IN THE LABOUR COURT OF SOUTH AFRICA
(HELD IN JOHANNESBURG)

REPORTABLE

Case No: JR 1641/02

JOHANNESBURG the 3rd day of February 2005
Before Judge E. Revelas

In the matter between:

TRADE AND INVESTMENT SOUTH AFRICA
(ASSOCIATION INCORPORATED UNDER SECTION 21) 1ST APPLICANT

DEPARTMENT OF TRADE AND INDUSTRY 2ND APPLICANT

AND

THE GENERAL PUBLIC SECTORAL
BARGAINING COUNCIL 1st RESPONDENT

LUFONO RAMABULANA N.O.
SOUTH AFRICAN LABOUR MARKET 2nd RESPONDENT

ALLIED WORKERS UNION 3rd RESPONDENT

NANDIPA DINEO SIWISA 4th RESPONDENT

JUDGMENT

REVELAS,J:

[1] This is an application for review in terms of section 145 of the Labour Relations Act 66 of 1995 as amended ("the Act"). The applicant seeks to set aside an award made by the second respondent, wherein he found that the recall of the fourth respondent by the first applicant from Paris to South Africa was an unfair disciplinary action falling short of dismissal.

[2] The first applicant is a division of the second applicant, and it was established by the latter in 1996 for the purpose of attracting foreign investment. The fourth respondent had been employed by the second respondent as an investment officer during 2000, when her application for a voluntary posting overseas was approved. The posting was for a period of three years which period was subject to variation. She retained the position she had in South Africa and was remunerated in accordance therewith. While serving in Paris, France in an embassy, the fourth respondent was entitled to certain foreign service benefits in the form of allowances. She reported to Ms Philisiwe Buthelezi , and the South African Ambassador in France.

[3] On 2 October 2001, the fourth respondent was suspended on full pay until 30 October 2001, pending the outcome of an investigation into an altercation between the fourth respondent and her manager Ms Buthelezi, and the subsequent breakdown in their working relationship and the fourth respondent's working relationship with the ambassador. The applicants appointed Ms Juliet Maniza (a senior human resources manager) and Mr Alan Kennedy (an employee relations manager) to conduct the investigation. They arrived in Paris on or about 5 October 2001, and held discussions with the staff members at the Paris office which included Ms Buthelezi, the fourth respondent and the ambassador. Two meetings (the first one over breakfast) were held with the fourth respondent. The second meeting lasted five hours. A report was then completed.

[4] In the report compiled on the investigation, it was recommended that the fourth respondent's suspension be uplifted and she be recalled to South Africa. On 11 October, the recommendation was implemented by way of written notification to the fourth respondent, who then referred a dispute about "unfair action in respect of provision of

benefits/suspension/disciplinary action short of dismissal". Conciliation failed and the dispute was arbitrated.

Ms Buthelezi and Ms Maniza testified at the arbitration hearing. The ambassador also deposed to an affidavit on the question of the breakdown between herself and the fourth respondent. No reliance was placed on this affidavit by the arbitrator. Ms Steyn testified about the applicants' policies and the circumstances under which an employee in a foreign posting could be called back to South Africa. The fourth respondent testified on her own behalf.

[5] It was the fourth respondent's case that no justifiable circumstances existed for the cancellation of the fourth respondent's foreign posting contract, other than the unhealthy working relationship between Ms Buthelezi and herself , which the former blamed the fourth respondent for. (Ms Buthelezi also issued the notice of suspension).

[6] The fourth respondent contended that her recalling prejudiced her, in that the financial advantage she enjoyed as a result of her position in Paris, had been lost. (The arbitrator held that this financial advantage was not a benefit as contemplated by Schedule 7, item 2(1)(b) of the Act). The arbitrator further held that it was unfair that Mrs Buthelezi who was also a party to the fight or altercation about keys to a vehicle (which fight allegedly included physical assault), was given the authority to suspend the fourth respondent.

[7] No disciplinary hearing was held in respect of this incident, but it was common cause that the relationship between the fourth respondent and her manager (Ms Buthelezi) deteriorated to such an extent that they were no longer on speaking terms, a situation which one could well imagine to be only detrimental to the working situation at the Embassy in Paris.

Clause 7 of the Council Resolution was applicable to a situation such as the one which gave rise to the arbitration hearing. (Clause 7.2 provides that the employer (in this case the, the applicant) may suspend an employee on full pay (as was the case in this matter) as a precautionary measure). Clause 7.2 (c) provides that within a month after a suspension has been imposed, a disciplinary hearing must be held. The fourth respondent emphasized that clause 7, which distinguished between management and the employer does <u>not</u> authorise management (thus Ms Buthelezi) to suspend employees.

[8] Resolution 2 (a collective agreement) incorporates Schedule 8 of the Act and ensures employees of a fair hearing, timeous notification of charges of misconduct, written reasons for decisions and the right to appeal against those decisions.

[9] Clause 7.3 prescribes several minimum procedural requirements for a disciplinary hearing, which the fourth respondent contends, was not complied with by the applicant.

[10] The arbitrator held the view that the recall was not in accordance with due process or in line with the provisions of processes within the second respondent, in that an independent person (other than Ms Buthelezi) should have dealt with the matter. According to the arbitrator, the fourth respondent was financially disadvantaged by the recall because she lost the financial advantages (benefits) that she enjoyed in Paris. He also held that the unhealthy working relationship was no justifiable reason to cancel her contract.

[11] Apart from reinstating the fourth respondent she was also awarded compensation equal to eight months' salary (her South Africa salary).

[12] The first justifiable criticism levelled against the arbitrator was that he misconstrued the nature of the dispute he had to arbitrate. The dispute referred to conciliation and arbitration was not about the fourth respondent's suspension, but her recall. Her suspension was uplifted only days after it had been imposed. In terms of clause 7.2 of the Council's Resolution it was permissible for her to be suspended on full pay. Ms Buthelezi was also clearly authorised, to suspend the third respondent as she reported to her.

[13] Since two independent parties came to Paris to investigate the situation and recommend the steps to be taken or not to be taken, Ms Buthelezi's actions and motives became completely irrelevant. In the circumstances it was unnecessary for an outsider to be called in to suspend the fourth respondent. The finding of the arbitrator that the suspension was "unacceptable", was therefore not supported by the evidence.

The arbitrators finding that the recall was procedurally unfair and tantamount to disciplinary action short of dismissal was also wrong. This argument was premised on the failure on the part of the applicant to afford the fourth respondent with an opportunity to test (e.g. cross-examine) Ms Buthelezi about the incident before she was "punished" with a recall.

At this point it is necessary to remember that the applicant called a witness (Ms Steyn) to explain the reasons for and circumstances in which the applicant may recall an employee. The applicant was entitled to recall employees under several circumstances, even as a disciplinary measure. In doing so it exercised its managerial prerogative. Provided there was consultation, such a step would be in order.

[14] The events preceding the recall should first be looked at. There was

the introductory meeting which took place over breakfast where the fourth respondent was told of the investigation, its purpose and that she had the right to be represented. Later she was interviewed for five hours during which she allegedly expressed her misgivings about remaining in Paris in the prevailing circumstances, but later said she wanted to remain. This was disputed in argument. However, it was common cause before the arbitrator that the relationship between the fourth respondent and Mrs Buthelezi had broken down and there was also evidence before the arbitrator that the fourth respondent had a poor relationship with the ambassador as well. After the interview was conducted, there were three options open to the applicant: A recall of the third respondent, a disciplinary enquiry or an incapacity hearing. The recall was decided upon as an operational measure, which in my opinion fell within the applicant's managerial prerogative. There was no need for a hearing if the applicant did not wish to dismiss or discipline the fourth respondent. The same applies to a poor performance enquiry. Relationships in Paris broke down. The situation had to be dealt with by recalling someone.

[15] The fourth respondent and arbitrator seem to suggest that if Mrs Buthelezi was cross-examined, her blameworthiness would have been established and she should have been recalled. In this regard, it must be pointed at that the applicant's investigators were not looking for fault. They were faced with a difficult situation and recalled the applicant in order to solve the problem. It was the applicant's prerogative to decide not to recall Ms Buthelezi who was, after all her manager. (Her position was actually Regional Manager Europe). Due to similar considerations the applicant probably did not insist on the recall of the South African Ambassador to France with whom the relationship with the fourth respondent had also broken down.

[16] The applicant, was plainly entitled to recall the fourth respondent, provided she was consulted with. She had an opportunity to contribute to the enquiry in the form of two interviews (one being five hours long). She was interviewed by two persons who were not of the Paris office. If she was disciplined, she might even have been dismissed.

[17] Ms Maniza (one of the investigators) gave evidence to the arbitration that she followed a fair procedure in conducting the investigation. In effect, the arbitrator rejected her evidence by finding that the procedure was unfair. The arbitrator had done so in circumstances where the fourth respondent, having referred an unfair labour practice dispute, bore an onus to be discharged in this regard. There was no indication, and it was not found, that the interview was a sham and that the fourth respondent's representations were not considered. The

arbitrator misdirected himself by placing the onus on the applicant to disprove that the recall was procedurally unfair.

[18] Insofar as the substantive fairness of the recall is concerned, it has already been demonstrated that the applicant was entitled to recall the fourth respondent, provided it consulted with her, which it did. Other factors which also played a part was her limited knowledge of French and exposure to French business conduct and poor leadership skills. These were not the reasons for her recall *per se*, but factors that played a role in assessing why she, rather than Ms Buthelezi should be recalled.

[19] One again there was no evidence to support a view that the findings of the investigations were false or driven by an ulterior motive. Only if the arbitrator had made such findings was it entitled to say the recall was unfair. He made no such findings, because on the evidence he was unable to do so. His findings are therefore disconnected to the facts.

[20] In the circumstances the review succeeds with costs as set out in the order already given herein.

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E.REVELAS

On behalf of the Applicant:

Adv Mark Wesley

Instructed by Routledge Modise Attorneys

Onbehalf of the third Respondent:
Ms R. Anderson of Anderson & Kloppers Attorneys