

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C 407/98

In the matter between:

SOUTH AFRICAN BREWERIES LIMITED

Applicant

BEER DIVISION

AND

DAVID WOOLFREY

First Respondent

FOOD AND ALLIED WORKERS UNION

Second Respondent

THE INDIVIDUAL EMPLOYEES LISTED ON

ANNEXURE “A” TO THE NOTICE OF MOTION

Third and Further

Respondents

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MLAMBO J.

1. This is an application to review a decision of the first respondent under section 33(1)(b) of the Arbitration Act 42 of 1965 on the grounds that he exceeded his powers.
2. The first respondent’s powers are set out in the arbitration agreement entered into between the applicant and the second respondent representing the third and further respondents (the employees). Those powers, to the

extent that they are relevant to this review, are to decide **‘what sanction is fair’** and to then **‘make an award which s/he deems appropriate and may prescribe a sanction or remedy including reinstatement’**.

3. The first respondent (Woolfrey) conducted the arbitration and, in respect of the employees decided that dismissal was not a fair sanction. He reinstated them retrospectively but imposed a three and four months’ suspension without pay effected by way of a deduction of wages for the respective periods from the back pay to which the employees were entitled as a result of their retrospective reinstatement.

4. The contentions advanced on behalf of the applicant by Mr Wallis SC, were:

4.1 the first respondent exceeded the powers conferred on him by the arbitration agreement because he had no power to impose the sanction of disciplinary suspension without pay;

4.2 he had no power to impose that sanction because an arbitrator cannot **‘impose a sanction which is not available to the employer’**;

4.3 the sanction was not available to the employer because there is nothing in the contracts of employment or any collective agreement permitting the sanction and its imposition would offend the provisions of section 19(1)(e) of the Basic Conditions of Employment Act, no. 3 of 1983.(BCEA)

5. The whole of the applicant’s case is based on the proposition that the arbitrator’s powers to make an award are limited to the range of decisions available only to the employer.

6. It is trite that arbitrators derive their powers solely from the provisions of the arbitration agreement between the parties. In this instance clause 2.2 of the arbitration agreement provides:

“The arbitrator shall have the power to make an award which s/he deems appropriate and which may prescribe a sanction or a remedy including reinstatement.”

The question is therefore whether Woolfrey could, as a sanction, impose a three or four months suspension

without pay as part of the reinstatement award.

7. It is correct that the effect of a retrospective reinstatement is, inter alia, to restore the employment relationship retrospectively. It is equally correct that it is impermissible in terms of section 19 of the BCEA to require employees to work and not pay them their wages. In this context the employer or arbitrator has no power to order the deduction of wages for work performed. It is also a contravention of this section to set off from wages due, an amount for shortages or money stolen by the employee.
8. Mr Wallis relied extensively on two english cases in support of his submissions. In **Sealand Petroleum Co. Ltd v Barrat (1986) 2 all ER 360** the employee and the employer had signed a contract which provided that the employer would be entitled to deduct losses incurred by the employee from his wages. In **Bristow V City Petroleum Ltd (1987) 2 all ER 45** the parties had also signed a contract essentially to the same effect. In those cases the deduction of shortages or losses from wages, even though agreed to by the parties, was struck down as unlawful and impermissible. Section 19 also renders such conduct unlawful.
9. The facts in the two English cases are, however, distinguishable from the matter before me. In casu no work was performed by the employees. Woolfrey found their dismissal to be unfair. He found that instead of dismissing the employees the applicant should have issued them with final written warnings and suspend them without pay for three and four months respectively in line with the charges they faced. Was it permissible and lawful for Woolfrey to award suspension without pay as a form of disciplinary penalty?
10. The recognition agreement between the parties provides for suspension without pay as a form of disciplinary penalty. During the period of suspension the employment relationship is maintained but the obligations to tender services and to pay wages are suspended. This form of disciplinary punishment has been in practice for some time and has also been upheld by the courts in the past. This Court has also held that suspension without pay as a form of disciplinary penalty is impermissible. See **County Fair v CCMA**

& others (1998) 6 BLLR 577 (LC).

11. In casu I see no reason to hold otherwise. It can never be correct that suspension without pay as a form of disciplinary penalty is impermissible and that it contravenes section 19 of the BCEA. Section 19 is premised on remuneration or wages becoming due after a tender of services or actual performance by the employee. In terms of this section it is unlawful to refuse to pay the remuneration due for any reason. The reason it is unlawful is because the employee has tendered his services or has performed his duties, which is his obligation and the employer must also fulfil its obligation to pay the remuneration due.
12. I do not agree with Mr Wallis for another reason. The imposition of suspension without pay as a disciplinary penalty is because the employee has committed some form of a disciplinary breach. An employer is entitled to take action against employees who misconduct themselves. Once the employer has decided that instead of terminating the contract of employment it will simply suspend it for a period it is not acting unlawfully. In fact section 19 is irrelevant to this scenario as no tender of services or performance by the worker takes place or is required.
13. The fact that Woolfrey awarded the employees reinstatement does not automatically mean that they were also entitled to their wages. See **Durban Confectionery Works (Pty) Ltd t/a Beacon Sweets v Majangaza (1993) 14 ILJ 663 (LAC)** where the Labour Appeal Court upheld an industrial court determination where an employee was reinstated but made to forfeit seven and a half months remuneration (or compensation). In view of the fact that Woolfrey found their dismissal to be unfair he had to decide whether to award them compensation as part of the reinstatement award. The Labour appeal Court in **Johnson & Johnson v Chemical Workers Industrial Union & Others case no PA 15/98** has ruled that the compensation awarded in dismissal cases is not for the loss of remuneration but is in the form of a solatium for a wrong perpetrated. The wrong is the infringement of the right not to be unfairly dismissed. It is therefore correct, as argued by Mr Cheadle, for the second and further respondents, that what Woolfrey

awarded was compensation based on the employees' rate of remuneration. What Woolfrey did, therefore, was to award the workers compensation for the duration of the period of their dismissal but deducted three and four months compensation. In my view he was entitled to do this.

14. The decision in **Consolidated Frame Cotton Corporation v President of the Industrial Court 1986 (3) SA 786 AD** does not alter the position. In that case the Appellate Division (as it was known then) held that a reinstatement order in terms of section 43 (4)(b) was aimed at a restoration of the “**status quo ante the termination, the change in the terms or conditions of the contract of employment, of the introduction of the alleged unfair labour practice.**” (798 F-G). This decision should be understood in the context of the purpose and objective of section 43(4)(b) of the Labour Relations Act no 28 of 1956 (now repealed). The objective of that section was to restore the status quo ante pending the final determination of the matter under section 46(9) of the same Act. Hence an order under section 43(4)(b) meant that dismissed employees were to be paid their normal wages and they had to tender their services which could either be accepted or rejected by the employer. A section 43(4)(b) order lapsed if it was not extended. Once the order lapsed the obligation to pay wages also ceased even if a final determination was not yet made. At the final determination stage if a court reinstated employees it was not automatically so that wages were also awarded. **Durban Confectionery Works (Pty) Ltd t/a Beacon Sweets v Manjangaza (supra)**. The court had to specifically order payment of compensation which was, invariably, based on the rate of remuneration.

15. Is it correct that the arbitrator's powers are limited to what the parties themselves can do? This cannot be correct for the simple reason that once the matter goes to arbitration (or to court) the arbitrator has power to confirm what has taken place or undo it. The employer who has dismissed the workers has no power to reverse the dismissal unilaterally. It therefore makes sense that the arbitrator has that power simply because he is seized with the matter once one party, usually the employer, has taken a decision. It would be very impractical for arbitrators to be constrained to what the parties themselves can do. This ignores the fact that

the decision taken to arbitration has consequences which only the subsequent process of arbitration (or litigation) must deal with. The Appellate Division in **Amalgamated Clothing & Textile Workers Union of South Africa v Veldspun Pty Ltd 1994 (4) SA 162 at 169F-H** stated, in relation to the arbitration process in labour matters, that

“When parties agree to refer a matter to arbitration, unless the submission provides otherwise, they implicitly if not explicitly (and, subject to the limited power of the Supreme Court under section 3(2) of the Arbitration Act) abandon the right to litigate in courts of law and accept that they will be finally bound by the decision of the arbitrator. There are many reasons for commending such a course and especially so in the labour field where it is frequently advantageous to all the parties in the interests of good labour relations to have a binding decision speedily and finally made. In my opinion the courts should in no way discourage parties from resorting to arbitration and should deprecate conduct by a party to an arbitration who does not do all in his power to implement the decision of the arbitrator promptly and in good faith.”

16. In the Veldspun case the appellate division upheld certain closed shop provisions which authorised deductions from wages even where same were not authorised by employees. The appellate division rejected argument that the closed shop provisions contravened section 19 (as argued in casu) of the BCEA. At page 176 E -G the court said:

“It is arguable that on a proper interpretation of these provisions the implementation by the employer of the closed shop arrangement would not inevitably be a contravention of any of their terms. The complicated and difficult process of interpreting these ambiguous and unclear statutory provisions is, however, unnecessary in this case. In the first place, it is by no means inevitable that the non-union employees would have refused voluntarily to authorise the deduction from their wages. If they did so authorise the deduction then it is highly unlikely that the employer would be committing any offence under the Employment Act. I do not agree with counsel’s submission that the threat of dismissal implicit in the closed shop arrangement would effectively preclude such written authority being given voluntarily. Thus, even if voluntariness must be implied in s 19(1)(e)(i), it is not inevitable that the provision would have been contravened.

But even if the implementation of the closed shop arrangement would have necessitated the employer contravening one or more of the provisions of the Employment Act, the employer would have been entitled to approach the Minister of Manpower under s 34(1) of the Act for an exemption.”

It is therefore, in my view, not open to Mr Wallis to argue that this decision is clearly wrong. The Veldspun decision upheld a long standing practice by arbitrators (and courts) when requested to intervene. Mr Wallis also requested that it would have been impractical for the applicant to suspend without pay 52 of the employees as this would have disrupted production. This argument also lacks merit. The number of employees involved is a fraction of the total workforce i.e 52 out of 530. In fact the applicant did suspend

18 of the 52 employees pending the finalisation of the disciplinary process. The decision in **Rikhotso & others v Transvaal Alloys (1984) 5 ILJ 228 (IC)** does not help the applicant. In that case the whole workforce was involved and perhaps in that sense it would be impractical to suspend the whole workforce.

17. It follows that in my view suspension without pay as a form of disciplinary penalty is permissible. I have further found nothing reproachable in Woolfrey's award. I therefore dismiss the application with costs which shall include the costs of two attorneys of attending court.

MLAMBO J.

nt: Mr Wallis SC with Mr Brasso, instructed by Findlay & Tait Inc.

lents: Mr Cheadle of Cheadle Thompson & Haysom.

ent: 11 January 1999.