IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case Number: JR1791/12

In the matter between:

THE MINISTER OF CORRECTIONAL SERVICES **Applicant**

and

POPCRU obo A.M. MMOLEDI **First Respondent**

J.S RAKGOADI *N.O.* **Second Respondent**

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

Date heard: 14 October 2015

Delivered: 8 February 2016

Summary: Clause 9.1 of the Disciplinary Code for the Department of Correctional Services does not provide for a termination of employment *ex lege*; review of an arbitration award in which Arbitrator misconstrued the nature of the enquiry before him.

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review an Award under case number PSSGA 1060-08/09. The Award in question is dated the 14 June 2012. On the 21 of May 2012 during the arbitration proceedings a recess was requested. The transcript of the proceedings reflects as follows:

> "Arbitrator: Welcome after a long recess, which was requested and the pre-arb was done and the minutes have been submitted and signed, which will be considered once the matter is finalised. These were done today by the two parties. Now we had agreed that when we reconvened that we would be getting straight into the matter and request the respondent to lead their evidence in the matter."

[2] Unfortunately the said minute is not contained in the record, an issue I shall return to. The Award records that on the 7 May 2012, a jurisdictional point was raised on the basis that there was no dismissal but that the employee had absconded. Reliance was placed on Clause 9.1 of Resolution 1 of 2006, entitled "the Disciplinary Code for the Department of Correctional Services" which provides:

> "9.1 Desertion/abscondment An employee who absents him/herself for 30 consecutive (calendar) days without permission or without notifying the employer shall be summarily dismissed. However, before dismissing the employee, the employer must endeavour to establish the whereabouts of the employee. Upon the employee's reappearance after desertion, he/she may not be reinstated. The employee must make written representations to the delegated authority within 5 days from his/her reappearance should he/she wishes reinstatement/re-employment to be considered."

[3] This Code is part of the Regulations promulgated in terms of the Correctional Services Act, 11 of 1998. In his analysis of the evidence and argument before him, the Arbitrator writes as follows:

> "5.1 The Respondent submitted that the Applicant was not dismissed but he deserted and attempts were made to ascertain the whereabouts of the Applicant. On two occasions a team was sent out to look for the Applicant at his place but could not find him.

5.2 The Respondent further submitted that the Applicant was given the opportunity to lodge an appeal and to present his case in written submission as per clause 9.1 of Resolution 1 of 2006.

5.3 Throughout the evidence of the Respondent is that the Applicant was summarily dismissed but the Respondent went on to and allowed the matter to be treated like it is an ordinary dismissal for misconduct. The Respondent allowed the Applicant to lodge an appeal which no provision is made for in clause 9.1. This was misleading to a person who was still a student in the department and contradictory to the clause the Respondent is relying on for the dismissal of the Applicant.

5.4 The Respondent further confuses the matter in the outcome of the appeal correspondence by stating that the matter was dealt with under a fair procedure and was substantively fair and proved on a balance of probabilities. This gives the impression that there was a disciplinary hearing conducted and a sanction of dismissal was pronounced……..

5.13 From the evidence provided and presented by the Respondent it is clear the Applicant was absent from work for a period over 30 days and the dismissal should have been in terms of clause 9.1 of Resolution 1 2006. However the Respondent chose to declare this matter dismissal for misconduct as stated in the minutes of the pre-arbitration. This then renders the evidence the Respondent led on desertion not consistent with the matter and irrelevant to some extent.

5.14 The Respondent by not following the procedure as required to deal with dismissal for misconduct violated the collective agreement. Furthermore the Respondent misled the Applicant by allowing him to make an appeal and called him to an interview as though he was afforded the opportunity to present his case without representation though.

5.15 The Applicant as a student who had just lost his mother and was affected by the loss should have been given assistance by the Respondent. The Respondent after establishing a link with the Applicant's father never made a follow up on the whereabouts of the Applicant. There should have been more done by the Respondent than just two visits if this matter was to be

determined in terms of clause 9.1 Resolution 1 2006. The Respondent did not do enough to assist the Applicant in the situation he was nor showed any sympathy towards the Applicant during his difficult time.

5.16 The Respondent acceded to the fact that there was no disciplinary hearing conducted. Since this was serious misconduct which led to dismissal a disciplinary hearing should have been instituted in terms of the disciplinary code and procedures. This did not happen and its renders the dismissal unfair. For a dismissal to be fair a fair procedure must be followed in terms of the code of good practice schedule 8 of the Labour Relations Act……"

[4] The Arbitrator concludes that:

"After considering all the evidence presented by both parties it is my well considered view that the dismissal of the Applicant was unfair.

1.1 The Respondent is ordered to retrospectively reinstate the Applicant to the position he occupied before his unfair dismissal without any loss of remuneration and or benefit.

1.2 The Respondent to bear cost."

[5] The grounds relied on for the review of the Award are in essence the following:

5.1 The outcome of the award is one that a reasonable decision-maker could not have made;

5.2 That the arbitrator lacked jurisdiction to entertain the matter as the First Respondent's services had terminated *ex lege* by virtue of clause 9.1 of Resolution 1 of 2006 and that the Second Respondent committed a gross irregularity by failing to appreciate the above;

5.3 That the Second Respondent committed a gross irregularity by confusing an appeal for reinstatement and appeal against dismissal.

Evaluation:

[6] The Disciplinary Code is a collective agreement, albeit promulgated in terms of the Regulations in terms of the Correctional Services Act. Clause 9.1 falls to be distinguished from clauses such as those contained in the Public Service Act,

1994 and Employment of Educators Act 76 of 1998[1]. These legislative provisions provide for a "deemed discharge" when certain jurisdictional facts are present i.e. the termination of the employment relationship occurs by operation of law. In contrast, clause 9.1 of the Disciplinary Code provides for the summary dismissal of an employee once he has been absent for 30 calendar days without permission, and efforts have been made to find him. Thereafter, on the employee's reappearance, such employee has the right to be heard (by making representations) to a delegated authority in respect of reinstatement or re-employment.

[7] The bargaining council thus had jurisdiction to entertain what was in essence a dismissal dispute on a charge of abscondment. However, it is evident from the face of the Award as quoted above, that the Arbitrator misconstrued the nature of the enquiry, which was to determine the fairness of a dismissal for misconduct. This was due to a misconception that Clause 9.1. of the Disciplinary Code does not cover a misconduct dismissal. Whether the result of the award was reasonable on the totality of the evidence before the arbitrator had the correct enquiry been addressed in the Award, is not possible for this court to duly discern given the content of the record before me. This is particularly so given the absence of the pre-arbitration minute from the record. In any event, where a dispute is arbitrated under the type of misconception as in *casu*, the evidence elicited may not assist a reviewing court to determine whether the award was reasonable on the totality of evidence before an arbitrator.

[8] In my view it would be in the interests of justice that the award be reviewed and set aside and the dismissal dispute be remitted to the third respondent to be reheard by another arbitrator. This will allow for consideration of the procedural and substantive fairness of the dismissal in terms of clause 9.1 to be properly

[1] i.e. s 17(3) (formerly s 17(5)) of the Public Service Act, 1994 and s 14(1)(a) of the Employment of Educators Act 76 of 1998. Foe example, Section 17(3)(a)(i) of the PSA provides:
'An employee, other than a member of the services or an educator or a member of the Intelligence Services, who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been dismissed from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty.'

determined. The totality of the evidence relating to the dispute deserves to be heard and weighed in the proper context.

[9] In the premises, I make the following order:

Order:

1. The award under case number PSGA 1060-08/09 is reviewed and set aside.
2. The dispute is remitted to the third respondent for re-hearing before an arbitrator other than second respondent.
3. There is no order as to costs.

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H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances:

Applicants:	Thapelo Kharametsane Attorneys
Third Respondent:	Advocate Molatelo Malowa
Instructed by:	The State Attorney