

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

CASE NO: JR 2134/08

In the matter between:

POPCRU obo G MASEKO

Applicant

and

**THE DEPARTMENT OF CORRECTIONAL
SERVICES**

1ST Respondent

**GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL**

2ND Respondent

M LOYSON N.O.

3RD Respondent

JUDGMENT ON LEAVE TO APPEAL

LAGRANGE,J

- [1] This is an application for leave to appeal against the judgment of this Court handed down on 30 August 2010. The application for leave to appeal was made timeously, but its consideration has been inordinately delayed by difficulties in locating the court file.
- [2] The case concerned the review of an arbitrator's award in terms of which she held the fairness of the dismissal of a prison warden who had been dismissed for having given an awaiting trial prisoner a bag of dagga to be sold to other prisoners. The Court dismissed the review application.
- [3] The essential issue in the review application was whether or not the arbitrator had acted improperly in admitting hearsay evidence of two awaiting trial prisoners who had testified in person at the disciplinary enquiry, but who could not be obtained to testify at the arbitration hearing for reasons beyond the employer's control. I concluded that the arbitrator's admission of the evidence after the arbitrator's consideration of a number of factors relevant to the admission of hearsay evidence was not unreasonable.
- [4] The applicant disputes this finding and contends that in these circumstances a reasonable decision-making would have found that the statements ought not to have been admitted as evidence in circumstances where they were central to the case. At paragraphs 81 and 82 of my judgment, I considered the prejudicial effect of admitting the hearsay evidence and noted that the SCA in ***S v Ndhlovu and others* [2002]** held that the mere fact that the hearsay evidence may have high probative value is not what makes it prejudicial. The prejudice that must be

considered in admitting hearsay evidence is the inability of the other party to cross examine the absent witness. I have no reason to believe that another court might come to a different decision in this regard in the light of the authority on the nature of the prejudice that must be evaluated.

- [5] The applicant further claims that the Court ought to have found that the statement of the awaiting trial prisoner who was caught with dagga in his possession (Saka) was unreasonably accepted by the arbitrator as having probative value when a reasonable arbitrator would have found that it had none, based on the fact that the deponent had apparently lied about his residential address and had claimed that the statement presented at the disciplinary enquiry was not the same as that which he had made to the investigating officer.
- [6] Consequently the applicant submits that, in truth, the arbitrator failed to establish the material facts which constituted an irregularity in the proceedings warranting the award being set aside.
- [7] Regarding the last-mentioned ground of appeal relating to the reliability of Saka's statement, this was not raised as one of the applicant's grounds of review, and no exceptional circumstances have been provided why it should not be considered for the first time on appeal. Accordingly, this ground of appeal should not be entertained.

Conclusion

- [8] I am satisfied that the grounds of appeal set out in the applicant's notice of its application for leave to appeal do not warrant the matter being revisited for the reasons stated above.

Order

- [9] In the circumstances, the application for leave to appeal is dismissed with costs.



**ROBERT LAGRANGE
ACTING JUDGE OF THE LABOUR COURT**

Date of judgment: 04 October 2011
(In Chambers)