IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH

CASE NO: PA 3/10

In the matter between:

VUYANI KENNETH ZONO	Appellant
and	
JONATHAN GRUSS N.O.	First Respondent
GENERAL PUBLIC SERVICES SECTORAL BARGAINING COUNCIL	Second Respondent
NATIONAL COMMISSIONER OF CORRECTIONAL SERVICES N.O.	Third Respondent
REGIONAL HEAD: CORPORATE SERVICES, DEPARTMENT OF CORRECTIONAL SERVICES N.O.	Fourth Respondent

Date of hearing: 09 March 2011

Date of Judgment: **29 June 2011**

JUDGMENT

LANDMAN AJA

LANDMAN AJA

Introduction

[1] The appellant, V K Zono, appeals with the leave of the Labour Court (Bhoola AJ, as she then was) against the whole of her judgment handed down on 8 July 2009.

[2] The appellant was charged before a disciplinary committee of the Department of Correctional Service on five charges of misconduct. He was found guilty on the first four charges against him and dismissed.

[3] A dispute concerning the dismissal was referred to arbitration after conciliation had failed. The arbitrator, the first respondent, upheld the dismissal. The appellant launched a review in the Labour Court but this was dismissed with costs hence this appeal.

The facts

[4] In April 2005, the appellant was stationed at Sada, near Queenstown, as part of the Department's belated attempts to give effect to an earlier arbitration award in which it was ordered to promote him. His home at the time was in Port Elizabeth.

[5] The appellant was scheduled to attend an official course in Krugersdorp from 11 to 15 April 2005. He decided to travel to the venue from Port Elizabeth with a colleague

in his colleague's vehicle. However, the colleague announced, at the last moment, that he had decided not to attend the course.

[6] The appellant needed transport so he arranged for an official vehicle to be driven from Sada to Port Elizabeth, so that he could drive to Krugersdorp. The vehicle was duly delivered. The appellant drove to Krugersdorp and attended the course.

[7] The appellant returned to Port Elizabeth and delivered the car to the State Garage there. The appellant fell ill and consulted a doctor who booked him off duty. The appellant alleges that he informed Mr. Kiva (Kiva), his supervisor, by short message service that he was unable to report for duty. Kiva then telephoned the appellant and instructed him to report for duty on 18 April 2005 because an audit was to be conducted. The appellant informed Kiva that he was ill. The appellant's failure to immediately transmit a medical certificate gave rise to charge 3.

[8] Kiva later instructed the appellant to return the vehicle immediately. The appellant was unable to do so because it was not parked at his home. The appellant's failure to do so gave rise to charge 2.

[9] On 9 May, the appellant faxed a medical certificate to Kiva. The appellant wrote certain remarks on the cover sheet. This gave rise to charge 4.

[10] The appellant was charged and found guilty on the following charges (one to four):

- Misuse of vehicle in that the appellant used the Department's vehicle to travel from Sada to Krugersdorp via Port Elizabeth without authorization;
- Gross insubordination in that the appellant failed to heed a lawful instruction from his supervisor to return the Department's vehicle to Sada on 18 April 2005.
- Absence without leave, in that the appellant failed to report for duty at Sada for the period 18 April 2005 to 6 May 2005.
- Addressing indecent and derogatory remarks to his supervisor, Mr Kiva.

The appeal

Right to discipline barred by lapse of time?

[11] Mr. Grogan did not argue this point but he did not abandon it and asserted that he stood by it. In essence the appellant relies on clause 7.4 of the Departmental Code. Clause 7.4 of the Code reads:

> "The formal disciplinary hearing should be finalized within a period of 30 days from the date of finalization of the

> investigation. If the time frame cannot be met, the parties involved must be informed accordingly with reasons for the delay. If the employer, without good reason, fails to institute disciplinary proceedings within a period of 3 months after completion of the investigation, disciplinary actions shall fall away."

[12] The arbitrator considered the provisions of the Code and concluded that these were in the nature of guidelines. Mr. Grogan submits that this is not so and that the provisions of the Code, a collective agreement, are binding and imperative. I do not need to resolve this issue. It is clear to me that on the facts and on a proper interpretation of the clause that the Department was not barred by the Code from disciplining the appellant.

[13] The alleged conduct of the appellant was subjected to two investigations on different aspects of the factual matrix. The second investigation was concluded on 31 August 2005. The appellant was advised, in writing, of the charges on 8 November 2005. The hearing was due to commence on 22 November 2005 but was postponed by the initiator because a neutral chairperson was not available and appellant raised procedural points. The appellant was advised of the reason for the postponement. Some of the subsequent postponements were at the appellant's requests. The hearing terminated on 7 June 2006 with the dismissal of the appellant.

[14] I am satisfied that the arbitrator's decision on this aspect was reasonable. The disciplinary inquiry was instituted timeously and the disciplinary hearing although protracted, was in the circumstances, finalized as expeditiously as the circumstances allowed. The appellant did not, at any time, languish under the impression that the Department would not discipline him.

The course of the appeal

[15] In the course of arguing the appeal, counsel, at the request of the Court, and on the assumption that only charge 4 (the derogatory remarks) was left standing, concentrated on whether the arbitrator could reasonably find that dismissal was a fair sanction. But, even though, Mr. Notshe SC (with him Mr. Gqamana) counsel for the Department, was constrained to admit that he had certain difficulties with the other charges, he did not concede that the arbitrator's findings, in this respect, were flawed. The result is that it is necessary to briefly deal with charges 1, 2 and 3; mainly on the basis of the submissions contained in the heads of argument.

Charge 1: Misuse of the vehicle

[16] This charge, as it is formulated, does not concern the misuse of the vehicle in the ordinary sense of the term. The appellant required a vehicle for an official purpose. He

was allocated a vehicle and used it to attend a course at Krugersdorp. The nub of the complaint is that the use was not authorized by Kiva, the appellant's supervisor.

[17] It is common cause that Kiva was not requested to and therefore did not authorize the use of the vehicle. However, the appellant was granted permission by Messrs Thanyane and Manxaba to use the vehicle. There is a minor complaint that the appellant did not insert his own name on the form but this is neither here nor there.

[18] Mr. Grogan submitted that:

- The court *a quo* observed that the appellant had not contested the arbitrator's finding on this charge. The appellant's case, however, was that the trip was authorized, albeit by officials other than Kiva, who was not available at the time.
- At worst for the appellant he followed the incorrect procedure by not obtaining authorization from Kiva personally. He cannot be held accountable because Kiva was unavailable.

[19] The respondent did not contradict the allegation that Kiva was not available. There is clearly no merit in this charge. There was no unauthorized use of the vehicle and certainly there was no misuse of the vehicle.

Charge 2: Failure to return vehicle

[20] Kiva testified that, when he conducted an inspection of his station's vehicles, he noticed that vehicle with registration number DGR431 was missing. He was informed that the appellant was in possession of the vehicle. Kiva telephonically contacted the appellant and instructed him to return the vehicle. The appellant agreed to bring the vehicle back on the same day. The appellant failed to do so. Eventually Kiva instructed the transport controller to drive to Port Elizabeth and collect the vehicle from the appellant. The appellant admits that he was instructed by Kiva to return the vehicle. The appellant's case was that he was unable to return the vehicle because he was ill on that day. Mr. Notshe SC submitted that as the appellant made no arrangement to return the vehicle to Sada, the arbitrator was entitled to find him guilty on this charge.

[21] The medical certificate and the Doctor's finding that the appellant was ill, is not disputed. Nor is it disputed that the Doctor booked the appellant off duty. It is on this basis that Mr. Grogan submitted that:

- Once it is accepted, that the appellant had been off duty at that stage, it is preposterous to find that he was guilty of insubordination by not carrying out a work related instruction during this period.
- Still less can it be found, as was found by the court below, that the appellant's conduct was defiant and rebellious.

[22] The appellant could have been more co-operative, depending on the nature of his illness. But this was not properly explored so it cannot be said that he was obliged to arrange for the return of the vehicle while he was off duty on sick leave. Clearly there was also no merit to this charge.

Charge 3: Absence from work

[23] It is common cause that the appellant was absent from work for the period 18 April 2005 until 6 May 2005.

[24] The evidence of Mr. Dingalibala was that the appellant was not on duty from 18 to 20 April 2005 and only faxed the sick certificate for that period on 9 May 2005. The appellant was informed that he was required to submit a Z.1 Form (the leave form) together with the certificate. The appellant was directed to comply with the Department's sick leave policy.

[25] Kiva alleged that he was not aware of the appellant's whereabouts. He says the appellant did not contact him while he was off ill. Clause 1.1 of the Department's disciplinary code provides that the following constitutes misconduct:

> "Absence from work during official working hours without prior permission or a valid reason or staying away for longer than the leave granted. Seven (7) or more days."

[26] Mr. Grogan submitted that the appellant's absence does not fall within the scope of this provision, properly construed. It was not the Department's case that the appellant was malingering. An employee cannot possibly obtain prior permission to stay away from work due to illness. The appellant cannot be said to have "stayed away for longer than the leave granted" because no leave was ever granted. Had the Department wished to discipline the appellant for not proving that he was ill for the entire period of his absence, he should have been specifically charged with that offence.

[27] The Departmental rules do not require employees, who fall ill, to submit medical certificates immediately. Even if this was a requirement the appellant was unable to do so because he did not have a fax machine at his home. Medical certificates for the period concerned were ultimately submitted. Similarly there was no merit to this charge.

Charge 4: Making derogatory remarks

[28] It is common cause that the appellant wrote the following on a letter to Mr. Kiva:

> "Area Commissioner SADS
> Dear Doctor Kiva (Hayi Suka, a fong king doctor, gossip doctor or a witch doctor, I suppose).

> Now seriously say, please recognize the sick note of this real doctor.
> He personally studied and forwarded his own for evaluation to be awarded a qualification.
> His qualifications were awarded by an old well established and recognized tertiary institution.
> It was not taking other persons work or study for a certificate from a fly by night (Mavuka Engceni) institution (plastic doctor)
> Kind regards."

[29] This letter containing these remarks was faxed by the appellant to Kiva together with a covering page stating the following:

> "To Mr. Balekile
> Weghardloop
> Kiiiva!
> With love."

[30] Mr. Notshe submitted that clearly these are indecent and derogatory remarks for a senior official, like the appellant, to address to his supervisor. With this overwhelming evidence, the arbitrator found that the appellant was also guilty of this charges. He pointed out that the appellant did not apologize for making these remarks even though he had ample opportunity to do so.

[31] Mr. Grogan attempted to take the sting out of these remarks in this way. He submitted that:

- At worst for the appellant, therefore, he wrote what may be described as an ill advised comment ("fong kong doctor, etc").
- The appellant explained that this remark was merely a retort to a conversation in which Kiva had questioned the validity of his medical certificates.
- Even if the remarks were intemperate, they cannot when seen in context be seen as "derogatory" (as the charges states), still less as an attempt to "challenge the authority of his supervisor" as the arbitrator found (and which the charge does not allege). Properly speaking, the words were nothing more than a jest, even if Kiva was not amused.

[32] Mr. Grogan submitted that in any event, since count 4 is the only charge on which the applicant could conceivably have been found guilty, the arbitrator grossly misdirected himself by finding that misdemeanour alone was sufficient to warrant dismissal.

[33] The appellant was charged with contravening the offence set out in part B item 5.13 namely "Indecent gestures and/or signs made to any other person." *Prima facie*, when read in the context of the other items, this offence relates to non-verbal communications which are indecent. The appellant communicated in a derogatory

fashion with Kiva and belittled him. But the remarks were also described by the Department's witnesses as silly. One may also add that they were puerile. The appellant's verbal communication to Kiva fits more readily with the charge in item 5.11: "Use of improper language to any other person". But here it seems that oral, verbal communication, was intended here but it could also cover written communication. The applicable charge, in my view, would be item 5.12: "Humiliating accusations directed at any other person."

[34] The court *a quo* found that the arbitrator's finding on the fourth charge was reasonable and endorses his finding that "the remarks were made in order to challenge the authority of his supervisor." It is true that Kiva thought so but this was not the essence of the charge nor was it contemplated in part B of item 5.

[35] The point was not taken that the appellant's communication did not constitute the offence set out in item 5.13. The appellant's remarks cannot be justified. However, the commissioner has unreasonably concluded that the remarks, which were in a sense aimed at belittling Kiva, were intended to undermine him and the Department's hierarchy. Indeed because the arbitrator took this view, he also read charges 1, 2 and 3 in this light and went so far as to find that the appellant's failure to attend the conclusion of the disciplinary hearing was further proof of insubordination. This approach overlooks

entirely the fact that the Department, which has an interest in maintaining rank and good order, framed the charge in such a way that it fell into a category B offence. This, having regard to the concept of a category B charge in the Code, means that the Department did not believe that the conduct of the appellant, as reprehensible as it was, was sufficient to warrant dismissal. The arbitrator misdirected himself by failing to examine the nature of the offence and thereby giving the contravention of item 5.13 more weight than it should carry and as more serious than the Department intended.

[36] The offence relates to an interpersonal communication between a superior and subordinate; but one outside the public eye. An aggravating factor is the appellant's sustained justification of the communication and his failure to apologize. The contravention does not warrant the dismissal of the appellant. But it does not mean that appellant's conduct should not be sanctioned.

[37] The finding of the commissioner, as it is based on a grave misdirection, cannot stand and renders his award unreasonable which must accordingly be reviewed and set aside.

Conclusion

[38] In the result the appeal should be upheld and the order of the court *a quo* replaced with an order reviewing and setting the award aside and replacing it with an order reinstating the appellant. Having regard to the obnoxious remarks made about and conveyed to Kiva, I would not be inclined to reinstate the appellant from the date of his dismissal. By dating his reinstatement to the date the award was handed down it will bring home to him the consequences of belittling one's superior.

Costs

[39] Costs should follow the result. But the appellant has produced a record of which roughly a half to three quarters was entirely unnecessary. The problem is not a new one. I can do no better than to endorse the sentiments in *Municipal Manager: Qaukeni v F V General Trading* [1]

> "There is, however, another issue relating to costs that needs to be considered. The record in this appeal is replete with unnecessary documents, and contains both the heads of argument filed during previous proceedings as well as a transcription of the lengthy argument of counsel in the court below. None of this ought to have been included in the record

[1] 2010 (1) SA 356 (SCA) at para 30.

> and the fact that it has, has resulted in at least half of the record being wholly unnecessary. This not only inflates the high costs of litigation but also leads to a complete waste of valuable judicial time and inconvenience to members of this court."

[40] That, however, is not the end of the matter. The index of the appeal record was woefully deficient. It is an index in name only which in substance comes nowhere near an index as we know it. The appellant made no effort in compiling the so called index to describe the documents being indexed. I illustrate the issue by referring to volume three of the record. That index simply states "Volume 3 of 17: Filing Notice and bundle of Applicant's documents -83-191." The same is done with all other volumes. The consequence of this is that we were left to painstakingly search for documents as we did not have the benefit of a proper index. This kind of conduct is unacceptable and deserves appropriate censure by this court.

[41] It appears justified therefore to order that the appellant be allowed to recover only 40% of the preparation and perusal of the record. The taxing master's attention is directed to this aspect. Furthermore the appellant's attorneys are not entitled to recover in excess of the costs of preparing and perusing the record from the appellant.

[42] In the result:

1. The appeal is upheld with costs.
2. The order of the court *a quo* is replaced with an order reviewing and setting the award aside with costs and replacing it with an order reinstating the appellant in his employment with the Department of Correctional Services as from 31 October 2007 being the date of the award.
3. The taxing master's attention is directed to the observations in paragraphs 39 to 41 of this judgment.

LANDMAN AJA

Mlambo JP and Mailua AJA concur in the judgment of Landman AJA

Counsel for the appellant:	Adv J Grogan
Instructed by:	Messrs Wheedon Rushmere & Cole Attorneys
Counsel for the respondent:	Adv S Notshe SC with Adv N Gqamana

LANDMAN AJA

Instructed by: The State Attorney