



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

NOT REPORTABLE

Case No: JR428/19

In the matter between:

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Applicant

and

RV MABANGA

First Respondent

POPCRU OBO MOREMI AND ANOTHER

Second Respondent

Heard: 30 January 2025

Delivered: 29 April 2025

Summary: Application to review and set aside disciplinary ruling issued by first respondent, in terms of section 158(1)(h) of the LRA. Ruling unreasonable and irrational. Review application granted, and dispute referred back for reconsideration.

JUDGMENT

DANIELS J

Introduction

[1] This matter relates to an application brought to review and set aside the disciplinary ruling of the first respondent, who chaired a disciplinary hearing for Ms. Nthabiseng Moremi (“Moremi”) and Mr Sello Sebela (“Sebela”).

[2] The decision of first respondent, the Deputy Director of the Department of Correctional Services, was a decision of the Department and constituted a decision of the State acting as employer.

Jurisdiction

[3] It is trite that this court is vested with the jurisdiction to review decisions or actions performed by the State, as the employer, on any grounds permissible in law, in accordance with section 158(1)(h) of the Labour Relations Act No. 66 of 1995 as amended.¹

Factual matrix

[4] The background to the dispute is as follows:

4.1 Moremi and Sebela are officials of the Department of Correctional Services (the “Department”). The Department, believing they committed acts of misconduct, charged them. A single disciplinary hearing was held, chaired by the first respondent.

¹ See *Hendricks v Overstrand Municipality & another* (2015) 36 ILJ 163 (LAC) at para 29 where Murphy AJA (as he then was) stated: “In sum therefore, the Labour Court has the power under s 158(1)(h) to review the decision taken by a presiding officer of a disciplinary hearing on (i) the grounds listed in PAJA, provided the decision constitutes administrative action; (ii) in terms of the common law in relation to domestic or contractual disciplinary proceedings; or (iii) in accordance with the requirements of the constitutional principle of legality, such being grounds permissible in law.” It is trite that administrative action must be lawful, reasonable, and procedurally fair. Legality permits the review of public power, including executive action, on the grounds of irrationality and on the basis that the decision-maker did not act in accordance with the empowering statute. Rationality requires that the exercise of public power must not be arbitrary, but must be rationally related to the purpose for which the power was given.

4.2 They were charged with aiding in the escape from custody of Ms Sibanda ("Sibanda") upon her release from prison on or about 22 July 2016. Sibanda, a foreigner, who was in South Africa unlawfully, was due for deportation. It was alleged that Moremi and Sebela were required to take her to Lindela Repatriation Centre ("Lindela") pending her deportation. Instead, they took Sibanda to the Department of Home Affairs (Johannesburg). Alternatively, through this conduct, they were grossly negligent.

4.3 In addition, Sebela was charged with aiding in the escape, from custody, of Pretty Gwebu ("Gwebu"), Magrieta Mabena ("Mabena"), and Martha Masunda ("Masunda") (hereafter "the three offenders"). The Department alleged that the three offenders were released, by Sebela, at Home Affairs (Johannesburg) when they should have been taken to Lindela.

4.4 The Director General of Home Affairs has issued a notice indicating the places where illegal foreigners may be detained, pending deportation. The notice, published in the GN434 on 22 June 2015, includes Lindela Holding Facility and *"any detention facilities and offices under the management or managed on behalf of or in partnership with the Department of Home Affairs, as places of detention of illegal foreigners pending deportation"*. There was some debate at the disciplinary hearing about the meaning and import of the words "and offices". In my view, nothing turns on this given that the notice relates to detention facilities.

4.5 At the hearing, the Department called three witnesses, and held an inspection in loco at Home Affairs (Johannesburg).

4.6 The first witness, Ms Sithembile Hlengiwe Zibane testified that she was the Head of the Correctional Centre (Female Section). She testified that foreigners facing deportation must be taken to Lindela,

where they will be held pending deportation. Sibanda should have been taken there. Home Affairs (Johannesburg) is an administration centre, and, unlike Lindela, has no holding facilities. Lindela is the holding facility of Home Affairs (Johannesburg). Though documents used at the hearing refer to Home Affairs (Johannesburg); it is known in Correctional Services that when someone must be taken to the holding facilities, this relates to Lindela.

4.7 Mr Zanele Mabaso testified that he was employed as the Centre Coordinator, Correctional Services, Johannesburg. According to him, a letter of approval (which authorised the detention of Sibanda at Lindela) was in her file.

4.8 Mr Thabiso Ndlovu testified that he was appointed to investigate the alleged misconduct of Sebela and Moremi. Lindela informed him that they had not received Sibanda and the other offenders. When individuals are handed over to Home Affairs, there must be a “hand over certificate”, which identifies the receiving official. Here, the certificate (in relation to Sibanda) did not indicate the receiving official.

4.9 During the inspection, officials from Home Affairs (Johannesburg) informed the chairperson that they do not detain individuals at their offices because they do not have holding facilities.

4.10 The employees called four witnesses:

4.10.1 Ms Violet Sehloho (“Sehloho”) testified that she was the Divisional Head: Correctional Management Area. Sibanda was required to be taken to Home Affairs (Johannesburg) for “further directions” because there was no letter of approval (authorising her detention at Lindela). However, after questioning by the chairperson, she also testified that the letter of approval was in the file. Sehloho stated that

she had instructed Moremi² and Sebela³ to take Sibanda to the Home Affairs offices in Johannesburg. In respect of the other offenders (namely Gwebu, Mabena, and Masunda), they should have been taken to Lindela.⁴

4.10.2 Sebela testified that he was the driver of the vehicle which transported Sibanda. His evidence about whether he had transported the other offenders was less clear.

4.10.3 Moremi testified that she had completed the certificate of placement before Sibanda was released from prison, which indicated on the certificate that Sibanda would be placed to Lindela. She believed that all the necessary documentation was present. She testified that Sehloho instructed her to take Sibanda to Home Affairs (Johannesburg) because Sibanda did not have a letter of approval. She handed over Sibanda to the Immigration Officials of Home Affairs but did not explain why the "Body Receipt" was not signed by the official that received Sibanda.

4.10.4 Ms Magagula, a reintegration officer of the Department, testified that officials of Correctional Services had been instructed to take offenders to the Home Affairs offices if those offenders have babies or did not have the correct deportation documents.

4.11 The second respondent informed the chairperson that it intended to call the Home Affairs official, into whose custody Sibanda had been released, but decided not to do so.

[5] The chairperson found that Moremi and Sebela were not guilty of any of charges. However, in his reasoning, he failed to deal with the charge of gross negligence.

² Transcript Vol 7 p 642

³ Transcript Vol 7 p 644

⁴ Transcript Vol 8 p 719

[6] It must be noted that this application was unopposed. Accordingly, I am compelled to accept the factual allegations in the founding affidavit.

Grounds of review

[7] The grounds of review, articulated in the founding affidavit are:

7.1 The chairperson failed to have regard to the certificate of placement which stated that Sibanda should be placed at Lindela.

7.2 The chairperson failed to have regard to evidence that correctional services officials are aware that foreign nationals are held at Lindela pending deportation.

7.3 The chairperson failed to have regard to evidence that Moremi delivered another foreign national to Lindela only a few days after sending Sibanda to Home Affairs.

7.4 The chairperson failed to have regard to evidence that the inspection in loco confirmed that Home Affairs Johannesburg has no detention facilities and therefore does not receive offenders.

7.5 The chairperson failed to have regard to evidence that a warrant for the release, and the notice of deportation, for Sibanda, were issued on 2 October 2013, several years earlier.

7.6 The chairperson's ruling that Moremi and Sebela were lawfully instructed to deliver Sibanda to Home Affairs was irrational and unreasonable.

7.7 The chairperson failed to apply his mind to the evidence and failed to consider the evidence of the Department that:

7.7.1 Moremi and Sebela failed to provide evidence identifying the immigration officials within Home Affairs who allegedly received the offenders;

7.7.2 Mabaso, on behalf of Home Affairs, confirmed that they do not receive offenders at the Johannesburg offices because they have no holding facilities;

7.7.3 The offenders were not deported but disappeared and their whereabouts are unknown;

7.7.4 Other officials who committed similar misconduct were dismissed.

Analysis of the grounds of review

[8] As previously mentioned, the application is unopposed. I must therefore accept the factual allegations in the founding affidavit as correct. In respect of the allegations in paras 7.7.3 and 7.7.4 above; the record was not helpful in confirming the allegations. Nevertheless, the balance of the allegations is adequately supported by the record.

[9] Having perused the record, and considered the papers, I accept that the ruling of the first respondent was irrational. For example, the chairperson pays absolutely no attention to the failure of the employees to positively identify the officials of Home Affairs to whom the offenders were allegedly released, and their further failure to explain the absence of a completed hand over certificate for Sibanda. The outcome was not grounded in the evidence. The outcome was so disconnected from the evidence that it was, in my view, arbitrary.

[10] I note that the chairperson made sweeping statements, but did not attempt to resolve the numerous factual disputes. Furthermore, as previously

mentioned, the chairperson did not consider the alternative charge of gross negligence or make any ruling in that regard.

[11] In the circumstances, in my view, the chairperson's ruling is both irrational and unreasonable, and falls to be reviewed and set aside.

Remedy

[12] It is trite that our courts are reluctant to assume a discretion entrusted by statute to another tribunal, or functionary.⁵

[13] I do not believe that it is appropriate, in this context, to substitute the ruling of the chairperson. I say this despite having been provided with a "complete record" of the hearing. Though complete, the transcript does not reflect all the testimony – from time to time the witnesses are unclear. Secondly, issues, which ought to have been clarified by the chairperson, or the parties, were not. Finally, I am unable to assess the demeanour of the witnesses based solely on the transcript.

[14] In the circumstances, it is proper and fair that the dispute be referred back to the Department for the conduct of a further disciplinary hearing de novo. This ought to be done before a different chairperson.

Conclusion

[15] In the circumstances, for the reasons set out above, I make the following order:

15.1 The ruling issued by the first respondent, in his capacity as the disciplinary chairperson, dated 29 January 2019, is reviewed and set aside;

15.2 The dispute is referred back to the Department for rehearing before a disciplinary chairperson other than the first respondent,

⁵ *Gauteng Gambling Board v Silverstar Development Ltd and others* 2005 (4) SA 67 (SCA) at paras 28 and 29

15.3 There is no order as to costs.

Reynaud Daniels
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv Matlejoane

Instructed by State Attorney

LABOUR COURT