



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JA27/2024

In the matter between:

DEPARTMENT OF CORRECTIONAL SERVICES Appellant

and

TD KUTU First Respondent

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

PM NGAKO NO Third Respondent

Heard: 27 February 2025

Delivered: 14 March 2025

Coram: Savage AJP, Nkutha-Nkontwana JA, et Sutherland AJA

JUDGMENT

NKUTHA-NKONTWANA, JA

Introduction

[1] This is an appeal by the Department of Correctional Services (DCS) against the judgment and order of the Labour Court delivered on 18 September 2023, reviewing and setting aside the arbitration award issued by the third respondent (arbitrator) dated 17 November 2020, only in relation to the sanction of dismissal. The arbitrator found the dismissal of the first respondent (Mr Kutu) procedurally and substantively unfair. The Labour Court upheld the arbitrator's finding that Mr Kutu was guilty of insubordination. Yet, the Labour Court set aside the sanction of dismissal and substituted it with an order of reinstatement with a final written warning.

[2] DCS is appealing the Labour Court's order with the leave granted by this Court on 7 May 2024. The record of appeal was filed in July 2024. However, DCS failed to file the notice of appeal. Mr Kutu filed the notice of cross-appeal on 17 October 2024, appealing the Labour Court's finding upholding the verdict of guilty issued by the arbitrator and the reinstatement with a final written warning.

[3] It is convenient to first dispose of the technical impediments facing both parties. DCS failed to file the notice of appeal per Rule 6(1) of the Rules of this Court.¹ Consequently, the cross-appeal is technically late.² There are no condonation applications by either party for failing to comply with the Rules of this Court.

[4] Mr Moeletsi, counsel for DCS, seemed ignorant of the requirement to file a notice of appeal consequent to the successful petition for leave to appeal. On the other hand, Mr Diamond, counsel for Mr Kutu, attributed the delay in filing the notice of cross-appeal to DCS's failure to file the notice of appeal. Both these submissions

¹ Government Notice 4775A of 2024: Rules for the Conduct of Proceedings in the Labour Appeal Court which came into effect on 17 July 2024. Rule 6(1) provides: 'A notice of appeal must be delivered within 15 days of leave being granted'.

² Rule 5 provides: 'Any respondent who wishes to cross-appeal has an automatic right to do so and must deliver a notice of cross-appeal within 15 days of the receipt of the notice of appeal'.

are fallacious and stand to be rejected as the Rules on the period within which to file the notice of appeal and/or notice of cross-appeal are explicit.

[5] The turn of events in this case is regrettable as the legal practitioners' ignorance of the Rules is inexcusable. Still, we were disinclined to strike the matter from the roll because of the inconvenience and limited judicial resources. Both the court and the parties are aware of the issues which have been raised in this appeal and the respondent has had a proper opportunity to provide a full and proper answer to these issues. In these circumstances, it is warranted that the merits of this case be dealt with when, in the interest of justice, non-compliance with the Rules by both parties is condoned in terms of Rule 13(1)(a) of the Rules.³ However, this indulgence is peculiar to this case and it must be recorded that this Court will not lightly tolerate such failings as a matter of course in the future.

Pertinent facts

[6] DCS employed Mr Kutu as a Correctional Officer at Atteridgeville Correctional Centre. He was dismissed on 29 August 2019 following a disciplinary hearing on three charges of misconduct pertaining to failure to carry out lawful instructions. Mr Kutu referred an unfair dismissal dispute to the second respondent, which served before the arbitrator following a failed conciliation.

[7] The arbitrator exculpated Mr Kutu on charges 2 and 3 but found him guilty of charge 1, which reads as follows:

'Charge 1: Disciplinary code and procedure - Annexure A: Point (K) fails to carry out a lawful order or routine instruction without just and reasonable

³ Rule 13 provides:

'Powers of the Judge President

- (1) The Judge President, may on request or application, or on the Judge President's own initiative:
 - (a) extend or reduce any time period prescribed in these rules and may condone non-compliance with these rules;
 - (b) give such directions in matters of practice, procedure and the disposal of any appeal, application or interlocutory matter as the Judge President or the Court may consider just and expedient.
- (2) Any power or authority vesting in the Judge President in terms of these rules may be exercised by a judge or judges designated by the Judge President for that purpose.'

cause. In that, on the 19th of July 2018 at about 11h00 at Atteridgeville Correctional Centre Mr Malungwana (unit manager) gave you a lawful and reasonable instruction to take offender [inmate] Sibusiso Mthimkhulu 218625225 to Kalafong Hospital for medical treatment. You failed to carry out this lawful and reasonable instruction.'

[8] Malungwana testified that, on 19 July 2018, he received a call from the prison clinic requesting an escort to take an inmate to Kalafong hospital. He went to the clinic to enquire about the situation. The nurse advised him that the inmate had a kidney and bladder problem, and as a result, he could not urinate. As he came out of the clinic, he came across Mr Kutu and asked him to assist with escorting the inmate, who had a serious medical problem, to the hospital. Mr Kutu refused to assist, stating that, as it was his birthday, he was going to knock off at noon.

[9] Mr Malungwana testified that he was not convinced it was Mr Kutu's birthday as he had been working with him for a long time. He went to the Human Resources to verify Mr Kutu's birthday. It then transpired that Mr Kutu was dishonest as his birthday is on 22 September. He approached Mr Kutu, who was next to the gate, and confronted him about his dishonesty. Mr Kutu claimed that he was confusing his birthday with that of his wife. Mr Malungwana once more requested Mr Kutu to assist with escorting the inmate to the hospital, but he refused because he was going for lunch.

[10] It is not in dispute that, as a Correctional Officer, Mr Kutu's duties included escorting inmates to court or hospital, escorting inmates to clean offices and accommodation of officials and guarding inmates in field duties. Yet Mr Kutu mounted a bifurcated defence. First, Mr Kutu denied that he was given a reasonable instruction to escort the inmate to the hospital. His evidence was that Mr Malungwana informed him that he was requesting assistance but did not specifically order him to escort the inmate. Hence, he told Mr Malungwana that he was going for lunch.

[11] Second, Mr Kutu testifies that he was a victim of a conspiracy that was orchestrated by Mr Mkwanazi, the head of the Correctional Centre, to dismiss him

because he had changed trade unions (he had left POPCRU for PSA). To support this conspiracy theory, the evidence of Messrs Luke and Papo was led. Mr Luke testified that he was part of the PSA delegation that met with Mr Mkwanzazi on 24 April 2018 to discuss a verbal warning against Mr Kutu following an alleged insubordination with the hope of reaching an amicable solution. However, Mr Mkwanzazi was not indulgent, stating that he was forced to act against Mr Kutu since he left POPCRU and joined PSA.

[12] Mr Papo, on the other hand, testified that Ms Ramokgopa, who was a part of management, advised him that Mr Mkwanzazi issued a directive that Mr Kutu had to be allocated tasks to escort inmates to the hospital or court so that he could refuse and be charged with misconduct. Both Mr Malungwana and Ms Ramokgopa denied that there was a conspiracy to entrap Mr Kutu with instructions to escort inmates. Mr Malungwana was adamant that, on the day in question, an inmate had an emergency medical problem; hence, he had to request another official to escort the inmate to the hospital when Mr Kutu refused to assist.

[13] The arbitrator found it immaterial that Mr Malungani used the word "assistance" instead of "ordered" when he issued the instruction since it was Mr Kutu's duty to escort inmates. Therefore, he found Mr Kutu guilty as charged. As regards the sanction, the arbitrator found the dismissal appropriate, having taken into consideration the seriousness of the inmate's medical condition.

In the Labour Court

[14] Mr Kutu lodged a review application against the award premised on three grounds of review. First, Mr Kutu contended that the arbitrator failed to consider the relevant evidence, particularly, the evidence that showed that there was no instruction. Alternatively, even if there was an instruction, the motivation for the instruction was unreasonable, it was further contended. Second, Mr Kutu contended that the arbitrator made an error of logic concerning the charge by ignoring the casual manner in which the instruction was given; as it gave the impression that he (Mr Kutu) had a discretion to refuse to assist. Lastly, Mr Kutu contended that the

arbitrator's finding on the appropriateness of the sanction of dismissal is supported by evidence.

[15] The Labour Court found that:

'[26] It should be noted, in my view, the applicant's testimony in regard to the incident seems condensed and lacking in certain respects. For example, he did specifically answer the evidence of Mr Malungwana regarding the misrepresentation of his birthday.

[27] Nonetheless, it appears to me largely common cause that the applicant was either asked or requested to assist Mr Malungwana, which request he refused.'

[16] Furthermore, the Labour Court rejected the conspiracy theory, stating the following in paragraph 30 of the judgment:

'I have not found any evidence on the record to support this contention; however, the fact remains that an instruction, which related to his employment, was given to the applicant and he refused to honour it. If there were certain employees of the third respondent who may have conspired to get rid of the applicant, their plan could have been foiled had the applicant elected to comply with a lawful instruction.'

[17] Regarding the sanction, the Labour Court found that the dismissal to be unreasonable, stating the following:

'[33] The applicant has been employed by the third respondent for around 17 years, and it cannot be said that he was a 'problem employee' or that his record is marred with disciplinary incidents.

[34] I do, however, we appreciate the seriousness of the applicant's employment and the requirement that he must follow orders. On Mr Malungwana's version, the inmate that required attention was in a serious condition. It is furthermore conceivable that the safety of all parties employed at the prison would be compromised if everyone followed the applicant's lead and refused to follow instructions.

[35] Notwithstanding, I am not satisfied that the applicant's misconduct justified an immediate dismissal, especially in a system which has restorative justice as one of its tenets.'

In this Court

[18] Mr Kutu persists with his contention that, to the extent that Mr Malungwana's instruction was casual, he was not guilty of insubordination. Mr Diamond submitted that the instruction was, in any event, unreasonable because Mr Kutu was a victim of a conspiracy which targeted him for instructions with a predetermined view of dismissing him in the event of non-compliance. Therefore, the arbitrator committed a reviewable irregularity in failing to appreciate the motive behind the instruction. Equally, the Labour Court erred in upholding the finding of guilty. Instead, the Labour Court ought to have found that Mr Kutu was not guilty and reinstated him without a final written warning.

[19] DCS appeals only the order of the Labour Court setting aside the sanction of dismissal. Mr Moeletsi submitted that the Labour Court erred in treating the matter as an appeal and, therefore, blurring the line between review and appeal.

Discussion

[20] The review test is trite and need not be restated, save to reiterate that in a reasonableness review, the reviewing court is not asked to undertake a *de novo* analysis of the issue or cogitate on what the correct decision would have been.⁴ On the contrary, the enquiry must be directed at the decision en bloc, including the reasons provided and the outcome that was reached by the arbitrator.⁵

⁴ See: *Sidumo and Another v Rustenburg Platinum Mines and Others* [2007] ZACC 22; 2008 (2) SA 24 (CC) at paras 78 - 79; *Booi v Amathole District Municipality and Others* [2021] ZACC 36; (2022) 43 ILJ 91 (CC) (*Booi*) at para 44.

⁵ See: *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC) at paras 18 - 21; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others* [2014] ZALAC 82; (2015) 36 ILJ 1453 (LAC) at para 12; *Mashaba v University of Johannesburg and Others* [2022] ZALAC 116; (2023) 44 ILJ 156 (LAC) at para 19.

[21] Mr Kutu's cross-appeal pays no homage to the above principles as his attack on the award is premised on cherry-picked evidence. If Mr Kutu's assertion that there was a conspiracy to target him for instructions to escort inmates is anything to go by, it must be accepted, at the very least, that Mr Malungwana did instruct him to escort the inmate to the hospital. In any event, Mr Malungwana was adamant that he had twice requested Mr Kutu to assist, but he refused. It was not in dispute that there was an inmate who needed to be escorted to the hospital. Contrary to Mr Diamond's submission, Mr Kutu conceded during cross-examination that escorting inmates to the hospital was part of his duties. Therefore, it is inconceivable that Mr Kutu could have been given an option to refuse to obey the instruction, which was reasonable and unlawful.

[22] As well, Mr Diamond's submission that the arbitrator ignored the uncontested evidence that Mr Kutu was a victim of a conspiracy to dismiss him is not supported by evidence. Ms Ramokgopa denied that she told Mr Papo about the conspiracy to dismiss Mr Kutu. While Mr Luke conceded during cross-examination that Mr Kutu was not victimised because of his union official duties, contrary to Mr Kutu's evidence.

[23] I therefore agree with the Labour Court that, even if there was a conspiracy to dismiss Mr Kutu, which, in his own version, he was aware of, it could have been averted had he obeyed the reasonable and lawful instruction to escort the inmate to the hospital. The adage "*obey now and grieve later*" (which requires employees to obey lawful and reasonable instructions by superiors and to challenge any indiscretions *post factum*) still holds true today. This is even more fundamental in law enforcement institutions, which DCS is part of, where obedience is imperative.

[24] It follows that the arbitrator's finding that Mr Kutu was guilty of charge 1 is reasonable and the Labour Court was correct in refusing to interfere with it.

[25] When it comes to the appropriateness of sanction of dismissal, in *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*,⁶ this Court, likewise confronted with a case of insubordination, stated that “... failure of an employee to comply with a reasonable and lawful instruction of an employer or an employee’s challenge to, or defiance of the authority of the employer may justify a dismissal, provided that it is wilful (deliberate) and serious”.

[26] The authority to decide on the severity of misconduct in the circumstances resides with the arbitrator.⁷ To the extent that the exercise of that authority implicates a value judgment, the arbitrator’s predilection must prevail unless it is shown to fall outside the realm of reasonable outcomes.⁸

[27] In the present instance, the Labour Court appreciated the seriousness of Mr Kutu’s defiance, not only in relation to the inmate who needed emergency medical assistance, but also the implication to the safety of other correctional officers should insubordination be tolerated. Yet, it erred in finding that Mr Kutu was not “a *problem employee*” or “*that his record is marred with disciplinary incidents*”. The evidence on record shows that Mr Kutu had three existing disciplinary warnings. Mr Momeki, the chairperson of the disciplinary hearing, testified that the three disciplinary warnings (verbal, written and final written) against Mr Kutu pertained to insubordination. This evidence was not seriously challenged.

[28] Instead, Mr Kutu denied any knowledge of the warnings. This assertion is obviously inconsistent with Mr Luke’s evidence that the reason PSA officials had a meeting with Mr Makwanazi on 24 April 2018 was to discuss the verbal warning against Mr Kutu, and whilst they were still in that meeting, another disciplinary warning was brought to their attention. It is also telling that the disciplinary warnings were never challenged, a fact conceded by Mr Kutu.

⁶ [2014] ZALAC 81; (2015) 36 ILJ 1511 (LAC) at paras 22 and 33.

⁷ See: *TMT Services and Supplies (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2018] ZALAC 36; (2019) 40 ILJ 150 (LAC) (*TMT Services*) at para 21.

⁸ *Id* at paras 21, 23 – 25. See also *Quest Flexible Staffing Solutions (Pty) Ltd (a division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* [2014] ZALAC 136; (2015) 36 ILJ 968 (LAC) at paras 18 – 19.

[29] It follows that the Labour Court paid lip-service to the review test and blurred the line between review and appeal. It failed to take cognisance of the fact that the threshold “*is higher than simply could a reasonable arbitrator have imposed a lesser sanction; rather the question is could no reasonable arbitrator have concluded dismissal was appropriate*”⁹. If regard is had to the entirety of the facts and circumstances of this case, the arbitrator’s finding on the sanction of dismissal is reasonable and accordingly unassailable.

Conclusion

[30] In all the circumstances, the appeal by DCS must succeed, and the order of the Labour Court pertaining to the sanction falls to be set aside. The cross-appeal by Mr Kutu, on the other hand, must meet its demise.

Costs

[31] Having considered the requirements of law and equity, I am disinclined to award costs.

[32] In the result, the following order is made:

Order

1. The appeal is upheld, and the order of the Labour Court is set aside and substituted with the order that the review application is dismissed.
2. The cross-appeal is dismissed.
3. There is no order as to costs.

Nkutha-Nkontwana JA
Savage AJP and Sutherland AJA concur.

Appearances:

⁹ *TMT Services supra* fn 7 at para 25.

For the Appellant: Adv BT Moeletsi
Instructed by: Office of the State Attorney Pretoria

For the Respondent: Adv AC Diamond
Instructed by: JW Wessels & Partners Inc

LABOUR APPEAL COURT