THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR1826/2011

POPCRU obo P PHAHO **Applicant**

and

L DREYER *N.O.* **First Respondent**

MINISTER OF CORRECTIONAL SERVICES **Second Respondent**

THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL ("GPSSBC") **Third Respondent**

Heard: **17 December 2015**

Delivered: **8 July 2016**

Summary: **Review application of a decision by an arbitrator finding that the dismissal of the Applicant, a correctional services officer, was both procedurally and substantively fair. Applicant dismissed for dereliction of duty related to the escape of a notorious criminal from C-Max Correctional**

Centre. Applicant successfully raising various irregularities in the conduct of the arbitrator such as relying on hearsay evidence, speculating on outcomes without evidence and misconceiving the nature of the enquiry. Not in the interests of justice to remit the matter to the Bargaining Council after so many years had elapsed since the first hearing. The Court is in an equally good position to determine the dispute. The Applicant was procedurally and substantively unfairly dismissed and was reinstated retrospectively into her former position with full benefits

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JUDGMENT

JACKSON, AJ

Introduction

[1] The Applicant, the correctional services officer at C-Max Correctional Centre, was charged with misconduct by the Department of Correctional Services in that she allegedly breached internal security which in turn contributed to the escape of one of the country's most notorious and wanted criminal, namely, Ananias Mathe.

[2] The main charge was that Applicant had left her tower, namely, tower 2, unattended during the night.

[3] The alternative charge was that Applicant had derelicted her duties because she had failed to detect and prevent the escape of Mathe who had apparently escaped in the vicinity of her tower.

[4] It is worth noting at this point that Mathe's escape occurred almost a decade ago.

[5] The Applicant was only found guilty of the alternative charge and was dismissed from service.

[6] Applicant referred an unfair dismissal dispute to the Third Respondent.

[7] The arbitrator found that the Applicant's dismissal was both procedurally and substantively fair.

[8] Applicant has launched an application to review the arbitrator's award on a number of grounds.

The merits of the review application:

[9] The Applicant's first ground of review is that the arbitrator relied on the hearsay evidence of Ananias Mathe in finding that the Applicant was in dereliction of her duty on the night that Mathe escaped by leaving her tower.

[10] It is common cause that Mathe did not testify at the arbitration hearing and, accordingly, the arbitrator irregularly relied on this hearsay evidence.

[11] I am in agreement with Applicant's contention that none of the seven exceptions to the hearsay rule provided for in section 3(1) of the Law of Evidence Amendment Act 45 of 1998 are applicable to the present dispute.

[12] The arbitrator, accordingly, committed a material error of law by relying on the aforesaid inadmissible hearsay evidence.

[13] The second ground of review is that the arbitrator irregularly speculated on evidence relating to Mathe without him having testified.

[14] The arbitrator, firstly, dismisses Applicant's version of how the radio fell out of her hands while she was up in tower 2 as not making sense without giving any reasons therefor.

[15] At paragraph 26 of her award, the arbitrator then states: 'one can surmise that Mathe took it himself and left it outside the wall with his other escape items.'

[16] Neither Mathe nor anybody else at the arbitration hearing testified that Mathe performed the above act.

[17] The arbitrator's finding, in this regard, is truly in the realm of unsubstantiated speculation.

[18] The Applicant's third ground of review relates to the arbitrator having misconceived the nature of the enquiry or having arrived at an unreasonable conclusion.

[19] The arbitrator seemed to have lost sight of the fact that at the disciplinary hearing, the Applicant was not found guilty of the main charge, namely, leaving her tower unmanned on the night of Mathe's escape.

[20] However and again at paragraph 26 of her award, the arbitrator finds as follows:

> 'All the evidence pointed to her having left the tower unmanned at the time in question.'

[21] Besides not having been found guilty under that charge, the common cause evidence at the arbitration hearing was that the Applicant was at all material times locked up in tower number 2. Only the person relieving her or bringing her supplies could let the Applicant out of the tower.

[22] Moreover, none of the Department's witnesses testified that she had ever left her post.

[23] The arbitrator should rather have attempted to determine the real issue, namely, whether the Applicant was in dereliction of her duties in allowing Mathe to escape. This was not done.

[24] I am in agreement with Applicant's contention that the arbitrator's mistaken reliance on the above three factors in concluding that the Applicant was in dereliction of her duty, was not a conclusion that a reasonable decision-maker could have reached on the material before her.

[25] The arbitrator failed to take into account that there was simply no evidence by any of the witnesses which could have led to a finding that the Applicant was in dereliction of her duties.

[26] There was important evidence which the arbitrator failed to take into account such as:

26.1 It was common cause that the C-Max facility was understaffed;

26.2 Only towers 2 and 5 were manned on the night of escape;

26.3 Towers 1, 3 and 4 were, it was common cause, unoccupied on that night;

26.4 The cat walk, namely, the area from which Mathe escaped, was not regularly patrolled;

26.5 The fact that officers were watching a "double-header" soccer match that evening; and

26.6 The fact that it was noisy that night as it had rained very heavily.

[27] A further ground of review was that relating to selective discipline.

[28] Applicant's representatives raised numerous cases in which fellow employees of the Applicant (some of whom were far more senior than her) that were on duty on the night of Mathe's escape, were initially charged but had their charges withdrawn without any explanation for same being offered by the Respondent.

[29] Names of officers against whom charges were withdrawn include Ms Chauke, Mr Molepo, Mr Modau and Mr Mkwanazi, who was in fact Head of the C-Max Correctional Centre at the time of the escape.

[30] Respondent led no evidence to rebut the allegations of selective discipline and I agree with Applicant's contention that Respondent failed to disclose the onus that it was consistent in its treatment of the employees with regard to discipline.[1]

[31] From a procedural point of view, I have grave concerns with regard to Second Respondent's prosecution of the disciplinary hearing.

[32] In terms of clause 7.3.2 of the Second Respondent's relevant disciplinary code (DBC Resolution 1/2006):

> 'The formal disciplinary hearing should be finalised within a period of 60 days from the date of finalisation of the investigation. If that timeframe cannot be met, the parties involved must be informed accordingly with reasons for the delay. If the employer, without good reasons, fails to institute disciplinary proceedings within a period of 4 months after completion of the investigation, disciplinary action will fall away.'

[33] The investigation report was signed by the relevant area commissioner on 3 April 2007. However, the notice of the disciplinary hearing is only dated 29 September 2008.

[34] This represents a significant delay of 17 months. No reasons have been advanced by Second Respondent for this delay.

[35] Besides the fact that it seems that in terms of the Second Respondent's code, the disciplinary action against the Applicant indeed fell away, the excessive delay in commencing with the disciplinary enquiry was a defect

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[1] See *South African Police Service v Safety and Security Sectoral Bargaining Council and Others* (2011) 32 *ILJ* 715 (LC) at para 10.

of such magnitude that the First Respondent should have found that the Applicant's dismissal was procedurally unfair too.

[36] I agree with the sentiments of Snyman, AJ in *Zondo and Another v Uthukela District Municipality and Another*[2] that it is in the interests of expeditious dispute resolution, being one of the cornerstones of the Labour Relations Act that disciplinary proceedings continue to finality as soon as possible.

[37] The Constitutional Court, in the recent case of *Toyota SA Motors (Pty) Limited v CCMA and Others*,[3] held that one of the objects of the Labour Relations Act was to promote the expeditious and effective resolution of labour disputes.

[38] I have a further difficulty with the way in which the arbitrator allowed Second Respondent's representative to lead his witnesses.

[39] Even though there was no objection from Applicant's representative at the arbitration hearing, the arbitrator should not have allowed the Second Respondent's witnesses to simply read their statements into the record.

[40] Such witnesses would have been allowed to read their statements prior to giving evidence in order to refresh their memories but the witness' evidence would be far more reliable if it was given *viva voce*.

[41] This irregularity is one which clearly prejudiced the Applicant's ability to properly cross-examine the Second Respondent's witnesses.

[42] In conclusion, I find that the award of the arbitrator should be set aside and substituted with an order in terms of which the Applicant's dismissal was both substantively and procedurally unfair.

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[2] (2015) 36 *ILJ* 502 (LC) at para 42.
[3] (2016) 37 *ILJ* 313 (CC) at para 46.

[43] The primary remedy in such circumstances is reinstatement and in terms of Section 193(2) of the Labour Relations Act, I am enjoined to reinstate the Applicant unless:

> ‘(a) The employee does not wish to be reinstated or re-employed;
>
> (b) The circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
>
> (c) It is not reasonably practicable for the employer to reinstate or re-employ the employee; or
>
> (d) The dismissal is unfair only because the employee did not follow a fair procedure.’

[44] It appears that the Applicant is seeking retrospective reinstatement.

[45] There is no evidence before me which suggests that a continued employment relationship between the parties would be intolerable.

[46] The Second Respondent has not produced any evidence to suggest that it would not be reasonably practicable for Second Respondent to re-employ the Applicant and as the Second Respondent is a large department of State, there should be no practical difficulty with re-employing Applicant into her position as a correctional services officer at C-Max Correctional Centre.

[47] Even though I agree with Applicant’s Counsel’s submission that the arbitrator’s award fell far short of the standard required and that there was, accordingly, no merit in Second Respondent opposing the review application, as a result of the substantial compensation which Applicant will derive from this order, I do not deem it appropriate that costs should follow the result in this matter.

Order:

(i) The dismissal of the Applicant was substantively and procedurally unfair.

(ii) The Applicant is reinstated into her position as a correctional services officer at C-Max Correctional Centre in Pretoria with immediate effect.

(iii) Such reinstatement shall be fully retrospective.

(iv) There is no order as to costs.

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Jackson, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate P H Kirstein
Instructed by:	Grosskopf Attorneys
For the Respondent:	Advocate L Pillay
Instructed by:	State Attorney, Pretoria