THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN

Case No: C369/2020
Of interest to other judges

In the matter between:

MUXE NDZERU	**First Applicant**
and	
TRANSNET NATIONAL PORTS AUTHORITY	**First Respondent**
TRANSNET NATIONAL BARGAINING COUNCIL	**Second Respondent**
COMMISSIONER ELVISO ADAMS (*N.O.*)	**Third Respondent**

Date of Set Down: 9 February 2023

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 16 March 2023.

Summary: (Review – Incapacity - Employee dismissed *in absentia* during incarceration – Procedural issues not properly canvassed in evidence – arbitrators can only be faulted on evidence before them - Review application dismissed – Case law on right to post dismissal hearing considered – no automatic right to such a hearing in incapacity due to incarceration cases – fairness of hearing depends on facts in each case)

JUDGMENT

LAGRANGE J

Introduction

[1] This is a review application of an award in which the arbitrator found that the applicant's dismissal on grounds of incapacity on account of his inability to perform his contractual obligations to the employer was substantially and procedurally fair.

[2] The applicant, Mr M Ndzeru ('Ndzeru') was a Marine Shore Hand working at Cape Town harbour who was employed by the first respondent (TNPA) on 3 October 2011 and dismissed on 30 July 2019. He had been employed for about 9 years at the time of his dismissal.

Brief Chronology

[3] For the purpose of contextualising the case, a very brief chronology of events leading to his dismissal is necessary.

[4] Around 26 July 2019, the applicant requested one day's leave, which was approved in principle. However, when he submitted the application for formal approval on the automated leave application system, he had increased the leave requested to 5 days. The application was rejected and he was immediately notified of this. Nonetheless he took more than one day's leave.

[5] He was absent from work from 28 May 2019. On 1 June 2019 he was involved in an attempted hijacking incident. The only version of the ensuing events, given by himself, was that he was the victim in the attempted hijacking in the course of which he had defended himself with his personal firearm and shot two persons. He was subsequently arrested on or about 7 June and detained in Limpopo pending trial. He was twice refused bail.

[6] Ndzeru did not advise his employer why he did not return to work. He left it up to Transnet to make enquiries to find out what had happened to him. After a couple of weeks, Transnet was able to ascertain what had transpired. After he had not returned to work by mid-July, a notice of an incapacity hearing scheduled for 30 July was handed to Ndzeru's spouse to convey to him. Amongst other things, the notice advised Ndzeru of his right to representation, to submit documentary evidence, call witnesses and cross-examine company witnesses. He was also advised he would be given an opportunity to state his case and defend himself both in respect of the incapacity hearing and the determination of a sanction.

[7] After Ndzeru's spouse conveyed the notice to Ndzeru, he asked her to ensure that his trade union represented him because he could not attend the enquiry in person as he was still incarcerated. The hearing then proceeded in his absence, with his union representative present. At the conclusion of the enquiry he was dismissed having been found guilty of failing to discharge his duties from 28 May 2019 until 18 July 2019, a period of just over seven weeks.

[8] On 1 August 2019, Ndzeru wrote to the TNPA stating that he had received the outcome of the hearing and gave his consent and permission for the dismissal to proceed. In the letter, he stated "I will not contest or appeal the dismissal as I am satisfied with the outcome", and granted permission for the management team to start processing his pension payment.

[9] Ndzeru claims that he wrote this letter in order to obtain his pension payment because he had not received any salary for two months and had been advised to do this by his manager, Mr R Johns (Johns), in order to speed up receipt of the payment. Johns testified that the applicant had phoned him to find out if there was any way he could speed up the payment of monies due to him. Johns in turn then spoke to Mr M Madolo (Madolo) of the Employment Relations department for advice. Ndzeru maintains that Johns told him he should state in a letter that he was happy with the outcome of the proceedings, was not going to lodge a dispute, and that he requested his pension payout with immediate effect. Johns did convey that advice to Ndzeru, but denies that they put any pressure on him to do so. Ndzeru said that he was been advised that it would take longer if someone had to go and visit him in

prison in Limpopo to sign the necessary papers to process the pension payout, and it would be quicker if he wrote a letter saying that he would not contest the outcome of the hearing. He claimed that at the time he was unaware of the provision in his letter of dismissal that he had 30 days to refer a dispute over his dismissal to the bargaining council.

[10] It was only on 12 August that he was granted bail, but one of his bail conditions was that he could not yet leave Limpopo province. On the same day he received the written outcome of the incapacity hearing which, *inter alia*, advised him of his right to refer his dismissal to the bargaining council within 30 days of the dismissal. Accordingly, he was aware of the time period for pursuing his dismissal further nearly three weeks before it expired. Ndzeru did contact Johns once he was released on bail on 12 August 2019, who advised him to contact the unions. Ndzeru claimed that at that stage he started communicating with union representatives who said they would speak to management on his behalf. He says they never reverted to him. He maintains he was also hoping Johns would afford him an opportunity to give his side of the story, but apart from contacting Johns once after he was out on bail, there was no evidence he communicated such a request directly to him.

[11] Following the relaxation of his remaining bail condition he was able to travel and came to collect his pension payment on 16 September 2019 but made no effort to contact management about his termination on that occasion.

[12] It was only in the beginning of October that he started seriously probing the prospect of re-employment or reinstatement with the company. On 4 October in an email to Johns' superior, Mr R Ramonyaluoe (Marine Operations Manager) he first complained about his dismissal, citing what he believed were comparable cases of more favourable treatment and requesting a 'face to face' meeting.

[13] In early December 2019, Ndzeru also sent a somewhat aggressive WhatsApp to Ramonyaluoe, which he copied to Johns, indicating that he was prepared to fight for his rights and would make things unpleasant by 'exposing' them. This was interpreted as a threat. While it demonstrated a certain degree of hostility it did not

amount to an obvious or implied threat of violence, but more along the lines of a threat to create adverse media publicity.

The Award

[14] The essential features of the arbitrator' s reasoning were that:

14.1 Ndzeru was working in a department in a busy harbour, in which there were operational pressures because of unfilled vacancies at the time, which was one of the reasons he was not granted five days' leave.
14.2 At the time of his incapacity hearing, he had been away from work for two months and had been refused bail on two occasions. In the result there was no indication when he might return to work.
14.3 The charges he was facing were serious and at no stage during his incarceration did he make representations to Transnet to keep his position open.
14.4 Ndzeru himself did not have any idea if and when he might be able to return to work and it was understandable that he wrote the letter to expedite payment of his pension monies. Equally, the company could not have been expected to keep his job open in the circumstances. All of these considerations meant his dismissal was substantively fair.
14.5 The arbitrator also found Ndzeru's dismissal was procedurally fair on the basis that he had accepted the outcome of the enquiry because at the time he believed he was not leaving prison any time in the near future. He had initiated the process to obtain his pension payment quickly and he only started querying his dismissal in October 2019.

Grounds of review

[15] Ndzeru's essential complaint is that he was dismissed without a fair procedure being followed and that other employees, who had similarly been absent on account of being incarcerated, were treated more favourably. In relation to substantive fairness, he claimed that the arbitrator had failed to address this adequately.

Alleged inconsistent treatment

[16] However, Ndzeru's perception that there was a comparable case turned out to be inaccurate because the individual in question was only absent for a period of just over two weeks on account of being arrested and was able to return to work on being released from custody at the end of that period. The undisputed evidence of Johns was that the employee's period of absence was taken off his annual leave and the charges had been dropped by the time he was released. By contrast, Transnet argued that by the time the enquiry was held, Ndzeru had been incarcerated for just over two months and there was no indication if and when he would be able to return to work. Accordingly, it was justified in terminating his services for incapacity at that time.

[17] In Ndzeru's heads of argument it was also argued that the arbitrator failed to appreciate that Transnet had previously held an enquiry at a prison when an employee had been incarcerated. Firstly, this was not pleaded as a ground of review, nor was John's challenged about this under cross-examination. Secondly, in the case in question, the employee had been incarcerated in Goodwood prison, which self-evidently was conveniently situated for the Cape Town based employer to conduct the enquiry there. By contrast, Ndzeru was detained in Limpopo province.

The signing of the letter on 1 August 2019 to obtain the pension payment.

[18] The arbitrator's finding that it was understandable Ndzeru signed the letter cannot be faulted. He took account of the fact that, at the time Ndzeru believed there was little chance he would soon be released. It was John's evidence that it was Ndzeru who initiated the request for advice on how he could get his pension moneys quickly. John's sought advice from the Employment Relations Department and relayed that advice to Ndzeru who acted upon it. When, eleven days after writing the letter saying he would not contest his dismissal, he received the letter of the outcome of the hearing advising him he could refer a dismissal dispute to the CCMA, he did not query it. When he came to sign for his pension moneys on 16 September 2019 he also did not attempt to speak to anyone in Employee Relations about being reinstated or re-employed, still less did he ask for an opportunity to put his side of the

case. He did not press his union representatives to act with greater speed and it was only on 4 October 2019 that he first engaged Transnet directly asking for a face-to-face meeting and advice from Ramonyaluoe The gist of the query he raised with him was regarding other persons who had been taken back after being incarcerated. Until then there was no reason for Transnet to suppose he was going to question his dismissal. In any event, he ultimately did refer an unfair dismissal dispute and was not prevented from doing so because he had supposedly waived his right to dispute the fairness of his dismissal. Accordingly, this issue is something of a red herring, except to the extent that it is one of the factors pointing to the fact that he was not asking Transnet for an opportunity to state his case at the earliest opportunity.

Fairness of the procedure followed

[19] Ndzeru contends the arbitrator failed to appreciate that he did not have an opportunity to state his case. He also argues that he was entitled to a post-dismissal hearing to ensure this happened.

[20] In relation to the question of post-dismissal hearings, he relied on a number of cases. In *Trident Steel (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2005) 26 *ILJ* 1519 (LC), the Labour Court confirmed that an employee who was dismissed in absentia was unfairly dismissed. The employee was incarcerated at the time and could not communicate with the employer, but the employer nonetheless knew he was in prison. When he returned to work he was subjected to a second disciplinary enquiry but even though he had a valid explanation why he had not contacted the employer and informed it of his whereabouts, his dismissal was unfairly confirmed. While two enquiries were conducted in that case, unlike the case of Ndzeru, the employee was completely unaware of the first enquiry taking place while he was in prison.

[21] In another Labour Court judgment[1] following the approach in *Trident Steel* an employee was dismissed for being absent without permission from 15 March to 8 June 2005. On returning to work, on 9 June 2005 he was given notice to attend a

[1] *Eskom Ltd v CCMA & Others* (JR2025/06) [2008] ZALC 92 (1 July 2008)

'confrontation discussion' in terms of the employer's disciplinary code. The court accepted that the employer's code provided that if an employee was physically unable to report for work, that was a justifiable defence for unauthorised absence. It was common cause the employer knew about his whereabouts and that he was released on being acquitted. The court held that he was not the cause of his incarceration and as his absence from work was beyond his control. The employer should also have considered alternatives to dismissal as suggested in *Trident Steel.*[2] In *Laminate Profiles CC v Mompei & others* (2007) 28 *ILJ* 1092 (LC) an employee was dismissed summarily without a hearing when the employer received confirmation of his detention and refused to reinstate him when he returned to work following his acquittal after a year's incarceration. The arbitrator's decision that the dismissal was unfair was upheld, but the case did not make any reference to when a hearing should be held.

[22] In *Samancor Tubatse Ferrochrome v MEIBC & others* [2010] 8 BLLR 824 (LAC), an employee had been dismissed for 'operational incapacity' ten days after his incarceration, because he could not render his services. After his acquittal some 137 days after his dismissal, he was given a second 'post-dismissal' hearing shortly after his release. This hearing enquiry was conducted by the same chairperson who had presided in the first hearing held *in absentia.* He re-confirmed the dismissal. On review in the Labour Court[3], the court endorsed the arbitrator's reasoning that the employee was not dismissed for 'operational incapacity' but because of his absence[4]. The court also accepted the arbitrator's finding that the dismissal was substantively unfair because the employer failed to take account of the fact that the employee had no control over his circumstances and the length of his detention.[5]

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[2] See *Trident Steel* at 1522, *viz*:

> "There were alternatives open to the applicant. It could have employed a temporary employee. If it had no alternative but to employ a permanent employee, it could have engaged the applicant in consultations in terms of s 189 of the Labour Relations Act about his redundancy or about its operational requirements. It does not suffice D merely to convey to an employee that he was dismissed for misconduct which was determined in his absence. A promise of re-employment is cold comfort to such an employee, particularly when he was disciplined and dismissed for a second time."

[3] *Samancor Ltd v Metal & Engineering Industries Bargaining Council & others* (2009) 30 *ILJ* 389 (LC).

[4] *Samancor* (LC) at para [26]

[5] *Samancor* (LC) at para [15].

[23] On appeal, the LAC found that incapacity had a broader meaning, which applied to circumstances where an employee could not attend work owing to incarceration, military service or a legal prohibition[6]. The LAC continued:

> "[11] Manifestly, the question as to whether a dismissal in the circumstances of the present dispute is substantively fair depends upon the facts of the case. An employer needs to consider the reasons for the incapacity, the extent of the incapacity, whether it is permanent or temporary, and whether any alternatives to dismissal do exist.
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> [12] In this case, the appellant had no idea as to how long the incarceration would endure. Further, the skilled nature of fourth respondent's position made it commercially necessary for the appellant to make an expeditious decision about fourth respondent's future and the imperative to ensure that a similarly skilled person could assume the responsibilities.
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> [13] A large organisation may be able to take a somewhat more generous approach to the particular problem of this case, namely, to keep an incarcerated employee's position open until his return, in that such an organisation may have "deep financial pockets." But, in principle, it cannot be the case that the law has developed an inflexible rule; that is that incapacity which is outside of the control of the employee cannot be a cause for dismissal.
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> [14] In my view, given the facts of the present dispute, it was not reasonable to expect appellant to have kept the position open and available to fourth respondent for an indefinite period of time, particularly in circumstances where he held an important position within the organisation. The potential indefinite length of the absence from work of a person holding a position which could not easily be filled by temporary employees renders this case one of incapacity as I have applied that term. For a similar approach, see the

[6] *Samancor* (LAC) at para [10].

Industrial Relations Court of Australia in *Young v Metropolitan Ambulance Service* (1997) IRCA 81.

[15] In the circumstances of this case and for the reasons so set out, second respondent should have considered that the decision to terminate fourth respondent's employment was fair and manifestly justifiable."

[24] The matter went on appeal to the Supreme Court of Appeal, which found that the categorisation of the dismissal was irrelevant to the case and the LAC had erroneously dealt with the matter as an appeal. The SCA set aside the judgment of the LAC, but did not deal with the principle of whether or not a post dismissal hearing should be held in such cases. The court only laid down the following broad statement of principle:

"[13] Counsel for Samancor advanced further grounds for his submission that no reasonable arbitrator could have made the award but I do not think it is necessary to recite them. In substance they are all facets of the rhetorical question that counsel posed: what else is an employer to do when he or she is not to know when the employee will be capable of resuming his or her duties, or even whether they will be resumed at all? I do not underestimate the dilemma of an employer in that situation but there can be no universal answer - as in all cases of unfair dismissal the question whether he or she acted fairly will depend on the particular facts. In this case Mr Stemmett [the arbitrator] concluded that Samancor had not demonstrated why no temporary arrangement could have been made. Nor, I might add, did it demonstrate why Mr Maloma - who had worked for Samancor for almost ten years - could not have been accommodated once he was able to return to work. Whether I would have reached the same conclusion as that reached by Mr Stemmett is not germane and I express no view on the matter. It is sufficient to say that on the material before him I have no doubt that his decision was not so unreasonable that it could A not have been reached by a reasonable decision maker"

[25] None of these cases established a general right to a post-dismissal hearing as such. In *Eskom* the hearing was only convened after the employee was released and it was the only hearing held. The issue of a hearing *in absentia* did not arise. In *Trident Steel* the employer did not notify the employee of the enquiry it was holding in his absence while he was incarcerated. He had no opportunity to be represented or to make representations. In *Samancor* a post dismissal hearing was part of the company's own procedure. At best these case simply follow the ordinary principle that an employee is entitled to an opportunity to present their case before being dismissed. Whether such a right was granted will depend on the facts of each case.

[26] Objectively speaking, the procedural fairness of Ndzeru's dismissal really depends on the adequacy of the hearing he *was* afforded when it was held *in absentia* and whether the failure to hold a post dismissal hearing meant that any defects in the original hearing were not rectified. Although Ndzeru focussed much attention on the idea that a post-dismissal hearing was a procedural right, I realise that this argument was essentially advanced as a step which Transnet should have taken after Ndzeru was able to return to work in order to give him the opportunity to present a case which he had been denied in the first hearing. Transnet contends that it was sufficient that he was represented by a shop steward.

[27] I appreciate that an employer, faced with uncertainty about if and when an employee might be expected to be able to return to work within a reasonable period, cannot be expected to wait until some indeterminate day in the future when the employee might appear, before making a decision on the feasibility of the employee's continued employment. That means that a hearing might have to take place *in absentia*. However, if the employee cannot be present then at least they should be invited to submit a written statement setting out their defence, preferably after receiving at least a summation of the material facts advanced by the employer, and be given an opportunity to make representations why they should not be found guilty. If found guilty, they could be given an chance to make representations on the sanction to be imposed even if that is only in a written form. That may necessitate a somewhat truncated procedure. Nonetheless, such an arrangement, or other practical arrangements which realistically address the practical obstacles inherent in

hearings of this nature, should ensure that an employee has an adequate chance to state their case even though unable to attend.

[28] However, it is important that none of these kind of issues about the original enquiry were canvassed with Johns', so the court can hardly blame the arbitrator for not taking account of them. In fact, at no stage was it put to him why the original enquiry was inadequate. Ndzeru should at least have put to Johns why he claimed the original enquiry was inadequate, which in turn, he could then have used to argue why a post dismissal enquiry was necessary to rectify any short comings. None of this was traversed in the evidence.

Conclusion and Costs

[29] In light of discussion above, while a case might have been made out for procedural unfairness, on what was before the arbitrator I cannot say that the arbitrator's findings that Ndzeru's dismissal for incapacity was substantively and procedurally unfair.

[30] I do not believe it would be appropriate to make a cost award in this case despite both parties asking for costs.

Order

[1] The review application is dismissed.

[2] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

Representatives

For the Applicant	Z Parker from Parker Attorneys
For the First Respondent	ZL Mapoma instructed by Maserumule Attorneys