IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE **CIVIL APPEAL NO. 67/09**

In the matter between

COMMISSIONER OF CORRECTIONALSERVICES **APPELLANT**

AND

NTSETSELELO HLATSHWAKO **RESPONDENT**

CORAM : RAMODIBEDI CJ

EBRAHIM JA

MOORE JA

HEARD : 12 MAY 2010

DELIVERED : 28 MAY 2010

SUMMARY

Appeal – The court a quo *granting an order which was not prayed for – Non-joinder of an essential party to the dispute – Disciplinary proceedings – Respondent dismissed for absenting himself from work for 77 days without leave – Regulation 3(bb)of the Prisons (Disciplinary Offences) Regulations 1965 read with Regulation 7 applicable – Appeal upheld with costs.*

JUDGMENT

[1] The dispute in this appeal commenced in the High Court by way of a notice of motion. The present respondent, as applicant, brought review

proceedings against the appellant and two others for prayers couched in the following terms:-

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

1. *Reviewing, correcting and setting aside the decision of First Respondent [now the appellant] of terminating the Applicant's employment in August 2008.*

1. *Directing the Second Respondent to pay Applicant his salary for the months of January February, March, April and May 2008, respectively.*

1. *Directing and ordering the First Respondent to reinstate the applicant to his employment as a Warder.*

1. *Costs of application.*

1. *Any further and/or any alternative relief."*

[2] The background facts were the following. The respondent, a Warder in the Correctional Services Department faced a disciplinary charge for contravening Regulation 3(bb) of the Prisons (Disciplinary Offences) Regulations 1965 read with Regulation 7 thereof. It was alleged that he absented himself from duty for 77 days without reasonable explanation, thereby acting in a manner prejudicial to good order and discipline of the service.

[3] Regulation 3(bb) reads 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."

[4] The record shows that the respondent had been transferred from Matsapha Correctional Services to Mankayane Correctional Services. He protested the transfer without following the official channels, so it seems. He simply did not go to the new station despite the fact that transport was duly provided for him for that purpose. Hence the disciplinary charge in question.

[5] At the conclusion of the disciplinary hearing the respondent was found guilty as charged. The Disciplinary Board recommended that the respondent be dismissed from the service, subject to review by the appellant. The respondent then brought an application in the High Court for prayers fully set out in paragraph [1] above.

[6] After hearing the matter the High Court (Mabuza J) made the following order which is the subject of appeal in this matter:-

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

1. *The decision by the First Respondent (now the appellant) terminating the Applicant's Employment is hereby set aside.*

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

(d) The Respondents are ordered to pay the costs hereof."

[7] At the outset it is instructive to note that the first order setting aside the decision of the Disciplinary Board was not prayed for. Accordingly, it was in my view incompetent for the court *a quo* to make the order in the absence of an amendment to the notice of motion. This part of the order was unfair both procedurally and materially. It is trite that a litigant can also not be granted that which he/she has not prayed for in the lis.

[8] The first order setting aside the decision of the Disciplinary Board was incompetent for another reason. This is that the Disciplinary Board was not

a party to the proceedings. There was no prayer for that matter reviewing the proceedings of the Disciplinary Board which recommended the respondent's dismissal by the applicant. It is, therefore, inconceivable that the court *a quo* could grant an order setting aside the decision in question in the circumstances. Similarly, this was a clear case of non-joinder of an essential and interested party. Indeed it is instructive to repeat the remarks which I had occasion to make in the Court of Appeal of Botswana in the case of **Ramokhua and Another v Mabote CACLB-036-07; [2008] BWCA 5O (25 July 2008)** (Moore Dr. Twum JJA concurring), namely:-

> *"As a matter of principle, this Court cannot allow orders to stand*
>
> *against parties whose rights are directly and substantially affected*
>
> *in the litigation and who had no opportunity to be heard, as in casu.*
>
> *It is for that reason that non-joinder is a matter that no court can*
>
> *overlook even if the court has to raise it* mero motu, *as happened*
>
> *here."*

One has a similar situation here. See also **Amalgamated**

Engineering Union V Minister of Labour 1949 (3) SA 637 (A);Maria Mavimbela N.O. V Sedcom Swazi and Others Civil Appeal No. 27/08. I should, therefore, be prepared to allow the appeal on the point of non-joinder alone in these circumstances. There is, however, a further reason why this appeal ought to succeed as I shall endeavour to demonstrate shortly.

[9] In granting the application in favour of the respondent the court *a quo* was scathing in its judgment. It adopted the view that the Disciplinary Board took into account irrelevant considerations in relying on absenteeism as a factor under Regulation 3(bb). This, the court held was "irrational and senseless". Thus, the Board's finding was not only "procedurally unfair" but was also "arbitrary and capricious". The court added, for good measure, that 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." With respect, I am unable to agree with these findings. In my view not only are the findings unjustified but they also stem from a misreading of Regulation 3(bb).

[10] A correct reading of Regulation 3(bb) as fully reproduced in paragraph [3] above will show that the Regulation is aimed at enforcing discipline which is in turn the bedrock of an organisation such as the Correctional Services. One must bear in mind, too, as Mr. Kunene correctly submitted on the appellant's behalf, that the Correctional Services is an institution that rehabilitates and disciplines convicted offenders. As such it is of fundamental importance that prison warders should maintain good discipline at all times.

[11] On a proper contextual reading of Regulation 3(bb) it is plain, as it seems to me, that the Regulation is wide enough to include absenteeism to the extent that it is manifestly prejudicial to good order and discipline or is likely to bring discredit to the Correctional Services. Indeed I consider it idle to suggest that absenteeism itself is not prejudicial to good order and discipline or that it is not likely to bring discredit to the Correctional Services within the meaning of Regulation 3(bb). The fact that an officer may be charged with the offence of absenteeism under Section 14(1) of the Prison Act 1964 does not mean that he/she may not be charged with the same offence under Regulation 3(bb) to the extent that such absenteeism is prejudicial to good order and discipline or is likely to bring discredit to the Correctional Services. This, in my view, is exactly what happened here. Put differently, Regulation 3(bb) does not exclude absenteeism as a ground for prejudicing good order and discipline or as bringing discredit to the Correctional Services.

[12] Faced with these difficulties Mr. Simelane for the respondent made two further submissions, firstly, that there was no evidence that the respondent had absented himself from work for 77 days. Secondly, he submitted that the appellant had no power under Section 190(5) of the Constitution.

[13] A reading of the record shows that the fact that the respondent absented himself for 77 days was never an issue in the first place. In his own words the respondent testified before the Disciplinary Board as follows:-

"I was not getting paid for (3) three months".

Quite clearly the reason for non-payment had to do with the fact that he had absented himself from work. He conceded in his evidence that he protested against being transferred. When he was offered transport to take him to the new Station at Mankayane Correctional Services he had the audacity to refuse to proceed on transfer on the ground that he was not ready. But more importantly, when he was asked at the Disciplinary Board hearing where he was all along he testified that he was at home.

[14] A further indication that the respondent's absence of 77 days was not disputed is to be found in the submissions by the prosecutor at the Disciplinary Board hearing. The prosecutor is recorded as having said the following:-

> *"It is undisputable fact that the accused person absented himself*
>
> *from duty for (77) seventy-seven days, thus from the 16th January,*
>
> *2008 up to the 1st April, 2008."*

Crucially, that statement was never refuted.

[15] Mr. Simelane's further submission that the appellant had no power under Section 190(5) of the Constitution to discipline the respondent equally has no merit. As counsel correctly conceded, the court *a quo* held against the respondent on the point. There is no cross-appeal by him. Accordingly the point does not arise for determination in this appeal.

[16] It follows from these considerations that the appeal must succeed. Accordingly, the following order is made:-

1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside and is substituted with the following order:-

"The application is dismissed with costs".

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M.M. RAMODIBEDI

CHIEF JUSTICE

I agree _____

A.M. EBRAHIM

JUSTICE OF APPEAL

I agree _____

S.A. MOORE

JUSTICE OF APPEAL

For Appellant : Mr. V. Kunene

For Respondent : Mr. B.J. Simelane