REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA SITTING IN JOHANNESBURG

CASE NO **J4783/2000**

In the matter between:

ANGLO OPERATIONS LIMITED
Applicant

and

INDEPENDENT MEDIATION SERVICE OF SOUTH AFRICA	First Respondent
S MATIME N.O.	Second Respondent
M NHLANHLA	Third Respondent
NATIONAL UNION OF MINEWORKERS	Fourth Respondent

ON BEHALF OF APPLICANT	MR M J VAN AS

ON BEHALF OF RESPONDENT MS N THSABALA

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J U D G M E N T

GERING AJ

[1] This is an application in terms of section 33(1)(b) of the Arbitration Act, 42 of 1965, (the Arbitration Act) as read with section 157 (3) of the Labour Relations Act, 66 of 1995 ("the LRA") in which the applicant seeks to review and set aside the arbitration award handed down by the second respondent ("the arbitrator") on 31 August 2000.

[2] The third and fourth respondents have opposed the relief sought by the applicant. The first and second respondents abide by the decision of this Court.

[3] There is a paginated bundle of papers, and references to it will

be denoted by the capital letter B followed by the relevant page number.

[4] The award which the applicant seeks to set aside is dated 31 August 2000 and appears on B24/25. The issue in dispute was whether the dismissal of third respondent (the employee) was substantively fair.

[5] The ground on which the applicant seeks to review and set aside the award is that the arbitrator exceeded his powers as contemplated in section 33 of the Arbitration Act.

[6] Prior to the arbitration, on 23 June 1992, the applicant and the fourth respondent (the union) entered into a collective agreement in terms of which the parties agreed to refer individual dismissal disputes for misconduct to private conciliation and arbitration.

[7] In the collective agreement, dismissal for misconduct is defined as follows: "Dismissal for misconduct shall mean dismissal consequent on individual misconduct other than any offence or breach relating to participation in any action of a

collective nature, including any complete or partial refusal or failure to work or to continue to work, or any retardation of the progress of work or any obstruction of work". (See B15)

[8] On 30 June 2000 the applicant completed a request for arbitration in terms of the collective agreement. (See B22)

[9] This request for arbitration was signed on behalf of the union and on behalf of the employer. It states on B22:

"Nature of Dispute: Unfair Dismissal (Unprotected Industrial Action/Absenteeism)"

[10] On B72 there appears an arbitration agreement on which is stated:

"Nature of Offence: Unprotected Industrial Action/Absenteeism"

and under the heading of "Substantive Fairness" the issues in dispute are set out as follows:

"Whether at the time of the incident, the complainant had the authority to change the grievance shifts; and whether the grievant was briefed about shift changes."

This is likewise signed by the union representative and the company representative.

[11] It is clear from the evidence as set out in the award (B24) that the employee's supervisor

"lodged a complaint against him for failing to report for duty on 20-22 March 2000".

On B25 the arbitrator set out as follows:

"From the facts of this case, more especially the evidence of John Mokgoto, leaves no doubt in my mind that John and the grievant were not briefed about the new shifts. I accordingly come to a conclusion that the grievant did not report for duty on 22 March 2000 due to miscommunication and the absence of transport from the hostel to work. ... From the aforementioned, there is no reason in logic or fact to support the conclusion that the employee participated in an unprotected industrial action. I find the dismissal to be substantively unfair."

[12] It is apparent from the definition set out above and contained on B15, that what is excluded from the ambit of the dismissal dispute agreement is the referral of a dismissal dispute to private conciliation and arbitration if the misconduct relates

"to participation in any action of a collective nature".

[13] In order to decide whether the arbitrator had power to arbitrate on the dispute between the parties, it is necessary to determine the true nature of the actual or real dispute between the parties. See *NUMSA v Driveline Technologies (Pty) Ltd* [2000] 1 BLLR [LAC] reported also in 2000(4) SA 645, as well as the case of *Zeuna-Starker Bop (Pty) Ltd v NUIMSA* [1998] 11 BLLR 1110 [LAC]. In the *Driveline* case at para.62 thereof ZONDO AJP (as he then was) stated:

"What the parties are bound by is the correct description of the real dispute that was referred to conciliation."

and he stated in the same paragraph that he disagreed with statements to the effect that a party who wants to take a dismissal dispute further is bound by the conciliating commissioner's description of the dispute in the certificate of outcome. He said that:

"The position is, as the Labour Court correctly pointed out in that case, that a party cannot change the nature of the dispute."

[14] It may be mentioned that whereas section 213 of the LRA defines a dispute as including an alleged dispute, there is no

similar definition in the collective agreement. What one has to deal with is the actual or real dispute, not an alleged dispute. Also in the *Driveline* case it is pointed out at para.48 that a dispute may be made up of demands and counter-demands.

[15] Having regard to what is set out above, the real dispute referred to arbitration was individual misconduct, namely absenteeism between 20 and 22 March and the issues were whether the employee had been briefed about the shift changes. A perusal of the evidence as contained in the award indicates that there was absolutely no evidence of any "action of a collective nature" nor of any "participation" by the employee in any such "collective action".

[16] Accordingly, in my judgment the dispute that was referred to arbitration in terms of the request for arbitration dated 30 June and the arbitration agreement dated 30 June, in both instances signed by and on behalf of the parties and was the subject of the award dated 31 August 2000, was one of individual misconduct not relating to participation in action of a collective nature, and was within the powers of the arbitrator and did not fall outside the definition of dismissal as set out in the

collective agreement.

[17] Accordingly, the application for setting aside the arbitration award is dismissed with costs.

[***Sgd**] GERING AJ
ACTING JUDGE, LABOUR COURT
31/7/02