THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 1294 / 13

In the matter between:

CAIPHUS SIBUSISO MASHABA **Applicant**

and

CITIBANK N.A. SA BRANCH **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Second Respondent**

TIMOTHY BOYCE N.O. **Third Respondent**

Heard: **13 November 2018**

Delivered: **29 May 2019**

Summary: Application for amendment of Court order – Rule 16A(1)(a) considered – principles relating to ambiguity in order considered – intention of order and underlying arbitration award considered

Court order – interpretation of order – principles considered and applied – where proper interpretation of order requires clarification of order – Court entitled to vary orders for the purposes of clarity provided substance of order not changed – amendment competent

Reinstatement and re-employment – differences discussed – substitution of reinstatement with re-employment cannot be assumed in the absence of a specific order to this effect

Court order – order containing ambiguity and clarification required – applicant made out proper case for variation – application succeeds.

JUDGMENT

SNYMAN, AJ

Introduction

[1] The application in this matter is somewhat unique and is a prime illustration of what can go wrong if orders granted by a Court are not motivated and supported by proper reasoning contained in a judgment. What I am now left with is the unenviable task of divining what a Judge of this Court may have meant where such Judge simply gave an order, without providing reasons for the order. Also, and why none of the parties requested reasons for the order, which would surely have been the appropriate course of action, is beyond me.

[2] But be the above as it may, what is now before this Court is an application by the applicant in terms of Rule 16A(2)(a) of the Labour Court Rules to vary an order granted by this Court, by way of Saloojee AJ, on 11 January 2017. The application was brought on 27 February 2017 and is opposed by the first respondent. The application came before me for argument on 13 November 2018, and was argued by both parties. Argument was concluded, and I reserved judgment. I will now proceed to decide the applicant's application, starting with setting out the relevant background facts.

The relevant background

[3] The background facts in this matter are fortunately mostly either common cause, or undisputed.

[4] The applicant was dismissed by the first respondent on 25 September 2012 for alleged misconduct. The applicant pursued an unfair dismissal dispute to

the Commission for Conciliation, Mediation and Arbitration ('CCMA'), challenging the fairness of his dismissal. This dispute came before arbitrator Timothy Boyce (the current third respondent) for arbitration under case number GAEK 6712 – 12.

[5] In an arbitration award dated 3 June 2013, arbitrator Boyce determined that the applicant's dismissal by the first respondent was substantively unfair, in that it was not for a fair reason. Because of its specific relevance to deciding the applicant's current application, the consequential relief afforded by arbitrator Boyce resulting from his finding of a substantively unfair dismissal needs to be set out in full. Arbitrator Boyce determined as follows in paragraph 5.2 of his award:

> '5.2.1 The employer, Citibank NA, is ordered to reinstate the employee, Caiphus Sibusiso Mashaba, on or before 14 June 2013, with retrospective effect to the date of his dismissal on terms no less favourable than those which were applicable at the time of the dismissal, and without the forfeiture of any benefits which could have accrued to him his unfair dismissal.
>
> 5.2.2 The employee is required to report for duty on later than 14 June 2013. (sic)
>
> 5.2.3 The employer, Citibank NA, is ordered to pay to the employee, Caiphus Sibusiso Mashaba, 2 months backpay in the amount of R39 673.52.
>
> 5.2.4 The backpay referred to in paragraph 5.2.3 supra is to be paid on or before 14 June 2014.'

[6] Dissatisfied with this award, the first respondent (then in the capacity as applicant) brought a review application in terms of section 145 of the Labour Relations Act ('LRA')[1] to review and set aside the award made by commissioner Boyce as aforesaid. This review application was brought on 16 July 2013 and was opposed by the current applicant (who was the third respondent in those proceedings).

[1] Act 66 of 1995 (as amended).

[7] The review application came before Saloojee AJ on 11 January 2017. After hearing argument by both parties, Saloojee AJ then made the following order:

> 'The application is dismissed and paragraph 5.2 of the award is substituted with an order: 'The employee is required to report to duty on or no later than 23 January 2017''.

As touched on above, there are unfortunately no reasons provided by Saloojee AJ for this order.

[8] Pursuant to this order granted by Saloojee AJ, the applicant indeed reported for duty on 23 January 2017. The applicant demanded that he be reinstated in his former position on the same remuneration, and be paid his arrear salary and increases since his dismissal.

[9] However, the applicant was not allowed by the first respondent to return to work at this time. Instead, the applicant was informed by the first respondent, which was later confirmed by way of a letter, that he remain at home whilst fully remunerated, until certain issues could be resolved. These issues were based on a contention by the first respondent that the order of Saloojee AJ in fact substituted the relief afforded to the applicant in the arbitration award of arbitrator Boyce in its entirety, to the effect that the applicant was no longer reinstated, but re-employed. It was further contended by the first respondent that there is no retrospectivity attached to the order.

[10] The applicant did not take kindly to these contentions. He addressed a letter to the Registrar of this Court on 9 February 2017, which he copied to the first respondent, indicating that he disagreed with the interpretation the first respondent attached to the order of Saloojee AJ, and requested that the Court clarify the situation.

[11] The first respondent answered the letter of the applicant on 20 February 2017. It reiterated its contentions that the substitution order granted by Saloojee AJ resulted in a substitution of the entire consequential relief contained in the arbitration award, with one of re-employment with no retrospective consequences. It also contended that the applicant had no intention of

returning to the employment of the first respondent and simply wanted payment for the time period between the award and the ultimate order. The first respondent also complained that the applicant was surreptitiously trying to rescind the judgment which would be improper. The applicant was invited to file a substantive application if he had a problem with the order.

[12] The applicant then obliged, and filed the current application on 27 February 2017. The basis of this application was a case that Saloojee AJ simply intended to change the date when the applicant was required to report for duty, as contemplated by paragraph 5.2.2 of the award, and did not seek to vary the consequential relief afforded in the award.

[13] The first respondent not only opposed the application, but also raised a number of further issues in its answering affidavit. These were that the applicant's function (meaning the position he held at the time of dismissal) had in the interim been outsourced and no longer existed. It was thus not possible to allow him to return to work in the same position. The first respondent further stated that the applicant was not entitled to the increases he demanded.

[14] The respondent also spent some effort in the answering affidavit dealing with the conduct of the applicant upon being offered a re-employed position by the first respondent. According to the first respondent, it offered the applicant another position, but the applicant failed to take up what the first respondent then called a '*re-employed position*'. The first respondent stated that the applicant reported for work again on 27 February 2017, but refused to sign take on documents for this re-employed position, and was the sent home until this could be resolved. Ultimately, the first respondent resorted to instructing the applicant to report for work on 2 March 2017, but the applicant failed to do so. The applicant's attorneys then became involved, and these attorneys then informed the first respondent that the applicant would return to work on 5 March 2017, which he also failed to do.

[15] I will now turn to deciding the applicant's application, based on the above facts.

<u>Analysis</u>

[16] At the heart of the current application must be the proper interpretation of the order of Saloojee AJ. Where it comes to the interpretation of Court orders, the applicable principles have been summarized by the Constitutional Court (CC) in *Eke v Parsons*[2] as follows:

> 'The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.'

The CC in *Department of Transport and Others v Tasima (Pty) Limited; Tasima (Pty) Limited and Others v Road Traffic Management Corporation and Others*[3] also added the following considerations:

> '… As in the case of any document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary or qualify, or supplement it.'

[17] But in addition to the aforesaid, there is in my view a further consideration. This consideration is that it must always be borne in mind that Court orders must grant effective relief, and the order as it stands must be capable of being construed so as to give effect to the purpose for which it was intended. This is evident from the following *dictum* in *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Limited and Others*[4]:

[2] 2016 (3) SA 37 (CC) at para 29. See also *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Limited and Others* 2013 (2) SA 204 (SCA) at para 13.
[3] 2018 (9) BCLR 1067 (CC) at para 43.
[4] 2018 (12) BCLR 1553 (CC) at para 52.

> 'Court orders are intended to provide effective relief and must be capable of achieving their intended purpose. That must be the starting point in interpreting a court order …'

The Court added that:[5]

> '… A determination of the legal context within which the words in an order are used is also required. …'

[18] Applying all the above principles *in casu*, the actual nature of the proceedings that came before Saloojee AJ must be considered. It was a review application, and such proceedings are regulated by section 145 of the LRA. The very purpose of review proceedings is to determine whether an arbitration award issued by a CCMA commissioner is an award a reasonable decision maker could come to.[6] What this means to the current application, in my view, is that any interpretation of the order of Saloojee AJ must also involve also considering and interpreting the award handed down by arbitrator Boyce, as this award is the very subject-matter of what the learned Judge had to consider, and then decide on, in the review before him. However, and in the end, it must be considered whether the ultimate outcome arrived at by the learned Judge in granting an order in the review application, would lead to a clear order that effectively determines the review application and achieves the objectives of the LRA in this regard.

[19] Where this Court decides a review application relating to a CCMA arbitration award, on the merits of the application (i.e. whether the award constitutes a reasonable outcome), and of course depending on the grounds of review raised by the review applicant, this Court must either uphold (grant) the review application and then set aside the award (whether in whole or in part), or dismiss the application. That has to be the starting point of any order granted.

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[5] Id at para 54.

[6] See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para 110; *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Duncanmec (Pty) Ltd v Gaylard NO and Others* (2018) 39 ILJ 2633 (CC) at paras 42 – 43; *Herholdt v Nedbank Ltd and Another* (2013) 34 *ILJ* 2795 (SCA) at para 25; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96; *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC) at para 14.

This is apparent from the clear wording of section 145(1) of the LRA which provides that '*Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award …*' (emphasis added). It is only when the Labour Court decides to set aside the award in the first place, that the Labour Court can then exercise its powers under section 145(4) of the LRA,[7] and determine the matter as it deems appropriate, or grant an order as to what process must be applied going forward to finally and properly determine the dispute. This is commonly known as substitution of the award, or remitting the matter back to the CCMA for arbitration *de novo*.

[20] Turning now to the facts *in casu*, it is undoubtedly so that in the arbitration award of arbitrator Boyce, he found that he dismissal of the applicant by the first respondent to be substantively unfair, because it was not for a fair reason. It is equally beyond contestation that the arbitrator awarded the applicant fully retrospective reinstatement as consequential relief flowing from this unfair dismissal finding. All this is clear from the wording of the determination made by the arbitrator in the award itself.

[21] The word '*reinstatement*' as it is recorded in the award of arbitrator Boyce is important. The reason for this is that the arbitrator had a choice under section 193(1) of the LRA as what consequential relief he could afford, having found the dismissal of the applicant to be substantively unfair.[8] He could award either reinstatement, re-employment or compensation. These three remedies are distinct and separate and operate to the exclusion of one another.[9] It has to therefore follow that there is a material difference between '*reinstatement*' and '*reemployment*'.[10]

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[7] The section reads: '*If the award is set aside, the Labour Court may- (a)determine the dispute in the manner it considers appropriate; or (b) make any order it considers appropriate about the procedures to be followed to determine the dispute'*.

[8] The section reads: '*If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may- (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal; (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or (c) order the employer to pay compensation to the employee'*.

[9] See *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 2507 (CC) at para 42.

[10] Compare *Benicon Earthworks and Mining Services (Pty) Ltd v Dreyer NO and Another* (1999) 20 ILJ 118 (LC).

[22] With the applicant having been specifically awarded reinstatement in the ward, this means, as said in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[11]:

> 'The ordinary meaning of the word 'reinstate' is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. …. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of s 193(1)*(a)* indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator. The only limitation in this regard is that the reinstatement cannot be fixed at a date earlier than the actual date of the dismissal. The court or arbitrator may thus decide the date from which the reinstatement will run, but may not order reinstatement from a date earlier than the date of dismissal. …'

[23] Applying the aforesaid *ratio* in *Equity Aviation supra*, the Court in *Themba v Mintroad Sawmills (Pty) Ltd*[12] held:

> ',,, 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 it 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.'

[24] And recently, the Labour Appeal Court (LAC) in *National Commissioner of the SA Police Service and Another v Myers*[13] said:

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[11] (2008) 29 ILJ 2507 (CC) at para 36.
[12] (2015) 36 ILJ 1355 (LC) at para 22. See also *Nel v Oudtshoorn Municipality and Another* (2013) 34 ILJ 1737 (SCA) at paras 8 and 10; *Mediterranean Textile Mills (Pty) Ltd v SA Clothing and Textile Workers Union and Others* (2012) 33 ILJ 160 (LAC) at para 26
[13] (2018) 39 ILJ 1965 (LAC) at para 52.

> '… *Equity Aviation* established the principle that where an employee is reinstated by the employer, he or she resumes employment on the same terms and conditions that prevailed at the time of the dismissal of the employee. This means that the employer does not conclude a new contract when reinstating a dismissed employee. It merely restores the employment relationship to what it was before the dismissal. …'

[25] Re-employment does not require the restoration of the *status quo ante* as if a dismissal has not happened. Re-employment is relief that in effect affords the employer greater flexibility where it comes to taking the employee back to work. Examples of where re-employment, as opposed to reinstatement, would be competent is:

25.1 Where there had been operational changes to the employee's position in the interim, or a change in conditions of employment, which do not go so far as to render taking the employee back into employment impracticable, but which makes a complete restoration of the *status quo ante* as required by reinstatement impossible, re-employment would be appropriate.[14] In simple terms, the employee is returned to work in an alternative position.[15] The Court or the arbitrator however still retains the discretion to decide the retrospectivity of such an award of re-employment, so it does not follow that all re-employment awards necessarily mean that it must be new employment with no retrospectivity.[16]

25.2 Also, re-employment, as opposed to reinstatement, can have conditions and/or terms attached to taking the employee back to work, not contemplated by the employee's original employment and/or employment terms.[17] For example, it may be ordered that an employee

[14] See for example *National Construction Building and Allied Workers Union and Others v Natural Stone Processors (Pty) Ltd* (2000) 21 ILJ 1405 (LC) at para 19.
[15] Compare *Bidair Services (Pty) Ltd v Mbhele NO and Others* (2016) 37 ILJ 1894 (LC) at para 43
[16] Both sections 193(1)(a) (reinstatement) and 193(1)(b) (re-employment) refer to *'… from any date not earlier than the date of dismissal …',* which is exactly the same discretion. See *Genrec Engineering (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others* (2016) 37 ILJ 2649 (LC) at para 12.
[17] See *National Union of Metalworkers of SA and Others v Genlux Lighting (Pty) Ltd* (2009) 30 ILJ 654 (LC).

is re-employed on a different medical aid.[18] Another example is *AFRAWU on behalf of Mgidlana v Bonnita (Pty) Ltd*[19] where the Court held that an arbitrator acted *ultra vires* when ordering reinstatement, but then ordering different terms as being applicable where it came to the provident fund, which according to the Court meant re-employment in this respect.

25.3 Re-employment would also occur where it is decided to regard the previous employment relationship as terminated and the replacement thereof with new employment which may or may not be on different terms. As said in *Tshongweni v Ekurhuleni Metropolitan Municipality*[20]:

> '… Re-employment implies termination of a previously existing employment relationship and the creation of a new employment relationship, possibly on different terms both as to period and the content of the obligations undertaken.'

[26] I have specifically set out the differences between reinstatement and re-employment above, because of the position adopted by the first respondent in this instance. It contended that the order of Saloojee AJ substituted the award of reinstatement made in the arbitration award of arbitrator Boyce, with an award of re-employment. I believe this position adopted by the first respondent is opportunistic and devoid of merit, for the reasons to follow.

[27] In its notice of motion in the original review application, the first respondent sought an order that the arbitration award of arbitrator Boyce be reviewed and set aside. Next, the first respondent asked the Court, having reviewed and set aside the award, to substitute the award with a determination that the dismissal of the applicant was substantively fair. Alternatively, the first respondent prayed that the matter be remitted back to the CCMA for arbitration *de novo*. These are prayers fully in line with the provisions of section 145(4) referred to above. The first respondent never sought to make

[18] See *Johnson Matthey (Pty) Ltd v National Union of Metalworkers of SA and Others* (2012) 33 ILJ 2420 (LC) at paras 19 – 20.
[19] (2000) 21 ILJ 2691 (LC) at para 19.
[20] (2012) 33 ILJ 2847 (LAC) at para 37.

out an alternative case of re-employment as a substitution for reinstatement, which it needed to do for this even to be considered by Saloojee AJ.[21]

[28] In the founding affidavit in the review application, the applicant never sought to make out a case that the relief of reinstatement awarded by arbitrator Boyce was inappropriate, and should not have been awarded by the arbitrator. Such a case would have to be founded on section 193(2) of the LRA,[22] and would have to be fully motivated in the founding affidavit.[23] None of this was done, and there was simply no reason for Saloojee AJ to have interfered with the consequential relief granted by the arbitrator, having actually dismissed the review on the undisputed facts where it came to the finding of the existence of an unfair dismissal.

[29] Therefore, Saloojee AJ decided the review application by first and foremost dismissing it. As I have discussed above, the dismissal of a review application can only lead to one plausible and logical conclusion, being that the arbitration award of arbitrator Boyce was not set aside, and stands. If the award was not set aside, then Saloojee AJ simply could not exercise any of the powers of the Labour Court under section 145(4) of the LRA which would include the power to substitute any part of the award made and in particular any part thereof relating to consequential relief.

[30] But even if it is by way of a generous stretch of the imagination assumed that Saloojee AJ could have substituted part of the award of arbitrator Boyce, even if he dismissed the review application, it is my view that in order for it to be accepted that the learned Judge indeed substituted the award of reinstatement with an award of re-employment, this would necessitate the learned Judge specifically saying so in his order. The material and distinct

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[21] See *Gijima AST (Pty) Ltd v Hopley* (2014) 35 ILJ 2115 (LAC) at para 46.

[22] In terms of section 193(2), an employee found to have been unfairly dismissed must be reinstated or re-employed by the Labour Court or an arbitrator, as the case may be, unless one or more of the following specified exceptions are shown to exist: *'(a) the employee does not wish to be reinstated or re-employed; (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or (d) the dismissal is unfair only because the employer did not follow a fair procedure*.'

[23] *Mediterranean Textile Mills* (*supra*) at para 28; *Independent Municipal and Allied Trade Union on behalf of Strydom v Witzenberg Municipality and Others* (2012) 33 ILJ 1081 (LAC) at para 30; *Elliot International (Pty) Ltd v Veloo and Another* (2015) 36 ILJ 422 (LAC) at para 53; *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha and Others* (2016) 37 ILJ 2313 (LAC) at paras 6 and 8.

differences between the concepts of reinstatement and re-employment requires that such kind of substitution be specifically expressed in an order. It simply cannot be inferred or implied from an order that such kind of substitution took place, especially in the absence of any written reasons.

[31] What did Saloojee AJ then intend when he granted the order that he did? In my view, the answer is actually simple, and it is only complicated by the legal wrangling of the first respondent in trying to escape the clear consequences of the dismissal of its review application by Saloojee AJ. In the award of arbitrator Boyce, he chose to specify when the applicant had to actually report for work, being 14 June 2013. However, because of the intervening review application of the first respondent, the applicant could not report for work by that date. So all that Saloojee AJ did, upon dismissing the review application, was to seek to amend this date when the applicant had to report for work, so that the award would be given proper effect to. It was an integral part of the award of the arbitrator that the applicant had to report for work by a specific date, which needed to be changed only as a result of the intervening litigation having been disposed of. Thus, and having dealt with the review application which removed the impediment to the applicant reporting for work, Saloojee AJ simply stipulated a new date when the applicant had to report for work in terms of the original award of arbitrator Boyce.

[32] The opportunistic approach of the first respondent was in my view triggered by the unfortunate use of a wrong paragraph reference by Saloojee AJ, in referring to the arbitration award, when the learned Judge sought to change the date by which the applicant had to report for work. The learned Judge referred to paragraph 5.2 of the award, when he should have referred to paragraph 5.2.2. The first respondent pounced on this, in essence reasoning that the entire paragraph 5.2 of the award was now substituted with this one and single determination: '*The employee is required to report to duty on or no later than 23 January 2017"*. I am however convinced that this could never have been what Saloojee AJ meant, considering that the order of the learned Judge, other than simply dismissing the review application, simply repeats the text of paragraph 5.2.2 of the award of arbitrator Boyce *verbatim,* but just substitutes a new date in that paragraph.

[33] In addition, it is my view that the interpretation the first respondent seeks to attach to the order of Saloojee AJ makes little sense, and is illogical. On the first respondent's own reasoning, paragraph 5.1 of the award would stand, as it was not dealt with in the order of Saloojee AJ. In paragraph 5.1 of the award, arbitrator Boyce not only concluded that the dismissal of the applicant was substantively unfair, but he also dealt with reinstatement as a remedy, finding it to be appropriate. With Saloojee AJ having dismissed the review application, this paragraphs stands, and thus a finding of unfair dismissal and reinstatement being the appropriate remedy equally stands. Paragraph 5.2 then dealt with the specifics of consequential relief, *in toto*, pursuant to the finding by arbitrator Boyce in paragraph 5.1 of the award. If that consequential relief is now taken to mean that the applicant must report for work on 23 January 2017, and nothing else, as the first respondent suggests, it makes the award of consequential relief a nonsense, and actually contradicts the remaining part of the award which was unassailed as a result of the dismissal of the review.

[34] Further, and if the first respondent is correct, then there would be no indication on what basis the applicant must report for work. The first respondent assumes re-employment. But it may just as well be reinstatement. The latter proposition is actually fully in line with specific reasoning by arbitrator Boyce in his award, which reasoning stands as a result of the dismissal of the review. In short, if there is any inference to drawn, it tilts heavily in favour of reinstatement, and not re-employment. Also, and if the first respondent's reasoning is correct, there would be no apparent exercise of a discretion as to the retrospectivity of the award and/or back pay, which is essential in deciding any award of either reinstatement or re-employment, leaving another *lacuna*.[24] This interpretation of the first respondent thus renders the order ineffective and ambiguous, and completely undermines the arbitration award in circumstances where the review application was actually dismissed and the award stands. This simply cannot be allowed.

[35] In sum, the dismissal of the applicant by the first respondent was substantively unfair and he was reinstated with retrospective effect to date of his dismissal,

[24] See *Mediterranean Textile Mills* (*supra*) at para 27; *Coca Cola Sabco (Pty) Ltd v Van Wyk* (2015) 36 ILJ 2013 (LAC) at para 16; *Themba* (*supra*) at para 23.

in terms of the award of arbitrator Boyce. The review application of the first respondent challenging this award was dismissed. Proper effect must thus be given to the award, and considering the objectives of the LRA, it must be enforced. The order of Saloojee AJ must be interpreted to give effect to these primary objectives, and it must therefore follow that learned Judge only intended to amend the date the applicant was required to report for work in terms of paragraph 5.2.2 of the award of the arbitrator, so that this award could be given proper effect to.

[36] In conducting this matter, both the applicant and the first respondent unfortunately went off track and became embroiled in irrelevant issues. The applicant demanded, as part of what he considered to be compliance with the award, that he paid a sum of some R4.4 million, being his salary from the original award reinstatement date to date when he finally returned to work following the order of Saloojee AJ. But the payment of this amount (even if due) has no relevance to the issue of compliance with the award. It is not a claim arising from the award, but is a distinct and separate contract claim. As held in *Themba supra*:[25]

> '… The applicant has been reinstated, and this reinstatement applied from 28 December 2009. The pending challenge by the respondent of the arbitration award by way of the review application does not change this. This means that the applicant's entitlement to be paid by the respondent whilst the review is pending does not arise from the reinstatement award, but actually arises directly from his contract of employment which has been restored to all its former glory by the reinstatement. Contractually, the applicant is an employee of the respondent and as from 28 December 2009 he is entitled to be paid his salary in terms of his contract of employment, being such an employee.'

[37] In *Coca Cola Sabco (Pty) Ltd v Van Wyk*[26] the Court similarly said:

> 'Therefore if the employee, after the reinstatement order and during the time that the employer exercises its review and appeal remedies to exhaustion, tenders his/her labour he/she does so in terms of the employment contract. He/she is therefore entitled to payment in terms of the contract of employment. The claim is therefore a contractual one, wherein the employee would have to

[25] Id at para 31. See also *Myers* (*supra*) at paras 54 – 56.
[26] (2015) 36 ILJ 2013 (LAC) at para 24.

> set out sufficient facts to justify the right or entitlement to judicial redress. The employee would inter alia have to prove that the contract of employment is extant; that he/she tendered his/her labour in terms thereof; and that the employer refuses or is unwilling to pay him/her in terms of that contract. The employer on the other hand would have all the contractual defences at his/her disposal.'

[38] Therefore, the issue of the applicant's payment from the original reinstatement date in the award of arbitrator Boyce and until he finally returned to work in terms of the order of Saloojee AJ, has absolutely no bearing on deciding this case. It is not an issue that is in any way relevant to interpreting either the arbitration award of arbitrator Boyce, or the order of Saloojee AJ. It is, in simple terms, another fight for another day based on a different cause of action.

[39] The first respondent similarly misconceived its defence by raising issues relating to the applicant's conduct in making undue demands after returning to work, refusing to complete take on documents, failing to come back to work when instructed and acting in what the first respondent perceived to be a generally obstructive manner. Again, these issues have nothing to do with the arbitration award of arbitrator Boyce or the order of Saloojee AJ. These are similarly part and parcel of the kind of issues that can be raised by the first respondent in a contract claim brought by the applicant, in which he would claim salary following the date of reinstatement in terms of the award of arbitrator Boyce.

[40] Further, and if the first respondent believes that the applicant by way of his conduct after 23 January 2017 had shown that he in some way abandoned or waived or otherwise compromised his right to reinstatement, this is equally an issue of no relevance in interpreting the order of Saloojee AJ. Even should a dispute develop in a case where the applicant contends that the first respondent did not comply with the arbitration award in effecting his reinstatement in terms of that award, that is a separate issue of enforcement[27] which could ultimately end up in contempt proceedings, and in those proceedings all the issues raised by the first respondent as to why the

[27] See Sections 143 and 158(1)(c) of the LRA.

applicant should not be reinstated could then be raised as a defence.[28] Again, none of this has a bearing on the matter *in casu*.

[41] So all that now remains is to take proper steps to ensure complete clarity were it comes to the order of Saloojee AJ and what is intended by it. There are a number of provisions designed to correct any ambiguity in Court orders and to ensure that these orders can effectively be applied. These include Rule 42 of the Uniform Rules of the High Court,[29] as well as Rule 16A of this Court. In addition, there is also section 165 of the LRA[30] that is virtually identical to the relevant part of Rule 16A applicable in this case. All these provisions are aimed at the same thing, being to allow a Court to vary an order where there is an ambiguity in the order or a patent error or omission in the order. Seeing the applicant has relied on Rule 16A, I will set out the relevant part of this Rule, which reads:

> '(1) The court may, in addition to any other powers it may have *(a)* of its own motion or on application of any party affected, rescind or vary any order or judgment- …
> (ii) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission …'

[42] It is competent for this Court to utilize the provisions of Rule 16A(1)(a)(ii) to correct an ambiguity which may arise out of the interpretation of a particular order, just as long as the actual substance of the order is not altered. This was recognized by the CC in *Minister for Correctional Services and Another v Van Vuren and Another; In re Van Vuren v Minister for Correctional Services and Others*[31] where the Court considered Rule 42 of the Uniform Rules and held:

> 'A court may clarify its order or judgment to give effect to its true intention which is to be ascertained from the language used without altering the sense

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[28] Compare *Independent Municipal and Allied Trade Union on behalf of Joubert v Modimolle Local Municipality and Another* (2017) 38 ILJ 1137 (LC).
[29] Rule 42(1) reads: '*The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary: … (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission …*'.
[30] Section 165 reads: '*The Labour Court, acting of its own accord or on the application of any affected party may vary or rescind a decision, judgment or order- (b) where there is an ambiguity , or an obvious error or omission, but only to the extent of that ambiguity, error or omission …*'
[31] 2011 (10) BCLR 1051 (CC) at para 8. See also *Minister for Justice and Constitutional Development v Chonco and Others* 2010 (7) BCLR 629 (CC) at paras 6 – 7.

and substance of the judgment if, on its proper interpretation, the meaning remains unclear …'

The Court in *Butters v Mncora*[32] also articulated the position, also with reference to Rule 42, as follows:

'… The principle that a court may clarify its judgment or order if, on a proper interpretation, the meaning remains uncertain and it seeks to give effect to its true intention is trite. The sense and substance of the order ought not to be altered. …'

The same reasoning can in my view clearly be applied to Rule 16A(1)(a)(ii).

[43] In *Firestone South Africa (Pty) Ltd v Genticuro AG*[33]*,* the Court gave the following apt summary of the circumstances under which the Court would be inclined to effect a variation of an order in the interest of clarity:

'… provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter, or supplement it in one or more of the following cases:

(i) 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 …

(ii) The Court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order …

(iii) 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. …

[32] [2014] 3 All SA 259 (SCA) at para 15. See also *Mostert NO v Old Mutual Life Assurance Co* (*SA*) *Ltd* 2002 (1) SA 82 (SCA) at para 5.

[33] 1977 (4) SA 298 (A) at 306G–307H. See also *McDonalds SA (Pty) Ltd v CCMA and Others* [2003] 10 BLLR 1020 (LC) at 1022-1023; *SAFRAWU on behalf of Mgidlana v Bonnita (Pty) Ltd* (2000) 21 ILJ 2691 (LC) at paras 12 – 13.

(iv) Where counsel has argued the merits and not the costs of a case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits), but the Court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order …'

[44] In this instance, varying the order of Saloojee AJ in line with what I have discussed above will not change the substance of the order. The variation will simply clarify the order so as to set out its true and proper intention. It will remove any ambiguity, and make enforcement of the order effective (if needed). In my view, Rule 16A(1)(a)(ii) was intended for this very eventuality.

[45] A final issue remains. Saloojee AJ made no pronouncement in his order on the issue of costs. It is however clear from the pleadings in the review application that both parties asked for costs. Saloojee AJ was thus required to exercise a discretion in terms of section 162(1) to decide this issue. I believe the *lacuna* in the order to this effect was simply an oversight. Considering the history of this matter and especially the kind of disputes that have arisen between the parties as discussed above, it is essential to clarify this issue of costs as well, so as to avoid a possible further bone of contention between the parties in the future. In line with the principle as set out in *Firestone Africa supra* I shall therefore further vary the order of Saloojee AJ, by reflecting that no costs order be made, which I consider would have been an appropriate exercise of the discretion in this regard, applying the reasoning in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[34].

Conclusion

[46] Accordingly, the applicant's application in terms of Rule 16A must succeed. It is my view that the applicant has made out a proper case as contemplated by Rule 16A(1)(a)(ii) for a variation of the order of Saloojee AJ so as to clarify the order and remove any ambiguity, and thus ensure certainty where it comes to the effective enforcement thereof, which has been lacking until now. The variation is in line with what Saloojee AJ in my view intended and would be consistent with the clear terms of the underlying arbitration award of arbitrator

[34] (2018) 39 ILJ 523 (CC) at para 25.

Boyce which stands as a result of the review application being dismissed, and the relevant provisions of the LRA. For the sake of clarity, I specifically state that the variation is granted only in the terms specifically set out in the order at the conclusion of this judgment.

[47] This only leaves the issue of costs. I reiterate that in terms of the provisions of section 162(1) of the LRA, I have a wide discretion where it comes to the issue of costs. Overall considered, and even though the applicant was successful, I cannot blame the first respondent for adopting the view that it did. After all, it is undeniably true that the order of Saloojee AJ as it stood in fact did create an ambiguity and contained an error, which is not the fault of the first respondent. The situation was exacerbated by the absence of written reasons. Even though some of the first respondent's arguments were in my view somewhat opportunistic, I do not believe the first respondent was *mala fide*. I also consider that there seems to be more to come between the parties in respect of litigation relating to implementing reinstatement, back pay and the contract claim I have referred to, and I do not intend to mulch any of the parties with a costs order pending all of this. In all these circumstances, it is my view that the only fair order where it comes to costs is to make no order as to costs.

[48] In the premises, I make the following order:

<u>Order</u>

1. The applicant's application is granted.

2. The order of Saloojee AJ dated 11 January 2017 is varied to read as follows:

   '1. The applicant's review application is dismissed.

   2. The date when the third respondent is required to report for work in terms of paragraph 5.2.2 of the arbitration award of the second respondent dated 3 June 2013, is substituted with the date of 23 January 2017.

3. There is no order as to costs.'

3. There is no order as to costs in this application.

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S Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate E Sithole
Instructed by:	Mabaso Attorneys
For the First Respondent:	Advocate A Snider
Instructed by:	Cliffe Dekker Hofmeyr Inc Attorneys