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Incarceration and employment: a case study in South African Labour Law

South African employers often face situations where an employee cannot report for duty due to circumstances beyond their control.

One of these ‘unforeseeable circumstances’ is incarceration. The relationship between incarceration and employment is a complex and multifaceted issue that has significant implications for both the employer and employee.

The recent case, ***Khanye v Auditor-General of South Africa (2024) 33 CCMA 8.17.1,*** presents a fascinating exploration of employee rights and employer obligations when an employee is incarcerated.

In this blog we will discuss this specific case in more detail as it examines the complexities of "supervening impossibility of performance" when an employee is incarcerated, and raises critical questions about procedural and substantive fairness in these scenarios.

Background and Incident

Mr Khanye, a senior manager in the accounting division of the Auditor-General of South Africa (AGSA), was arrested on 2 June 2021, and subsequently detained for nearly 10 months before charges against him were withdrawn. During this period, he was unable to report for duty. On the day of his arrest, Mr Khanye asked his investigating officer to inform his superior of his arrest and explain that he had no access to his cell phone as it was confiscated. As a result, the AGSA granted him three days' leave, as per the organisation's leave policy, to cover his bail application period. However, after his bail was denied, Mr Khanye did not make further contact with the AGSA until the time of his release on 24 March 2022. His uncommunicated absence of nine months was unauthorised and ultimately led to his suspension on 28 March 2022, and subsequent dismissal on 18 November 2022. His dismissal was upheld by the Chairperson on appeal on 18 December 2022.

The Dispute

Mr Khanye challenged his dismissal, arguing that his prolonged absence was due to circumstances beyond his control, and thus constituted a "supervening impossibility of performance". He claimed that his incarceration should have been treated as a form of temporary incapacity, entitling him to leave for the entire period of his detention. The AGSA, on the other hand, argued that the emergency leave provision in their policy only covered the initial three days that were granted to Mr Khanye when he informed the organisation of his absence. However, due to the lack of further communication from Mr Khanye, his dismissal for unauthorised absence was justified, as the policy clearly states that leave would only be granted or authorised if the employee informs the company of his/her absence in advance, which Mr Khanye failed to do for nine months.

Legal Analysis and Findings

The Commissioner at the Commission for Conciliation, Mediation, and Arbitration (CCMA) was tasked with determining whether the dismissal was substantively and procedurally fair. The key issues revolved around whether Mr Khanye's absence could be considered an emergency (as per the organisation's policy) or incapacity, and whether the AGSA had an obligation to explore alternatives to dismissal.

Substantive Fairness

The Commissioner acknowledged that in previous judgements, South African courts had recognised incarceration as a form of incapacity. Notably, in *Trident Steel (Pty) Ltd v CCMA and others (2005) 26 ILJ 1519 (LC)**[1]***, the Labour Court held that absence due to imprisonment may constitute a supervening impossibility to tender a service and as such, employers should consider alternatives to dismissal, such as temporary replacements, when an employee is incarcerated.

If that is not possible, employers must engage employees in terms of section 189 of the Labour Relations Act (LRA) regarding his/her redundancy or its operational requirements. Similarly, in *Eskom Ltd v CCMA and others (JR2025/06) [2008] ZALC 92*, the court held that an employee's absence due to incarceration was beyond their control, and that the employer should have considered less drastic measures than dismissal.

Applying these principles, the Commissioner found that the AGSA had failed to prove that Mr Khanye's prolonged absence was without a valid reason. The organisation did not explore alternatives, such as employing a temporary replacement or engaging in consultations to address operational requirements, despite knowing about his incarceration.

Procedural Fairness

On the procedural front, Mr Khanye argued that the disciplinary process was flawed, alleging that the Chairperson lacked authority and that there was interference in the process. However, these claims were dismissed by the Commissioner, who found no evidence of procedural irregularities and found that the dismissal had been procedurally fair.

Award

The Commissioner concluded that Mr Khanye's dismissal was substantively unfair, given the valid reason for his absence and the lack of consideration for alternative measures by the AGSA. As a result, the AGSA was ordered to reinstate Mr Khanye with full retrospective effect, underscoring the importance of fair treatment and due process in cases of employee incarceration.

Conclusion

This case highlights the importance of following the correct procedures in respect of incarcerated employees. Procedural fairness not only requires following the correct procedure in the form of an incapacity inquiry or disciplinary hearing, but also entails affording the employee the opportunity to be heard. This could be done at an incapacity inquiry prior to incarceration; by asking the employee to make written representation or submission; by means of an inquiry held at the place of incarceration; or by inviting the employee's legal representative or shop steward to make written submissions on their behalf.

At *SERR Synergy,* we are dedicated to *assisting our clients in navigating the complexities of employment law, particularly when balancing workplace rules with accommodating employees' unforeseen and uncontrollable circumstances.* We provide expert guidance to ensure that employers thoroughly consider all possible alternatives before resorting to dismissal and that procedural and substantive fairness is maintained in all disciplinary actions. Our comprehensive support includes developing fair and legally compliant workplace policies, conducting impartial investigations, and offering strategic advice on handling sensitive situations to protect both employer and employee rights.

About the author: Angelique van der Sandt joined SERR Synergy in March 2017. She is the Labour Manager at our Cape Town branch. She is an admitted attorney of the High Court of South Africa and completed her Bachelor of Arts (BA) in Law and subsequent Bachelor of Laws (LLB) degrees, Law School and post-graduate Certificate in Advanced Labour Law at the University of Pretoria.

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[1] [also reported at [2005] 10 BLLR 1028 (LC) Ed]