IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

CASE NO: PA10/09

BEFORE: MLAMBO JP, TLALETSI JA and LANDMAN AJA

In the matter between:

VOLKSWAGEN SA (PTY) LTD	**APPELLANT**
and	
MARTIN KOORTS N.O	**FIRST RESPONDENT**
NUMSA	**SECOND RESPONDENT**
D GOLIATH	**THIRD RESPONDENT**
K SAME	**FOURTH RESPONDENT**
H MARAIS	**FIFTH RESPONDENT**
L FANSE	**SIXTH RESPONDENT**
M BARKES	**SEVENTH RESPONDENT**
S ARNOLDS	**EIGHT RESPONDENT**
P HAIGH	**NINTH RESPONDENT**
H JORDAAN	**TENTH RESPONDENT**
A DOLLEY	**ELEVENTH RESPONDENT**
R VAN BUCHENRODER	**TWELFTH RESPONDENT**
G SLAMDILL	**THIRTEENTH RESPONDENT**
M JANTJIES	**FOURTEENTH RESPONDENT**
M TAKA	**FIFTEENTH RESPONDENT**

J ARENDS	**SIXTEENTH RESPONDENT**
D TYLER	**SEVENTEENTH RESPONDENT**
L HLULANI	**EIGHTEENTH RESPONDENT**
H CLAASEN	**NINETEENTH RESPONDENT**

JUDGMENT

LANDMAN AJA:

Introduction

[1] This is an appeal against the judgment of Bhoola AJ (as she then was) dismissing an application to declare a submission to arbitration void on the grounds of a common error or supposition and declining to review and set aside the award of the arbitrator. The appeal is opposed by all the respondents save for the first and ninth respondents. I shall refer to the respondents, who were employees of the appellant, as "the employees".

[2] Volkswagen SA (Pty) Ltd, the appellant, manufactures vehicles at its plant in Uitenhage. It employs a large staff of salaried and hourly paid employees. Early in 2005 Mr Rautenbach, the appellant's head of security, received information that some employees were playing cards and gambling in the lead wipers locker room ("the wiper locker room"). As a result it was decided to install a video camera and to commence with video surveillance of all the employees who entered and exited the wiper locker room. The surveillance covered the period Saturday 21 May to Friday 10 June 2005.

[3] The footage was viewed and a number of employees, mostly those who spent, what the security services considered to be an undue period of time in the locker room,

were interviewed individually or in groups by the head of security. The employees were not told that the company had conducted a video surveillance.

[4] Thereafter the selected employees were charged with three attendance offences. Supervisors were charged with an additional offence. A disciplinary enquiry was convened in September 2005. After the employees had given their evidence the video tapes were screened and admitted into evidence. The chairperson of the disciplinary committee found that the charges had been proven and dismissed the employees.

[5] The employees, assisted by their trade union, declared a dispute. They entered into an arbitration agreement with the appellant and appointed the first respondent, Martin Koorts, as their arbitrator. The arbitrator heard the evidence and concluded that the dismissals were procedurally fair but substantively unfair and awarded compensation to two employees and ordered the retrospective reinstatement of the other employees.

[6] The appellant decided to challenge the award in the Labour Court. It discovered that the award made by the arbitrator could only be challenged on the relatively narrow grounds contained in section 33 of the Arbitration Act 42 of 1965. Appellant's challenge of the validity of the arbitration award was unsuccessful. The appellant was also unable to convince the court *a quo* to review and set aside the award. The appellant appeals to this court against that judgment. The main premise of the appeal is that the parties laboured under a common error in concluding the submission to arbitration.

The validity of the arbitration agreement

[7] The arbitration agreement was settled by three sets of legal representatives. The terms of the arbitration agreement are particularly relevant. Three aspects of clauses two and three of the submission to arbitration need to be highlighted:

(a) the arbitrator was enjoined to determine whether, based on the evidence presented during the course of the arbitration proceedings, there existed: "…fair cause to make a finding of misconduct against the employees based on the allegations raised against them in the disciplinary proceedings". The arbitrator was in the event of such misconduct being established further enjoined to determine a fair sanction;

(b) the arbitrator was obligated to "conduct the proceedings as if appointed under section 188A of the Labour Relations Act 66 of 1995 (the "Act")";

(c) the parties specifically agreed that "although the proceeding are private in nature they will be entitled to rely upon the grounds of review encapsulated in section 145 of the Act and further agree, to the extent necessary, that the arbitrator's award is required to be both rational and justifiable within the meaning of the authorities". (My emphasis.)

[8] Mr A E Franklin SC, with him Mr R B Wade SC, who appeared for the appellant, submitted that in spite of the parties' best intentions, the position is that courts are not legally able to give effect to the parties' requirement that a private arbitrator render an award which is "rational and justifiable", or any other review standard for that matter. Unless the error thus vitiates the award a review court is bound to measure the product of private arbitration proceedings against the narrow grounds of review encapsulated in the Arbitration Act of 1965.

[9] That this is the legal position is borne out by **Telcordia Technologies Inc v Telkom SA Ltd** 2007 (3) SA 266 (SCA). Harms JA had the following to say at 292:

> "[51] Last, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in s 33(1) of the Act. By necessary implication they waive the right to rely on any further ground of review, 'common law' or otherwise. If they wish to extend the grounds, they may do so by agreement but then they have to agree on an appeal panel because they cannot by agreement impose jurisdiction on the court."
> (My emphasis.)

[10] This view has been reconfirmed by the SCA in **Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and another** 2008 (2) SA 448 (SCA) which has received the approval of the Constitutional Court in **Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and another** 2009 (4) SA 529 (CC). The Labour Appeal Court adopted the same view in **National Union of Mineworkers on behalf of employees v Grogan NO and another** (2010) 31 ILJ 1618 (LAC) at para 33.

[11] Counsel for the appellant submitted that it is necessary to decide on the validity of the arbitration agreement at the outset. This was the approach which the court *a quo* followed. The court *a quo* decided that the agreement was not vitiated by mistake.

[12] Counsel for the respondents pointed out that, in the court *a quo,* the appellant urged the court to adopt the opposite approach. On that occasion appellant's junior counsel, Mr Wade (now Wade SC) urged the court to review the award and, only if the review were to fail, should the court decide the nullity issue.

Evaluation

[13] In my view the logical approach is that adopted by the court *a quo*. If the arbitration agreement is null and void then the award must fall with it. The court *a quo* found that the Labour Court was clothed with jurisdiction to consider whether the arbitration award before it was preceeded by a valid arbitration agreement. See section 157(3) of the LRA read with the Arbitration Act of 1965. Section 157(3) of the LRA reads:

> "Any reference to the court in the Arbitration Act 1965 (Act 42 of 1965), must be interpreted as referring to the Labour Court when an arbitration is conducted under that Act in respect of any dispute that may be referred to arbitration in terms of this Act."

[14] A High Court has the power in terms of section 3 of the Arbitration Act of 1965 to set aside a submission to arbitration. This being so the Labour Court, when it performs

the functions as contemplated by section 157(3) of the LRA, enjoys the same jurisdiction and powers. Section 151(2) does not affect the operation of section 157(3) of the LRA.

Agreement vitiated by common error?

[15] The court *a quo* decided that the parties were *ad idem* in respect of the review standard, even though this may have been based on a common error. This error does not vitiate the consensus; nor does the nature of the award render the review standard material. The court *a quo* said, in this regard, at paragraph 15 of the judgment:

> "Insofar as submissions were made by the parties on the issue of whether the materiality of the clause was contingent on a finding that the award was irrational and unjustifiable, I do not consider it necessary to deal with this given that I have concluded that the review standard is not a material term of the arbitration agreement. I agree with the applicant that this court is not required to determine rationality and justifiability and then on this basis backtrack to determine whether the term was material or not, but instead I am required to decide whether there was consensus, and if not the agreement is then vitiated. I have already indicated that, in my view, there clearly was consensus between the parties in respect of the review standard, even though this may have been based on a common error. The error does not vitiate the consensus, in my view, nor does the nature of the award render the review standard material."

[16] Counsel for the appellant submitted that the court *a quo* was plainly wrong to conclude that the common error was not material. He submitted that its finding runs counter to the evidence which was either common cause or not seriously disputed and further that, had the court accepted the materiality of the error, it is inevitable that the application would have succeeded. That being so, the appeal should succeed on this circumscribed issue so it was submitted.

[17] This submission was made on the following basis:

(a) The appellant's ability to have recourse to the grounds of review that would have been available to it (had the matter run its ordinary course in the CCMA) represented "an absolute precondition to the submission of the dismissal dispute to the first respondent."

(b) It is plain that the parties' consensus reflected in the arbitration agreement had two main elements. First, the three parties to the arbitration proceedings plainly intended to afford themselves the right to invoke section 145 of the LRA. Secondly, the parties also intended prescribing the precise review standard against which they wished the Labour Court to assess the arbitrator's award in the event that either of them were dissatisfied with the award.

(c) Although there may previously have been some uncertainty regarding the question whether or not parties to private arbitration proceedings could, in a binding fashion, expand upon a review court's jurisdiction, the law has now become settled.

(d) If the parties' mistake is sufficiently fundamental the contract will be *void ab initio* for initial impossibility. The general rule is that a contract is a nullity if at the time it was made it was factually or legally impossible of performance. See **Peters, Flamman and Co v Kokstad Municipality** 1919 AD 427.The impossibility must be absolute as opposed to probable.

(e) A common mistake not giving rise to initial impossibility will justify rescission by either party if it relates to a matter which was vital to the transaction, in the sense that if either of them had been aware of the true position, the transaction would not have gone ahead. A common mistake on a matter which is not material will of course have no effect on the validity of the contract.

(f) The disputed clause was considered material or "*vital to the transaction*" because:

  (i) had the appellant been aware of the legal impediment under consideration, it would not have entered into the arbitration agreement in its current form and would either have allowed the matter to be addressed under the LRA, or insisted on material adjustments to the arbitration agreement;

(ii) the mere fact that the clause was inserted and that it features prominently and can hardly be regarded as an ancillary provision is proof positive that the respondents' themselves considered the clause material.

(g) The matter is identical to the decision of the Labour Court in **Lear Sewing (Pty) Ltd v Tokiso Dispute Settlement (Pty) Ltd and others** (unreported judgment of the Labour Court; P 131/07) where a submission to arbitration was set aside.

[18] On the other hand the respondents contended that:

(a) No mistake, whether material or otherwise, was made.

(b) To the extent that there had been a common mistake between the parties, the respondents dispute the appellant's contention regarding the materiality of that alleged mistake.

(c) The judgment in **Lear** does not support the appellant's case at all. In **Lear** the dispute between the parties was that the applicant, in that matter, claimed that the parties had agreed on extended review grounds whilst the respondents in that case claimed that they had in fact, by necessary implication, agreed on the narrow review grounds contained in the Arbitration Act of 1965.

(d) The court *a quo* was entirely correct when it concluded that the common mistake between the parties was not a material one.

Evaluation

[19] A submission to arbitration is a contract. A party cannot resile from the contract without the consent of the other party. See **Turkstra and another v Massyn** 1958 (1) SA 623 (T) at 625. But if the agreement is void it is unenforceable and any award made in terms of a void submission to arbitration will be invalid.

[20] The appellant alleged that the submission to arbitration is void on account of a common mistake. The second to eighth and tenth to nineteenth respondents defend the validity of the submission to arbitration and that of the award.

[21] The appellant relies, *inter alia*, upon the decision in **Lear**. This decision concerned parties who wished to submit to pre-dismissal arbitration in terms of section 188A of the LRA which would ensure that the award could be reviewed on the broad grounds in section 144. They however laboured under a common error that Tokiso was an accredited organisation and that an award of an arbitrator acting under the auspices of Tokiso could be reviewed on broad grounds. Tokiso was not accredited by the CCMA and the result is that the narrow grounds of section 33 of the Arbitration Act of 1965 applied. The Labour Court set aside the submission to arbitration.

[22] The Labour Court in **Lear** did not refer to the approach adopted in **Wilson Bayly Homes (Pty) Ltd v Maeyane and others** 1995 (4) SA 340 (T) nor **Van Reenen Steel (Pty) Ltd v Smith NO and another** 2002 (4) SA 264 (SCA). It was content to find that there had been a common error of fact. It did not consider the further step mentioned in these two decisions.

[23] In **Blaas v Athanassiou** 1991 (1) SA 723 (W) Hartzenberg J, who was seized with a similar matter (both parties had thought that an award could be appealed), said at 725A-D:

> "It is accepted that the respondent would not have entered into the agreement if he had known that he could not appeal to the Appeal Court against the arbitrator's award. Even if it is accepted that that *error juris* can in these circumstances vitiate the contract, which I definitely do not say is the case, then in any event it has to be decided if the respondent's *error* was j*ustus* or not. (See *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 471C-E.) There is no suggestion of any fraud or other improper conduct on the side of the applicant, which led the respondent to his mistaken belief. He has only himself to blame for it. In the circumstances I cannot accept that his *error* was j*ustus.* In my judgment, further, the right in the

> agreement as to an appeal, as opposed to an automatic right of review, was merely incidental to the main agreement, i.e. to submit to arbitration. In my view the respondent is bound by the agreement. This point accordingly fails."

[24] **Blaas v Athanassiou** was followed by Mpati J (as he then was) in **Patcor Quarries CC v Issoroff and others** 1998 (4) SA 1069 (SE).

[25] However, the error need not be a justus or reasonable one where there is a common error as regards a supposition, as is the case here. See **Humphreys v Laser Transport Holdings Ltd** 1994 (4) SA 388 (C). I accept that, for purposes of common mistake, there is no difference between a mistake of law and a mistake of fact. See R H Christie **The Law of Contract** 4th edition 382 and **Bulawayo Municipality v Dundee Butchery Ltd** 1944 SR 120 at 125. In **Van Reenen Steel (Pty) Ltd v Smith NO and another** (*supra*) at 270 Harms JA (as he then was) cited the following passage from Van der Merwe et al **Contract: General Principles** 19 with approval:

> "[12] *Van der Merwe et al* sum it all up:
> 'A common mistake is said to be present where both parties to an agreement labour under the same incorrect perception of a fact external to the minds of the parties. Such a mistake, of course, does not lead to *dissensus:* the parties are in complete agreement, although their *consensus* is based on an incorrect assumption or supposition. This kind of mistake can be related to the concept of a common underlying supposition ("veronderstelling") on which the parties base their contract so that a mistake in their common motive will render the contract without further effect.'
>
> [13] It follows from this that the quoted statement in *Wilson Bayly Homes* conforms to authority and principle..."

[26] The dictum by Nugent J (as he then was) in **Wilson Bayly Homes (Pty) Ltd v Maeyane and others** (*supra*) at 343I clearly explains the basis for voiding some agreements featuring common errors or the existence of an assumption and not others. Nugent J said at 344I to J:

> "As I understand the decisions in those cases, a common mistake relating to the existence of a particular state of affairs will not render the contract void unless it can be said that the parties expressly or tacitly agreed that the validity of the contract was conditional upon the existence of that state of affairs."

[27] This is what prompted Harms JA in to say in **Van Reenen** at 270D:

> "The correctness of the conclusion can be tested in other ways. If the question were to be asked whether the appellants would not have concluded the agreement had they known of the true facts, the answer is probably in the affirmative."

[28] Clearly the parties laboured under a common error. But would the appellant not have concluded the submission to arbitration had it known of the true legal position? What would the parties have said to the officious bystander if told that they could not instruct the Labour Court to review their matter on broader grounds than those in section 33 of the Arbitration Act? They probably would have said: "We have a limited choice. Either we go to the CCMA and have no say as to which commissioner will be allocated to arbitrate our matter but we can review the award on wide grounds; or we can continue with arbitration, choose our arbitrator but accept the narrow grounds of review". The probabilities are that the parties would rather wish to choose their arbitrator and the benefits of private arbitration. The parties would also probably say: "Although we cannot prescribe to the Labour Court how it should review an award, we can validly charge the arbitrator with the injunction to hear the matter as would a CCMA commissioner. If the arbitrator fails to do so his award can be reviewed on the basis of misconduct". They may also have said: "We could arrange for an appeal to a panel and charge that panel with powers similar to those relating to the wide grounds of review. But if we do so the decision of that panel could be reviewed on the narrow grounds". See **Hos+med Medical Aid Scheme v Thebe Ya Bophelo Healthcare and others** [2008] 2 ALL SA 132 (SCA). "So we stand by our submission".

[29] I therefore conclude that the submission to arbitration is valid. That part of clause 3, which purports to impose an obligation on the court, is severable from the remainder of the contract. It can be deleted without depriving the parties of their bargain. It must therefore be deleted. I turn to consider the application to review the award of the first respondent.

The review on narrow grounds

[30] The award of the arbitrator may be reviewed on the grounds in section 33 of the Arbitration Act of 1965 which are set out below:

> "Setting aside of award:
>
> (1) Where-
> (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
> (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its power; or
> (c) an award has been improperly obtained,
>
> the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.
>
> (2) …
> (3) …
> (4) If the award is set aside the dispute shall, at the request of either party, be submitted to a new arbitration tribunal constituted in the manner directed by the court."

The charges

[31] During the disciplinary hearing and during the arbitration the employees faced the following charges:

> "It is alleged that you committed serious misconduct, in breach of the trust necessary to sustain the employment relationship in that:

1. You dishonestly and deliberately abandoned your workstation during normal working hours, and without having any prior authority to do so for periods/approximating to the time specified below.
2. You dishonestly took money in the form of remuneration for the period during which you were not working, to which you knew you were not entitled.
3. You dishonestly and deliberately attempted to mislead the Company by providing false information when you were requested to explain your conduct.

In respect of group leaders:

4. You undermined the authority entrusted to you in your position as a Group Leader by participating in and/or condoning conduct in breach of the standards which you are required to uphold."

Appellant's submissions

[32] Counsel for the appellant submitted that:

(a) the arbitrator's award is an aberration, *inter alia,* on account of the fact that he never at any stage sought to actually assess the versions of the individual respondents with a view to determining (on the probabilities) whether those accounts were credible and, importantly, whether or not the individual respondents actually believed that they could do what they did. He therefore ignored his terms of reference;

(b) the arbitrator could only discharge his function (under his agreed terms of reference) by analysing the individual respondents' evidence, and thereafter properly assessing the appellant's submissions in relation to both the veracity of their account, and the central enquiry whether or not they had acted dishonestly by engaging in their own private affairs whilst being paid by the appellant;

(c) what is plain is that the arbitrator premised his assessment of the evidence on the adoption of the fixed principle that the individual respondents were unaware that what they were doing was wrong;

(d) there was no credible evidence supportive of the conclusion that the individual respondents were not aware of the concept of *"stealing company time."* This was in any event not the case presented by them. The essence of their defence, and it was far from consistent, was to the effect that they were entitled to do what they did in circumstances where there was no work for them to perform;

(e) at the most elementary level the arbitrator inexplicably failed to appreciate that the central factual enquiry, being whether or not the individual respondents had been dishonest, could not be resolved with reference to general principles and abstract observation;

(f) the arbitrator acted unjustifiably and irrationally (and "unreasonably") in concluding that the question whether or not there was in fact work to perform was a central enquiry, and that the individual respondents' evidence to the effect that they had no work to perform was probable;

(g) this general conclusion was at odds with the individual respondents' own evidence and, moreover, the clear import of the probabilities something the arbitrator never turned to assess;

(h) entirely irrelevant was the arbitrator's conclusion to the effect that there was no sustainable evidence to support the finding that the individual respondents had compromised either quality or quantity. Not only was this not the thrust of the appellant's case, it is a fact or consideration of absolutely no relevance in relation to the fundamental enquiry regarding the individual respondents' state of mind;

(i) equally irrational and unjustifiable was the arbitrator's attempt to suggest that there could be no dishonesty in the absence of concrete proof that, at time of the respective absences, the individual respondents did not in fact have work to perform;

(j) equally devoid of rationality and reason was the arbitrator's finding that because (according to him) certain of the individual respondents had not acted dishonestly, those of the individual respondents who performed the function of group leaders could not be guilty of either participating in and/or condoning a breach of the appellant's standards;

(k) the arbitrator plainly failed to appreciate that charge four was not in itself dependent upon a factual conclusion to the effect that either the group leader or his subordinates were themselves dishonest;

(l) the fact is that in exercising his power an arbitrator is enjoined to comply with the provisions of the arbitration agreement. He is also primarily obliged to observe the rules of natural justice, implying, *inter alia*, that he must act fairly; and

(m) the arbitrator's award cannot stand because in his method of approach and reasoning the arbitrator's adoption of a number of fixed and abstract "principles" led to him consciously electing not to address fundamental aspects of the evidence supportive of the appellant's overall version, thereby depriving the appellant of its right to a fair hearing.

Evaluation

[33] This matter has been made more difficult by the intrusion of an excess of emotion. First the employees have been taxed with: deliberately abandoning their work, "stealing company time", and dishonestly taking remuneration. Secondly the charges, which I have set out above, are not found in the disciplinary code although it was conceded that the code is a guide and that additional offences may be formulated. Thirdly I must point out that there appears to be a splitting of charges. The employees are charged with making false explanations to Rautenbach about their absence from their workstation and activities in the locker room although there appears to be no explicit provision in the code for this offence. This charge or the evidence relating to this charge is in turn, according to the appellant, to be used to demonstrate that the employees were dishonest in the sense that

they stole company time to spend on their own private interests while being paid for this time.

[34] Another aspect which is raised in counsel's heads is that the pursuit of private matters during working hours is prohibited. This, it is said, may be inferred from the prohibition on gambling on company premises during working hours. Although the employees believed gambling was prohibited it seems that the appellant did not share this view at the hearing. In any event this was not the charge the employees faced. It was their non-attendance or, as it was framed, dishonest state of mind and their non-attendance which was the cause of the complaint.

The award

[35] A close reading of the award shows that the arbitrator approached the matter asking whether the charges brought against the employees were permissible and legitimate. In the second instance, which is in effect in the alternative, he said that the evidence did not establish dishonesty on the part of the employees.

The main approach to charges one and two

[36] The arbitrator started from the premise that the evidence presented during the arbitration proceedings established that the employees left their workplaces or stations during a period when there was no work to be done. This was either when there was a break in production for one or other reason or where an employee had such a degree of expertise that he "could work his way up the production line", so that he would complete his work competently in less time than allowed.

[37] The appellant has attacked this finding but there is no evidence that the absences of the employees from their work place did not coincide with down time. The appellant led no evidence from the supervisors that this was the case. The appellant also submits that the arbitrator misdirected himself by taking into account irrelevant evidence namely that production did not suffer when the employees were absent from work. But this does not take sufficient cognisance of the fact that this evidence supported the employees' case that there was no work to be done; hence no harm. In addition a manager called by the appellant said that it would have been impossible for an employee to have been absent from his work for long periods when the production line was running.

[38] After having established that the absences related to down time, the arbitrator examined the charges which the employees faced to determine whether they were legitimate charges.

[39] The arbitrator was charged to conduct the arbitration as a CCMA Commissioner would (this was directed by terms of the submission to arbitration). Paragraph 7 of the Code of Good Practice: Dismissal (8th schedule to the LRA), which CCMA commissioners routinely apply, provides:

> "**Guidelines in cases of dismissal for misconduct. –**
>
> Any person who is determining whether a dismissal for misconduct is unfair should consider –
>
> (a) whether or not the *employee* contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
> (b) if a rule or standard was contravened, whether or not –
>
> (i) the rule was a valid or reasonable rule or standard;
> (ii) the *employee* was aware, or could reasonably be expected to have been aware, of the rule or standard;
> (iii) the rule or standard has been consistently applied by the employer; and

(iv) *dismissal* was an appropriate sanction for the contravention of the rule or standard."

[40] The arbitrator noted the following species of misconduct, which are gathered under the general heading "Transgressions Relating to Attendance".

> "Being absent from work without authority (A.W.O.L.)."
> "Being late at one's place of work without a legitimate reason (this includes tea and lunch breaks)."
> "Leaving workplace before official stopping time (this includes tea and lunch breaks)."
> "Being absent from workplace without permission from duly authorised Supervisor."

[41] These offences indicate the rules relating to attendance at work regardless of whether there is work to do or not. But in the context and against the backdrop of the evidence the arbitrator confined himself to non-attendance at the workplace or station while there was no work to be done.

[42] The arbitrator appreciated that the code was a guideline and that the employer was entitled to amplify it. But only where it was fair and only where the employees would have an appropriate inkling that the conduct in question could reasonably be regarded as misconduct in their workplace.

[43] The arbitrator concluded in essence that it was impermissible to create charges based on their non adherence to the rules relating to attendance (being absent from their workstations without permission) coupled with a mental element of dishonesty. He provided examples as to why this was not so but he was careful to provide examples where non-attendance and dishonesty could be legitimately coupled.

[44] An important charge, which the employees faced, was that which the appellant expressed metaphorically, namely that they were guilty of "stealing company time". The first observation, of course, is that time cannot be appropriated; merely wasted. Secondly when there was no work to do employees were paid for being available for work. The notion of dishonesty imports an intention to cheat or defraud another. The employees did not represent or misrepresent to the employer that they are entitled to remuneration for down time. The employer paid them as it is obliged to do. If an employee left his or her workstation, when there was no work to do, and kept himself available for the resumption of work when work becomes available, it cannot be said that the employee defrauds the employer when he is remunerated.

[45] What if the employer is correct that the employees went to the locker room to play cards or even gamble, during down time and without permission to absent themselves from their workplaces, would the employees be defrauding their employer? They would be paid in any event when there is down time. They have not caused the down time. They may be punished if they left their work stations during down time without permission but they would be entitled to their wages. They had not, on the facts, engaged on a frolic of their own which would have entitled their employer to have regarded them as being absent from its service.

The alternative approach to charges one and two

[46] Secondly the arbitrator examined the evidence (presumably on the assumption that the charges were good ones) to see if there was dishonesty on the part of the employees and found that the employees were not dishonest. This he did in a cursory fashion as he had already decided the matter on the basis that the charges were impermissible. He was entitled to deal with the evidence in this way and to make the decision he did. It cannot be said that he misconducted himself in anyway.

Charge three

[47] If an employee leaves his workplace when there is no work, and lies about what he went to do in a locker room during this time, he may be contravening an employer's rule. This is the substance of the third charge. The arbitrator did not investigate whether the code provided for this or, if the code did not contain such a rule, whether the rule was a legitimate one; whether the rule was breached; was the breach a breach of trust; how serious was the breach and what would be a suitable sanction? The arbitrator opined that "the Applicants were clearly not confronted with the allegation that they 'were stealing Company time' when they were interviewed by Claasen and Rautenbach..." This was not substance of the charge. The charge was that they provided a false explanation of their presence in the locker room. The arbitrator clearly failed to apply his mind to the charge and the evidence and to investigate this aspect. He committed misconduct in the sense which it is used in review proceedings.

[48] The court *a quo* did not specifically consider this aspect. It should have. The failure of the arbitrator to have applied his mind in this respect constitutes misconduct.

Charge four

[49] The appellant charged group leaders with undermining the authority entrusted to them as a Group Leader by participating in and/or condoning conduct in breach of the standards which they are required to uphold. The appellant complains that the arbitrator did not appreciate that this charge was unrelated to the charges relating to non attendance and dishonesty. The arbitrator did not see it this way. The whole thrust of the charges was based on this alleged conduct. The arbitrator cannot be faulted. Even at this stage it is not specified what other conduct the group leaders participated in or what other conduct they condoned in breach of the appellant's standards.

[50] One of the employees found guilty on charge four was not even a group leader.

Conclusion

Should portion of the award be remitted?

[51] The arbitrator has erred as regards charge three. Nevertheless there is nothing to show that the whole award should be reviewed and set aside. The award is separable as far as the four charges are concerned. Charge three can be separated and it, alone, can be remitted to the arbitrator. But should it be remitted?

[52] The question whether an award should be remitted involves the exercise of a discretion. See **Melmin v Egelman** 1940 WLD 151 at 155. The exercise of the discretion will depend upon the facts and circumstances of the particular case. See **Harlin Properties Ltd v Rush and Tomkins (SA) Ltd** 1963 (1) SA 187 (N). A factor which would weigh in favour of a remittal of the award is the fact that there is nothing to show that the arbitrator will not be able to deal with the issue impartially and competently.

[53] But on the other hand the principal issue was whether the dismissal of the employees was fair. In my view, even if the arbitrator were to find that the employees lied about their whereabouts whilst they were in the locker room, this is not sufficiently serious to warrant a dismissal on this ground alone. Strictly speaking this would be for the arbitrator to decide. But this is a labour dispute and such disputes must be decided as expeditiously as possible. This dispute has remained unresolved for far too long. It would work a grievous injustice to set aside this portion of the award and remit it to the arbitrator particularly as it would not be possible to reinstate the employees pending the outcome of the remittal. The parties have not sought a remittal of the award in the event that this court finds it to be defective. That is not bar to this court remitting the award *mero motu*.

See **Kannenberg v Gird** 1966 (4) SA 173 (C). But it is a factor which must be taken into account in the exercise of the discretion conferred on this court.

[54] In the result I do not consider that the award, in so far as it concerns charge 3, should be remitted to the arbitrator.

Costs

[55] The respondent was successful. In my view costs should follow the result. Appellant is to pay the respondents' costs.

[56] In the result:

The appeal is dismissed with costs.

A A LANDMAN
ACTING JUDGE OF APPEAL

I agree

D MLAMBO
JUDGE PRESIDENT

I agree

P TLALESTSI
JUDGE OF APPEAL

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Date of Judgment:	9 March 2011