



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D469/14

In the matter between:

NUMSA

First Applicant

SIPHO MTHETWA

Second Applicant

And

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL (MEIBC)

First Respondent

FAAIZA SYED N.O.

Second Respondent

OKAPI INDUSTRIES (PTY) LIMITED

Third Respondent

Heard: 10 February 2016

Delivered: 8 August 2016

JUDGMENT

WHITCHER J

- [1] This is an opposed review application to set aside an arbitration award in which the second respondent (“the commissioner”) found that the dismissal of the second applicant (“Mthethwa”) was substantively and procedurally fair.
- [2] Mthethwa was dismissed for refusing, even after being subpoenaed, to give evidence at an arbitration hearing at the MEIBC in which other employees were charged with serious misconduct during a strike.
- [3] In reviews, the applicant must show that the conduct and consequent final decision of the commissioner fell outside the band of what could be expected from a reasonable decision-maker. This test too is trite. The applicants have failed to meet it.
- [4] Substantively, the commissioner appears justified, on the evidence before her, in finding Mthethwa’s excuse for refusing to testify unconvincing, vague and not directly related to his own safety. In the context of Mthethwa’s evidence and attitude in the proceedings as a whole, the commissioner was not unreasonable in finding that reports of shots fired at another employee’s house did not constitute acceptable grounds for *his* refusal to testify. Having listened to the evidence, she plainly formed the impression that Mthethwa was more concerned with being unpopular or having fingers pointed at him than truly fearful that he may be harmed should he testify.
- [5] If there were other factors besides the gunshots at Gumede’s house that made Mthethwa fearful, the evidentiary burden lay on him to flesh these factors out in the evidence. The commissioner noted that he did not do so, applying the evidentiary principles correctly.
- [6] The parties concluded a pre-hearing agreement. Inconsistency in the application of discipline was not raised as an issue in dispute. The commissioner therefore acted reasonably in not considering this as an element of substantive unfairness at play in the case. Even if it were an issue, the evidence reveals distinguishing factors between Mthethwa’s refusal and that of the comparator employee. This other employee, Gumede, against whom no action was taken for also refusing to testify, mentioned specific threatening actions; shots fired at his house. However, since then, the

evidence showed that other employees freely testified against those charged with misconduct with nothing happening to the witnesses. As mentioned earlier, an additional factor weighed heavily against Mthethwa. This was the commissioner's sense, obtained with the benefit of seeing him testify in person, that he disingenuously offered up the story of feeling afraid.

- [7] The commissioner made the self-evident finding that Mthethwa's refusal to testify against other employees constituted the sort of disloyalty that destroys an employment relationship. She did not impose upon Mthethwa the duty to elevate his loyalty to the company above his genuine fears for his safety. She found, on the probabilities, that those fears were exaggerated and that the dominant reason behind the Mthethwa's refusal to testify at the MEIBC was solidarity with the other workers and a reluctance to be unpopular. These reasons, unfortunately for him, do not in employment law trump his duty to obey a lawful instruction.
- [8] On procedure, the commissioner correctly found that, as far as representation at his hearing was concerned, Mthethwa was afforded the rights set out in the Code of Good Practice on Dismissal. She did not fail to consider evidence that other employees were in the past permitted representation by external union officials. This indulgence does not create the right the First Applicant contends it does.

Order

- [9] In the premises, the following order is made:
1. The review application is dismissed.
 2. There is no order as to costs.

Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES:

For the applicants: S Montshiona from NUMSA

For the third respondent: Norton Rose Fulbright

Labour Court