows:

> 13. It is common cause that the 1st Respondent was aware of the alleged offences against myself since December 2018. They lay supine until sometime in February 2020 when they now decided to start investigations which led to disciplinary proceedings being instituted against myself. A period spanning to approximately a year of inaction from the Respondent, when they were well aware of the alleged offence against myself since 2018.
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> 14. On the basis of the above I state that the period taken by the Respondent before instituting the disciplinary proceedings against myself was unreasonably long. The 1st respondent has therefore waived its right to discipline myself due to failure to institute the proceedings promptly.
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> 15. In the premises the disciplinary proceedings that were commenced after approximately a year had no effect, as well as the dismissal. The employer had long waived its right to discipline myself.

32. In response to the aspect of the founding affidavit above, the 1st respondent avers, at Paragraph 8 of his Answering affidavit, as follows:

> 8. Contents herein are denied. Save to state that, promptness will depend on the circumstance of each case and not time a set time lines, as there are logistics that comes with conducting a disciplinary hearing. In this prevailing case the disciplinary herein was held promptly. Moreover that when an employee does something that is or was not supposed to be done, the employer first has to give them the opportunity to explain themselves before any adverse step is taken. The employer further investigates or looks into their claims in terms of the dictates of natural justice to avoid taking issues where it was not necessary to, as the general orders requires that there should be investigations. Applicant is put to proof thereof.

I have reproduced from the respondent's answering affidavit, together with all the typographical and grammatical errors contained in there. I take the view that what the parties have averred in their respective affidavits, and what they have not, is where the decision in this matter hinges.

33. The importance of affidavits in an application is a matter of common knowledge. It was said in *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another*[25]

> 'It is trite that in motion proceedings affidavits fulfil the dual role of pleadings and evidence. They serve to define not only the issues between the parties, but also to place the essential evidence before the court. They must therefore contain the factual averments that are sufficient to support the cause of action or defense to be made out. Furthermore, an applicant must raise the issues as well as the evidence upon which it relies to discharge the onus of proof resting on it, in the founding affidavit'.

Following the *Quartermark Investments* case, in *Chairman, Gambling Authority and Another v Moonlite Casino,*[26] and in laying down the importance of fully ventilating a party's case on affidavit, the Court of Appeal said;

> This is so for in motion proceedings affidavits constitute both pleadings and the evidence of the party filing them. They serve the dual purpose of defining the issues between

[25] 2014 (3) SA 96 (SCA) per Theron JA at 100-101.
[26] [2018] 1 BLR 40 (CA).

> the parties and placing the essential evidence before the court.[27]

31. Just as an applicant stands or falls by his founding affidavit, as the courts have repeatedly cautioned, so too does a respondent with his answering affidavit. It is significant that a respondent must lay out comprehensively in his answering affidavit not only his response to the founding affidavit, but his own case as well. In *Keafetole v Mogotsi,*[28] the applicant sought an order evicting the respondent from some immovable property that he said he owned. In resisting the eviction order, the respondent claimed that she co-owned the property with the applicant, but did not lay down the basis on which co-ownership was claimed. In dismissing the respondent's claim and upholding the application, Makhwade J (as he then was) said:

> in the case of a respondent, the answering affidavit must clearly set out the basis for opposing the application and such evidence as would have been necessary at a trial.[29]

He held that the respondent had neither provided the evidence nor laid the basis for her claim to co-ownership of the property.

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[27] At page 47, per Lesetedi JA.
[28] [2007] 2 BR 581.
[29] At page 583.

In the *Quartermark Investments* case, the respondent (Ms Mkhwanazi), instituted proceedings against the appellant, a property investment company, claiming that it had fraudulently induced her into signing certain lease and sale agreements in respect of her immovable property. She sought an order setting aside the sale to the appellant as null and void and another transferring the property into her name, and laid out the case of a fraudulent misrepresentation, by an official of the appellant (a certain Mthebe) in the founding affidavit. The appellant resisted the application but did not challenge the allegations of fraud in the answering affidavit. Mthebe did not depose to an affidavit when the circumstances clearly called for a response from him and there was no explanation from the appellant as to why Mthebe did not do so. In finding for the respondent, the court held that *'there is therefore no evidence to gainsay that of Ms Mkhwanazi regarding the representations made to her by Mr Mthebe and the circumstances that led to her signing the agreements.'*[30] The failure to answer an applicant's case on the answering affidavit is therefore fatal. And it must be an answer that responds to

[30] At page 102.

the substance of the applicant's claim. As I shall demonstrate below, the respondent's answering affidavit does not respond in substance to the applicant's claim that the employer became aware of the misconduct in December 2018.

32. In addition to the *dicta* in the cases above, the rules of court prescribe the manner in which pleadings are to be drawn, and the content to be included, in particular, by parties against whom proceedings have been instituted. In this regard, Order 20 Rule 4 provides:

> (1) Every allegation in a declaration or claim in reconvention shall be dealt with by the opposite party specifically.
> (2) He must admit or deny every allegation or state that he has no knowledge concern it, or confess and avoid it.
> (3) Every allegation not so dealt with shall be taken to be admitted.

Although this seems to deal with declarations and claims in reconvention only, to the extent that they are expressly mentioned, I hold that this applies to other pleadings as well, and in particular affidavits in an application. This is so because the Order under which the rule is made is about '*Pleading generally*' and that as the cases above indicate, in an

application the parties' cases are made on affidavit, and as such a respondent who does not deal specifically with the factual averments made in the founding affidavit will not have any other opportunity of dealing with it. Those will stand as admitted or at least it will be held there is no dispute of fact arising.[31] Hence this applies to other pleadings in similar fashion.

Order 20 Rule 5 provides:

> (1) When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but must answer the point of substance; thus, if it is alleged that that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else state how much he received.
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> (2) When a fact is alleged with diverse circumstances, it shall not be sufficient to deny it along with these circumstances, but a fair and substantial answer must be given.

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[31] The twin decisions in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) and *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) are instructive on this point.

33. I have perhaps overly elaborated in discussing the case law and in reciting the rules, but this is because ultimately the matter, being an application, falls to be resolved on the pleadings, and it is necessary to have regard to both case law and the Rules of court to the extent that they may be relevant and applicable. I now turn to discuss the specific averments in the parties' pleadings.

34. In the matter at hand, the applicant says *'the 1st Respondent was aware of the alleged offences against myself since December 2018. They lay supine until sometime in February 2020 when they now decided to start investigations.'* In a matter in which the dispute turns on whether or not the employer took prompt action, this is a significant averment containing several allegations to *wit,* the time when the employer became aware of the conduct in issue (December 2018), lying supine, and ultimately commencing investigations at a particular time (February 2020). The respondents contend that they acted promptly. They therefore must not only deal specifically with the substance of the applicant's averments but must state when they became aware of the commission of

the offence so that an assessment may be made as to the promptness or otherwise of their action.

35. The Respondents answer is '*Contents are denied.*' Thereon the 1st respondent does not answer the pointed averments in the founding affidavit but simply explains how the question of promptness is to be determined. He says in this case the hearing was held promptly, but does not say why he says so. Instead he ventures into a discussion as to what an employer is supposed to do when a case of misconduct has occurred. This is a far cry from answering the pointed averments in the founding affidavit, and is not in compliance with the rules of court referred to above, nor does it satisfy the exhortations in case law cited. The response is evasive, and does not answer the point of substance as to when the employer became aware of the employee's offensive conduct. The response is what in legal parlance is called a bald or bare denial which is not sufficient to defeat a claimant's matter nor introduce a dispute of fact for which a resolution falls due.[32] In the *Combination Construction* case, after analysing the circumstances in which

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[32] See the cases of *Combination Construction (Pty) Ltd v Kweneng Land Board* [2006] 2 BLR 277; *Lobatse Town Council v Herbst and Others* [2010} BLR 547; *ND v Attorney General and Another* [2018] 2 BLR 223.

a dispute of fact arises, Dingake J, relying on the *Room Hire* case, said:

> .. in every case the court must carefully scrutinize the alleged dispute of fact and determine whether such alleged dispute of fact is genuine and or is not fictitious or simply meant to delay the applicant to obtain appropriate relief timeously. It follows therefore that a bald denial of the applicant's allegations in his affidavit will not in general be sufficient to generate a genuine or a real dispute of fact.[33]

He repeated this in the *Herbst* case where he emphasised that 'a respondent is not entitled to defeat an application merely by bare denials.'[34] And in the *ND* case, Nthomiwa J, relying on both the *Combination Construction* and *Herbst* cases, said that 'a bare denial does not generate a genuine or real dispute of fact.'[35]

36. During oral submissions, and in a bid to answer a question from court as to where the respondent's answer the applicant's pointed averment as to when they became aware of the

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[33] At page 285.
[34] At page 549.
[35] At page 237.

applicant's misconduct, Ms *Mokgwathi*, learned counsel for the respondents, pointed to Annexure 'KM20' of the founding affidavit, which is the letter of dismissal dated 8 April 2021. In it the 1st respondent says; *'You also indicated that the Ministry waived its right to take action against you, please be further advised that the matter was formally brought to the Ministry in December 2019 and the administrative process began immediately.'* This, as counsel submitted, answers the question when the employer became aware of the misconduct.

37. In reply to the submission above, Mr *Kebonyemodisa*, learned counsel for the applicant, vehemently took issue with submission, and argued that this was an unacceptable afterthought since it was never raised in the initial correspondences of the parties and was not raised in the respondent's pleadings. He submitted that this came at the stage of dismissal, which was the final step in the process and the respondents had spurned all opportunity of raising it at the time when charges were drawn in 2020 since the applicant had raised it then. Given that annexures form part of the pleadings to which they relate, it is perhaps not too

objectionable should any party rely on those attached to pleadings of the opposite party. In the circumstances of this case, it seems to me that this latest submission is still inadequate for the reason that it seeks to sever a vital umbilical cord existing between the Maun office and Headquarters as if they are independent entities when in fact when they are a single unit of government. Besides, it still fails to answer the applicant's averments in his letter of the dated 19th March 2020, which is his response to the 'show cause' letter dated 11th March 2020. The relevant portion of the letter, which is really the nub or pith of the applicant's case, is again reproduced hereunder:

> 'This is because the Complainants being the Principal Administration Officer, Mr. Richard Malose, the Station Manager Mrs Ntshadi Mosie, and most importantly my immediate supervisor the Principal Transport Officer, Mrs. Onalenna Monyatsi knew about the alleged misconduct from DCEC officials and failed to institute a disciplinary proceeding's within a reasonable period of four consecutive months effective from the December 2018, early January 2019.'

38. As said above, this was never responded to. And the letter of dismissal does not answer these pointed averments. The applicant has not only averred that the office was aware of the allegations, but has gone further to identify the particular officers, and their designations, to whom he attributes knowledge or awareness of the misconduct, and the time they became aware of such misconduct. The answering affidavit only presents a bald denial and no response in substance. There is no affidavit from any of the identified officers to refute the allegations of awareness of the misconduct. It would have been easy for the respondents to obtain affidavits from one or other of these officers as these are people from whom counsel is expected to have received instructions. The 1st respondent's office in Maun is as much an integral and concomitant unit of the Ministry and it is the one expected to deal with issues of discipline arising from that office or station. In *Kobedi*, the employer's knowledge of the supposed misconduct was attributed to the School Head of the secondary school where the applicant was a night watchman. In *Mudongo*, awareness of the misconduct was attributed to the respondent's officials in the Maun office where the disciplinary proceedings were

held. In *Temeki* case, the time was reckoned from the time the school authorities became aware of the alleged misconduct. There was no reference to Ministry.

39. In this case, the 1st respondent seems to reckon the time from the time when *'the matter was formally brought to the Ministry'* with all the attendant permutations attaching to that statement which in the circumstances is seemingly ambiguous. Since the averment that the 1st respondent's officers in Maun, who are the applicant's superiors, became aware of the misconduct in December 2018 is not gainsaid, it must, on the application of Order 20 Rules 4 and 5, and the *Quartermark* and *Moonlite* cases cited above, stand as either admitted or as established fact and this is the time the Ministry became aware of the miscinduct. That means the applicant's position prevails.

40. I must also say that even on the disparate claims of the parties on the papers before me, which are (a) that the employer became aware of the applicant's misconduct in December 2018 as contended by the applicant, and (b) that the employer

became aware of that conduct in December 2019 as contended by the respondents, the applicant's version is more probable than that of the respondents. This is because on the record of the preliminary investigations the DCEC official conducted a search on the applicant at the DRTS offices on the same day. In all probability the staff at that office would have known about this incident. More pointedly, the respondents would have annexed the dismissal letter to their answering affidavit in order to refute the applicant's claim as to when they became aware of the conduct that warranted disciplinary action, and not wait to raise it in court. This lends credence to Mr *Kebonyemodisa*'s submission that the contention is an afterthought that counsel stumbled across at the last minute and clutched on as the last escape valve available. This will mean therefore that the disciplinary action was taken a little over a year after the employer became aware of the misconduct. This cannot, by any stretch of the imagination be prompt action as envisaged under Section 39 (1) of the Public Service Act.

41. I now deem it useful to run through some of the cases referred to in this judgment and others to see how other cases have treated the issue of delay. In *Kgarebe*, it was held that the commencement of disciplinary proceedings after four and half months constituted undue delay. In *Kobedi*, the High Court had held that a period of four and a half months to complete disciplinary proceedings was too long and in violation of Section 39(1) of the Public Service Act. In that case the employer became aware of the alleged misconduct in September 2014 and commenced disciplinary proceedings in December 2014 which culminated in a dismissal in January 2015. On appeal, in *Attorney General and Others v Kobedi and Another*[36] the employee did not support the High court decision on the point, and the Court of Appeal held that the employer had acted promptly. *Bolaane v Permanent Secretary and Another*[37] was rather peculiar. The applicant had been subjected to a hearing on the 20th November 2012. The hearing was later nullified and a re-hearing scheduled for the 16th October 2013, some 11 months after the first hearing. Sechele J held that the re-hearing was not held promptly. In *Kalanke*

[36] [2018] 1 BLR 76 (CA).
[37] [2016] 2 BLR 122.

the employer's breach was in respect of the several stages of the disciplinary process. The applicant was suspended and only charged with an offence 10 months after the employer became aware of the misconduct. The decision to dismiss was taken nine months after the commencement of the disciplinary hearing. The court took the view that there was a delay in carrying out investigations, charging the applicant, conducting the hearing and dismissing her.[38] In *Motlhanka,* a show cause letter was written on the 10th January 2017, and a hearing of the 6th April 2017 recommended a dismissal. The decision was only made in November 2017, some 5 months later. This was considered a long delay and contravened Section 39(1) of the Public Service Act. In *Mudongo,* the period complained of was that between the conclusion of the disciplinary hearing and the applicant's dismissal. That period was a little over two months and the court determined that throughout that period the employer was actively engaged in the matter and there was an explanation for it. It was held that there was no contravention of the Public Service Act. In *Mokgathi v Garebaitse and Others*[39] the employer became

[38] Paragraph 19.
[39] [2018] 1 BLR 523.

aware of the employee's misconduct in September 2015 and informed him in November 2015 that he would be subjected to a disciplinary hearing. The hearing was held in May 2016 and the outcome was communicated to the applicant 5 months later and he was ultimately dismissed in January 2017. Nthomiwa J held that this was a violation of Section 39(1) of the Public Service Act. Finally, in *Temeki,* the complaint was directed at the period from the 20th September 2017 when the disciplinary proceedings were concluded, to the 14th November 2017 when the applicant was dismissed. The court observed that some period in between was explained, and that the actual delay was a matter of a few weeks, and held this was not a contravention of Section 39(1) of the Public Service Act.

42. The respondents have devoted quite some sizeable space in their heads of arguments justifying the charge, outlining the process of instituting proceedings, explaining the rights of an employee who faces disciplinary hearings and other substantive matters, which with respect, do not answer the case brought by the applicant. This was not the case they were facing. I said above that the applicant took a risk and anchored

his case purely on Section 39 (1) of the Public Service Act (thereby waiving any contention he might otherwise raise on the propriety or otherwise of the offence charged). It was that case that warranted the respondents' attention, and not any other case that the applicant did not present.

43. In the circumstances, the long delay spanning in excess of a year since the respondents became aware of the employee's misconduct has not been explained. No justification has been proffered. I hold that the respondents did not take prompt action as envisaged by the Act. To directly address the issues raised by the parties, those raised by the applicant are answered in the affirmative, while the only relevant issue raised by the respondents, which is issue (a) at Paragraph 9 above, is also answered in the affirmative.

Conclusion

44. In conclusion it is my view that the applicant has made a case for the grant of the orders he seeks. Accordingly the following orders are made:

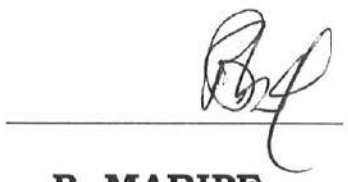
    a) The application succeeds.

b) The decision of the 1st respondent dismissing the applicant from his employment in the Public service is hereby set aside.

c) The disciplinary proceedings that were commenced against the applicant leading to his dismissal from employment are hereby set aside.

d) The respondents shall bear the costs of these proceedings.

DELIVERED IN OPEN COURT AT MAUN THIS 18th DAY OF FEBRUARY 2022.



B. MARIPE

(Judge)