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

Case No.: JA 57/08

SAMANCOR TUBATSE FERROCHROME	**Appellant**
and	
METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL ("MEIBC")	**First Respondent**
JAN STEMMET N.O	**Second Respondent**
NATIONAL UNION OF MINEWORKERS	**Third Respondent**
M J MALOMA	**Fourth Respondent**

JUDGMENT:

DAVIS JA:

Introduction

[1] This is an appeal against a judgment of Francis J in which he dismissed an application to review and set aside an arbitration award issued by second respondent on 28 February 2007. Second respondent found that 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] After hearing argument, the court delivered a judgment *ex tempore*. Inexplicably, the operator of the recording machine in the court failed to inform the Court that the machine was not functioning. The judgment

could not be transcribed and accordingly this judgment is a reconstruction thereof.

[3] Briefly the facts were as follows: Appellant conducts business in the mining sector and is a division of a larger mining company. Fourth respondent was employed by appellant as a furnace operator, having commenced employment with appellant in August 1996. On 20 May 2006, fourth respondent was arrested on suspicion of having committed an armed robbery. He remained in custody and was absent from work for approximately 150 days. On 30 May 2006, fourth respondent was dismissed on the grounds of incapacity, in that he was physically unable to tender his services. A letter advising him of his dismissal was delivered to the police station at which he was being held on 6 June 2006.

[4] On 2 November 2006 a post-dismissal hearing was held by the appellant, following fourth respondent's release in custody. The hearing was chaired by Mr Niewoudt, appellant's human resources manager, and was held in terms of appellant's disciplinary code.

[5] This hearing determined that fourth respondent had been arrested on 20 May 2006, and was absent from work until 17 October 2006; that is for a period of approximately 150 days. It confirmed that fourth respondent had advised the appellant by way of a telephone call of his arrest on the

day on which he was arrested. The following day fourth respondent's sister informed the appellant of his arrest.

[6] The hearing found that the appellant could not have been expected to put in place a temporary arrangement for such a period of time which would have allowed fourth respondent's position to be kept open for him. The position he held was an important one within the framework of appellant's organisation. The criminal case against fourth respondent was still pending at the time of the post-dismissal hearing. This was a second instance within a six month period that fourth respondent had been arrested and had thus been absent from work. Accordingly, the dismissal of fourth respondent was upheld.

[7] Fourth respondent then referred the matter to arbitration and the dispute was heard by second respondent. Second respondent found that the dismissal was substantively unfair because respondent had not taken proper account of the fact that fourth respondent had no control over the circumstances and duration of his absence. Furthermore, on 30 May 2006, when appellant made his decision to dismiss fourth respondent, no opportunity was given to the latter to present his case. Accordingly, the dismissal was also procedurally unfair. For these reasons, appellant was ordered to reinstate fourth respondent on conditions no less favorable

than those that applied prior to his dismissal with effect from 2 November 2006.

[8] On review, Francis J agreed with second respondent's finding:

> "*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 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*."

Evaluation

[9] The letter purporting to dismiss fourth respondent dated 30 May 2006 provides the basis of the case against fourth respondent:

> "*Operational Incapacity Dismissal*
>
> *You have failed to report for duty since the 20th May 2006 and you are therefore in breach of contract of employment as you are physically unable to tender your services 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*:"

Both second respondent and the court *a quo* placed considerable emphasis on the scope of the term 'incapacity', that is it should be caused

by ill health, injury or poor performance; thus the finding that the charge exceeded their defined scope of the definition of incapacity. This finding was critical to the decisions of both second respondent and the court *a quo*.

[10] The approach is not entirely compatible with existing jurisprudence. Thus, in Jabariv v Telkom SA (Pty) Ltd (2006)27 ILJ 1854 (LAC) the court relying on Du Toit Labour Relations Law (4th ed) 402, found that incompatibility was a species of incapacity as it relates essentially to the subjective relationship of an employer and other coworkers within an employment environment regarding an employees' inability or failure to maintain harmonious relationships with his peers. The implication of this judgment is that incapacity extends beyond the narrow confines of the term adopted both by the second respondent and the court *a quo*. Brassey Commentary on the Labour Relations Act at para A8 – 76 submits, correctly in my view, that:

> "*Incapacity may be permanent or temporary and may have either a partial or a complete impact on the employee's ability to perform the job. The Code of Good Conduct: Dismissal conceives of incapacity as ill-health or injury but it can take other forms. Imprisonment and military call-up, for instance, incapacitate the employee in pursuance of a closed shop is for incapacity; so is one that results from a legal prohibition on employment*."

There is thus no justification for the limitations placed by the court *a quo* or second respondent upon the meaning of incapacity as adopted.

[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.

[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.

[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.

[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 employee renders this case one of incapacity as I have applied that term. For a similar approach, see the 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.

Procedural fairness

[16] It may have been impossible for appellant to hold a pre-dismissal hearing while the fourth respondent was incarcerated. But, merely providing fourth respondent with a letter informing him in writing of the decision to dismiss him and the reasons for the dismissal while he was in prison did not constitute a fair opportunity for fourth respondent to present his case.

[17] When the matter came before the post-dismissal hearing, the same person who presided over the initial hearing again presided. But the

decision to dismiss had already been made. Thus the post dismissal hearing appeared to be nothing more than an *expo facto* rationalisation of the earlier decision. In the circumstances, fourth respondent was not accorded the standard of fairness which is required in a dismissal hearing. In the circumstances therefore, procedural fairness was not complied with by appellant.

[18] Accordingly, section 194 of the Labour Relations Act 66 of 1995 (LRA) applies. The maximum compensation which can be awarded to fourth respondent in such a case is the equivalent of twelve months remuneration calculated at the employee's rate of remuneration and the date of dismissal. In the circumstances of this case, particularly given the difficulties of dealing with a person who was incarcerated for some six months, the discretion afforded to a court to determine what is 'just and equitable' in terms of sections 194(3) of the LRA must be exercised. Compensation based upon fourth respondent's remuneration for a period of six months calculated at the employee's rate of remuneration at the date of dismissal is a just and equitable award for the breach of the right of procedural fairness which was owed to fourth respondent.

[19] In the result the following order is made:

1. The appeal is upheld.
2. The order of the court *a quo* is set aside and replaced with

the following order

2.1 The dismissal of fourth respondent is declared to be substantively fair.

2.2 The dismissal of fourth respondent is found to be procedurally unfair.

2.3 An amount of compensation in the equivalent of six months remuneration calculated the rate of remuneration on the date of dismissal is awarded to fourth respondent.

2.4 There is no order as to costs.

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DAVIS JA

JAPPIE JA and REVELAS AJA agreed

APPEARANCES:

For the Appellant: Adv. A. Mosaum

Instructed by: Bowman Gilfillan Inc

For the Respondent: Mr. MES Makinta

Instructed by : ES Makinta Attorneys

Date of Judgment: 12 March 2010