



GENERAL PUBLIC SERVICE
SECTOR BARGAINING COUNCIL



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**IN THE GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL
HELD AT
CNR MELLE & JORISSON STREETS, BRAAMFONTEIN, JOHANNESBURG**

Commissioner : Adv. Itumeleng Kgatla

Case No : GPBC1008/2021

Date of Award : 01 December 2022

In the dispute between:

PSA obo KA MOKHUTLE

(Union/Applicant)

And

DEPARTMENT OF CORRECTIONAL SERVICES

(Respondent)

Applicant's representative : Mr Sam Mbatha (PSA)

Respondent's representative : Mr Pheane Machitje (Deputy Director, Labour Relations)

ARBITRATION AWARD

PARTICULARS OF THE PROCEEDINGS AND REPRESENTATION:

- [1] The above-mentioned matter was referred to **GPSSBC** for arbitration in terms of section 186(2) (b) of the Labour Relations Act 66 of 1995 (LRA), as amended. The arbitration was set down before me on several days at Cnr Melle and Jorisson Streets, Braamfontein, Johannesburg.
- [2] The Applicant appeared and was represented by **Mr Sam Mbatha**, a union official from the **PSA**. The Respondent was represented by **Mr Pheane Machitje**, an employee of the Respondent in his capacity as Deputy Director, Labour Relations.
- [3] The proceedings into the arbitration were concluded on the 31st of October 2022. The Respondent submitted their closing arguments on the 14th of November 2022. The Applicant's closing arguments were not received by the Commissioner despite an undertaking having been made by both parties to submit same on the 08th of November 2022.
- [4] The proceedings were conducted in English without the need of a language interpreter. Digital and manual recordings were made during the process. Both parties were afforded the opportunity to present *viva voce* evidence under oath, in chief and in re-examination and to cross examine opposing testimonies. Written closing arguments were presented and considered.
- [5] In terms of Section 138(7) of the LRA, the Commissioner is required to issue a signed arbitration award with brief reasons. It is for this reason that only salient points will be referred to in this award even though all evidence and submissions were considered.

POINT IN LIMINE

- [6] None

ISSUES TO BE DECIDED:

- [7] I am required to make a determination on whether or not the conduct of the Respondent in subjecting the Applicant to a disciplinary hearing and meting out a sanction of Three (3) months punitive suspension coupled with a final written warning, amounts to an act of unfair labour practice in relation to disciplinary action short of dismissal as envisaged in terms of Section 186(2) (b) of the LRA.
- [8] Should I find that an act of unfair labour practice was committed by the Respondent against the Applicant, I must determine an appropriate remedy in terms of Section 193(1) of the LRA.

COMMON CAUSE ISSUES

- [9] The Applicant was appointed by the Respondent with effect from the 14th of February 1986 and is currently on retirement since October 2021.
- [10] The Applicant was still an employee of the Respondent at the time of the dispute and was at the salary of **R33646-19** per month.

ISSUES IN DISPUTE

- [11] The Applicant contends that the disciplinary sanction of Three (3) months punitive suspension was harsh and therefore amounted to an act of unfair labour practice against him by the employer on the basis that other employees charged of offences arising from the same facts were given lesser sanctions. The Applicant contends further that he was not supposed to have been found guilty in the first place.
- [12] In terms of the relief sought, the Applicant is praying for the setting aside of the suspension and that, consequently, he be paid the Three (3) salaries withheld by the Respondent for the subsistence of his suspension. The Respondent has recorded its prayer that the Applicant's application be dismissed.

SUMMARY OF EVIDENCE

APPLICANT'S EVIDENCE

- [13] The Applicant was sworn in and testified as the only witness in support of his case and his evidence is summarised as follows:
- [14] He was appointed in terms of the policies of the Respondent and was based at the Johannesburg Management Area, mainly responsible for the transportation of inmates.
- [15] He was charged together with **Mr Frazenberg**, **Ms Mbuli** and **Mr Hatang** but the trio were charged for erroneously releasing an inmate from lawful custody.
- [16] He testified that an inmate escaped from the Randburg Community Corrections facility after he discovered that the Respondent has picked up that he does not have a positive address.
- [17] He testified that on the day in question, he had driven inmates to the Chris Hani Baragwanath hospital when he received a call from his Manager, **Mr Chauke** requesting him to come and assist with the transportation to Community Corrections facilities, one in Johannesburg and the other in Randburg.
- [18] He raised the issue of lack of escort with the Manager (**Mr Chauke**) who assured him that the reaction unit from the Correctional Service (EST) will be arranged to back him up.
- [19] He transported Six (6) inmates in total, four (4) were destined and successfully transported and admitted at the Johannesburg Community Corrections and two (2) were destined for the Randburg Community Corrections, one was successfully admitted while the other one escaped from the facility upon realising that his address is not positive during an interview with staff at Randburg.
- [20] He informed **Mr Frazenburg** over the phone about the negative address of one of the inmates and was later phoned by **Mr Chauke** that the inmate must be transported back to the correctional facility. He testified further that when he went back into the office where the inmates were being interviewed, he found that one of the inmates has escaped.
- [21] He stated that it was not his responsibility to escort the inmates but to drive them. He stated further that **Mr Billy Hatang** is a Captain, senior to him and is the one responsible for the overseeing of the release paper work of the inmates before same can be sent to the reception where the final checking is done by **Ms Mbuli** for the inmates to be released.
- [22] He testified about the trip authorisation sheet as per page 8 of bundle "A" dated 07 November 2019, co-signed by **Mr Chauke** and **Mr R Maluleke** wherein he was designated as a driver and escort.

- [23] He was not involved in the paper work and his only responsibility was to drive. The inmate would not have escaped had he not been released erroneously by the people responsible for paper work. He drove without escort merely because he was following lawful instruction from his Manager, **Mr Chauke**.
- [24] He testified under cross examination that he proceeded to drive based on a believe that escort will catch up with him along the way or would find him at the Community Correction.
- [25] He had 33 years of experience at the date of the inmate's escape under his watch. He stated further that the inmates were offloaded by himself from the vehicle with the assistance of the staff from Community Corrections.
- [26] He had gone out of the office where the interview was taking place to make a call to the prison for advice or directive and had left the inmate in the care of the Community Corrections staff as the call was necessary after having realised that the inmate had a negative address.
- [27] He stated that he merely acknowledged the inmates and their valuables when he signed the trip sheet but not necessarily that he is going to be an escort.

RESPONDENT'S EVIDENCE

- [28] The Respondent called three (3) witnesses and their evidence is summarised as follows:

Witness 1-Mr Tivane Makhasana:

- [29] He is the Deputy Director and Head of the Centre at the Zonderwater Management Area and was the Chairperson of the disciplinary hearing at the instance of the Regional Commissioner wherein the Applicant was found guilty and sanctioned to three (3) months punitive suspension and a final written warning.
- [30] The Applicant had a clean disciplinary record, married with three (3) children and such mitigating factors were taken into consideration during sanctioning, and that the sanction was an alternative to dismissal in the circumstances.
- [31] The charges of the four transgressors were not the same even though they emanated from the same chain of events. The Applicant had the duty to monitor the offender who escaped while in his care.
- [32] He testified under cross-examination that the Applicant was working as both driver and escort as per the paperwork signed.
- [33] The Applicant was sanctioned to final written warning for charge 1 and three (3) months punitive suspension for charge 2 as per page 82 of bundle "R".

Witness 2-Mr Mahlalela Phillip Chauke

- [34] He is the Assistant Director and Divisional Head responsible for administration of the Centre Management Administration (CMA) with 26 years of service as an employee of the Department of Correctional Services.
- [35] He was on duty on the 07th of November 2019 when the Applicant came to him with a trip sheet for authorisation. He was informed by the Applicant that everything was sorted including escort and only needed his signature on the trip sheet.

- [36] He later on the same date got a call that one of the inmates transported by the Applicant had escaped in Randburg Community Correction and that a case was opened with the South African Police Service (SAPS) at the Randburg police station.
- [37] He was not aware about the inmates and their imminent releases, he only found out from the Applicant when he was requesting for his signature that the inmates are already at the reception, and further that the Applicant had informed him that all was in order.
- [38] He testified about the **G348** form on page 77 of bundle “**R**” and that any person who signs as the escort on the document takes responsibility of escorting the inmates as per paragraph C of the document.
- [39] He stated that a signed and stamped copy of the **G348** form is sufficient proof that the inmates have been successfully transferred and admitted by the receiver. He stated further that the entry on the document as per page 78 of bundle “**R**” indicates that the inmate was not received or transferred and therefore the escort is responsible for the non-receipt of the inmate.
- [40] He testified under cross-examination that one inmate must be escorted by at least two (2) officials. He stated further that the six (6) parolees were supposed to be escorted by one (1) official and the driver.
- [41] He was not involved in the overseeing of the documents as same was done by his superiors. He stated that he has got the responsibility to verify issues relating to escort with **Ms Mbuli** but did not do so.
- [42] He is disputing the Applicant's version that he called him to come from the hospital to come and assist with the transportation of the inmates to Community Correction. He stated further that escort can be arranged either by him or **Ms Mbuli**.
- [43] He stated that under normal circumstances it is not necessary to call EST backup when transporting short-term parolees to the Johannesburg and or Randburg Community Corrections.

Witness 3-Mr Thabiso Ndlhovu

- [44] He is an employee of the Respondent in the position of Assistant Director and is attached to the investigation Unit based at the Head Office (Pretoria) since 6 March 2006. He was appointed on this specific matter by the Area Coordinator (Johannesburg) to deal with the investigation to do with the escape of an offender as per page 57 of bundle “**R**”.
- [45] He made a recommendation in his report that the Applicant be charged with negligence and that he be subjected to a disciplinary hearing. He stated further that he interviewed all the relevant stakeholders based at Medium B Correctional Centre in Johannesburg, including the Applicant and the offender who was transported together with the escapee during the investigation as per para 3 of bundle “**R**”:
- [46] He testified that the offender escort process includes signing for the offender and the equipment such as firearm. He stated further that dangerous offenders are escorted by at least two (2) officials per offender.
- [47] He stated that the offender who in this specific case was a short-term and therefore less dangerous. He stated further that the offender becomes a parolee once he or she is accepted and admitted by then relevant community corrections.

[48] He testified under cross-examination that an inmate must be escorted to the Community Correction and that such an escort is compulsory. He stated that **Mr Chauke** was the Applicant's Supervisor on the day in question and had the responsibility to appoint escort for the offenders to be transported.

[49] He stated that it is possible that six (6) offenders can be transported and escorted by one official who juxtaposes as both driver and escort depending on the classification of the transported parolee.

EVALUATION OF EVIDENCE, ARGUMENT AND FINDINGS

[50] The statutory framework for the determination of this dispute is provided in terms of Section 186(2) (b) of the LRA, which defines unfair labour practice as follows:

"any unfair act or omission that arises between an employer and an employee involving unfair conduct of the employer relating to the unfair suspension of an employee or any other unfair disciplinary action short of dismissal.."

[51] Briefly, I am required to determine whether or not, the decision of the Respondent to issue a final written warning and a three (3) months punitive suspension against the Applicant following a disciplinary hearing was substantively fair.

[52] Essentially, I must make a determination on whether or not the conduct of the Respondent in the circumstances was justified, and if not, I must determine whether or not such conduct amounts to an act of unfair labour practice against the Applicant as envisaged in Section 186(2)(b) of the LRA.

[53] It is common cause that the Applicant had, at the time of the incident, served as an employee of the Respondent for a period of 33 years and had signed the **G348** form as both the driver and escort of the total number of six (6) would be parolees to two different destinations, being Johannesburg and Randburg Community Corrections.

[54] It is further common cause that four (4) of the offenders were successfully transferred and admitted at the Johannesburg Central Community Corrections, and one (1) of the two (2) who were destined for Randburg Community Corrections escaped before admission to the facility. It follows in the circumstances that the escapee was still in the care and watch of the Applicant.

[55] Central to the Applicant's evidence and consequently argument, is that, the inmate who escaped was wrongfully released while he was not eligible for same, the escapee would not have had a chance to escape had he not been released erroneously by the responsible officials, which officials, according to the Applicant were let off the hook lightly while he was punished harshly.

[56] The Applicant's argument is based on the well-established principle of *condictio sine qua non* which is normally used to determine a link between the results and the conduct of the accused person taking into account all the circumstances irrespective of whether or not they are relevant. Given the detailed and long chain involved in applying this principle, it has been replaced by the *legal causation* principle which is confined to the closest link between the conduct of the accused and the result.

[57] It is my view that, if the Applicant's argument was to be accepted, it would mean that he would be liable to be charged together with the officials who have erroneously released the escaped offender even in the

circumstances where the offender did not escape merely because the disciplinary offence would have emanated from the same chain of events.

- [58] In the case of **NUM and Another v Amcoal Colliery [2000] 8 BLLR 869 (LAC)**, the Court opined that: *"The parity principle was designed to prevent unjustified selective punishment or dismissal and to ensure that like cases are treated alike. It is not intended to force an employer to mete out the same punishment to employees with different personal circumstances just because they are guilty of the same offence"*
- [59] I find that this line of argument cannot be accepted as he (the Applicant) cannot be absolved from his responsibility of transporting and escorting the offenders merely because they were released by error, more so that it is common cause that the other officials were not facing the same charges as the Applicant.
- [60] It cannot be disputed that it was the responsibility of **Mr. Chauke**, the Applicant's Manager on the day in question to arrange escort for the Applicant's trip, which he (**Mr. Chauke**) did not carry out as expected. However, it is my conclusion that the Applicant cannot divorce himself from his signature on the **G348** form in terms of the *caveat subscriptor* principle, wherein he signed the forms as both the driver and escort for the six (6) would be parolees.
- [61] The principle is interpreted to mean that, once a person signs a contractual document, the law accepts that one has read the contents of the document and consents to be bound by the terms thereof, unless otherwise proven that the signing was influenced by other external factors such as misrepresentation, duress, undue influence or coercion.
- [62] Apart from the submission that he was called by **Mr. Chauke** to come and assist with the transportation of the inmates, the Applicant has not been able to demonstrate that he was put in an untenable situation by his Manager by giving him an unlawful and unreasonable instruction.
- [63] I find that the Applicant would not have been without recourse in the circumstances, he could have easily refused the instruction if he viewed it as unreasonable and would have had the opportunity to ventilate the matter at a proper forum if he were to be charged with either insubordination or insolence.
- [64] After having considered the totality of the evidence and the argument in the circumstances, I find that the blame in relation to the escape of the offender should fall squarely on the shoulders of the Applicant.
- [65] In the case of **Nampak Corrugated Wadeville v Khosa 1999 20 ILJ 578 (LAC)**, the Court said the following with regard to the fairness of dismissal as a sanction. *"The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A Court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the Court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable"*
- [66] With regard to the sanction(s) of final written warning and three (3) months punitive suspension, I find that the Respondent was considerate and excessively generous towards the Applicant in the circumstances.

[67] I see no reason why the Respondent's decision should be interfered with, alternatively why the Applicant's prayers should be granted.

[68] In the premises, I come to the following conclusion:

AWARD

[69] The Applicant's application is dismissed.

[70] I make no order as to costs.

Signature: 