

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: D 163/08

Not Reportable

In the matter between:

NATIONAL UNION OF METAL WORKERS

OF SOUTH AFRICA

FIRST APPLICANT

POOBALAN DANNY CHETTY

SECOND APPLICANT

And

TOYOTA SA (PTY) LTD

FIRST RESPONDENT

NHLANHLA MATHE N.O.

SECOND RESPONDENT

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

THIRD RESPONDENT

JUDGMENT

Conradie AJ

1. In this matter the Applicant seeks to review and set aside the award of the Second Respondent under case number KNDB 7686 – 07 in terms of which the second Respondent upheld the dismissal of the Applicant.
2. The Applicant seeks to review the award on numerous grounds as set out in paragraphs 33 -35 of his founding affidavit as follows:

“33. For reasons stated herein below, the Second Respondent-

- (i) Committed misconduct in relation to the duties of the Second Respondent as an arbitrator;*
- (ii) Committed a gross irregularity in the conduct of the arbitration proceedings; and*
or

(iii) *Exceeded the Second Respondent's powers.*

34. I submit that the second Respondent, when deciding my matter, failed to apply his mind to the issues before him. The basis for this submission is that:

35.1. There is no indication from the award that the conclusion of the Second Respondent is logically connected with overall assessment and impact of evidence. A copy of the award is attached hereto marked "PDC 4".

35.2. The Second Respondent took into account irrelevant considerations and/or ignored relevant ones.

35.3. That there was no evidence led to indicate that the work relationship between me and the First Respondent has irretrievably broken down to warrant the failure to reinstate me.

35.4. The Second Respondent unreasonably and inequitably curtailed the First Applicant to cross question the First Respondent.

35.5. The Second Respondent was very biased and harsh to the First Applicant.

35.6. That the Second Respondent was very lenient and accommodative to the First Respondent; the number of postponements at the instance of the First respondent clearly indicates that.

35.7. The Second Respondent erred in deciding that the Second Applicant blatantly refused an instruction was not disproved. The Second Applicant indicated that he did not refuse to execute the instructions of the First respondent. The Second Applicant also indicated that he was completing his medical paperwork, and that the Second Applicant would off load the truck after tea time as it was almost tea time.

35.8 The supervisor of the Second Applicant knows that the Second Applicant uses tea time to take medication for high blood pressure.

35.9 The Second Respondent failed to take into cognizance the fact that it was common cause between the parties that the Second Applicant had a medical problem, high blood pressure, and that the Second Applicant was attending treatment. The completion of the paper work concerned the treatment thereof.

35.10 The Second Respondent erred in deciding that the Second Applicant indicated that he (Second Applicant) can not off load a truck as it is not part of his job description. The Second Applicant off loaded trucks in the past without any complaints, and it is

therefore highly improbable that the Second Applicant can state that off loading trucks is not part of his job description.

35.11 The Second Respondent failed to address the question of selective justice as by the admission of the First Respondent's witnesses, the first company witness, Ishmael Nhlengethwa was always undermined by the First Respondent's employees. There was no disciplinary action lodged against the said employees by the First Respondent. This is a complete distate to the parity rule.

35.12 The Second Respondent failed to take into cognizance the fact that the testimony of the first company witness is not corroborated by the second and third company witnesses. The second and third company witnesses stated that they did not witness the incident.

35.13 The Second Respondent failed to apply the cautionary rule to the testimony of the First Respondent in light of the fact that the First Respondent's testimony can not be corroborated.

35.14 The testimony of the Second Applicant was corroborated by two witnesses, Bruce Dimba and Keith Govender, and the Second Respondent failed to take that into cognizance.

35.15 The Second Respondent also failed to take into cognizance the clean disciplinary record of the Second Applicant.

35.16 The Second Respondent also failed to take into cognizance the length of service of the Second Applicant." (sic)

3. Notwithstanding these grounds, which are largely repeated in the Applicant's heads of argument, the Applicant's representative has been unable to show me where and how these alleged irregularities came about.
4. The focus of the Applicant's argument appears to be that the Second Respondent's true mistake was in not appreciating or considering the evidence before him. In particular that the Applicant's evidence was that he refused to off-load the truck due to his medical condition and that this was explained to the First Respondent's witnesses who were involved in the matter.
5. Miss Naidoo for the First Respondent countered this by referring to the agreed record which clearly shows that the "medical condition" issue was not part of the

Applicant's case before the Second Respondent nor at the disciplinary hearing. Rather, the response appeared to be a mix of a refusal to off load the van because it was not part of his job to do so and/or he would do so once he was done with his paperwork. The latter reference is probably on the basis that as it was not his job he would be doing the First Respondent a favour by assisting and as such the Third Respondent could wait until the Applicant was ready to assist.

6. In my view the Second Respondent correctly concludes that Applicant refused to comply with the reasonable instruction in circumstances where he had no reason to do so. I am further of the view that the Second Respondent came to the correct conclusion insofar as dismissal being the appropriate sanction is concerned. It is clear that the misconduct in this case was blatant and without justification. The Applicant had sufficient opportunity to consider his refusal but failed to do so and rather persisted with his intransigent stance. Given the Applicant's approach to this matter that he did not refuse to offload the truck but simply wanted to first take his medicine, which evidence I have rejected, he denied himself the opportunity to deal constructively with the appropriate sanction and in fact did not offer the Second Respondent any reason why dismissal was inappropriate.
7. In light of the above I am of the view that the review must fail.

In the circumstances I order as follows

1. The application for the review and setting aside of the Second Respondent's award under case number KNDB 7686 – 07 is dismissed.
2. No order as to costs.

Conradie AJ

Date: 9 December 2009

Appearances:

For the Applicant: Eugene Muteleni - NUMSA

For the Respondent: M Maeso – Shepstone and Wylie