THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: DA 17/21

In the matter between:

MARTIN MLATE MGAGA **Appellant**

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES **First Respondent**

S B BALKARAN N. O. **Second Respondent**

GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL **Third Respondent**

Heard: **07 November 2023**

Delivered: **11 April 2024**

Coram: **Waglay JP, Mlambo JA *et* Smith AJA**

JUDGMENT

WAGLAY, JP

Introduction

[1] This appeal is against the judgment of the Labour Court which dismissed an application to review and set aside an arbitration award handed down by the second respondent (arbitrator) under the auspices of the third respondent, the General Public Service Sectoral Bargaining Council (Council). The arbitrator had found the dismissal of the Appellant to be fair.

Background

[2] The appellant commenced employment with the Department of Justice and Constitutional Services in 1985. At the date of his dismissal, he held the post of Head of the Waterval Prison.

[3] On 17 August 2012, two inmates were involved in a fight, one of whom was stabbed and taken to hospital. Some days later the hospitalised inmate succumbed to his injuries.

[4] In cases of assaults between inmates, the head of the prison in this case, the Appellant, is required to report the incident to the Area Commissioner within an hour of the incident taking place, at the very least telephonically. The area Commissioner is the Appellant's immediate head. The Appellant only made such a report 4 days later on 21 August 2012, a report which was lacking in clarity. The Appellant was then advised to redo the report and an acceptable report was then filed on 22 August 2012.

[5] Because of the Appellant's failure to report the incident to the Area Commissioner as required, he was placed on suspension and a departmental investigation was instituted.

[6] While on suspension, the Area Commissioner was informed that the Appellant was required to attend a meeting with the Regional Commissioner at 13h00 on the same day. The meeting was to take place at Pietermaritzburg some 300 km away from the Waterval prison. The Appellant was telephoned as early as 07h00 by Ms Loots, the Area Commissioner's secretary, and informed of the meeting he was called upon to attend. His response was that he would not attend the meeting, and, in any event, he was suspended, so could not do so. It appears that he also added that the notice to attend the meeting was too short.

[7] Some three hours after being told of the meeting and having informed Ms Loots that he would not be attending the meeting, the Appellant attended the

Prison to sign the register. The Appellant was required to do so in terms of his suspension. When he got to the prison and after signing the register he met with the Area Commissioner who once again informed him of the meeting and handed him a letter to say that his suspension was lifted for the day. This letter was prompted because of the Appellant's statement that he was on suspension so could not attend the meeting. On receiving the letter, the Appellant's reaction was that the letter was simply inadequate as he would only attend the meeting if his suspension was lifted altogether and not just for the day to attend a meeting.

Disciplinary enquiry

[8] On the conclusion of the investigation relating to his failure to report the assault between the inmates timeously or at all, various charges were preferred against the Appellant. The Appellant was subjected to two separate disciplinary enquiries. One related to the non-reporting of the assault and the other was a charge of insubordination for his refusal to attend the meeting with the Regional Commissioner of the Prison Service. The Appellant was found guilty of each of the misconduct offences with which he was charged, and the sanction of dismissal was imposed. He unsuccessfully appealed internally against the finding and sanction of the disciplinary hearings.

The arbitration hearing

[9] Aggrieved by the decision of his employer, the Appellant referred an unfair dismissal dispute to the Council, first for conciliation and then arbitration. The appellant asked the Council to find his dismissal unfair and to award him reinstatement, alternatively compensation.

[10] The arbitrator found the Appellant had committed the following misconduct offences: i) insubordination; ii) failure to report the incident to the Area Commissioner in accordance with the prescribed rules and procedures; and iii) failure to report the incident to the Inspector Judge in accordance with the prescribed rules and procedures.

[11] The arbitrator, in relation to the charge of failure to report the incident telephonically to the Area Commissioner within an hour of the incident in terms of Procedural Guidelines: Reporting of Security Related Incidents (Procedural Guidelines), found that there was a standard or rule that was known to the Appellant and he failed to comply with it. The Appellant confirmed that he was aware of the rule and conceded that he had not complied with the procedures in relation to reporting the incident to the Area Commissioner.

[12] In relation to the insubordination charge, the arbitrator found that the instruction issued to the Appellant whilst on suspension (his failure to meet the Regional Commissioner) was a wilful disregard of a lawful instruction and that the appellant committed misconduct in that regard. Also, as stated earlier, the arbitrator had found that the Appellant had committed misconduct by failing to report the assault incident to the Inspector Judge.

[13] Having found the Appellant guilty of three of the charges, the arbitrator was of the view that the only appropriate sanction was that of dismissal.

The Labour Court

[14] The Appellant then applied to the Labour Court to review and set aside the award. The Labour Court held that the evidence, on the basis of which the arbitrator found that the Appellant had committed misconduct in failing to report the incident to the Judge Inspector, was insufficient for a commissioner in the stead of the arbitrator to reasonably have found the Appellant guilty. There is no cross-appeal against this finding.

[15] In analysing the decision of the arbitrator in respect of the charge of failure to report the assault incident, the Labour Court held that since the Appellant conceded that he failed to comply with the Procedural Guidelines, it follows that he was guilty of the charge against him. The Labour Court further said that despite the non-adherence to the procedures, an explanation for such non-adherence was not forthcoming from the Appellant and that written

representations about the incident were not a mitigating factor because the report was only delivered by 20 or 21 August 2012.

[16] On the charge of insubordination, the Labour Court held that there was clear and direct evidence that the Appellant made a conscious decision to defy the instruction issued to him to attend the meeting with the Regional Commissioner.

[17] Finally, the Labour Court held that on the material before the arbitrator, it was evident that the Appellant committed two serious acts of misconduct adding that it could not be said that, on the test for review as laid out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[1], that it was a decision that no reasonable decision-maker could have arrived at, and that dismissal of the Appellant, even on the two counts of misconduct, was a fair sanction.

The appeal

[18] In respect of the charge of insubordination, the Appellant argues that the court *a quo* erred both factually and in law when it came to the decision that the arbitration award was one that a reasonable decision-maker could reach. The Appellant argues that the Labour Court failed to take into consideration the actions of the employer prior to the refusal of the instruction to attend the meeting and only focused on the wilfulness of the Appellant. The Labour Court further erred in law as it did not consider the evidence presented that firstly, compliance with the instruction was impossible because he was required to attend the meeting at 13h00 at a venue 300 km away: if the appellant left after having spoken to his Area Commissioner at 10h00 he would not be able to make it to the meeting in time. Secondly, no agenda for the meeting was forthcoming. These arguments are without merit. The Appellant was informed of the meeting at 07h00, had he been serious about attending the meeting, he had sufficient time to make the necessary arrangements and be on time for the meeting. He had no intention, in my view, to attend the meeting as he had indicated to Ms Loots who informed him

[1] [2007] ZACC 22; (2007) 28 ILJ 2405 (CC).

of the meeting that he would not attend the meeting. I also wonder if he would have attended at the prison that morning if he did not have to sign the register. In any event, he only arrived at the prison to sign the register at 10h00, that is three hours after being informed of the meeting. For the Appellant to then raise that there was insufficient time to make it to the meeting is an excuse wholly false because it was he who ensured that he would not be on time to attend the meeting. Also, the fact that he was not given an agenda is not only irrelevant but borders on arrogance. He was called to a meeting by a very senior manager, and he wanted to know where was the agenda for the meeting!

[19] The above notwithstanding, the Appellant then demands that his suspension be lifted altogether for him to attend the meeting. This, in my view, again indicates that he had no intention of attending the meeting and tried to find reasons for not doing so. In any event, for him to put conditions to be in a position to carry out a lawful and reasonable instruction from his employer is quite outrageous.

[20] It does appear that the arguments made by the Appellant are that although the instruction was lawful, it was not reasonable. This is based on the evidence that it could not be complied with because of the distance he was required to travel. As I have said earlier, had he accepted the instruction at the time it was communicated to him he would have had more than sufficient time to attend the meeting. In the circumstances, these arguments are devoid of any merit.

[21] On the Appellant's failure to report the assault to the Area Commissioner telephonically within an hour of the incident occurring: The Appellant conceded his failure to do so. In his evidence he clearly stated that he failed to comply with the Guidelines Procedures, however, he argues that the arbitrator should have taken into account that it was a first-time offence and that he had no intention to hide the incident from the Area Commissioner as he had reported it to the Inspecting Judge and had made a note of it in the HCC diary, *albeit* through a subordinate.

[22] The Appellant's attempt to justify his failure by claiming that he had reported the incident to the Inspecting Judge and entered it in a diary is rather puzzling: he states in no uncertain terms that he knew the rule that he was required to telephonically report the incidence within the hour of its occurrence to the Area Commissioner. In the circumstances, it defies common sense that he would do everything else but what he should do in terms of the rules. In any event, what he did do, assuming that he did what he said, is irrelevant and does not take the matter any further. The charge was based on the failure of the Appellant to report the incident according to the rules and it is common cause that he did not do this.

[23] Finally, the Appellant argues that dismissal for a first-time offence is harsh, unreasonable and unfair as the employer's disciplinary code states that "*generally it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable".*[2] The Appellant thus asks this Court to find the finding of guilt on the insubordination charge unreasonable and that a sanction of dismissal was unfair for a first-time offence in regard to the failure to report the assault incident charge, especially so when regard is had to his long service at the Department of some 29 years with no previous disciplinary infringement.

[24] While it is not for this Court, nor was it for the Labour Court, to decide whether the arbitrator was correct in finding the Appellant guilty of the offences with which he was charged as one would in an appeal, in this Court, as in the Labour Court, what needs to be determined is whether the decision of the arbitrator was a decision which, based on the evidence presented at the arbitration, any person in the position of the arbitrator would similarly find.

[25] The Appellant was found to have committed two serious wrongs. To fail to report an assault between inmates within an hour to the Area Commissioner

[2] See: Item 3 (4) of the Disciplinary Code.

is a serious misconduct. There can be little doubt that the employer considered an assault between inmates as something extremely serious and thus required the head of the prison to inform the Area Commissioner thereof within an hour of such an incident taking place. Assault within a prison environment and between inmates must constitute a dangerous incident not only to those involved in the assault but to other prisoners. The seriousness and danger of the assault incident that took place were clearly manifest by the fact that the assault resulted in the death of an inmate. The Appellant as the head of the prison does not appear to appreciate this.

[26] On the charge of insubordination, it is common cause that the Appellant was insolent. From the very outset, he had adopted the attitude that he would not attend the meeting and said as much to Ms Loots when informed of the meeting at 07h00. His later attempts to justify his refusal to attend the meeting are neither reasonable nor honest.

[27] Coming to the issue of sanction, the Appellant was the head of a prison, a position of enormous responsibility. A prison is a volatile environment and those responsible for running it must know that the rules that apply there must be followed to maintain discipline and peace, there can be no half-measures in such an environment. The Appellant knew the rule he was required to comply with but deliberately failed to do so. This cannot be acceptable. This misconduct is then compounded by a refusal to carry out a lawful and reasonable instruction to attend a meeting with the most senior manager in his Region. His actions displayed a disregard for authority which cannot be tolerable in the prison service.

[28] Cumulatively the Appellant's conduct belies an employee that is blasé with the rules. In my view, he portrays the actions of a recalcitrant employee. The fact that he has 29 years of service without blemish cannot save him from the sanction of dismissal.

[29] In the result, the appeal must fail. I have however decided that there should be no order as to costs.

Order

1. The appeal is dismissed with no order as to costs.

Waglay JP

Mlambo JA and Smith AJA concur

APPEARANCES:

For the Appellant:	Mr Matthee of Kranko Karp Attorneys
For the Respondent:	Advocate R. Itzkin
	Instructed by Yusuf Dockrat Attorneys