



EMPLOYMENT

Managers, who are members/representatives of a trade union, are still required to fulfil their contractual obligations to their employer

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Introduction

In *Association of Mineworkers and Construction Workers Union obo Ntuli v Ferroglobe Silicon Smelters (Pty) Ltd*, the Labour Court ("LC") had to determine whether the Applicant's ("Ntuli") dismissal was automatically unfair, in that it was related to his participation in trade union activities, or otherwise unfair.

Facts:

The material facts of the matter are briefly as follows. Ntuli was employed by the Respondent ("**Ferroglobe**"). Ntuli was initially appointed as an electrician, but was later promoted to the position of an engineering superintendent which was a managerial role. In 2015, prior to his promotion, Ntuli joined the Association of Mineworkers and Construction Workers Union ("**AMCU**"). In 2018, Ntuli was charged on three counts of misconduct, namely:

1. poor work performance – in that Ntuli failed to carry out his tasks after having attended several poor work performance counselling sessions;

2. conflict of interest – in that Ntuli acted contrary to management decisions and workplace policies and failed to attend to his managerial responsibilities; and
3. disorderly conduct / misconduct – in that Ntuli led employees in an unprotected strike.

The allegations of poor work performance and misconduct were dealt with in the same hearing. Ntuli was found to have committed the allegations levelled against him and was dismissed. AMCU, acting on behalf of Ntuli, then referred an unfair dismissal dispute to the CCMA. Following the matter remaining unresolved at conciliation, the matter went to arbitration. The arbitrator however, ruled that the CCMA did not have jurisdiction over the matter as Ntuli alleged that he had been unfairly discriminated against, and that the matter must be referred to the LC. Ntuli thereafter referred the matter to the LC.

At the LC, Ntuli argued he had been automatically unfairly dismissed because he was charged, found guilty and dismissed due to his position as an AMCU branch chairperson and shop steward. Ferroglobe however, argued that Ntuli's dismissal was as a result of his failure to meet the performance standard expected of him as a senior employee, despite being provided training, instruction and time to improve. Further, that Ntuli exceeded the limits of his role as a shop steward by misconducting himself by attending to his duties in a manner that conflicted with his duties as a senior employee and in breach of his obligations as set out in the recognition agreement between AMCU and Ferroglobe.

LC Finding:

In relation to the allegation of poor work performance (i.e., charge 1), the LC found that Ntuli's responsibilities were clear and not subject to misunderstanding, yet by the time of his final counselling session, he still had failed to complete certain tasks (which are dealt with in detail by the LC). The LC further held that it is well accepted that the requirements applicable ordinarily in cases of poor work performance may be dispensed with in a case involving a manager or senior employees. A senior employee or manager should know what is expected of them and should be capable of evaluating their own performance to know whether they are acting in accordance with same. The LC in this regard found that despite the counselling sessions and repeated opportunities to improve, Ntuli still fell short of the performance standard expected of him and ought to have known this as well. The LC highlighted further that part of the reason why Ntuli failed to adhere to his contractual duties, was because he over-prioritised his trade union responsibilities and consequently, failed to attend to his contractual obligations.

In relation to the conflict of interest allegation (i.e., charge 2), the LC found that the charge was premised on the fact that Ntuli attended to his trade union duties in such a way as to cause a conflict with his managerial duties. In particular, Ntuli would miss work-related meetings that he was contractually obliged to be present for, in order to attend to his trade union duties. On the question of whether it is a conflict of interest for senior managers to join trade unions, the LC referred to the decision of *Independent Municipal and Allied Trade Union and others v Rustenburg Transitional Council* which held that –

"The protections conferred by the organisational rights clauses give employees, whatever their status, the absolute right to join trade unions and take part in their activities. By doing so, they legitimise acts that might otherwise constitute a breach of the employee's duty of fidelity, prohibit victimisation and outlaw rules of the sort that the respondent laid down in the present case. Beyond that, they do nothing to exempt employees from their duties under the contract".

The LC in this case held that employees, regardless of their rank or position in the workplace, may join trade unions. However, the ability or right to join a trade union does not excuse an employee from carrying out their contractual duties nor is it a means to neglect the work for which one is employed. Failure to adhere to one's contractual duties in such circumstances, means an employee may be "disciplined for misconduct or laid off for incapacity".^[1] By the same token, a charge of conflict of interest alone, cannot warrant a dismissal. This is because, as the LC held, to the extent the Labour Relations Act allows senior employees to join a trade union and participate in its activities and, in turn, have divided fidelities, a distinct charge of conflict of interest is untenable.

Rather, the conflict of interest must result in misconduct or poor work performance. The LC ultimately found that Ntuli failed to attend to his contractual duties and this constituted misconduct, warranting dismissal. Essentially, the LC found that it is not a conflict of interest for a senior employee to join a trade union, however, an employee will commit misconduct in circumstances where joining a trade union results in the employee breaching his contractual obligations.

In relation to the allegation of disorderly conduct (i.e. charge 3), the LC found that this pertained to Ntuli's conduct during an AMCU general meeting. At this meeting Ntuli kept the employees away from their places of work for longer than the authorised period and led a group of AMCU members in protest/strike action, disrupting the proceedings of an ongoing disciplinary hearing. The LC found that Ntuli's conduct

served no other purpose other than to cause a disruption to the proceedings. The LC found that Ntuli's conduct had exceeded the bounds of the indemnity extended to shop stewards and that such indemnity ends when a shop steward commits misconduct that would warrant dismissal.

For these reasons, the LC ultimately found that Ntuli's dismissal was substantively fair.

Conclusion

The LC, having regard to the evidence above, found that Ntuli did not satisfy the test for an automatically unfair dismissal (which, in essence, requires that the main, dominant or most proximate reason for his dismissal was because his participation in union activities and performing his role as a shop steward. The LC found, too, that his dismissal was substantively fair in that he was found, for the reasons set out above, to have committed the allegations levelled against him (Ntuli did not pursue a claim for procedural unfairness). Insofar as the appropriate sanction was concerned, the LC found that dismissal was an appropriate sanction in the circumstances and that the trust relationship between the parties had been irretrievably broken.

[1] Para 41.

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