

SOUTH AFRICA / JUDGMENT

UTI Pharma (Pty) Ltd v Bracks NO and Others (JR 2459/2018) [2021] ZALCJHB 11 (15 February 2021) [2021] ZALCJHB 11

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR 2459/2018

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Source record

The
Labour Court of South Africa
(Held at Johannesburg)
Not
reportable
Case
No: JR 2459/2018
In

the matter between:

UTI
PHARMA (PTY)
LTD
Applicant
and
RONNIE
BRACKS N.O.
First Respondent
NATIONAL BARGAINING
COUNCIL FOR
THE
CHEMICAL
INDUSTRY
Second
Respondent
GIWUSA
obo LUVATSHA & 9 OTHERS
Third Respondent
Hearing: Application

considered in Chambers on the papers

Date

of judgment: 15 February 2021. Judgment delivered by email.

JUDGMENT

VAN NIEKERK J

- [1] In this unopposed application, the applicant seeks to review and set aside an arbitration award issued by the first respondent (the arbitrator). The application was filed some 11 days late. Given the minimal period of delay and the explanation proffered by the applicant, the late filing of the application is condoned.
- [2] The dispute between the parties has a long history and illustrates the ease with which the statutory purpose of expeditious dispute resolution can be thwarted. The individual employees on whose behalf the third respondent (the union) acts were dismissed in 2012, on charges of absence from work without permission. The fairness of the dismissal was disputed in the matter referred to arbitration in April
2014. An arbitration award was issued in favour of the individual employees, who were found not to have committed any misconduct and reinstated with retrospective effect. The applicant sought to review and set aside that award. In a judgment delivered on 10 October 2017, the court held that the employees were indeed guilty of misconduct

and proceeded to consider whether the sanction of dismissal was fair. The court held that it was arguable that the employees should have received a severe sanction short of dismissal. In the absence of any evidence on record of the parties having addressed the arbitrator on the question of appropriate relief in the event that the dismissals were found to be unfair, the court remitted the matter to the bargaining council for an arbitrator to determine whether the employees should be reinstated or awarded compensation. The order issued by the court is to the effect that the arbitration award was reviewed and set aside and substituted with an award that the employees were guilty of the misconduct in issue, but that their dismissal was substantively unfair. I understand this formulation to mean that the court considered that dismissal was too harsh a sanction in the circumstances, and that the employees'

dismissal was substantively unfair for this reason. What the bargaining council was required to do was convene a hearing to determine the remedy that the employees should be afforded, in the light of the court's findings.

- [3] The dispute was duly remitted to the bargaining council and an arbitration hearing was eventually convened on 3 September 2018. At the hearing, the employees were represented by a union official and the applicant by an official of an employers' organisation. The parties had presented heads of argument, which have not been included in the record but to which extensive reference was made in the course of the hearing. The applicant's representative submitted that the delays in prosecuting the review proceedings were occasioned through

no fault of its own and then proceeded to address the question of why reinstatement would not be appropriate. First, it was submitted that reinstatement would create an intolerable employment relationship given the protracted litigation between the parties, that it was not reasonably practicable for the employees to be reinstated or re-employed, since the employer party had been taken over by another party, the DSV group. Consequent on the takeover, the applicant's business had been restructured and the posts occupied by the employees had been filled or become redundant. In response, the union's representative contended that reinstatement was the primary remedy, and that if compensation were to be awarded, the quantum was placed in the hands of the commissioner.

- [4] The arbitrator rendered an award (the award under review in the present proceedings) on 22 September 2018. The arbitrator correctly records that the matter had been remitted by this court and that in terms of the order, the council was directed to appoint an arbitrator to determine the appropriate relief to be granted in circumstances where the employees had been found guilty of misconduct but their dismissal substantively unfair. In his analysis of the submissions made by the parties, the arbitrator recorded (correctly) that the primary remedy for an unfair dismissal is reinstatement. He refers to section 193 (2) of the LRA in which this court or an arbitrator (as the case may be) is required to reinstate or re-employ an employee who is unfairly dismissed unless the employee does not wish to be reinstated or re-employed, the circumstances surrounding the dismissal was such that a continued employment relationship would be intolerable, it is not reasonably practicable for the employer to reinstate or re-employ the employee, or the dismissal is unfair only because the employer did not follow a fair procedure. The arbitrator suggests that while the LRA establishes reinstatement as a primary remedy, in practice, this has not been the case, largely on account of the protracted nature of dispute proceedings and the fact that posts of unfairly dismissed employees are more often than not filled by the time that the proceedings conclude. The arbitrator went on to refer to a number of cases in which the application of section 193
- (2) had been considered by the courts and concluded that having regard to the 'full conspectus of the evidence', he was persuaded that the retrospective reinstatement would be the most appropriate remedy. The arbitrator proceeded to reinstate the employees, with retrospective effect from the date of dismissal, being 8 June 2012. The quantum of the backpay awarded to the employees amounted to some R5 million.
- [5] In the present proceedings, the applicant contends that the award is reviewable on three grounds. The first is that the arbitrator failed to call for oral evidence and that the award is based solely on written representation submitted by the parties. Given that in terms of those representations the arbitrator was confronted with two conflicting versions regarding the appropriateness of reinstatement as a remedy, the applicant submits that the arbitrator was duty-bound to insist on oral evidence, assess that evidence, and evaluate the probabilities prior to making any finding. The second ground for

review relates to the quantum of the award. The applicant submits that neither party contributed to the delay in finalising the matter and that the arbitrator ignored this court's finding in the initial review proceedings to the effect that the employees were in fact guilty of misconduct. Thirdly, the applicant contends that the award by and large comprises the replication of an article published by Judith Geldenhuys in the Potchefstroom Electronic Law Journal. That article, entitled 'The Reinstatement and Compensation Conundrum in South African Labour Law' appeared in 2016. The applicant submits that the wholesale copying of the award is indicative of the fact that the arbitrator failed to apply the mind to the matter before him.

- [6] I deal first with the third ground for review. The bulk of the arbitrator's award is nothing more than an unacknowledged replication of the article to which the applicant refers. This is the grossest form of plagiarism. There is ordinarily no bar to making reference in an award to articles and other academic texts but where this is done, proper references and acknowledgements must necessarily be included. What the arbitrator has done is pass off the text of the article as his own. Even then, the plagiarism has been clumsily effected, especially at the page breaks between pages 5 and 6, pages 6 and 7, and pages 7 and 8 of the award. In these instances, the arbitrator omitted parts of sentences from the article, with the result that the text of the award is incomprehensible. The arbitrator's conduct is highly unprofessional, amounting to nothing less than a form of intellectual theft.
- [7] As the applicant submits, the arbitrator's plagiarism is indicative of a failure to apply his mind to the issues. This much is apparent from the last page of the award, where at paragraph 41, after a recitation of the relevant authorities on the primacy of reinstatement, the arbitrator simply records the conclusion that retrospective reinstatement would be the most appropriate remedy. There is no reasoning to support this conclusion, certainly none that refers to any evidence before him. Arbitrator, like judges, are required to provide reasons for the awards. Indeed, section 138 (7)
- (a) of the LRA obliges arbitrators to do so. The purpose of the requirement to provide reasons is inextricably linked to the reasoning process itself. Reasons enable the parties to the dispute (and others) to appreciate the application of legal principle to assess facts, and thus the basis of the conclusion drawn. The absence of any proper assessment of the relevant facts and the failure to apply legal principles to those facts, in my view, renders the award reviewable. It is not sufficient for an arbitrator simply to record a number of legal authorities and then to state a conclusion, without more.
- [8] The third ground for review thus discloses the arbitrator has committed a reviewable irregularity. It is not necessary for me to consider the first and second grounds for review but in passing, neither of them are particularly persuasive. In regard to the first ground for review, the parties clearly agreed to have the matter resolved by filing written submissions, supplemented with oral argument. There was no objection from the applicant's representative at that stage to the process adopted, and it is not open to the applicant effectively to object at this late stage. The second ground for review more properly flows from the third.

- [9] The existence of a reviewable irregularity is not sufficient in itself to render the award reviewable. As the Labour Appeal Court observed (see *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC)), the court must nonetheless consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result or outcome could be reasonably reached. In my view, there are a number of factors which militate against such a conclusion. The first is the fact that the events that gave rise to the dispute between the parties occurred in 2012, now almost 9 years ago. The arbitrator correctly accepted that responsibility for the delays in the dispute resolution process, and particularly in prosecuting the review application, were not to be ascribed to either party. But a lapse of time to this degree militates against the practicability of reinstatement – see *Republican Press v CEPPWAWU & others* 2008 1 SA 404 (SCA)). Indeed, in the first review judgment, the court makes reference to the period of time that had then elapsed and its relevance to remedy. The second is that in the judgment delivered after the first review application, this court found the employees guilty of misconduct. The only basis on which the dispute was remitted was to determine whether the employees should be reinstated or rewarded compensation. The fact that they had been found to have committed an act of misconduct is a material factor in this enquiry, one that the arbitrator appears to have entirely overlooked. This was not a case where employees’ innocent of any misconduct were found to have been unfairly dismissed. The facts disclose that the applicant in the present proceedings provided emergency medication to clients on a day-to-day basis. The employees failed to advise the applicant, as they were required to do, that they were not going to be present at work and failed to make the necessary arrangements with the supervisors. As the review court pointed out, the case was not concerned with the employees’ right to attend a conciliation meeting – it concerned their failure to advise their employer about what amounted to a planned collective absence. None of these issues was considered by the arbitrator. For these reasons, the result of the proceedings under review (in the form of reinstatement with full retrospective effect and without any penalty short of dismissal) does not meet the applicable threshold and stands to be reviewed and set aside.
- [10] Ordinarily, a review court has a discretion to remit the matter for rehearing or to substitute the arbitrator’s decision. This is not a matter that ought to be remitted for rehearing. As I have indicated, the dispute between the parties is rooted in events that occurred in 2012. The matter has been to arbitration twice, and arbitrator’s award set twice been reviewed. It is in the interests of all concerned that the matter be brought to finality. That leaves this court in the unenviable position of deciding on an appropriate remedy. I am guided by the facts as they are disclosed in the arbitration award issued in 2014, and the judgment delivered by this court on 16 October 2017. The employees did not dispute that if they were unable to attend work for any reason, they were required to notify the supervisor within two hours from the commencement of the

shift but by no later than the end of the first working day of their absence, to convey both the reason for absence and the anticipated

date of return to work. The applicants had not attended at work on account of their going to the CCMA. The hearing concerned final

written warnings issued to the employees a few weeks prior to the incident that led to the dismissal. It is common cause that they had not sought the necessary permission, nor conveyed in advance their intentions. The review court made the point that the arbitrator took a narrow technical approach to the charges against employees and failed to appreciate that the allegations, read fully and sensibly, raised a case to the effect that the employees had failed to warn the applicant in advance about their intended absence, particularly given the fact that 10 employees would be absent. The court observed that given that a collective absence was planned, commonsense and fairness dictated that the employees provide the applicant with a fair warning about their intended absence. They could have done so but chose not to, and as a result the applicant was obliged to employ temporary employees in their place. This, according to the court, constituted misconduct.

[11] Even if reinstatement were appropriate at the time of the 2014 award, any reinstatement would ordinarily have been accompanied by some form of sanction, perhaps in the form of a written warning. That is no longer a practicable option, and given the nature of the employees' misconduct, the effluxion of time since their dismissal and the applicant's changed circumstances, an award of compensation is warranted. In my view, an award of the equivalent of six months' remuneration to each employee is a fair remedy in the circumstances.

I make the following order:

1. The arbitration award issued by the first respondent on 22 September 2018 under case number GPCHEM 525-11/12 is reviewed and set aside.
2. The award is substituted by the following:

'The applicants are awarded compensation in a sum equivalent to 6 month's remuneration, calculated at the level of remuneration earned by each of them as at the date of dismissal'.

André van Niekerk

Judge of the Labour Court of South Africa

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Prepared on 10 October 2026 · Esheria