Sneller Verbatim/JduP

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JR1379/01

2003.03.18

In the matter between

XOLANI KHANYA	1st Applicant
JABULANI DMADI	2nd Applicant
MESHACK RAMSEY	3rd Applicant
LUCKY SIWUNDLA	4th Applicant

and

PHILLIP COHEN	1st Respondent
SECTORIAL BARGAINING	2nd Respondent
MINISTER OF HOMES AFFAIRS	3rd Respondent

J U D G M E N T

PILLAY, J: The applicants were employed as immigration officers by the third respondent. On 11 April 1996 they were transporting a group of about forty aliens to Beit Bridge in order to repatriate them to Zimbabwe. An accident occurred and some of the aliens and the applicants were injured. The more seriously injured aliens were taken to hospital. The applicants proceeded to the offices of the Department of Home Affairs in Louis Trichardt for instructions.

Mr Breytenbach who was in charge of the Louis Trichardt

office contacted Mr Raubenheimer of the Department of Home Affairs' offices in Pretoria. On the applicants' version this was to obtain instructions from Mr Raubenheimer. On Mr Raubenheimer's version at the arbitration, it was simply to keep him informed. No instructions were forthcoming from either Mr Breytenbach or Mr Raubenheimer.

At 16:00 Mr Raubenheimer locked the offices and left. The applicants attempted to take the aliens to a hospital in Louis Trichardt and in Elim. But they were refused admission on the basis *inter alia* that payment could not be guaranteed.

They drove to Johannesburg and left the aliens at Johannesburg's Hillbrow Hospital. There is a dispute as to whether they left the aliens in the custody of the security guards or simply dropped them off at the hospital entrance.

The applicants were charged and dismissed in terms of section 20(d) of the Public Service Act of 1994 for being -

> "...negligent or not diligent in the carrying out of their duties in that on or about 11 April 1996, and at or near Hillbrow Hospital, Johannesburg, they left a group of injured illegal aliens without the necessary supervision." *(sic)*.

The arbitrator confirmed the dismissal, having found that the applicants were guilty of the charge.

It is common cause in this review that the finding of misconduct by the arbitrator is not reviewable. The sanction of dismissal is the focus of this review.

The grounds of review, relevant for the purposes of this

judgment, are that :

- The arbitrator failed to apply his mind and committed gross irregularities in his award, which was unjustifiable in relation to the reasons given therefor,
- He failed to consider whether the dismissal by the third respondent was an appropriate and fair sanction,
- He failed to apply his mind to the appropriateness of any other sanction.

The award does not manifest that the arbitrator had applied his mind to the question of sanction. That is not necessarily decisive. However, the common cause facts before the arbitrator were so compellingly against a finding of dismissal that they ought to have struck the arbitrator between the eyes so to speak, even if they were not pertinently argued before him. These facts were:

1. The incident occurred on 11 April 1996.

2. They were charged on 16 January 1998.
3. They were dismissed on 5 August 1999.
4. They remained on duty until their dismissal.
5. The evidence for the third respondent was that the applicants continued to render services after the incident and were trustworthy.
6. They received no instructions or guidance from the leadership of the department in the form of Messrs Raubenheimer and Breytenbach.
7. The applicants had been on the road for about 24 hours, the accident having occurred at about 10:30 on 11 April 1996, and the delivery of the aliens to Johannesburg being in the early hours of the morning of 12 April 1996.

The arbitrator had correctly criticised the conduct of Mr

Raubenheimer, but did not consider the implications of the latter's omission insofar as it might have been a mitigating factor for the applicants, or might have explained their conduct.

The arbitrator also did not consider the undisputed fact that the applicants were exhausted and stressed, having been involved in an accident in which their vehicle had overturned.
Furthermore, no account was taken of the human rights violations upon the applicants themselves. They were injured on duty as employees, and were given no instructions by their employer. Nor were they given any guidance or assistance on the steps to be taken to either address the circumstances in which they found themselves or their own personal predicament.
Another factor that the arbitrator failed to take into account is that this was an extraordinary event. It was not a regular occurrence in the normal course of duties. This is one of the factors relevant to determining the risk posed by the applicants' continued employment with the third respondent.
The arbitrator's confirmation of the dismissal is, to say the least, startling in the circumstances. However, as the arbitrator had not applied his mind to the appropriate penalty, the matter should be referred back to him to consider this issue.

There are many factors, other than those that I have enumerated above, that go to determining the appropriateness of the penalty. They include the quality of the evidence of the respective witnesses, as well as the content thereof. It is appropriate therefore that the commissioner, having heard the matter on the substantive charges, should also be the one to determine the appropriate penalty.

In the circumstances the notice of motion is amended at paragraph 1 by the deletion of the words "procedurally and".

I grant an order in terms of paragraphs 1 and 2.
Paragraph 3 of the order: The matter is referred back to the third

respondent for determination of an appropriate penalty.
Paragraph 4 of the order: The third respondent is to pay the applicants' costs.

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PILLAY, J

FOR THE APPLICANT	:	ADVOCATE BUIRSKI
INSTRUCTED BY	:	MASHILE-NTLHORO INC.
FOR THE RESPONDENT	:	ADVOCATE HULLEY
INSTRUCTED BY	:	STATE ATTORNEY

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