



REPUBLIC OF SOUTH AFRICA

Not Reportable

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C406/2009

In the matter between:

DEPARTMENT OF CORRECTIONAL SERVICES

Applicant

and

FRANS MULLER

First Respondent

RETIEF OLIVIER N.O.

Second Respondent

THE GENERAL PUBLIC SECTORAL

BARGAINING COUNCIL

Third Respondent

Heard: 12 May 2011

Delivered: January 2012

Summary: review, formulation of allegation of misconduct, appropriate sanction

JUDGMENT

VAN VOORE AJ

[1] This is an application to review and set aside an arbitration award of the second respondent (the commissioner) in arbitration proceedings under the auspices of the General Public Service Sectoral Bargaining Council (the bargaining council). The

applicant is the Department of Correctional Services (the Department). It also seeks further relief as set out in the notice of motion.

[2] The review application was filed late and the applicant has applied for condonation. For the reasons set out below condonation is granted.

Background

[3] The First Respondent, Frans Muller (Muller) was employed by the Department at the Pollsmoor Correctional Facility as a co-ordinator, health care. A disciplinary hearing was convened into serious allegations of misconduct against Muller. Muller was found guilty of serious misconduct and was dismissed. Muller lodged an internal appeal. Muller's dismissal was confirmed on appeal.

[4] Muller then referred an alleged unfair dismissal dispute to the bargaining council. Following arbitration proceedings, the commissioner issued an arbitration award. In that award, the commissioner writes:

'26. The sanction of dismissal of the Applicant was unfair. The Applicant stated that he wished he wished to be reinstated. The employer argued that should an award be issued it must also be considered that the Applicant's position has been filled as it was a critical position.

27. I therefore order the following which I consider just and equitable:

- (1) The Applicant is reinstated from the date of dismissal on the 18 July 2007.
- (2) The Applicant is to report for duty on 4 May 2009.
- (3) The Respondent is ordered to pay the Applicant's salary he would have earned from the date of dismissal to reinstatement (from 19 July 2007 to 3 May 2009). That the parties quantify and agree to this amount, including taking into account any salary increases that would have accrued [to] the Applicant. If the parties fail to reach agreement on the amount of the outstanding payment, it can be referred back to the arbitrator.
- (4) Payment is to be effected on or before 4 May 2009.

(5) Considering the fact that the Applicant's position has been filled I further order the Respondent to reinstate the Applicant in a similar and reasonably suitable position in terms of the conditions of service that are not less favourable than to the position he previously held.'

[5] This outcome is remarkable and troubling on a number of levels. The undisputed material facts before the commissioner include the following:

- 1.1 Muller was employed by the Department at Pollsmoor Correctional Facility.
- 1.2 Muller has been employed by the Department for a very long time and understands the correctional services environment.
- 1.3 In the ordinary course of his work, Muller interacts with persons in prison at the Pollsmoor Correctional Facility.
- 1.4 Muller's duties include facilitating the provision of health services to persons in prison at the Pollsmoor Correctional Facility.
- 1.5 Muller was in contact with an inmate and with associates of an inmate. Muller facilitated transactions between an inmate and persons outside the correctional services facility. This conduct was quite obviously in breach of the terms and conditions of Muller's employment and the Department's policies and procedures.

[6] In the face of these and other undisputed facts, the commissioner awarded *inter alia*, that Muller be reinstated.

2. The allegation of misconduct against Muller is as follows:

'You are alleged to have committed misconduct in terms of the Department of Correctional Service Disciplinary Code and procedure resolution 1 of 2006 paragraph A, in that on or about 30 November 2006 and on or about 14 February 2007 you received / accepted money from an offender and / or from an offender's representative for your benefit whilst employed in the Department of Correctional services at Pollsmoor Management Area.'

[7] The formulation of the charge left Muller in no doubt that very serious misconduct was alleged against him. Further, Muller could not have been in any doubt that the serious allegations of misconduct against him included an allegation that Muller was

involved in a transaction or dealings in which monies changed hands and that Muller had received this money. It appears from the record of the arbitration proceedings that at some point Muller, through the mouth of his representative, denied that money was received for his 'benefit' and that on that basis he ought not to have been found guilty of the misconduct alleged against him. This contention is alarming to say the least.

[8] There can be no doubt that Muller was charged with facilitating an interaction or transaction involving monies between a prisoner at the Pollsmoor Correctional Facility and persons who are either prisoners or but were associated with or acting on behalf of a prisoner. The attempt to undo a finding of guilt of such serious misconduct on the basis contended for, *i.e.* not for Muller's 'benefit' is at the very least ill-informed and misguided and, in reality, offensive. On any assessment, Muller knew what the nature of the allegations of misconduct against him was and knew what the facts were on which they were based. I draw this conclusion not only from an assessment of the documents but also from contentions by Muller's representative during the arbitration proceedings.

[9] In the arbitration proceedings, there were a number of occasions on which Muller's representative said that Muller was not disputing the charge¹ and that Muller is disputing the 'verdict'. This too is a mealy-mouthed formulation to escape the inescapable. On a proper assessment, the main plank of Muller's case at the arbitration proceedings was that the sanction of dismissal was too harsh.

[10] The arbitration award itself records that Muller contended that dismissal was too harsh a sanction and that he had a clean disciplinary record at the time of his dismissal.²

[11] The arbitration proceedings also include the fact that Muller had made a number of admissions at the disciplinary hearing. An arbitrator is not at liberty to simply ignore such admissions without more. Muller himself made those admissions. Muller said that R530 was for a sheep and that the money was deposited into an account. Muller quite clearly was involved in receiving or accepting moneys. During the arbitration proceedings, Muller himself testified that he had been approached by a prisoner at the 'maximum prison' to collect money allegedly for a sick child. Further, Muller himself

¹ transcript page 13 line 20 is but one example

² arbitration award paragraph 3

testified that he did indeed get involved in the collection of the money and that this included him going to a 'yacht club' during his lunch hour to collect money from the prisoner's lawyer. However, Muller and most improbably, contends that he was motivated by good faith and that his intention was to assist the prisoner and the sick child.

[12] The largely undisputed evidence before the arbitrator was that Muller was improperly and most irregularly involved in financial dealings between a prisoner and those outside the Pollsmoor Correctional Services facility. This is a very serious transgression on Muller's part. In fact, the arbitrator at paragraph 18 of the arbitration award records the following:

'The applicant explained that he did not dispute the incident, but that according to the Act he was engaged in 'pecuniary dealings' with an inmate, which was not the conclusion arrived at by the Chairperson. The Chairperson found that he did not benefit from his actions and was therefore not engaged in corruption, and therefore not guilty of the main charge.'

[13] Muller was engaged in interactions, transactions and or dealings with a prisoner and those outside the correctional services facility. Such conduct is a serious breach of the rules and procedures of the Department. Muller was charged with misconduct and was found guilty and dismissed. It is indeed so that the allegations of misconduct might not have been phrased very clearly. It might even be that the framing of the allegation of misconduct is more than just a bit inelegant. However, at no stage was Muller prejudiced by the manner in which the charges were phrased.³ As noted above, Muller knew precisely on which events the allegations of misconduct were based and knew that his conduct was against the rules and procedures of the Department. In those circumstances, Muller cannot escape the ordinary consequences of so serious a breach of the Department's rules and procedures on the basis that the allegation of misconduct is not a model of clarity.

[14] Muller conceded and in fact admitted that he was involved in transactions including transactions involving money. The only real basis of Muller's challenge is that the sanction of dismissal was too harsh. In this regard Muller seeks to rely on long service of some 32 years, and a clean disciplinary record.

³ *Num & Others v CCMA* (2011) 32 ILJ 956 LC.

[15] An instructive assessment of what section 145 of the LRA requires is to be found in the judgment of Van Niekerk J in *Pam Golding Properties (Pty) Ltd v Erasmus and Others*.⁴ In that matter, Van Niekerk J held that:

‘. In summary, s 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner’s decision) must fall within a band of reasonableness. The Court is also empowered to scrutinize the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review including for example, a material mistake of law, and a party is likely to be prejudiced as a consequence, the commissioner’s decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that the result is nonetheless capable of justification.’

[16] It has long been part of our law that in respect of a certain category of serious misconduct no amount of long service and clean disciplinary record can constitute mitigating factors of such a nature as to avoid dismissal. In my view, this is one of those cases. There was simply no proper basis in the evidentiary material before the commissioner for his finding that the sanction of dismissal was unfair.⁵

[17] Accordingly, the commissioner ignored evidentiary material properly before him and had given too little weight to other material properly before him (the fact that Muller admitted the essential facts on which the allegations of misconduct are based) and further that he applied the incorrect test in our law in determining or assessing the fairness of the sanction of dismissal.

[18] In those circumstances, I make the following order:

- 1) The arbitration award of the second respondent is reviewed and set aside. The matter is remitted back to the third respondent for arbitration before an arbitrator other than the second respondent.
- 2) The first respondent is ordered to pay the applicant’s costs.

⁴ (2010) 31 ILJ 1460 (LC) at para 8.

⁵ arbitration award, paragraph 26

Van Voore AJ

Acting Judge of the Labour Court

APPEARANCES:

For the applicant: Adv R Nyman

Instructed by: The State Attorney

For the respondent: Adv C.A Casner

Instructed by: AP Botes & Associates