Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case No: C832/2019

In the matter between:

JEAN LUDICK **First Applicant**

And

VODACOM (PROPRIETARY) LIMITED **First Respondent**

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

COMMISSIONER SUE WRIGHT N.O **Third Respondent**

Date of Set Down: 28 April 2021

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court

website and release to SAFLII. The date and time for handing down judgment is deemed to be 12h00 on 10 September 2021

Summary: (Review – variation ruling – arbitrator misdirecting enquiry and concluding the dispute was a matter of interpretation and therefore outside her jurisdiction – arbitrator failing to consider uncertainty created by the wording of the award – ruling set aside – an award of backpay is inextricably linked to retrospective reinstatement - ruling replaced with variation of the award to give effect to the relief arbitrator intended to award)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an application to review and set aside an arbitrator's ruling in an application to vary an award.

[2] On 18 June 2019, the third respondent (the arbitrator) issued an award in an unfair dismissal dispute in favour of the applicant, Mr Ludick ('Ludick'), who had been dismissed by the first respondent (Vodacom) on 24 of August 2018. On 14 November she declined to vary the award at the instance of Ludick because she held that she was being asked to interpret her award and she had no jurisdiction to do that. It is that ruling which Ludick is taking on review.

The variation application

[3] The variation application arose from a dispute about the implications of the relief ordered by the arbitrator, after she found that Ludick's dismissal was substantively unfair.

[4] In deliberating on the remedy for his unfair dismissal, the arbitrator reasoned as follows in her original award:

> "101. In making this award I have taken into account the provisions of the LRA in particular section 193. Ludick sought to be retrospectively reinstated with a Final Written warning for 12 months.

> 102. Taking into account that this dismissal occurred on 24 of August 2018, some 10 months have passed and [as] the applicant is not without blame, I do not believe full retrospective reinstatement with a Final Written warning is justifiable. Particularly taking into account that the period of 12 months is almost concluded on reinstatement if a Final Written warning were to be issued. I have also considered that the part(ies) had the opportunity to resolve this matter in the beginning of 2019 and during the pre-arbitration meeting.
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> 103. I believe that reinstatement on 1 July 2019 on the same terms and conditions prior to Ludick's dismissal together with six months back pay would be justifiable in the circumstances. This alone should ring loudly in the applicant's ears that any further transgression of such nature would in all likelihood lead to his dismissal. The value of backpay is calculated as follows: R 85, 352, 46 x six month's compensation = R 512,114, 76."

(emphasis added)

[5] The arbitrator then ordered the following relief:

> "105. The respondent, Vodacom Group Ltd (operating as Vodacom) is to reinstate the applicant, Mr. J Ludick, on 1 July 2019 on the same or similar terms and conditions that prevailed at the time of his dismissal.
>
> 106. The respondent is to pay the applicant sum of R 512, 144.76 by no later than 1 July 2019."

(emphasis added)

[6] Vodacom paid Ludick the six months' back pay on his reinstatement. However, Vodacom refused to allocate Ludick his accrued leave for the six months period for which he was awarded backpay and also a *pro rata* annual increase and bonus which he claims he was contractually entitled to during the period for which he received backpay.

[7] In his application to vary the award, Ludick sought to have the relief varied to reflect that the date of his reinstatement was the date from which the period of his back payment of six months' remuneration began. He contended that the arbitrator's wording of the relief she awarded was ambiguous and the ambiguity had led to an impasse between him and Vodacom on the effect of the award. The crux of the difference between the parties is that Vodacom interprets the relief to mean that Ludick was

reinstated on 1 July 2019, without any retrospective effect, whereas he contends his reinstatement should have been given six months retrospective effect. Although there was initially a dispute whether Vodacom had recognised that his service with it commenced on 1 November 2001, that dispute was resolved by the time the variation application was determined, so that the continuity of his service, bar the time between his dismissal and reinstatement, was recognised. Because Vodacom understood Ludick to have been reinstated only with effect from 1 July 2019, it regards the period between his dismissal on 24 of August 2018 and reinstatement on 1 July 2019, as a period during which he was not employed by it.

[8] Vodacom opposed the variation application. It contended that there was nothing ambiguous about the award and that it had simply given effect to the 'straightforward and clear award', when it paid him the six months' backpay and reinstated him on 1 July 2019.

The ruling and the review

[9] Section 144 of the Labour Relations Act, 66 of 1995 ('the LRA') sets out the circumstances in which an arbitrator may alter an award or ruling after it is has been issued:

> **144 Variation and rescission of arbitration awards and rulings**
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> Any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling-
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> (a) erroneously sought or erroneously made in the absence of any party affected by that award;
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> (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission;
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> (c) granted as a result of a mistake common to the parties to the proceedings; or
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> (d) made in the absence of any party, on good cause shown.

In this case, Ludick asked the arbitrator to vary the award under section 144 (b).

[10] In her variation ruling, the arbitrator succinctly set out the respective contentions of the parties. However she simply concluded that these amounted to a dispute about interpretation of her ruling and there was nothing to be varied in the award. Accordingly, it was up to the applicant to simply enforce his rights flowing from the award and she had no power to interpret the award.

[11] Ludick argues that the arbitrator failed to address the crux of the variation application, namely that by stating that he should be reinstated "on" 1 July 2019, she had not given effect to her clear intention that his reinstatement should be retrospective for a period of six months. Her attention had been misdirected to consider the disputes which had arisen between the parties after the award was handed down rather than asking whether the relief she awarded clearly reflected her intention.

[12] In, *Ekurhuleni Metropolitan Municipality v Spies & others* (2014) 35 *ILJ* 1283 (LC), this court summarised the scope for variation of an award, which applies equally to judgments. For present purposes, it suffices to cite the following extract from that judgment:

> '(10) In Erasmus Superior Court Practice, the authors indicate that the general principle is that once a court has handed down a final judgment or order, it has no authority to correct, alter or supplement it, because it becomes *functus officio* and its authority over the subject-matter has ceased. The authors also record that despite the general principle, the Appellate Division (as it was then known) has recognized a number of exceptions to the rule, some of which include the following:
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> 10.1 The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant.
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> 10.2 The court may clarify its judgment or order if, <u>on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided that it does not thereby alter 'the sense and substance' of the judgment or order</u>.

> 10.3 The court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance.
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> (11) In other words, the rule is a procedural step designed to correct quickly or expeditiously an obvious wrong, a mistake or ambiguity in the judgment.
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> (12) Where an arbitration award expresses the true intention and the decision of the commissioner, ordinarily, there would be no mistake, inadvertent omission or any oversight on the part of the commissioner or in the award that was made. In the ordinary course of things, an application for variation of the order is limited to a clarification of or the removal of any ambiguous language, patent error or omission in the award. In other words, insofar as there is a variation it would for the most part be limited to an aspect of the original award that would clarify matters. Insofar as it does not, and goes beyond the import or purport of s 144, that variation would clearly be reviewable.'[1]

[13] Having regard to paragraphs 101 to 103 of the award, it is clear that the arbitrator was intent on formulating appropriate relief, which gave effect to her finding that Ludick's dismissal had been substantively unfair, but simultaneously giving expression to her serious disapproval of the misconduct he was guilty of. She considered Ludick's submission that he should be reinstated retrospectively to the date of his dismissal with a final written warning, but found that this would not sufficiently address the blameworthiness of his misconduct, because it would mean that the final warning would expire barely two months' after he restarted work. She decided not to issue a final written warning but to curtail the amount of backpay he would receive. Instead of "full retrospective reinstatement" with the warning she ordered his reinstatement with six months back pay. It is noteworthy that she believed the fact that he would only be entitled to six months back pay, instead of the 10 months remuneration he would receive if his reinstatement was fully retrospective, would have a sufficiently salutary effect, making a warning unnecessary.

[1] At 1288-9.

[14] However, instead of stating that Ludick was retrospectively reinstated for a period of six months prior to the award being issued, she identified a date a fortnight *after* the award as the date on which he should be reinstated, whereas she clearly intended that his effective date of reinstatement should be retrospective to a date, which was four months less than what would have been the case if she had awarded him "full retrospective reinstatement". That date could only have been the date on which the award was issued, and identifying a date a fortnight later could not give effect to her intention as the date of reinstatement can only be from the date of dismissal to the date the award is issued.[2]

[15] What is clear is that the arbitrator limited the extent of backpay that Ludick should receive to six months' pay.

[16] Vodacom argued, relying on the judgment of this court *in Themba v Mintroad Sawmills (Pty) Ltd* (2015) 36 *ILJ* 1355 (LC), that the question of awarding backpay was entirely separate from the concept of reinstatement. In that case, the employee had been reinstated with effect from the date of the award and accordingly the reinstatement was not retrospective. In the course of discussing the relationship between reinstatement and backpay, the court stated, amongst other things that:

> '(22) In my view, the ratio in *Equity Aviation*[3] is clear. Reinstatement means the restoration of the *status quo ante*. It is as if the employee was never dismissed. Where reinstatement is awarded, an employer will be in compliance with such an award if the employer, on (or as from) the date of the award having been made, takes the employee back into its service on the same terms and conditions of employment of the employee as existed at the time of dismissal of the employee. Also, and as a necessary consequence, the original starting date of employment of the employee will remain the same and applicable, if such reinstatement is awarded.
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> (23) When it comes to the issue of the retrospectivity of reinstatement, this is however, in terms of the above ratio in Equity Aviation, a completely different issue. Reinstatement is not necessarily coupled with retrospectivity

[2] See *Coca Cola Sabco (Pty) Limited v Van Wyk* 36 *ILJ* 2013 (LAC) at para [16].

[3] *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* 2009 (1) SA 390 (CC); (2008) 29 *ILJ* 2507 (CC)

> and is not a sine qua non of it. Retrospectivity of reinstatement is a separate discretion that must be exercised by the arbitrator or judge when deciding to award reinstatement. Retrospectivity, in simple terms, relates to what is commonly known as 'backpay', and constitutes what the arbitrator or judge expects an employer to pay the employee for the time the employee has been languishing without remuneration as a result of the employee's unfair dismissal. In short, reinstatement means taking the employee back on the same terms and conditions of employment as if the dismissal of the employee never occurred, which would apply as from the date of the award of reinstatement and with continuity of employment intact. But the concept of reinstatement does not per se include the issue of backpay. Backpay is a separate issue and determination, albeit coupled with reinstatement.
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> …
>
> (27) The discretion as to whether backpay is awarded in the case of reinstatement, and also to what extent it is awarded (being the very issue of retrospectivity of the operation of the reinstatement) is not statutorily prescribed. It is for the arbitrator or judge to decide. Accordingly, and considering the above ratio in Equity Aviation, if a judge or arbitrator just awards reinstatement, and makes no determination on retrospectivity of the operation of reinstatement, reinstatement will only operate from the date of the award going forward. The arbitrator or the judge is in my view required specifically to address the issue of the retrospectivity of reinstatement, and determine the extent of the same in making the award.

[17] It is correct that whether ‘backpay’ is awarded when reinstatement is ordered is a separate consideration from whether an award of reinstatement should be made. However, an award of backpay is not a form of relief which is additional to reinstatement. Backpay can only be awarded if retrospective reinstatement ordered. It is important to bear in mind that section 193(1)(a) of the LRA only speaks of an order of reinstatement from a date not earlier than the date of dismissal. The section does not make provision for a separate award of backpay. When the jurisprudence talks about backpay being a separate consideration from reinstatement, it is inextricably bound up with the adjudicator’s exercise of their discretion whether to make the

order of reinstatement retrospective, as indicated in the emphasized portion of paragraph 27 in the *Themba* decision cited above.

[18] The arbitrator was plainly aware that her award of six months' backpay was linked to the question of retrospectivity of Ludick's statement because she intended that he would not be fully retrospectively reinstated but only for a limited period. In settling on an award of six months' back pay, the arbitrator was giving effect to that interpretation, but simply failed to clearly express the concomitant retrospectivity of Ludick's reinstatement, which was inseparable from her award of backpay. Since retrospective reinstatement was necessarily implied by the award of backpay, she could not have meant 1 July 2019 to have been the effective date of reinstatement and the only plausible explanation for identifying that date is that she meant it to be a date on which Ludick was to return to work, rather than the legally effective date from which his reinstatement would run.

[19] What is clear from the above discussion is that on a proper interpretation, the meaning of the relief awarded was uncertain, and it did not give effect to the arbitrator's true intention to make an award of reinstatement retrospective for a period of six months. Instead of focusing on whether her expression of the relief awarded properly reflected her intention, the arbitrator had focused on the different interpretations arising from the way she had expressed that relief. Had she not misdirected herself, she would have appreciated the uncertainty created by her description of the relief and corrected it to align it with what she intended.

[20] In the circumstances, her ruling must be set aside and her award of relief must be varied or corrected to align it with her intentions.

[21] On the question of costs, I am mindful there is an ongoing employment relationship, and there was a *bona fide* dispute between the parties about the interpretation of the award, which arose from the wording of the relief. As a matter of law and fairness, a cost award would be inappropriate in my view.

Order

[1] The ruling issued by the Third Respondent in the variation application on 14 November 2019 under case number WECT16371-18 is reviewed and set aside.

[2] The award issued by the Third Respondent on 18 June 2019 under case number WECT16371-18 is varied by the paragraphs 103 and 105 of the award are substituted with the following:

'"103. I believe that retrospective reinstatement on the same terms and conditions prior to Ludick's dismissal together with six months back pay would be justifiable in the circumstances. This alone should ring loudly in the Applicant's ears that any further transgression of such nature would in all likelihood lead to his dismissal. The value of backpay is calculated as follows: R 85, 352, 46 x six month's compensation = R 512,114, 76."

and

"105. The respondent, Vodacom Group Ltd (operating as Vodacom) is to retrospectively reinstate the Applicant to a date six months prior to this award, on the same or similar terms and conditions that prevailed at the time of his dismissal."

[3] Each party is to pay their own costs.

Lagrange J
Judge of the Labour Court of South Africa

Representatives

For the Applicant	G Cassells of Maserumule Attorneys

For the First Respondent	K Olivier of Edward Nathan Sonnenbergs Inc