

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 861/09

In the matter between:

NTSETSELELO HLATSHWAKO

APPLICANT

v

**THE COMMISSIONER OF CORRECTIONAL
SERVICES**

THE ACCOUNTANT GENERAL

THE ATTORNEY GENERAL

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

CORAM

FOR THE APPLICANT FOR

THE RESPONDENT

Q.M. MABUZA -J

B.M. MDLULI OF BEN

J. SIMELANE AND ASS.

T.N. SIMELANE FROM ATTORNEY

GENERAL'S CHAMBERS

JUDGMENT 24/11/09

[1] The applicant seeks the following order:

- a) **Dispensing with the rules relating to time limits and manner of service and hear the matter as one of urgency.**

- 2) **Reviewing, correcting and setting aside the decision of First Respondent of terminating the Applicant's employment in August 2008.**
- 3) **Directing the Second Respondent to pay Applicant his salary for the months of January, February, March, April and May 2008, respectively.**
- 4) **Directing and ordering the First Respondent to reinstate the Applicant to his employment as a Warder.**
- 5) **Costs of application.**
- 6) **Any further and/or any alternative relief.**

[2] The Respondents oppose the application.

[3] In his founding affidavit the Applicant sets out that he was employed as a warder during 2002. On or about 20th January 2008, he was stationed at Matsapha Central Prison under the supervision of Senior Superintendent Abednigo Mthupha who was the officer-in-charge of the institution. During January 2008, the Applicant requested time off to go and deal with some personal problems relating to his transport business. Mr. Mthupha responded that he would call him the following day to his office in order to finalise the issue. The Applicant was called the following day but found many people in Mr. Mthupha's office who included the Applicants father and elder sister. Mr. Mthupha invited the Applicant to state his problems before all the people who were present and that the Applicant's father had been invited so that he

could hear the Applicant's problems and sign for the days on which the Applicant would be away from work. The Applicant declined to discuss his personal problem in front of all the people gathered there.

Mr. Mthupha got angry and accused the Applicant of being disrespectful to him even in front of the Applicant's father. He ordered the Applicant to leave his office.

On the following day Mr. Mthupha called the Applicant to his office and informed him that he had been transferred to Mankayane Correctional Services but did not give him the letter of transfer. The Applicant responded that he would write a letter protesting the transfer; which he did but Mr. Mthupha refused to take it and informed the Applicant not to come to his office again.

On the 16th January 2008 a truck arrived at the Applicant's house to remove him to Mankayane. The

Applicant responded that he was not ready to move as he had not been informed of the transfer prior to that date. On the following day when the Applicant tried to enter the prison camp he was prevented from doing so on the instruction of Mr. Mthupha. He could no longer gain access to his house and belongings. He decided to go and stay at home while pursuing the issue of protesting the transfer to the Commissioner.

[7] The Applicant states that he was only able to gain access to his house at Matsapha during April 2008 whereupon he packed his belongings and proceeded to Mankayane where

he resumed duties on the 2nd April 2008. He did not receive his salary from January 2008 to May 2008.

[8] The Applicant stated that during June 2008, he received a letter informing him that charges had been preferred against him and that he would be subjected to a disciplinary hearing in respect thereof. The charge was that of being absent from work for a period of seventy seven days.

[9] The Applicant further states that he was charged with contravening Regulation 3 (bb) of the Prison (Disciplinary offences) Regulation 1965 read with Regulation 7. The charge sheet sets out the particulars of the offence as follows:

"You are charged with the disciplinary offence of contravening Regulation 3 (bb) of the Prison (Disciplinary Offences) Regulations, 1965 read with Regulation 7."

In that upon or about the 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th- 28th, 29th- 30th- 31st-January 2008. 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, February 2008. 1st, 2nd 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st March 2008, 1st, 2nd April 2008 at or near Matsapha Central Correctional Institution, you, S/No. 2304 Warder Ntsetselelo Hlatjwako did unlawfully and intentionally absented yourself from duty without

reasonable explanation, thereby acting in a manner prejudicial to good order and discipline of the service."

[10] He further states that a disciplinary hearing was held and he was found guilty and the Disciplinary Board recommended his dismissal. The Commissioner dismissed him during August 2008.

[11] The Applicant's contention is that the Disciplinary Board failed to apply its mind to the issues before it which resulted in a verdict of guilty. He further contends that the Commissioner acted unlawfully in terminating his employment as this is a prerogative of the Civil Service Commission as provided in section 187 (1) of the Constitution.

[12] He stated that he subsequently lodged an appeal with the Civil Service Commission and his appeal was dismissed.

[13] Mr. Mthupha deposed of an opposing affidavit in which he denies most of the allegations by the Applicant. He admitted that the Applicant requested a day off to attend to his transport business; this was during September 2007. He also states that the Applicant was not at work on the 20th January 2008 as he had absconded from work on the 16th January 2008. Mr. Mthupha admits that the Applicant found his father and sister and members of the Matsapha Administration at Mr. Mthupha's offices.

[14] Mr. Mthupha stated that on the 3rd January 2008, the Applicant was found in possession of a live round of

ammunition and had threatened to kill himself. When asked where the gun was he said that he had given it to his father. Mr. Mthupha stated that he requested the Applicant's father to come to the Correctional Institution

on the 8th January 2008 to talk about the behaviour of the Applicant and to see whether the father could caution him to change his behaviour. The Applicant was invited to this meeting. When the Applicant arrived he looked around the room and after seeing the people present, he left the room without any discussions being held. Mr. Mthupha sent an officer to call him he returned, looked at the people at the meeting and left. Mr. Mthupha referred to another incident that the Applicant's father was once called to Mbabane Correctional facility after the Applicant was found with a live round of ammunition. This new evidence is hearsay and I shall disregard it.

[15] Mr. Mthupha referred the Court to annexure "AG 3" as being the charge which was preferred against the Applicant.

Annexure "AG3" furnished by Superintendent Mthupha states:

"CHARGE: COUNT 1

Particulars of Offence: Contravening regulations 3 (a) of the Prisons (disciplinary offences) regulations of 1965, read with regulation (7) "is insubordinate by word or act towards any officer, or officer in charge whose orders it is his duty to obey"

In that on or about 8th January 2008 at or near Matsapha Institution you as a prison officer and as such governed by Prison rules and regulations did wrongfully, unlawfully, intentionally without good and reasonable excuse, you showed an act of insubordination when you left an audience of the Officer-in-charge together with other Senior officers including your biological Father and Sister without given permission to leave at about 1040 hours.

CHARGE II

(bb) Acts in a manner prejudicial to good order and discipline or likely to bring discredit to the service in that on or about 6th January 2008 at around 1000 hours and 1100 hours at or near Matsapha Prison quarters, you surrendered two (2) live rounds of ammunition to Sergeant Dominic Gamedze which were in your possession."

[16] Superintendent Mthupha further refers to statements made by Superintendent Titus Dlamini and Assistant Superintendent Motsa. These statements refer to events that occurred on the 8th January 2008 and were signed on the 13th January 2008. Hereunder is a reproduction of the contents of the statement of Superintendent Titus Dlamini:

"I remember on the 8th January 2008 at Matsapha Correctional Institution at about 1000 hours, I was called by the Officer In charge Mr. Mthupha in his office where I found a delegation of officers who were together with Warder Ntsetselelo Hlatshwako's father and sister. Ntsetselelo came fifteen minutes later to join us in the office.

The Officer In charge was the Chairperson who was leading the discussion matter. When the Officer In charge finished introducing the subject matter Ntsetselelo's father wanted his son to clarify a certain point in the matter but instead of responding to what was asked by his father, he told the house that he wont discuss anything here then he went out and left us in the office without being permitted to do so at about 1040 hours. What he did, he showed no respect to his father and the officers who were present. Therefore he was charged for insubordination."

A reproduction of the sworn statement made by Assistant Superintendent Motsa states:

"On the 8th day of January 2008 at about 1015 hours I was called by the Officer in charge in his office. I found S/No. 2304 N. Hlatshwako's father, his sister and other officers. Later officer S/No. 2304 N. Hlatshwako was called to the same office of Officer in charge and asked about his absence from duty. S/No. 2304 N. Hlatshwako immediately stood up and went out leaving us in the office.

[17] Superintendent Titus Dlamini's statement refers to **insubordination**. Assistant Superintendent Bernard Motsa's statement refers to **absence from duty**. But on the 8th January 2008 the Applicant had not absented himself from duty. Count II refers to possession of live ammunition which the Applicant surrendered on the 6th January 2008. Both Dlamini and Motsa do not refer to this count at all.

[18] The Applicant in his replying affidavit denies ever being in possession of a live round of ammunition and correctly wonders why a criminal charge was not laid against him., The Applicant denies that the charges contained in

annexure "AG 3" were the same as those he faced at the disciplinary hearing.

It is obvious from Mr. Mthupha's affidavit that he thought that the charges preferred against the Applicant were those of insubordination and the possession of the live rounds of ammunition. Meanwhile the prosecutor preferred a different set of charges against the Applicant namely that of absenteeism. This explains why Superintendent Maseko found the Applicant guilty of a mixture of the two namely insubordination and absenteeism and was most eager to mete out the harsher punishment of dismissal without considering its dire

consequences upon the Applicant and his dependants. For the junior officers there is no three strikes you are out!

Letter of transfer

[19] The Applicant was never given a letter of transfer, neither is there a copy filed off record by Senior Superintendent Mthupha. Senior Superintendent Mthupha admits that the letter of transfer was never given to the Applicant. Its contents were read to the Applicant and he was asked if he understood what was being said to him and the Applicant said he did (see paragraph 13.1).

[20] The failure to address and deliver a personal letter of transfer to the Applicant is clearly wrong and an abuse of his right to be informed so that he could prepare how to best respond thereto. To this date there is no such letter

addressed to the Applicant neither is there any letter attached to these proceedings. Only the letter to Senior Superintendent Mthupha. The Applicant had a right to be informed by a personal letter why he was being transferred. Clearly this is an abuse of power by Mr. Mthupha.

The disciplinary hearing

[21] The disciplinary hearing was chaired by Superintendent E.G. Maseko and the Prosecutor was CH/OFF M. Shongwe, both officers of the Correctional Services. The Applicant was represented by an attorney, Mr. S. Dlamini. The charge that the Applicant pleaded to was to the contravention of Regulation 3 (bb) of the Prisons (Disciplinary Offences) Regulations 1965 read with Regulation 7.

In that upon or about the 16th January 2008 - 1st April 2008 at or near Matsapha Central Correctional Institution, the accused (Applicant) did unlawfully and intentionally absent himself from duty without reasonable explanation, thereby acting in a manner prejudicial to good order and discipline of the service.

[22] The Correctional Service led 4 witnesses.

- It is not clear from the charge and evidence if he was absent from Matsapha or Mankayane Correctional Services.
- » Regulation 3 (bb) provides as follows:
"A Prison Officer shall commit a disciplinary offence if he acts in a manner prejudicial to good order and discipline or likely to bring discredit to the service."

- Regulation 7 provides as follows:

"Regulation list competent sanction which may be imposed on an officer found guilty of a disciplinary offence."

[23] Needless to say the Applicant was found guilty. None of the evidence that was adduced during the disciplinary hearing proves that the Applicant was absent from work for 77 days. The witnesses who testified merely related the events immediately after the transfer letter was read to the Applicant and when a truck was sent to the Applicant's house to transport him to Mankayane. I agree with Counsel for the Applicant that the Disciplinary Board took into account irrelevant considerations when it found the Applicant guilty as charged. Instead of evaluating the evidence before it to determine whether the evidence led supported the charge. The evidence did not support the charge and the Applicant should have been acquitted. I accept that under normal circumstances the procedures followed in disciplinary hearing at the work place need not be strictly adhered to as in a court of law. But even so a finding of guilt where there is no evidence to support the charge is substantively unfair.

[24] The Disciplinary Board found that the Applicant had contravened Regulation 3 (bb) by being absent despite the fact that Regulation 3 (bb) of the Prison (disciplinary offences) Regulation of 1965 has nothing to do with absenteeism. This was irrational and senseless.

[25] It would have made sense had the Applicant been charged under section 14 (1) of the Prison Act of 1964 which clearly prohibits officers from being absent without permission. The penalty prescribed by section 14 (2) of the Prison Act, 1965 is a fine not exceeding E50.00 or imprisonment not exceeding three months or both. The board's finding was procedurally unfair.

[26] I agree with the Applicant's attorney that the decision taken by the Board was arbitrary and capricious. The Board failed to apply its mind to the issues before it and consequently came to an irrational and senseless decision without foundation or purpose. See: Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 (3) SA132.

[27] The issue of the unpaid salary was dealt with by Counsel for the Respondents who together with the Applicant's Counsel agreed to sort out or pay whatever remained outstanding.

[28] The issue of the Commissioner not being competent to fire the Applicant is moot. He can fire junior officers of the rank of the Applicant. The appeal to the Civil Service Commission was ill conceived.

[29] Had the correct evidence been led against the Applicant he would have been found guilty of absenteeism and been sentenced to pay E50.00 and or 3 months imprisonment. As matters stand he could not have been found guilty as the wrong evidence was led.

[30] In the event it is ordered that:

(a) The decision of the Disciplinary Board is hereby set aside.

(b) The' decision by the First Respondent terminating the Applicant's Employment is hereby set aside.

7) The First Respondent is hereby ordered to reinstate the Applicant forthwith and to restore all his benefits and pay.

8) The Respondents are ordered to pay the costs hereof.


O.M. MABUZA-J