

REPUBLIC OF SOUTH AFRICA



THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P 532/10

In the matter between:

JONGISANGO WISEMAN MBIZA

Applicant

and

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL & OTHERS

FirstRespondent

ANTHONY MARE N.O

Second Respondent

MINISTER OF CORRECTIONAL SERVICES

Third Respondent

Heard :10 October 2012

Order : 10 October 2012

Summary : Application to review dismissed with costs.

JUDGMENT-REASONS FOR ORDER

AC BASSON J.

Introduction

- [1] This is an application to review and set aside an arbitration award handed down by the second respondent, the Bargaining Council arbitrator, under the auspices of the first respondent, the General Public Service Sectoral Bargaining Council, in terms of which the second respondent found that the dismissal of the applicant was procedurally and substantively fair and that the dismissal was the only appropriate sanction.
- [2] Very briefly the applicant was employed by Correctional Services at Mthatha Correctional Centre until his dismissal on 30 March 2009 on a charge based on Resolution 1/2006 of the Department of Correctional Services. The charge reads as follows:
- “Dereliction of duty, poor work performance of his duties and negligence”.
- [3] The charge emanated from an incident where four offenders escaped during the time the applicant was on duty in the section under his control. The applicant was charged with two others. They were all on night duty from 12h00 midnight until 08h00 the next morning. They were all assigned to guard a specific number of inmates in separate sections of the prison. On 18 September 2008 four unsentenced prisoners escaped from unit 1 that was assigned to an officer with the name of Mr Jubase. The applicant was assigned to guard 292 sentenced inmates in ‘E’ section. This section was also known as unit 6. It is common cause that the next morning it appeared that nobody escaped from his section. However, it appeared that at least one of the inmates tried to escape from the section under the control of the applicant.
- [4] At the arbitration it was the applicant’s main contention that he was specifically tasked to look after the convicted inmates in his section, (section ‘E’) which housed 292 sentenced inmates. According to him, and that was not in dispute, all the inmates he had to look after were still incarcerated on the following day. As I understand the applicant’s case, he argued that there was no connection between him and the section where the unsentenced inmates were held, and that those inmates were under the control of another individual with the name of Jubase. According to the applicant he therefore cannot be held accountable for their attempted escape. Secondly

he further contended that he was inconsistently treated in that other employees were not dismissed for similar infractions, specifically with reference to a certain Mr Mampana and a certain Mr Ngane. The commissioner deals with both these two individuals in his award. I will return to his conclusions in this regard hereinbelow.

- [5] I will deal with the consistency argument first: The alleged inconsistency treatment with Ngane is not raised with the respondent's main witness in cross-examination. The respondent was therefore never afforded an opportunity to deal with the allegation of inconsistent treatment. In fact Ngane's name appears or surfaced for the first time in the applicant's evidence when he gave evidence in chief. As far as Mampana is concerned the respondent's witness in chief dealt extensively with the disciplinary action taken against Mampana and the reason why that process did not result in a dismissal. He explains in detail why Mampana was not dismissed with reference to the duties which he performed. The applicant's representative did not dispute any of this evidence in cross-examination. The evidence therefore stands. Insofar as the inconsistency argument was raised as a ground for unfair dismissal there is absolutely no merit in this ground and the commissioner's conclusions are more than reasonable. I can find no reason to interfere with his conclusions in this regard.
- [6] Turning to the main issue, and that is whether or not the applicant should have been found guilty. On the evening in question it appears that one of the escapees tried to escape through the Medium Correctional Centre where the applicant worked, and tried to escape through the roof. The applicant's evidence was that he did not hear the ceiling boards break or dropping to the ground in his section because he allegedly was in the toilet at that stage.
- [7] The applicant was therefore charged and dismissed for dereliction of duty, poor work performance of his duties and negligence in the execution of his duties in that he did not prevent the inmates from escaping from prison and more in particular he did not stop the inmates from using his section from which to escape.

- [8] The commissioner evaluated the evidence and came to the conclusion that he did not accept the applicant's version that he was in the toilet during the time of the incident. The commissioner accepted the evidence led by the inmate who tried to escape who testified that he checked the office as well as the toilet and that he did not see the applicant. The commissioner also accepted the evidence that the applicant should have heard the commotion when the inmate tried to escape through his roof by breaking the ceiling.
- [9] The senior correctional officer who was the initiator testified and explained in detail what evidence was taken into account in deciding whether to find the applicant guilty and why the sanction of dismissal was imposed. Of particular importance is the consideration that was taken into account which is that the taxpayer expected that the Department ensures that prisoners do not escape. He also confirmed in his evidence that no-one escaped since these guards have been disciplined, whereas previously a number of inmates had escaped. The initiator also explained that there were no distinctions made between guarding the sentenced inmates as opposed to unsentenced inmates.
- [10] The chairperson of the disciplinary hearing, Mr Zimema (the Deputy Director of Prisons) also testified that the applicant never raised the alarm to indicate that there was an escape. He also testified that, according to him, the applicant ought to have heard the ceiling break and the dropping of the ceiling boards on the ground of his section.
- [11] I have considered the award and I am satisfied that the commissioner had arrived at a reasonable conclusion and that his conclusion is not only sustainable read against the record, but also a reasonable conclusion.
- [11] I should also point out when the applicant initially lodged an appeal after his dismissal by the chairperson of the disciplinary hearing, he only appealed against the sanction; he never appealed against the guilty finding. What is also striking is the fact that during the arbitration hearing the applicant's representative never challenged the guilty finding when cross-examining the respondent's witnesses and more in particular, Zimema, who was the chairperson of the hearing. In other words Zimema was not challenged on the guilty finding, he was only challenged in respect of the sanction, and he

was also never challenged in respect of the consistency of the sanction that was meted out.

[12] In the event I am of the view that the award should stand. Not only is the conclusion reasonable, the thought process and the process in arriving at this decision is reasonable.

[13] In the event the review is dismissed and I can find no reason why costs should not follow the result.

AC BASSON J.
Judge of the Labour Court
09 March 2013

LABOUR COURT