



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not reportable

CASE NO P 277/12

In the matter between:

SOLIDARITY obo WILKINSON, V.I and

1 Other

Applicant

And

EASTERN CAPE LIQUOR BOARD

First Respondent

COMMISSION FOR CONCILIATION

MEDIATION & ARBITRATION

Second Respondent

JOHN ROBERTSON N.O

Third Respondent

Date heard: 20 November 2014

Date delivered: 7 January 2015

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an application to review and set aside an arbitration award issued by the third respondent, to whom I shall refer as 'the commissioner'. In his award, the commissioner found that the dismissal of Mr. V Wilkinson, on whose behalf the applicant acts, was substantively and procedurally fair.
- [2] The material facts are to be found in the arbitration award, and I do not intend to repeat them here. It is sufficient to state for present purposes that Wilkinson was employed by the applicant as a senior liquor inspector. He was dismissed on 31 December 2010 after being found guilty of a number of charges relating to a raid on a liquor outlet in Motherwell, the confiscation of liquor at the same premises and the detention of a Mr. Ayanda John, who had been found selling liquor. Also dismissed was a liquor inspector Ms Ndema, on similar charges arising from the same circumstances.

The commissioner's award

- [3] The commissioner's reasoning in relation to the substantive fairness of Wilkinson and Ndema's dismissals are to be found at paragraphs 36 to 54 of his award. The commissioner considered each of the charges brought against Wilkinson in relation to the evidence before him. In brief, the charges against Wilkinson were that he had contravened sections 54 and 55 of the Eastern Cape Liquor Act. He had permitted Ndema to raid and close the liquor outlet Zoscan Trading without the necessary authority, that he had contravened section 61 of the Act in that he had allowed Ndema to authorise the imprisonment of John without following the necessary procedures and that he had been grossly negligent in that as a senior inspector, having been instructed by the chief inspector to reopen Zoscan Trading he had failed to carry out that instruction. In essence, the commissioner found that at the relevant time, until the board had cancelled a registration certificate in terms of the ECLA, it remained valid. On this basis, the registration certificate had not been withdrawn and John had a certificate to manage the

business. There was accordingly no contravention of the ECLA. In any event, the proper course of action would have been to serve a compliance notice on John as the person apparently in control of the premises. Wilkinson was as guilty on the first charge. Insofar as the charge of gross negligence was concerned, the commissioner observed that two charges were conflated and that Wilkinson and Ndema ought to have been charged with insubordination, alternatively negligence in failing to obey an instruction. Insofar as Wilkinson and Ndema had submitted that they had complied with the instruction given to them by the chief inspector Mr. Tyikwe, the commissioner observed that notwithstanding their view that the instruction of the chief inspector was illegal, they had eventually complied with the instruction after a follow-up by Tyikwe. The commissioner concluded as follows:

[50] Had the applicants been firmly of the view that they were in the right one would expect that they would not have complied with the chief inspectors instruction when it was given and insisted that he attend to it alternatively seek legal advice or approach the courts. They did none of these which leads inescapably to the inference that for reasons best known to the applicant they instituted the raid against Mr A John and did not wish to restore the status quo.

[51] Given the gross breach of Mr A John's rights, the potential for adverse civil claims, the time that had already passed by the time the chief inspector became aware the matter I am of the view that the applicant is guilty of insubordination.'

- [4] The final charge against Wilkinson was that he had committed gross misconduct by advising Ndema to refrain from reversing the closure of Zoscan Trading. For reasons already recorded, the commissioner rejected Wilkinson's defence that Zoscan had not been closed. The commissioner concluded that if Wilkinson had been convinced that the chief inspector was correct in his understanding of the ECLA, he would have ensured that instruction was expedited. If he was of the view that the chief inspector was wrong, then he would have pointed this out and refused instruction. He did not do this and the delay given the circumstances of

the time in the implementation of the instruction suggested for the commissioner that some ulterior motive was involved. Wilkinson was accordingly found guilty on this charge.

- [5] In relation to the sanction, the commissioner considered a number of factors and came to the conclusion, expressed in paragraph 69 of the award, in the following terms:

‘It is beyond belief that the applicants would genuinely believe that they could institute procedures leading to prosecution terms of section 19 of the ECLA in the circumstances of this case. The only inference to draw from this is that they had an ulterior motive and considered it better to dispute the meaning of the ECLA and manual rather than share their reason with the respondent....’

- [6] The commissioner noted that the first respondent had indicated that it would not have dismissed the applicants have they admitted the error and undertaken not to commit similar misconduct in future. However, they had shown no remorse and in the circumstances, the commissioner concluded that ‘the respondent clearly cannot afford the risk of the continued employment of the applicants for fear of similar conduct which goes to the core of the applicant’s functions. There is a certain recalcitrance and lack of trust on the part of the applicants in not being open with the respondent as to their true motives. The commission accordingly found that the dismissal was an appropriate sanction.

The applicable principles

- [7] The legal principles to be applied are well established. The test for review focuses on the reasonableness of the outcome. In *Herholdt v Nedbank Ltd* (2013) 34 ILJ 2795 (SCA) the Supreme Court of Appeal clarified the relationship between the constitutional requirement of reasonableness and the grounds for review in s 145(2) of the LRA. The concept of gross irregularity in the conduct of arbitration proceedings is not confined to the situation where the arbitrator misconceived the nature of the enquiry; it extends to those instances where the result is unreasonable. A result is unreasonable if and only if it is one that a

reasonable arbitrator could not reach on all the material that was available. Material errors of fact, as well as the weight and relevance to be attached to particular facts are not in themselves a basis for an arbitration award to be set aside. These are relevant only if their consequence is to render the outcome of the proceedings under review unreasonable. In *Goldfields Mining South Africa (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and others* (2014) 35 ILJ 943 (LAC) the LAC confirmed this approach and held that it was the function of a reviewing court to ascertain whether the arbitrator considered the principal issue before him or her, evaluated the facts at the hearing and come to a conclusion which was reasonable to justify the decision to which he was she had come. What is to be avoided is an approach that invites the reviewing court to consider and analyse every issue raised at the arbitration and to regard a failure by the arbitrator to consider all or some of the issues, even if they are material, as rendering the award reviewable on the basis of a process -related review. It is apparent from this formulation that the threshold in a review application is set high, and as the LAC once observed, it is not often that an applicant in a review application will succeed.

The grounds for review

- [8] The applicant grounds for review are not clearly articulated and to a large extent, directed at what are referred to as 'unreasonable findings' irrationally connected to the issues that the commissioner was required to decide. It is possible to distil a number of key complaints identified by the applicants – these include the averment that the commissioner found Wilkinson guilty of charges that were not applicable having regard to the facts, that he (the commissioner) misunderstood and disregarded material evidence, and that he reached a conclusion that is not based on the material before him. All of these grounds smack of an appeal rather than a review. The reasonableness test is not referred to in any material sense, but for the concluding paragraph in the founding affidavit to the effect that the commissioner reached a ruling which a reasonable decision-maker could not reach 'when he found that us applicants were dishonest and there is a breach of

trust. The third respondent clearly indicates a conjecture of evidence in his finding (sic)'.

Analysis

- [9] What the applicants have done is precisely what the Labour Appeal Court in *Goldfields* has enjoined litigants not to do – to engage in a nit-picking exercise in which every sentence of the award under review is scrutinised and criticised. In the present instance, insofar as the grounds for review invite the court to have regard to particular aspects of the evidence and in particular, to the weight which the commissioner accorded or failed to accord them, this is not of any consequence. The commissioner clearly understood the nature of the enquiry before him, afforded the parties a fair opportunity to present their respective cases, and applied his mind to the evidentiary material before him. I do not understand this to be disputed. Insofar as the applicant contends that the commissioner's conduct notwithstanding, the decision to which he came was not one to which a reasonable decision-maker could come in the circumstances, in my view, there is no merit to that submission.
- [10] The applicant contends that the evidence before the commissioner discloses that Ayanda John, given the eviction of the Koyanas, was trading for his own account despite being registered as a manager of Zoscan Trading. The applicant contends further that a compliance notice could not be issued in the circumstances as it had to be served on the owner of the licence, and the prosecution was the only option as Zoscan Trading was selling liquor without a licence. The applicant submits that the evidence exculpatory Wilkinson and Ndema since neither closed down Zoscan Trading; and that Ayanda John was arrested by the SAPS and that the SAPS confiscated the liquor. These are of course the same submissions made before the commissioner. As the award discloses, the commissioner dealt with these defences *inter alia* by making the point that the registration of Zoscan Trading had never been cancelled by the ECLB, which meant that that entity was permitted to trade until such time as its registration had lapsed or it was cancelled by the ECLB. In the circumstances,

Zoscan Trading was trading lawfully. The commissioner further observed that Wilkinson and Ndema were entitled to issue a compliance notice, which was in the circumstances thus giving Zoscan Trading notice of what remedial action was required, together with a reasonable opportunity to undertake that action. In relation to the conduct of the SAPS, the commissioner clearly found that had Wilkinson and Ndema not initiated the raid, the arrest and confiscation of liquor and closing of the outlet would not have occurred – the fact that the SAPS effected the arrest and confiscation was not relevant. These are by no means unreasonable conclusions drawn from the available evidence – they may not be the only conclusions to be drawn and there may be other conclusions that are correct or equally reasonable. However, in terms of the applicable principles, that is of no consequence.

- [11] Given the nature of the submissions made in the applicant's heads of argument, I should emphasise that it is not for this court to engage in an interpretation of any of the relevant sections of the ECLA, or to decide whether the commissioner's decisions in this regards were correct. Wilkinson and Ndema were not on trial for contravening the provisions of the ECLA – they were charged with misconduct which had its roots in the Act that they were obliged to implement. The commissioner clearly took a holistic view of what was expected from Wilkinson and Ndema as inspectors both in relation to the provisions of the Act and the instructions of the chief inspector, and found them wanting. As I have indicated, that is not a conclusion to which a reasonable decision-maker could not come on the available evidence
- [12] Insofar as the applicant contends that the commissioner's decision to uphold the sanction of dismissal was unreasonable on account of there being no evidence of any breach of trust, it is clear from the record that the commissioner was alive to the parties' submissions in this regard and in particular, to the first respondent's view that had Wilkinson and Ndema and up to the conduct and given the assurance that they would not act similarly in future, they would not have been dismissed. The commissioner, whose function it was to determine a sanction that

was fair in the circumstances, clearly took into account that an employee who commit serious misconduct, does not own up to it and refuses to provide an undertaking not to commit such misconduct in future, acting breach of the trust relationship between employer and employee. Again, it is not the function of this court to determine whether it would have come to the same decision in relation to sanction as that of the commissioner – it is sufficient that the sanction is reasonable in the circumstances. In the present instance, in my view, there is no basis to call the commissioner's decision into question.

- [13] Finally, in relation to costs, the court has a broad discretion in terms of section 162 of the Act to make orders for costs on the basis of the requirements of the law and fairness. This court traditionally does not make orders for costs where the parties are engaged in a collective bargaining relationship and where an order for costs may have the effect of prejudicing that relationship. I intend to make no order as to costs.

For the above reasons, I make the following order:

1. The application is dismissed.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Union official

For the third respondent: Adv. Grobler, instructed by Kirchmanns Inc