Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1190/13

In the matter between:

THEMBA EPHRAIM RADEBE	**First Applicant**
and	
GENERAL PUBLIC SERVICES SECTORAL BARGAINING COUNCIL	**First Respondent**
MARTIN SAMBO (*N.O.*)	**Second Respondent**
DEPARTMENT OF HOME AFFAIRS	**Third Respondent**

Heard: 12 November 2015

Delivered: 13 November 2015

Summary: (Review-Procedure for verifying immigrant status – sufficient basis for concluding requirements of Immigration Act not met before releasing detained immigrants)

REASONS FOR JUDGMENT

LABOUR COURT

LAGRANGE J

Introduction

[1] The order in this matter was handed down on 13 November 2015. Brief reasons for dismissing the review application are set out below.

[2] In the award, the arbitrator found that the dismissal of the applicant was substantively and procedurally fair. The applicant had been dismissed after being found guilty of two counts of unlawfully releasing illegal foreigners on 24 May 2006 without following the necessary immigration procedures.

[3] Evidence of the procedure to be followed before releasing illegal immigrants was given by the applicant's supervisor but he could not produce the training manual and which he said the procedure was reduced to writing. Evidence was also given by an SAPS captain dealt with illegal immigrants, who did not know the Department of Home Affairs policy on releasing immigrants held in custody, but testified that the normal practice was to obtain documents from the detained immigrants in question and after investigation would indicate who could be released.

[4] The applicant had issued warrants of release in respect of two detained foreigners, one on the basis that he had a valid visitor's permit and the other on the basis that he was an asylum seeker, though he later claimed that he had made a mistake in recording that one of them had a valid work permit.

[5] The central issue in review was that the applicant claims that it was irrational of the arbitrator to find on balance of probabilities that there was a rule that he had transgressed in releasing them or that he knew of the rule. The applicant did not seek to attack the arbitrator's findings that his dismissal was procedurally fair. Essentially, the applicant relied on the fact that the applicant's supervisor did not provide the training manual in which he claimed the detailed procedures to be followed were contained.

LABOUR COURT

[6] The applicant had contended that all that he needed to do was to interview the immigrants in question and if he was satisfied that they were in the country legally he could order their release at his discretion. In this instance, he claimed that both of them were registered asylum seekers and therefore could not be detained. The respondent agreed that if persons' names appeared on a list of registered asylum seekers that was the case.

[7] The evidence of the SAPS Captain amongst other things was that when he had asked the applicant why he was sitting with the two immigrants in his car outside the police station, the applicant told him that he had booked them out for investigation, a procedure he had never heard of in his 18 years of service. He also said that the applicant had made no mention of the two individuals being on a list of registered asylum seekers. However he discovered that the applicant had in fact issued warrants of release for both of them, nor did he make any reference to any document. He had then instructed his colleagues to re-arrest the two individuals. After the two foreigners had been re- detained, the applicant was supposed to return to the police station after parking his car but never did.

[8] The applicant's own version on the last mentioned matters was that he had returned to the police station and had argued with the police about their re-detention of the immigrants. Although it was put to the respondent's witnesses that the applicant had returned after parking his car, no mention was made of the alleged altercation with the police. The applicant said that he released them on the basis that they appeared on a list of refugees waiting interviews for asylum at the Rosettenville refugee Centre. He denied that there was any procedure to be followed and instead relied on what is stated in the Immigration Act. It was apparent from his evidence that he never claimed to have verified whether the two individuals were registered with the Rosettenville Refugee Centre as asylum seekers, but having established from their accents that they were from Zimbabwe and having been told that they were on the list of asylum seekers he used his discretion to let them go. He did concede somewhat reluctantly that normal procedure required him to open a file in each case. The list on which the names of the two immigrants appear was a list

LABOUR COURT

bearing a date stamp more than a fortnight after the individuals were released, and which the applicant's supervisor dismissed as not being a valid document. At no stage during his evidence in chief that he had verified the status of the two immigrants against the records of the Refugee Centre. Later, he claimed to have forgotten that he had phoned someone from the Rosettenville centre to verify that they were on the list, but even on his own version that appears to have been after he had ordered their release.

[9] The arbitrator concluded that the case was not the one in which a rule did not exist but simply that the rule was not clear. The arbitrator expressed it thus:

> "It seems to me there should be a rule for asylum seekers and other immigrants and for cases where the immigrants has documents and where they do not possess documents. What is clear from the evidence of both parties is that before an immigrant is released, they must first be interviewed to verify their legal status. Section 41 of the Immigration Act states that the immigrants are detained until their prime at facie status is ascertained. I therefore find on a balance of probabilities that this rule exist."
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> (*sic*).

[10] S 41 of the Immigration Act, 13 of 2002, states:

> "41. Identification
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> (1) When so requested by an immigration officer or a police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the Republic, such person may be interviewed by an immigration officer or a police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody without a warrant, and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34.

LABOUR COURT

(2) Any person who assists a person contemplated in subsection (1) to evade the processes contemplated in that subsection, or interferes with such processes, shall be guilty of an offence."

[11] In essence, the applicant had ordered the release of the two individuals without attempting any independent verification of their claims, whereas he was required to take reasonable steps to verify their status. The arbitrator concluded that he has not done what the act required him to, quite apart from not following any detailed regulations or procedure. At the crux of the arbitrator's reasoning on the evidence reads:

> "The applicant's version is that he is satisfied himself that although the two immigrants did not have documents they were on listed on Rosettenville Refugee Reception Office list and therefore should be released as asylum seekers. The evidence brought by the applicant is a list that he claims is from the Refugee Reception Office and that it must have been included in his bundle by the police or the respondent.
>
> What I find strange is that the list is dated 12 June 2006 where is the incident occurred on 24 May 2006. Further the applicant does not who brought the list in his bundle. It is strange then as to how the applicant on the second day established the prima facie status of the immigrants that he decided to release them if he did not have a list. It is further strange that he did not inform the police that re-arrest at the immigrants, that went with him, that the reason of releasing them is that they are appearing on the list of the Refugee Reception Office. The respondent's second witness testified that he was not told of the list and that evidence was not disputed by the applicant. What is further strange is that the last page of the list is date stamped 12 June 2006 with the Braamfontein stamp and the handwriting there does not look the same as that on the first two pages. It is clear that the last page has been added to the first to as also the table fonts are not the same.
>
> On the release warrants the applicant has written through his hand that one of the immigrants was an asylum seeker and other's permit was valid. When asked about the discrepancy he said that he made a mistake of forgetting to cancel the permit was valid. When asked him at the end how he verified with Rosettenville that the immigrants on their list he said he forgot he called another person at Rosettenville to verify. For the above

LABOUR COURT

reasons the applicant did not come across as a credible person. One does not forget important testimony that would prove his innocence especially when the matter was postponed on several occasions. That should have been used to bring witnesses to dispute any version brought against party.

I therefore find on the balance of probabilities that the applicant has contravened the rule."

[12] The arbitrator's finding on the credibility of the applicant is borne out by a reading of the transcript. In the course of his testimony he is evasive and made allegations never put to the respondent's witnesses.

[13] In light of the above, the fact that the respondent failed to establish the detailed regulations or procedures to be followed by an immigration officer did not detract from the applicant's obvious dereliction of his duty to take reasonable steps to verify the status of the detained foreigners in question before releasing them as required by the Immigration Act. There was more than sufficient basis for the arbitrator to find him guilty on the charges he faced and the outcome was not one no reasonable arbitrator could have reached.

[14] In consequence the following order was made.

Order

[15] The review application is dismissed.

[16] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES

For the Applicant:	M Magoshi of Majang Inc.
For the Third Respondent:	A Platt instructed by the State Attorney

LABOUR COURT