REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no. JA 5/2011

Reportable

In the matter between:

MOTOR INDUSTRY STAFF ASSOCIATION	**First Appellant**
H. J. VAN JAARSVELD	**Second Appellant**

and

SILVERTON SPRAYPAINTERS AND	
PANELBEATERS (PTY) LTD	**First Respondent**
MOTOR INDUSTRY BARGAINING COUNCIL	**Second Respondent**
J. MOOLMAN N.O.	**Third Respondent**

Heard: **13 March 2012**

Delivered: **31 December 2012**

Summary: Employee, an estimator in a panel-beater's shop, refusing (3 times) to obey employer's instruction to go out and solicit work for the company. Dismissed for insubordination. Issues include: (1) Whether, in the circumstances, the instruction amounted to unilateral change to terms and conditions of employment contract or merely change to the working practice; and (2) whether dismissal was fair. Held: Dismissal fair. Appeal dismissed.

JUDGMENT

NDLOVU JA

Introduction

[1] At all material times the second appellant, Mr Hendrik van Jaarsveld (Mr van Jaarsveld) was a member of the first appellant, the Motor Industry Staff Association (MISA), which is a duly registered trade union in terms of the Labour Relations Act[1] (the LRA) and which facilitated the institution of this appeal both in its own interest and on behalf of Mr van Jaarsveld.[2]

[2] The appeal is against the judgment and order of the Labour Court (Boda AJ) in terms of which the Court *a quo* dismissed the appellants' review application against the arbitration award issued by the third respondent (the arbitrator) whereby the arbitrator declared that the dismissal of Mr van Jaarsveld by the first respondent (the company) was substantively and procedurally fair. Leave to appeal to this Court was granted by the Court *a quo.*

[3] The company carried on the business of panel beating and spray painting of vehicles, situate at Silverton, Pretoria. On or about 1 June 2006,[3] Mr van Jaarsveld was employed by the company as a panel beater. During July 2007, he was promoted to the position of an estimator. However, on 17 March 2009, he appeared before a disciplinary enquiry charged with misconduct. He was found guilty and dismissed from the employ of the company with effect from 18 March 2009.

Background facts

[4] During or about September 2008, the company experienced financial problems occasioned by a downturn in its business. The company advised the

[1] Act 66 of 1995
[2] Section 200 of the LRA. See also *National Union of Mineworkers v Hermic Exploration (Pty) Ltd* (2003) ILJ 787 (LAC) at paras 37-- 41; *Amalgamated Engineering Union v Minister of Labour* 1949 (4) SA 908 (A) at 910.
[3] This date (1 June 2006) was alleged on behalf of Mr van Jaarsveld in his founding affidavit in the review application. (See para 12). Strangely, though, in his notice of internal appeal Mr van Jaarsveld stated that he commenced employment with the company on 27 July 2006. (See p97 of the indexed papers). However, nothing seems to turn on this apparent discrepancy.

employees about the problem and the possibility of retrenchments. However, nothing happened immediately. During January 2009, the company again advised the employees about the possibility of retrenchments. There was simply not enough work coming in to maintain the economic viability of the company's business. It was then decided that everyone involved with the company had to put some extra effort in the form of promoting the business. Pamphlets and flyers were printed for distribution to prospective clients, advertising the company's business.

[5] As a result, during January 2009 an instruction was issued by Mr Andreas Cronje, the sole director of the company, to Mr van Jaarsveld to take part in marketing the company's business. In particular, Mr van Jaarsveld was instructed 'to physically go to the office of the assessors and fleet companies in order to promote the business of the [company] and to procure work[4].' In undertaking these duties, Mr van Jaarsveld would use the company car and all the expenses incurred in relation thereto would be paid by the company. He would also carry brochures containing the company profile for distribution to assessors and company clients. However, Mr Jaarsveld refused to comply with the instruction on the basis that marketing was not part of his work as estimator.

[6] It was common cause that there was no written contract of employment concluded between the company and Mr van Jaarsveld and he had no letter of appointment ever issued to him. It was also common cause that none of the company employees, including Mr van Jaarsveld, had ever received training by the company in the field of marketing. According to Mr van Jaarsveld's version, which was not challenged, his job description as estimator involved the following:

6.1 quoting customers for accident damages to their vehicles;

6.2 corresponding with assessors regarding quotations for repairs to vehicles;

6.3 assisting the workshop manager in controlling the ordering and receipt of parts;

6.4 informing customers of progress made in respect of repairing their vehicles; and

6.5 obtaining prices for vehicle parts.

[7] Mr van Jaarsveld averred that the instruction given to him during January 2009 amounted to unilaterally amending his terms and conditions of employment. On that basis he had declined to comply with the instruction. Then on 10 March 2009, Mr Cronje once again confronted Mr van Jaarsveld, then in the presence of the company's bookkeeper, Ms Ruby Edna Spaans, with the same instruction to go out and promote the company's business in the manner described above. Mr van Jaarsveld's response to Mr Cronje's instruction was to the following effect:

7.1. It was not part of his job description to attend to the marketing of the company's business.

7.2. In any event, he had telephonically contacted assessors who told him that they would come and see him in due course. He submitted that Mr Cronje did not believe him in this regard.

7.3 He was also wary about the possibility of certain clients asking him marketing-related questions which he might not be able to answer, and which situation would potentially embarrass the company.

[8] Mr Cronje felt that Mr van Jaarsveld's excuses were unacceptable because, as an experienced panel beater and estimator, it would not be a difficult task for him to go out and promote the company's business. Further, if he encountered any problems, including difficult questions and uncooperative clients, he would refer those matters to Mr Cronje. Consequently, on the same day (10 March 2009) Mr Cronje summarily handed Mr van Jaarsveld a final written warning for refusing to obey a lawful instruction.

[9] On the following day (11 March 2009) Mr Cronje again confronted Mr van Jaarsveld with the same instruction which Mr van Jaarsveld again refused to obey, for the same reasons he had stated previously. He was then charged with misconduct and served with a notice to attend a disciplinary enquiry scheduled for 17 March 2009. The misconduct charge read as follows:

> 'Weiering of versuim om 'n wettige instruksie na te kom in dat jy op die 11 Maart 2009 vir die derde keer geweier het om uit te gaan en werk in te bring op die maatskappy se kostes.'

[10] Then sometime between 11 and 16 March 2009, Mr van Jaarsveld was removed from the position of an estimator and reinstated as panel-beater, presumably without any change in his salary. He did not object to this change. However, on 16 March 2009 he was placed on suspension pending the disciplinary enquiry.

[11] The disciplinary hearing proceeded on 17 March 2009 and was chaired by Mr Grant Joubert of SEESA (presumably, Small Enterprise Employers of South Africa), being the company's employers' organisation. Mr van Jaarsveld was found guilty as charged and the chairman recommended a sanction of summary dismissal, which was duly approved and his dismissal took effect on 18 March 2009. At that time he was earning a basic salary of R15 500 per month. He lodged an internal appeal, but unsuccessfully.

[12] Mr van Jaarsveld referred an unfair dismissal dispute to the second respondent bargaining council (MIBCO) for conciliation, which process, unfortunately, failed to resolve the dispute.

The arbitration proceedings

[13] The matter culminated in the arbitration hearing being held under the auspices of MIBCO before the arbitrator. Mr van Jaarsveld claimed that his dismissal was both substantively and procedurally unfair and sought relief in the form of maximum compensation in terms of the LRA[5].

[5] Section 194(1)

[14] In his award the arbitrator remarked, among other things, as follows[6]:

> 'It is common cause that the change to applicant's duties was motivated by a desire on the part of the employer to avoid retrenchments and to increase the profitability of the company after a slowdown in business. Whether the employer's unilateral change to applicant's terms and conditions of employment constitutes a breach of contract or unfair labour practice depends on the facts of the case at hand. …
>
> [The applicant] is an experienced panel beater and competent estimator (in his own words), which shows that he has sufficient knowledge of a panel beating business to answer any questions relating thereto and that he was capable to interact with troublesome clients … .
>
> I do not believe that he lacks the necessary skills and qualities to comply with the instruction, which would have been detrimental to the image of the company.
>
> During cross examination he gave a perfectly acceptable rendition on how to persuade assessors and managers of large companies to provide work for the company …..
>
> The mere fact that he contacted assessors to arrange meetings with them shows not only that he had accepted this additional task as part of his duties, but realized the significance thereof….
>
> Against the background of his duties as an estimator, the company's operational requirements, the fact that his job as an estimator at the time did not keep him fully occupied everyday and to safeguard his job, I am of the opinion that his employer was entitled to unilaterally change his job description to include the additional task of marketing. This change does not seem so dramatic that the applicant undertakes an entirely different job or that it exceeds the boundaries of the core content of his job….
>
> Respect and obedience are implied duties of an employee and the courts require a reasonable degree of respect and courtesy to their employers. Applicant's conduct was not only disrespectful but is sufficient to show an

[6] Arbitration award, at 31-34 of the indexed papers.

intention to challenge the authority of his employer and was aggravated by the fact that it was done in the presence of other employees like Ms Spaans.'

[15] On the basis of these reasons, amongst others, the arbitrator found that the instruction given to Mr van Jaarsveld was lawful and reasonable; and that his refusal, three times, to comply with the instruction constituted a gross, persistent, and deliberate insubordination of his employer, which was serious indeed. He further noted that Mr van Jaarsveld had been issued with a final written warning in respect of his refusal to obey the same instruction and that, at that point, it should have been clear to him that he would be dismissed if he persisted to refuse to comply with the instruction. Hence, the arbitrator found that '[t]he relationship of trust, mutual confidence and respect which is the essence of a master-servant relationship cannot under these circumstances continue.'

[16] The arbitrator noted that, even though there was no formal disciplinary hearing which preceded the final written warning issued to Mr van Jaarsveld at the meeting of 10 March 2009, it was clear that the meeting 'had a decidedly investigative air about it [and that] it was convened for the purpose of motivating applicant and [for the applicant] to alert the employer of any problems that might be in the way of complying with the instruction….The applicant made no attempt to alert the employer of any deficiencies of a personal nature or indicated any valid reason for refusing to comply with the instruction…He had ample opportunity to state his case and explain his conduct…There is no reason why a final written warning should not have been issued against the applicant in these circumstances.'

[17] Accordingly, the arbitrator declared that Mr van Jaarsveld's dismissal was both substantively and procedurally fair. Mr van Jaarsveld's claim was, therefore, dismissed and no order as to costs was made.

Proceedings in the Labour Court

[18] As the appellants were not satisfied with the outcome of the arbitration hearing they launched a review application in the Court *a quo*, in terms of

section 145, read with section 51(8), of the LRA. The grounds of review, in terms of the appellants' founding papers, included the following:

18.1 There was no evidence before the arbitrator that Mr van Jaarsveld had tacitly agreed to promote and market the business of the company. The arbitrator therefore erred in this regard.

18.2 Insofar as the arbitrator held that the company had the right to implement unilateral changes to the terms and conditions of Mr van Jaarsveld's employment contract, the arbitrator erred.

18.3 The arbitrator erred in holding that by telephoning the assessors Mr van Jaarsveld had thereby accepted the instruction.

18.4 The arbitrator erred in failing to ask the question whether marketing fell within the ambit and scope of Mr van Jaasrveld's duties as an estimator in order to determine whether it was a lawful instruction, alternatively a reasonable instruction. It was clear from the evidence before the arbitrator that marketing did not fall within Mr van Jaasrveld's duties as an estimator. As such, the arbitrator should have held that it was an unlawful instruction, alternatively an unreasonable instruction.

18.5 The arbitrator erred in holding that Mr van Jaarsveld's duties as an estimator showed that he had the necessary skills and qualities to comply with the instruction.

18.6 The arbitrator erred, therefore, in finding that Mr van Jaarsveld's dismissal was substantively fair.

18.7 The arbitrator erred in holding that the company could simply issue a final written warning without holding a disciplinary hearing.

18.8 The arbitrator erred in failing to hold that it was procedurally irregular for Mr van Rooyen to have presided over Mr van Jaarsveld's the appeal, yet Mr van Rooyen had signed the dismissal recommendation prior to the appeal before him.

18.9 The arbitrator erred, therefore, in finding that Mr van Jaarsveld's dismissal was procedurally fair.

[19] After considering the submissions from Counsel, the learned Judge *a quo* remarked, in part, as follows[7]:

> 'In my view this is a case where it is fundamentally important for the court to hold the line between an appeal and a review. There are very persuasive arguments made by Mr *Ebersohn*, as to why perhaps some other commissioner could have found that the instruction to the employee did amount to a unilateral change to terms and conditions of employment, and that the employer should have utilised section 189 of the Labour Relations Act, and followed a retrenchment process if the employee did not want to accept the change because of the *Mazista Tiles* judgment.
>
> Those arguments that Mr *Ebersohn* made are very comprehensive and very persuasive. But that is not the test for review. The test for review in a case like this is whether the commissioner asked himself the right question, applied his mind to the matter, and came to the conclusions which this court cannot second guess unless it is satisfied that no reasonable arbitrator would have come to that conclusion.
>
> I am not satisfied that a case for review has been made out on any three legs of substantive fairness, or on the leg of procedural fairness.'

[20] On procedural fairness, the Court *a quo* had, specifically, the following to say:[8]

> 'The LRA does not oblige an employer to give an appeal hearing, and if the initial hearing was fair I cannot see on what basis the employee can then later complain that the *audi alteram partem* principle was not followed. Based on the principles of Avril Elizabeth Homes, I cannot fault the commissioner's decision that the dismissal was procedurally fair.'

[21] The learned Judge *a quo* noted that it did appear that there was a "slight contradiction" in the arbitrator's award in that at one stage the arbitrator seemed to treat the matter as one involving a unilateral change to terms and

[7] Record, vol 5 at 314-315.
[8] LC Judgment, at 319 of the indexed papers.

conditions of employment whilst at some other stage he found that 'actually there was not such a great unilateral change because the instruction was not an extraordinary instruction, having regard to the employee's normal duties, and that the employee consented to the instruction in any event.'

[22] Accordingly, the review application was dismissed and each party was ordered to pay their own costs.

The appeal

[23] The grounds of appeal, in terms of the notice of appeal, were basically that the Court *a quo* erred in holding -

23.1 That the arbitrator's reasons were not 'so unreasonable' that no reasonable arbitrator could have come to these conclusions.

23.2 That the arbitrator had applied his mind to the issues before him and that he had asked the correct question and therefore had not committed a mistake of law.

23.3 That there were no grounds for reviewing the award in respect of the finding that Mr van Jaarsveld's dismissal was substantively fair.

[24] Mr *Ebersohn,* appearing for Mr van Jaasrveld, submitted that the arbitrator failed to ask himself the correct question. (*Stocks Civil Engineering (Pty) Ltd v Rip NO and Another*[9]*).* He submitted that the right question which the arbitrator ought to have asked himself was three-fold: firstly, whether marketing fell within Mr van Jaarsveld's terms and conditions of employment, to which the answer (on the common cause facts) was in the negative. Secondly, whether the company could unilaterally amend the terms and conditions of Mr van Jaarsveld's contract, to which the answer, in terms of our law, was also in the negative. Thirdly, whether, in those circumstances, the instruction was lawful and reasonable. The answer was also clearly a 'no'. That being the case, Mr van Jaarsveld should not have been convicted of any misconduct.

[9] (2002) ILJ 358 (LAC) at paras 27-28.

[25] Mr *Ebersohn* argued that, by failing to ask himself the correct question, the arbitrator had, as a result, reached a wrong conclusion of law when he found that the company 'was entitled to unilaterally change [Mr van Jaarsveld's] job description to include the additional task of marketing' and that the instruction was both lawful and reasonable. Counsel submitted that this was a gross error of law on the part of the arbitrator which affected his award and rendered it reviewable. He contended that, given Mr van Jaarsveld's position as an estimator, the company's instruction that he must, in addition to the duties pertinent to his position aforesaid, go out and promote the company's business, constituted a unilateral change to his terms and conditions of employment. Such instruction was unlawful, unreasonable and impermissible. In this regard he referred us, particularly, to this Court's decision in *Mazista Tiles (Pty) Ltd v National Union of Mineworkers and Others.*[10]

[26] Counsel further submitted that the fact that Mr van Jaarsveld had phoned certain assessors about getting work for the company could not be construed, as the arbitrator did, to have constituted consent on Mr van Jaarsveld's part. In any event, the arbitrator contradicted himself by holding, on the one hand, that the company had the right to unilaterally amend the terms and conditions of Mr van Jaarsveld's employment whilst, on the other, also holding that Mr van Jaarsveld had consented to the amendment. Mr *Ebersohn* also pointed out that it was common cause that Mr van Jaarsveld was not even trained by the company in the field of marketing. Therefore, his refusal to obey the instruction was justified and he was not guilty of insubordination. Consequently, his dismissal was substantively unfair. He submitted that the arbitrator, in the circumstances, reached a conclusion which no reasonable decision-maker could have reached.

[27] It was common cause that the disciplinary hearing was chaired by Mr Grant Joubert who was appointed by SEESA. At the conclusion of the enquiry, Mr Joubert made a recommendation that Mr van Jaarsveld be summarily dismissed. However, the recommendation letter was not signed by Mr Joubert, but instead, it was signed by Mr van Rooyen who was also employed

[10] (2004) 25 ILJ 2156 (LAC).

by SEESA. It was also common cause that Mr van Jaarsveld lodged an internal appeal against his dismissal. The appellants' complaint lies with the fact that the same Mr van Rooyen was the one who went on to preside over Mr van Jaarsveld's internal appeal, which was dismissed. Mr *Ebersohn* submitted that Mr van Rooyen ought not to have signed the dismissal recommendation letter since he knew that in the event of Mr van Jaarsveld lodging an internal appeal he would be the one to preside over it. He further pointed out that Mr van Rooyen had initially denied that he had even seen or signed the letter. However, he had later admitted that he had done so. On this basis, counsel submitted there was a reasonable perception of bias on the part of Mr van Rooyen, which tarnished the internal appeal process and thus rendered Mr van Jaarsveld's dismissal also procedurally unfair.

[28] At the outset Mr *Beaton* SC, for the company, pointed out that there was no written contract of employment which the company concluded with Mr van Jaarsveld. He reaffirmed that Mr van Jaarsveld was appointed as a panel beater and subsequently promoted to the position of estimator. He submitted that, on Mr van Jaarsveld's own version, this was an employment contract whose content was flexible. In this regard, he referred us to the evidence of Mr van Jaarsveld during the arbitration hearing, as appearing in the reconstructed record, where Mr van Jaarsveld acknowledged that none of the other employees were also trained in marketing and further that he had himself assisted in that regard as much as he could.[11] According to Mr *Beaton*, this was proof that the contract was a flexible one. However, it was common cause that Mr van Jaarsveld had never gone out to solicit work, but he had only phoned assessors and clients from his office, which was probably the assistance he had referred to.

[29] In his heads of argument, Mr *Beaton* submitted that the question which the arbitrator was required to ask was whether Mr van Jaarsveld was instructed to undertake an entirely different job to that for which he was employed at the time of the instruction. Counsel further submitted that the arbitrator asked himself this question and he answered it correctly when he found that the

[11] Arbitration record (reconstructed portion), at 274 para 204 of the indexed papers.

company 'was entitled to unilaterally change [Mr van Jaarsveld's] job description to include the additional task of marketing.'[12] He argued that if the arbitrator was required to have asked the question whether marketing fell within Mr van Jaarsveld's terms and conditions of employment (which Mr *Ebersohn* suggested the arbitrator should have done) that would render impossible any accommodation of changes in the work practice as envisaged in the *Mauchle (Pty) Ltd t/a Precision Tools v NUMSA and Others,*[13] decision.

[30] On the question of procedural fairness, Mr *Beaton* conceded that since the company provided an internal appeal structure it was imperative that the appeal process be conducted in a fair manner. He submitted that, in any event, on the evidence before the arbitrator, it was evident that both the disciplinary hearing and the internal appeal process were procedurally fair.

Analysis and evaluation

The substantive fairness aspect

[31] It is trite that an employee is guilty of insubordination if the employee concerned wilfully refuses to comply with a lawful and reasonable instruction issued by the employer. It is also well settled that where the insubordination was gross, in that it was persistent, deliberate and public, a sanction of dismissal would normally be justified. Mr van Jaarsveld was charged and convicted of misconduct involving insubordination, as a result of which he was dismissed from the company's employ. The case for Mr van Jaarsveld is that he was not guilty of misconduct, in the first place, because he was entitled to refuse to obey an unlawful and unreasonable instruction given to him by the company, on the basis that the instruction constituted an impermissible unilateral change to his terms and conditions of employment as an estimator.

[32] Ordinarily, an employer is not entitled to unilaterally change the terms and conditions of an employment contract. In *Mazista Tiles,* this Court formulated the principle thus:

[12] Arbitration award, at 34 lines 3-5 of the indexed papers.
[13] (1995) 16 ILJ 349 (LAC).

> 'An employer who is desirous of affecting changes to terms and conditions applicable to his employees is obliged to negotiate with the employees and obtain their consent. A unilateral change by the employer of the terms and conditions of employment is not permissible. It may so happen, as was the position in this case, that the employees refuse to enter into any agreement relating to the alteration of their terms and conditions because the new terms are less attractive or beneficial to them. While it is impermissible for such employer to dismiss his employees in order to compel them to accept his demand relating to the new terms and conditions, it does not mean that the employer can never effect the desired changes. If the employees reject the proposed changes and the employer wants to pursue their implementation, he has the right to invoke the provisions of s 189 and dismiss the employees provided the necessary requirements of that section are met.[14] …
>
> Nor will [the employer] be justified to institute disciplinary action against the employees who resist the implementation of the unilaterally changed terms and conditions. The employees' resistance against such unilateral changes cannot be regarded as constituting misconduct.'[15]

[33] It is trite that, in terms of the *Sidumo* test,[16] the question to be asked in determining whether an award is reviewable, in that it does not pass muster of judicial review under section 145 of the LRA, is whether the award constituted a decision which a reasonable decision-maker could not have made.

[34] Indeed, it would appear, at the cursory glance of the award, that the arbitrator made a finding that the company was entitled to unilaterally change Mr van Jaarsveld's employment contract to include marketing. However, from the holistic reading of the award one gets the clear and proper perspective of the arbitrator's actual finding in this regard. Firstly, he hastened to add that, by issuing the instruction, the company acted reasonably under the circumstances. Secondly, he went on to find that 'actually there was not such a great unilateral change because the instruction was not an extraordinary instruction, having regard to the employee's normal duties…' and further that

[14] *Mazista Tiles* at para 48.
[15] *Mazista Tiles* at para 53.
[16] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC).

the unilateral change to Mr van Jaarsveld's 'job description…does not seem so dramatic that [he] undertakes an entirely different job or that it exceeds the boundaries of the core content of his job'. Of course, the apparent unfortunate choice of words on the part of the arbitrator tended to have the effect of blurring his finding, to the extent which the Court *a quo* regarded as a "slight contradiction" in the arbitrator's finding.

[35] As indicated, it would appear that the arbitrator engaged in the usage of wrong phraseology in his finding on the issue of alleged unilateral change to terms and conditions of employment. In any event, it has been held that it is not important how a commissioner/arbitrator expresses himself/herself in the award; what the review court is required to do is simply to look at the arbitration record and, having done so, ask the question, in terms of the *Sidumo* test, whether the award is one which a reasonable decision-maker could have made. In *Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration and Others,*[17] this Court (per Zondo JP, with Khampepe and Jappie JJA concurring) stated[18]:

> '…It seems to me that, even if there may have been a debate under *Carephone* and prior to *Sidumo* on whether a commissioner's decision for which he or she has given bad reasons could be said to be justifiable if there were other reasons based on the record before him or her which he or she did not articulate but which could sustain the decision which he or she made, there can be no doubt now under *Sidumo* that the reasonableness or otherwise of a commissioner's decision does not depend - at least not solely - upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but, when one looks at the evidence and other material that was legitimately

[17] (2008) 29 ILJ 964 (LAC).
[18] Ibid, at para 102.

> before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision.'

[36] Whether the mistake of law committed by the arbitrator is one which warrants that the award be reviewed and set aside also depends on the nature and extent of the mistake in a given case. Not every mistake of law warrants or justifies the nullification of a decision under scrutiny. In *Local Road Transportation Board and Another v Durban City Council and Another*,[19] the Appellate Division (now the Supreme Court of Appeal) (*per* Holmes JA) stated:[20]

> 'A mistake of law *per se* is not an irregularity but its consequences amount to a gross irregularity where a judicial officer, although perfectly well-intentioned and bona fide, does not direct his mind to the issue before him and so prevents the aggrieved party from having his case fully and fairly determined.'

[37] In *Mauchle,* above, which the arbitrator notably referred to in the award, the facts of the case were briefly the following. There were several employees, each of whom was employed as a machine operator – ordinarily operating one machine. However, when the employer got a special order that had to be attended to urgently an instruction was issued that each employee would have to operate two machines in order to dispose of the special order. The employees refused to comply with the instruction, claiming that in terms of their contracts they were required to operate only one machine and that the instruction constituted a unilateral change, by the employer, to the terms and conditions of their employment contracts. They were dismissed for misconduct. When the dispute eventually came on appeal, at the instance of the employer, this Court distinguished between a change in working conditions and one in terms and conditions of employment, as follows:[21]

> 'On those facts it was not a term of the contract of employment that the applicants would operate only one machine. A description of the work to be performed as that of 'operator' should not, in my view, 'be construed inflexibly

[19] 1965 (1) SA 586 (A).
[20] Ibid at 598A.
[21] *Mauchle*, at 357F-358B.

provided that the fundamental nature of the work be performed is not altered.' (Wallis *Labour and Employment Law* para 45 at 7-9). I agree with the view expressed by the learned author at 7-23 n 9 that employees do not have a vested right to preserve their working obligations completely unchanged as from the moment when they first begin work. It is only if changes are so dramatic as to amount to a requirement that the employee undertakes an entirely different job that there is a right to refuse to do the job in the required manner. In *Crewswell v Board of Inland Revenue* (1984) 2 All ER 713 (ChD) at 720b-d Walton J said:

"I now turn straight away to a consideration of the main point on which counsel for the plaintiff relied. He put his case in this way, that although it is undoubtedly correct that an employer may, within limits, change the manner in which his employees perform a work which they are employed to do, there may be such a change in the method of performing the task which the employee was recruited to perform proposed by the employer as to amount to a change in the nature of the job. This would mean that the employee was being asked to perform work under a wholly different contract and this cannot be done without his consent …

It is a very fine line from counsel's submissions to the submission that employees have a vested right to preserve working obligations completely unchanged as from the moment when they first begin work. This cannot surely, by any stretch of the imagination, be correct."

See, too *De Beers Consolidated Mines Ltd (Finsch Mine) v National Union of Mineworkers & others* (unreported decision of the Northern Cape Division of the Supreme Court, case no 1111/92).'

[38] After analysing the material presented to him, the arbitrator found that, on the basis of Mr van Jaarsveld's job description as an estimator, it was clear that his duties (as listed by Mr van Jaarsveld himself) involved a common denominator, namely, the daily interaction with assessors and clients of the company. The Court *a quo* found, correctly so in my view, that the arbitrator had given 'comprehensive reasons why he [came] to the conclusion that this particular instruction was not a dramatic change to the terms and conditions of the employee's core duties.'

[39] I am satisfied that the instruction for Mr van Jaarsveld to physically go out and solicit work from assessors and fleet companies during an economically

threatening period, was simply something that could be inferred from, or at most, which was ancillary to, his normal duties. Put differently, it was simply a variation in his work practice or a change in the manner his job was to be performed - a situation that was occasioned by sound and compelling operational reasons on the part of the company. Previously, the company waited for clients to knock on the door to bring the work; but this was no longer happening. So, the company came up with the idea that 'Look, instead of waiting for clients to come to us, let's go out and solicit work from them.' It was fundamentally the same job which was then to be performed in a slightly different manner. Indeed, it was, in my view, the situation in respect of which Mr van Jaarsveld did not have a vested right to preserve his working obligations completely unchanged as from the moment when he first began to work.[22]

[40] It also seems to me that, in the present context, the term 'marketing' was simply bandied about and loosely used in a manner which, in my view, did not actually entail the change in the work practice which the company had envisaged. On the facts, this scenario was not meant to refer to the formal business marketing profession. As I have said, it only entailed solicitation of work which Mr van Jaarsveld was, after all, involved with. It clearly did not require of him to have had some special training 'in marketing' in order to be able to perform the job. In my view, the employer had the right to effect these changes in the work practice in order to adapt to the changing economic environment that was adversely affecting the operational requirements of the company. Therefore, a denial of flexibility in the interpretation of the terms and conditions of Mr van Jaarsveld's unwritten employment contract would be unreasonable and absurd, as it would have the effect of frustrating the company's efforts towards its economic revival, an objective that was in the interest of both the company and all its employees, including Mr van Jaarsveld.

[41] It is also significant to note that Mr van Jaarsveld was to be provided with the company car which he would use when going out to solicit work and that any

[22] See *Mauchle*, above.

incidental expenses in relation to his field duties would be paid by the company. Further, it was common cause that his position as an office-bound estimator, in terms of his listed duties, was no longer occupying him full-time at the time the instruction was issued. Therefore, instead of engaging him in terms of section 189 of the LRA, with a view to possible retrenchment, the company resorted to a pragmatic, reasonable and practicable solution that was intended to, and indeed would, benefit everyone involved with the company. In my view, it was within the company's legitimate power to resort to this method in its own interest and that of its employees, including Mr van Jaarsveld. In any event, it was not the appellant's complaint in the Court *a quo* that the company should have resorted to section 189 consultation procedure. This issue was never raised by the appellants in both their founding and supplementary affidavits filed for the review application. It is, therefore, not open to the appellants to raise the issue at this stage. In *Director of Hospital Services v Mistry,*[23] the Appellate Division stated:[24]

> 'When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in *Pountos' Trustees v Lahanas* 1924 WLD 67 at 68 and as has been said in many other cases:
>
> > "... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon to confirm or deny".'

[42] It seems to me that in the present instance the arbitrator properly applied his mind to the issues before him. Save his usage of wrong legal phraseology that the company was entitled to unilaterally amend the terms and conditions of Mr van Jaarsveld's employment contract, the arbitrator's award comprehensively dealt with all the relevant issues in a sound and well-reasoned manner. In other words, if such usage of wrong phraseology

[23] 1979 (1) SA 626 (A).
[24] *Ibid*, at 635H-636A. See also *Smuts v Adair and Another* [2004] 1 BLLR 34 (LAC); *Mauerberger v Maurberger* 1948 (3) SA 731 (C) at 732; *Titty's Bar & Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1 1974 (4) SA 362 (T) at 368B-369A.

amounted to the commission of a mistake of law by the arbitrator, as contended by Mr *Ebersohn*, then it was not, in my view, a gross or material mistake of law. It is clear that the mistake did not materially affect the arbitrator's ultimate decision. The mistake was, therefore, immaterial and irrelevant. It does not, in my view, constitute a ground to review and set aside the award.

[43] It appears to me, considering the evidentiary material properly presented to the arbitrator and notwithstanding the mistake aforesaid, that the company's instruction was a lawful and reasonable one which Mr van Jaarsveld was obliged and obligated to carry out. His blatant, persistent and public refusal to comply with this lawful and reasonable instruction constituted gross insubordination on his part. He seriously and inexcusably undermined the authority of management. In my view, he was correctly convicted of the misconduct as charged and his dismissal was, therefore, substantively fair. Given this finding, it is no longer necessary to determine whether Mr van Jaarsveld, by phoning the assessors, thereby consented to the controversial change introduced by the company.

The procedural fairness aspect

[44] The record of the disciplinary hearing shows that the company had put in place a fair disciplinary procedure which was followed perfectly during the proceedings against Mr van Jaarsveld. Indeed, the appellants lodged no complaint against the disciplinary process at the first instance level. The complaint lies only against the alleged unfairness in the internal appeal process. Although the LRA does not oblige an employer to provide an internal appeal structure, it is, in my view, imperative that once the employer has decided to establish such structure in the workplace the appeal process must be fair. Any employee who feels aggrieved by the outcome of a disciplinary process has a vested right of access to a fair internal appeal process, where such appeal structure is provided in the workplace. Otherwise, if the fairness of the internal appeal process should simply be ignored as irrelevant, then the establishment of such appeal structure becomes a meaningless exercise. In any event, such action would be in direct violation of every person's right to

fair labour practices as enshrined in the Constitution.[25] I therefore do not agree with the view expressed by the learned Judge *a quo* on this point, to which I referred earlier in this judgment.

[45] It is common cause that Mr van Rooyen was not involved in the disciplinary hearing. It is also clear that he signed the dismissal recommendation letter on behalf of his colleague, Mr Joubert,[26] who chaired the disciplinary enquiry. Mr van Rooyen testified that when he signed the letter on behalf of his colleague he had neither seen the disciplinary minutes nor discussed the matter with Mr Joubert. He also explained that from the time when he signed the letter to the time that the appeal came before him, he had completely forgotten that he had ever seen the letter because, as he put it, '…daar word in ons kantoor op 'n weeklikse basis tussen 250 en 300 dissiplinere verhore gedoen. So die moontlikheid dat ek al hierdie brifies net afteken en hulle word net uitgefaks is 'n baie groot moontlikheid'.[27] That, to my mind, innocently explained why Mr van Rooyen might have first denied that he had seen or signed the letter. It does not appear that, with his signature clearly appended on the letter, he would have wilfully lied that he did not see or sign the letter. The arbitrator accepted Mr van Rooyen's version in this regard.[28] On the holistic consideration of Mr van Jaarsveld's disciplinary process, I am inclined to hold that it was conducted fairly. In any event, his complaint about the internal appeal process would have been compensated by the fact that he was subsequently accorded another opportunity to state his case and ventilate all his grievances when the dispute was dealt with *de novo* during the arbitration hearing. Accordingly, I hold that the procedure followed by the company which led to the dismissal of Mr van Jaarsveld was a fair procedure.

Was the sanction of dismissal appropriate?

[46] As I have stated above, where the insubordination was gross, in that it was persistent, deliberate and public, a sanction of dismissal would normally be

[25] Section 23 (1) of the Constitution of the Republic of South Africa, Act 108 of 1996.
[26] Letter dated 17 March 2009, at 94 of the indexed papers.
[27] Arbitration record, at 222 lines 5-7 of the indexed papers.
[28] *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC) at 583I-584F.

justified. In *Slagment (Pty) Ltd v Building Construction & Allied Workers Union and Others,*[29] two employees had persistently refused, without just cause, to carry out lawful instructions given to them by their newly appointed manager under whose supervision they were. Before holding that the employees' dismissals were "not substantively unfair" but that they were "fully justified", the Appellate Division (per Nicholas AJA) remarked as follows:

> 'The employees had been guilty of sustained disobedience. They had deliberately set themselves on a collision course with management. They were insubordinate and insulting. Their conduct was such as to render a continuance of relationship of employer and employee impossible.'[30]

[47] In the present instance, Mr van Jaarsveld wilfully, persistently and publicly defied a lawful and reasonable instruction given to him by his employer, Mr Cronje, who was the sole director of the company. On one of the occasions when Mr van Jaarsveld defied the instruction it was in the presence of Ms Spaans, one of the company employees. It is trite that mutual trust and respect constitute a fundamental pillar in every sustainable employer-employee relationship. In my view, Mr van Jaarsveld's unbecoming conduct completely ruined his employment relationship with the company, which rendered his dismissal justified.[31] The misconduct was so serious that the sanction of dismissal would, in my view, have been justified even in the absence of the final written warning. On this basis, the question whether the warning was regularly and fairly issued becomes irrelevant.

[48] Mr *Ebersohn* further argued that the fact of the company having decided to reinstate Mr van Jaarsveld as a panel beater with effect from 16 March 2009 served as sufficient proof that the company was still happy to continue with him as its employee, provided he was a panel beater. On that basis, he submitted that the employment relationship between Mr van Jaarsveld and the company had not irreparably broken down. With respect, counsel's argument is not sustainable. The reinstatement of Mr van Jaarsveld as a panel beater was to be in place pending the holding of the disciplinary

[29] (1994) 15 ILJ 979 (A).
[30] At 989H-I.
[31] *Slagment*, above.

hearing. There was nothing unusual with the company's initiative in this regard, namely, to reinstate Mr van Jaarsveld as a panel beater pending the disciplinary enquiry. In my view, this initiative did not amount to a waiver by the company of its right to execute the sanction of dismissal upon Mr van Jaarsveld being convicted of the misconduct. After all, it would have been wrong and irregular for the company to have assumed his guilt before the disciplinary process was even finalised.

[49] In my view, therefore, the decision which the arbitrator reached in his award was one which any reasonable decision-maker, presented with the same evidentiary material, could have reached. For the reasons that I have stated, the appeal must fail. Mr *Ebersohn* submitted that costs should follow the result; and reluctantly conceded that it would mean that if the appellants lost the appeal they should bear the costs thereof. However, bearing in mind that (1) Mr van Jaarsveld lost his job and was currently presumably out of employment and (2) the appeal involved legal issues which were fairly arguable from both sides (that is, it was not a frivolous and/or vexatious exercise on the part of the appellants), it is my considered view, notwithstanding counsel's concession aforesaid, that fairness and equity dictate that no order as to costs of the appeal should be made.

The order

[50] In the result, the following order is made:

1. The appeal is dismissed.

2. There is no order as to costs of the appeal.

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Ndlovu JA

Waglay DJP and Murphy AJA concur in the judgment of Ndlovu JA

APPEARANCES:

FOR THE APPELLANT:	Dr G Ebersöhn
	c/o Ebersöhn Attorneys, Randburg
FOR THE RESPONDENT:	Adv RG Beaton SC
	Instructed by Vogel Malan Attorneys, Pretoria