

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR1061/2007

In the matter between:

SAMANCOR LIMITED

Applicant

and

METAL AND ENGINEERING INDUSTRIES
BARGAINING COUNCIL

First Respondent

JAN STEMMETT N.O.

Second Respondent

NATIONAL UNION OF MINEWORKERS
obo JOHANNES MALOMA

Third Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. This is an application to review and set aside an arbitration award issued by the second respondent (the commissioner) under case number MEGA14010 dated 28 February 2007. The commissioner had found that the third respondent's dismissal was substantively and procedurally unfair and ordered his reinstatement on conditions no less favourable than those that applied prior to his dismissal with effect from 2 November 2006.
2. The review application was opposed by the third respondent.

The background facts

3. The third respondent, Johannes Maloma was employed by the applicant as a furnace operator in August 1996. He was arrested on 20 May 2006 on suspicion of having committed a robbery. He remained in custody and was absent from work for approximately 137 days. The applicant was informed about the third respondent's arrest.
4. The third respondent was dismissed on 30 May 2006 on the grounds of incapacity in that he was physically unable to tender his services. On 2 November 2006 a post dismissal hearing was held by the applicant following the third respondent's dismissal for incapacity after his release from custody. The disciplinary chairperson said that he could not have been expected to put in place a temporary arrangement for such a length of time to keep the third respondent's position open for him. His absence could not be condoned and his dismissal was upheld.
5. The third respondent assisted by the National Union of Mineworkers referred the dispute to the first respondent for conciliation and after conciliation had failed to arbitration.

The arbitration proceedings

6. The third respondent challenged the procedural fairness of his dismissal on the grounds that the chairperson of the enquiry, Mr Niewoudt, was not objective because he initiated the charge as the human resources manager and chaired the enquiry. The applicant's disciplinary code requires that the chairperson of the enquiry must be agreed upon by the stakeholders. Incapacity is not a ground for dismissal in terms of the disciplinary code. He challenged the substantive fairness of his dismissal since his

dismissal from work was due to reasons beyond his control and his dismissal was not justified. The sanction of dismissal was too harsh in the circumstances. The applicant was not dismissed for disciplinary reasons, but due to operational incapacity. This did not fall under the applicant's disciplinary code.

7. The applicant did not call any witnesses at the arbitration hearing. The third respondent testified. A bundle of documents was handed up. The issue that the commissioner had to decide was whether the third respondent's dismissal for operational incapacity relating to his absence from work was both procedurally and substantively fair.
8. The third respondent testified that he commenced employment with the applicant in August 1996 and was working as a furnace operator, earning R9 692.00 per month at the time of his dismissal. He was detained by the South African Police Services on a suspicion of a robbery from 27 March 2006 to 10 April 2006. After his release on 11 April 2006, he was charged by the applicant for absenteeism but he was found not guilty and returned to work. On 20 May 2006 he was rearrested for robbery. He telephoned his supervisor from the police cells and his sister also notified the applicant the following day after his arrest. Ten days later, he was dismissed in his absence for operational incapacity because he was incapable of doing his duties. He was unaware of his dismissal and when he was released after 137 days, he returned to work. He then established that he had been dismissed on 30 May 2006. He was given a post dismissal hearing on 2 November 2006. The chairman, Niewoudt found that the period of his absenteeism was too long to expect the applicant to accommodate him.

9. During cross examination, the third respondent testified that he was detained and the applicant was kept informed of his whereabouts and court appearances by his sister, who informed his supervisor on a regular basis. He did not know how long he was going to be kept in custody. He was then taken to other police stations where he was questioned which is the reason why he did not get the applicant's letter.
10. The third respondent's union submitted that the applicant did not notify the union about the applicant's dismissal. A notice of dismissal was delivered to the police station from where the third respondent had initially telephoned his supervisor after his arrest. This letter was not delivered to the third respondent. In the letter dated 30 May 2006, Niewoudt wrote as follows:

“OPERATIONAL INCAPACITY DISMISSAL

You have failed to report for duty since the 20th of May 2006 and you are therefore in breach of contract of employment as you are physically unable to tender your services as required. Your service of employment is terminated with effect from 30 May 2006.

A post dismissal hearing will be held on your return to work to establish if you have a valid reason for your absence.”

11. The third respondent submitted that the dismissal was procedurally unfair because the applicant did not apply its own disciplinary code. Among others, the code stipulates that the chairperson of a disciplinary enquiry, should be agreed between the applicant and the union.

12. The applicant contended that the third respondent was dismissed for incapacity. Incapacity is a no fault dismissal based on the principle on impossibility of performance. The employee, through no fault of his, is incapable of doing his duties. The respondent also referred to the requirements of a fair dismissal for incapacity. The third respondent's position could not be left open indefinitely due to the operational requirements of the applicant. Furthermore the third respondent had no knowledge of the duration of the third respondent's absence and, in the light of the additional charges, whether the third respondent would be arrested. The post dismissal hearing held on 2 November 2006, was held in terms of the applicant's disciplinary code. The hearing was chaired by Niewoudt and it is recorded in the disciplinary report, that the charge was the post dismissal hearing following the third respondent's dismissal for incapacity. In reaching the verdict, the chairperson acknowledged that the third respondent had notified his supervisor of the reasons for his absence. The chairperson took into account that the third respondent was absent for 137 days, that the applicant could not have been expected to proceed with a temporary arrangement for such a long time, that the criminal case was still pending and that this was the second time in a period of six months that the third respondent had been detained. The chairperson decided that the third respondent's absence could not have been condoned and that the decision to terminate the third respondent's services was upheld. The applicant referred to several decided cases including *Lebowa Platinum Mine Limited v CCMA and others* (2002) 5 BLLR 429 (LC), in which the court held that there is a duty on an employer to conduct a disciplinary hearing if an employee returns to work. The applicant contended that it had complied with its obligations.

The arbitration award

13. The commissioner summarised the issue that he was called upon to decide and then proceeded to record the evidence led and arguments raised. The commissioner said that the dismissal for incapacity needed to be investigated in the extent and likely duration of the incapacity. The applicant did not appear to have investigated this matter. No contact was made with the third respondent while he was detained and no discussion was held with the union.
14. The commissioner found that on the evidence before him that the dismissal of the third respondent on 30 June 2006 as confirmed on 2 November 2006 was procedurally unfair for the following reasons:
 - 14.1 Absenteeism is a disciplinary offence and cannot be treated as an operational incapacity.
 - 14.2 Whatever procedure the applicant purported to follow on 30 May 2006, did not afford the third respondent an opportunity to present his case. No effort was made to ascertain how long the third respondent was likely to be detained and the matter was discussed neither with the third respondent nor with his union. After 10 days absence, the applicant decided to dismiss him and a letter was delivered to the police station but was not received by the third respondent.
 - 14.3 Niewoudt apparently took the original decision to dismiss the third respondent and chaired the post dismissal hearing on 2 November 2006. This created a

perception of bias and renders the dismissal procedurally unfair.

15. The commissioner said that he found that the third respondent's dismissal was substantively unfair, because the applicant did not properly take into account the fact that the third respondent had no control over the circumstances and duration of his absence. There is no evidence that the third respondent was occupying such a key position at the applicant that necessitated his dismissal after 10 days of absence.
16. The commissioner found that he was not convinced that the employment relationship between the third respondent and the applicant had been rendered intolerable. He was of the view that the third respondent should be reinstated but that the applicant should not be penalised for the period that the third respondent was detained. It would have been fair if the applicant had decided to re-employ the third respondent from the date of the post dismissal hearing on 2 November 2006.
17. The commissioner found that the dismissal of the third respondent by the applicant was substantively and procedurally unfair. The applicant was ordered to reinstate the third respondent on conditions that are not less favourable than those that applied before the third respondent's dismissal, with effect from 2 November 2006.

The grounds of review

18. The applicant submitted that the commissioner's award suffers from certain material misdirections and defects in relation to the assessment of the evidence concerning procedural fairness, and further that the conclusions reached is not reasonable and/or unfair and irrational and/or not justifiable on the basis of the evidence before the

commissioner or the reasons given for them. In finding that the third respondent's dismissal was procedurally unfair, the commissioner misconducted himself, committed a latent gross irregularity and/or exceeded his powers in that he concluded that absenteeism could not be treated as an incapacity; found that the third respondent was not afforded an opportunity to present his case but failed unjustifiably to attach the appropriate weight to the fact that it was impossible for the third respondent to do so given his detention; not reasonable and/or unfair and/or unjustifiably placed the responsibility of ascertaining how long the third respondent would be detained upon the applicant; found that the fact that the initial and post-dismissal decision to dismiss were taken by the chairperson created the perception of bias and produced an award that is accordingly unjustifiable in that it bears no rational connection to the evidentiary material before him.

19. In finding that the third respondent's dismissal was substantively unfair, the commissioner misconducted himself, committed a latent gross irregularity and/or exceeded his powers in that he:

- 19.1 not reasonably and/or unfairly and/or unjustifiably concluded that the applicant had not properly taken into account the fact that the third respondent had no control over the circumstances and duration of his absence;

- 19.2 not reasonably and/or unfairly and/or unjustifiably concluded that the dismissal was unfair because there was no evidence to suggest that the third respondent was occupying such a key position in that the applicant that necessitated his dismissal within ten days;

- 19.3 not reasonably and/or unfairly and/or failed unjustifiably to attach sufficient weight to the fact that the applicant could not have been expected to hold the third respondent's position open for him indefinitely or for an extended period of time which his absence amounted to;
- 19.4 not reasonably and/or unfairly and/or unjustifiably and erroneously concluded that the applicant's decision to dismissal was substantively unfair; and
- 19.5 produced an award that is not reasonable and/or unfair and/or unjustifiable in that it bears no rational connection to the evidentiary material before him.
20. The commissioner's award of reinstatement is not reasonable and/or unfair and/or unjustifiably reflecting the commissioner's failure to apply his mind to the evidence and law for the following reasons:
- 20.1 the award does not reflect that the commissioner attached any weight to the period of the third respondent's absence and the fact that he was, by reason of his detention, incapable of performing his duties at his workplace for an extended period of time;
- 20.2 the commissioner concluded in his findings that it would have been fair to re-employ the third respondent from the date of his post dismissal hearing but proceeds unjustifiably and without any reasons being provided, to award the third respondent's reinstatement from 2 November 2006;

20.3 the commissioner failed to find that it was incapacity which led the third respondent to be unable to tender his services with the applicant by virtue of his detention and that given the period of such incapacity and the effect thereof upon the applicant, reinstatement was inappropriate in the circumstances.

Analysis of the facts and arguments raised

21. It is common cause that the third respondent had failed to report for work for about 137 days after he had been arrested on suspicion of robbery. He had notified the applicant of his arrest on the day of his arrest and the applicant was informed of further developments until the third respondent was released. It is common cause that he was unable to report for work during his incarceration and that while he was in prison, the applicant went on with a disciplinary enquiry and dismissed him in his absence. Upon his release a post dismissal hearing was convened where he was charged with operational incapacity which is a charge that does not exist at the applicant. He was found guilty and was dismissed.
22. Section 188(1) of the Act deals *inter alia* with dismissals related to the employee's conduct or incapacity. The onus is on the employer to prove that the dismissal was for a fair reason and that it was effected according to a fair procedure. Section 188(2) requires any person considering whether or not the reason for dismissal is a fair reason or whether the dismissal was effected according to a fair procedure to take into account any relevant Code of Good Practice issued in terms of this Act.
23. Item 10 of Schedule 8 deals with Incapacity: Ill health or injury. It provides as

follows:

10(1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.

10(2) In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.

10(3) The degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.

24. It is clear from the above that the Act recognises two types of incapacities. The first

relates to ill health and the second to injury. Operational incapacity is not recognised in our law and if it did exist it must surely be related to ill health or injury. An employer, before dismissing an employee for incapacity, must follow the procedures outlined in paragraph 27 above.

25. The commissioner's award and remarks should be considered in the light of his analysis of the applicant's contention that the third respondent was dismissed for operational incapacity. I do not believe that the commissioner has committed a reviewable irregularity as contended by the applicant. The third respondent had been dismissed for operational incapacity. For the applicant to succeed on this ground, the requirements for incapacity as referred to in paragraph 27 above must be met by the applicant. What the commissioner said was that one of the requirements would be the duration of the incapacity which in this case would be his imprisonment. The commissioner did not agree that the applicant could have used incapacity but that if this was used, the requirements would have to be complied with.
26. It is clear from the applicant's letter dated 30 May 2006 that the reason given for the termination of the third respondent's services was that he was in breach of his contract of employment since he was physically unable to tender his services. He was informed that a post dismissal hearing would be held on his return to work to establish if he had a valid reason for his absence. He was therefore not dismissed for the applicant's operational incapacity but due to his absence. The purpose of the post dismissal hearing was to ascertain whether he had a valid reason for his absence.
27. It is trite that supervening impossibility is a defence to breach of contract which would

also include the employment contract. Where the employee is the cause of his absence from work, it appears that his service may be terminated. Where it is a factor beyond his control like an unlawful arrest which either leads to his acquittal or withdrawal of the charges, it cannot be said that the employee was absent without permission. It will not be clear what an employee would be guilty of if he is arrested which caused his absence from work. He surely cannot obtain the employer's permission to be absent from work under those circumstances.

28. The third respondent clearly raised a defence of supervening impossibility. The onus was therefore on him to prove that the failure to perform in terms of his contract of employment was as a result of a superior force, in this instance the SAPS, for which he was not to blame. It is not clear what misconduct he was guilty of since he was not the cause of his incarceration. It was a factor beyond his control and it could therefore not be said that he had been absent without permission. He was not the author of his own misfortune. Since he had a valid reason for his absence, he had to be reinstated with loss of income. See *Trident Steel (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2005) 26 ILJ 1519 (LC). Revelas J at page 1522 of the said judgment states what alternatives an employer has in such cases. This is equally applicable to the applicant.
29. It is trite that the decision that the commissioner arrived at must be one that a reasonable decision maker would have made. In this regard see *Sidumo and Another v Rustenburg Mines Ltd and others* (2007) 28 ILJ 2405 (CC). I have carefully considered the commissioner's arbitration award. The commissioner as required in terms of section 138(7)(a) of the Act, had to give brief reasons for the award that he

made. This is precisely what the commissioner did. The commissioner's award is well reasoned. He dealt with all the issues that arose in the matter. It can therefore not be said that the commissioner committed any reviewable irregularity. His decision is one that a reasonable decision maker would have made. His award is lawful, reasonable and procedurally fair. He had decided the issue on the basis of his own sense of fairness. It is reasonable and meets the constitutional requirement that an administrative action must be reasonable.

30. The application stands to be dismissed. There is no reason why costs should not follow the result.

31. In the circumstances I make the following order:

31.1 The application is dismissed with costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : ATTORNEY E S MAKINTA

FOR THIRD RESPONDENT: A MOSAM
INSTRUCTED BY HAFEGEE SAVAGE ATTORNEYS

DATE OF HEARING : 25 JUNE 2008

DATE OF JUDGMENT : 1 JULY 2008