THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 625/10
No precedential significance

In the matter between:

NATIONAL UNION OF MINEWORKERS	**First Appellant**
MARIFI JOHANNES MALOMA	**Second Appellant**

and

SAMANCOR LIMITED (TUBATSE FERROCHROME)	**First Respondent**
METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL ("MEIBC")	**Second Respondent**
JAN STEMMETT NO	**Third Respondent**

Neutral citation: *National Union of Mineworkers v Samancor Ltd* (625/10) [2011] ZASCA 74 (25 MAY 2011)

Coram: NUGENT, PONNAN, CACHALIA and TSHIQI JJA and MEER AJA

Heard: **6 MAY 2011**

Delivered: **25 MAY 2011**

Summary: **Labour law – arbitrator – review – standard for interference on review.**

ORDER

On appeal from: Labour Appeal Court (Davis and Jappie JJA and Revelas AJA sitting as court of appeal).

The appeal is upheld with costs. The order of the Labour Appeal Court is set aside and substituted with the following order:

'The appeal is dismissed with costs'.

JUDGMENT

NUGENT JA (PONNAN, CACHALIA and TSHIQI JJA and MEER AJA concurring)

[1] The second appellant (Mr Maloma) was employed by the first respondent (Samancor) as a furnace operator in August 1996. On 20 March 2006 he was arrested on suspicion of robbery. Fourteen days later the charge was withdrawn and Mr Maloma was released and he returned to work. On 20 May 2006 he was again arrested on the same charge. On this occasion he was detained for about 140 days until he was released on bail. Meanwhile, on 30 May 2006, ten days after his second arrest, Samancor terminated his employment. A letter telling him of his dismissal was sent to the police station where Mr Maloma was being detained but he did not receive it. For obvious reasons there was no hearing before the termination but a 'post dismissal' hearing was held

after his release. Following that hearing Samancor decided not to reverse the earlier termination.

[2] Mr Maloma disputed the fairness of his dismissal and the dispute was referred to arbitration under the auspices of the bargaining council. The arbitrator was Mr Stemmett (the third respondent). Mr Stemmett found that the termination was both substantively and procedurally unfair and issued an award ordering his reinstatement. Adopting the view that Samancor should not be penalized for the period that Mr Maloma was detained he ordered that he should be reinstated with effect from 2 November 2006 (the date of the post dismissal hearing).

[3] Samancor applied to the Labour Court to review and set aside the award. The grounds alleged in the founding affidavit were that the arbitrator committed a gross irregularity, exceeded his powers, misconducted himself, and that the award was irrational and not justified by the evidence. I need to say immediately that the word 'misconduct' was used in a technical sense by Samancor and there is no suggestion that Mr Stemmett acted in any way to his discredit.

[4] The application was dismissed by the Labour Court (Francis J). An appeal to the Labour Appeal Court (Davis and Jappie JJA and Revelas AJA) succeeded. The order of the Labour Court was set aside and substituted with orders declaring the dismissal to have been substantively fair, but procedurally unfair for which Mr Maloma was awarded compensation equivalent to six months' remuneration. Mr Maloma, assisted by his union (the first appellant), now appeals with the special leave of this court.

[5] It is trite that an appeal does not lie against the award of an arbitrator. Even if the reviewing court believes the award to be wrong, there are limited grounds upon which it is entitled to interfere. Section 145 of the Labour Relations Act 66 of 1995 permits the Labour Court to set aside an award for one or other defect stated in s 145(2) – none of which are now applicable. But it was recognised in *Sidumo v Rustenburg Platinum Mines Ltd,*[1] adopting what was held in *Carephone (Pty) Ltd v Marcus NO*,[2] that an award may also be set aside if it is one that 'a reasonable decision-maker could not reach',[3] and it was on that basis that Samancor sought to have the award set aside. Thus the question that was before the Labour Court – and subsequently before the Labour Appeal Court – was whether the award in this case was so defective as to fall within that category.

[6] After considering the facts, and the reasons give by Mr Stemmett for his award, the Labour Court answered that question as follows (referring to Mr Stemmett as 'the commissioner'):

'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'.

[7] It is apparent from the reasons given by the Labour Appeal Court that it did not appreciate the limited nature of the question that had been before the Labour Court – and hence the limited question that was before it on appeal. Nowhere in its reasons is there any express finding that the

1 *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC).
2 *Carephone (Pty) Ltd v Marcus NO* 1999 (3) SA 304 (LAC).
3 Para 110.

award was one that no reasonable decision-maker could make nor does it appear by implication. The most that can be said is that it found that the arbitrator erroneously categorised the dismissal – a matter to which I will return – but error is not by itself a proper basis for reconsidering an award. Having found that there was an error the Labour Appeal Court said that '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' and proceeded to consider the facts, reaching the following conclusion:

'In the circumstances of this case and for the reasons so set out, [Mr Stemmett] should have considered that the decision to terminate [Mr Maloma's] employment was fair and manifestly fair'.

That approach to the matter would have been appropriate if the arbitrator's award had been under appeal but not where it was being subjected to review. (The court went on to find that the termination had been procedurally unfair but I need not deal with that aspect of the case.)

[8] Before us it was submitted for Samancor that the order of the Labour Appeal Court was nonetheless correct because the award was indeed one that could not reasonably have been made and I turn to that submission.

[9] One of the grounds that was advanced in support of that submission was the error made by the arbitrator in categorizing the reason for the dismissal. On that issue some background is necessary. Under s 185 of the Act every employee has the right not to be unfairly dismissed. Section 188(1) of the Act provides that a dismissal that is not automatically unfair (that is, one that does not fall within the categories listed in s 187) is unfair if the employer fails to prove

'(a) that the reason for the dismissal is a fair reason –

i) related to the employee's conduct or capacity; or

ii) based on the employer's operational requirements; and

b) that the dismissal was effected in accordance with a fair procedure'.

[10] There was debate before Mr Stemmett as to the correct categorization of the dismissal. It appears from the reasons given for the award that Samancor argued that it had dismissed Mr Maloma for 'incapacity', which Mr Stemmett described as a 'no fault dismissal based on the principle of impossibility of performance.' He concluded, however, that in truth Mr Maloma had been dismissed for absenteeism and that 'absenteeism is a disciplinary offence and cannot be treated as an operational incapacity'. The Labour Court was of the same view and said that since Mr Maloma was not 'the author of his own misfortune' he had a 'valid reason for his absence' and thus had to be reinstated with loss of income'. The Labour Appeal Court, on the other hand, said that 'incapacity' might include imprisonment, which seems to me to be correct. But I do not see that the difference of opinion on the correct categorisation of the dismissal plays any material role in this case.

[11] It was submitted before us by its counsel that Samancor had not purported to dismiss Mr Maloma for fault on his part (that is, for the disciplinary offence of absenteeism). He was dismissed because he was no longer capable of performing his employment duties (that is, for incapacity). Reminding us of the ordinary consequences for a contract of the inability of one party to perform, counsel submitted that the inability of Mr Maloma to present himself for work in itself entitled Samancor to bring the employment to an end, which is what it had purported to do.[4]

4 RH Christie *The Law of Contract in South Africa* 5 ed p 474.

[12] The submission is not altogether correct. While ordinary principles of contract permit a contracting party to terminate the contract if the other party becomes unable to perform, that is not the end of the matter in the case of employment. The question that still remains in such cases is whether it was fair in the circumstances for the employer to exercise that election. In making that assessment the fact that the employee is not at fault is clearly a consideration that might and should properly be brought to account. But the fact that Mr Maloma was not at fault was not the sole reason for the arbitrator's decision. Another consideration that he took account of – and it was clearly decisive of his decision - was that there was 'no evidence that [Mr Maloma] was occupying such a key position in the company that necessitated his dismissal after 10 days of absence'. He added that he had not been persuaded that the employment relationship had become intolerable. In those circumstances I cannot see that the error that he made was material to the outcome. His reasoning shows that he would have reached the same conclusion however the dismissal was categorised. Least of all does it follow from his error that the award was so unreasonable that it fell to be set aside.

[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 under-estimate 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 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 not have been reached by a reasonable decision-maker. In those circumstances there were no grounds for the order of the Labour Court to be set aside.

[14] But that is not the end of the matter. The basis for the decision of this court in *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd*[5] was that it will not interfere with a decision of the Labour Appeal Court only because it considers it to be wrong: what is required in addition are special circumstances that take it out of the ordinary. It is because of that approach that this court takes to appeals from the Labour Appeal Court that leave to appeal will not be granted in cases that do not fall within that category. As it was expressed in that case:

'No doubt every appeal is of great importance to one or both parties, but this Court must be satisfied, notwithstanding that there has already been an appeal to a specialist tribunal, and that the public interest demands that labour disputes be resolved speedily, that the matter is objectively of such importance to the parties or the public that special leave should be granted. We emphasise that the fact that applicants have already enjoyed a full appeal before the LAC will normally weigh heavily against the grant of leave. And the demands of expedition in the labour field will add further weight to that.'[6]

That is consistent with the observation by the Constitutional Court in

5 *National Union of Metalworkers of SA v Fry's Metals* 2005 (5) SA 433 (SCA).
6 Para 43.

Dudley v City of Cape Town[7] that

'[t]he LAC is a specialised appellate Court that functions in the area of labour law. Both the LAC and the Labour Court were established to administer labour legislation. They are charged with the responsibility for overseeing the ongoing interpretation and application of labour laws and the development of labour jurisprudence.'

[15] The fact that leave to appeal has been granted upon application to the President of this court is not decisive of whether a case meets the criteria laid down in *Fry's Metals*. That question is one that is ultimately to be answered by the court itself upon consideration of an appeal (Cf *Rawlins v Kemp*[8]). Applications to review the awards of arbitrators are unfortunately not uncommon and generally raise no issues that bring them within those criteria. But counsel for the appellant submitted that this case is indeed out of the ordinary. He submitted that while this court might generally not entertain an appeal where the Labour Appeal Court has exercised its judgment on the merits of the case that is not what occurred in this case. In this case, he submitted, the Labour Appeal Court overturned the lower court without considering at all the question that had been placed before it, effectively denying the appellant his entitlement to answer the appeal. I think there is merit in that submission. It seems to me that there has indeed been a failure that is so fundamental as to take the case out of the ordinary and that intervention is warranted. This court entertained an appeal in comparable circumstances in *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration*[9] and there is no reason to differentiate in this case. Had the Labour Appeal Court not misconceived its function it ought to have dismissed the appeal and consequently this appeal should succeed. I see no reason why the

7 *Dudley v City of Cape Town* 2005 (5) SA 429 (CC) para 9.
8 *Rawlins v Kemp* [2011] 1 All SA 281 (SCA) paras 19-20.
9 *Shoprite Checkers (Pty) Ltd v Commission For Conciliation, Mediation and Arbitration* 2009 (3) SA 494 (SCA).

appellants should not receive their costs both in this court and in the court below.

[16] The appeal is upheld with costs. The order of the Labour Appeal Court is set aside and substituted with the following order:
'The appeal is dismissed with costs'.

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R W NUGENT
JUDGE OF APPEAL

APPEARANCES:

For appellant:	N H Maenetje Instructed by: E S Makinta Attorneys, Johannesburg; N W Phalatsi & Partners, Bloemfontein.
For first respondent:	A E Franklin SC T Ngcukaitobi Instructed by: Bowman Gilfillan, Johannesburg; Matsepes Inc, Bloemfontein.
For second respondent:	Abides the decision of the Court
For third respondent:	Abides the decision of the Court