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# IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

**Held in Durban**

**Case no: JA 45/07**

In the matter between

**National Union of Mine Workers** Appellant

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: [redacted]/NO.
(2) ~~OF INTEREST TO OTHER~~ JUDGES: YES/NO.
(3) ~~REVISED.~~

29\01\10 ........ [signature]
DATE SIGNATURE

**And**

**The Commission for Conciliation , Mediation and Arbitration** 1st Respondent

**Zondi, D N.O** 2nd Respondent

**Precious Metal Refiners (Pty) Ltd** 3rd Respondent

**Rustenburg Base Metal Refiners (Pty) Ltd** 4th Respondent

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## JUDGMENT

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**ZONDO JP**

**Introduction**

[1] This appeal concerns the correctness or otherwise of a judgment and order made by the Labour Court dismissing a review application that had been brought by the appellant to have a certain arbitration award issued by the second respondent under the auspices of the first respondent reviewed and set aside. The arbitration award related to a dispute between the appellant, on the one hand, and, the third and fourth respondents, on the other, about whether or not the third and fourth respondents were obliged to pay certain employees who were members of the appellant union

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certain bonuses in terms of a certain agreement. The second respondent, who was the arbitrator in the dispute, issued an arbitration award to the effect that the third and fourth respondents were not obliged to pay the employees such bonuses. The appellant then brought an application in the Labour Court to have the award reviewed and set aside. The Labour Court found that the arbitration award was justifiable and dismissed the application. It subsequently granted the appellant leave to appeal to this Court against that order. Before considering the appeal, it is necessary to set out the background to the dispute.

**The background**

[2] The appellant is a registered trade union and had members among the employees of the third and fourth respondents. In December 2002 the third and fourth respondents entered into an agreement with a number of trade unions regarding the payment of incentive bonuses to their employees when they had achieved certain performance targets. This agreement was called: "**Incentive Scheme Framework Agreement Financial year 2003**." Although the appellant was not a signatory to the agreement, it is common cause that the agreement was applicable to the appellant's members. It is common cause that the agreement was binding upon the third and fourth respondents and those of the appellant's members who are affected by this matter. It is necessary to refer to certain of the provisions of the agreement.

[3] Clause 2:4 of the agreement sets out the objectives that the incentive scheme was designed to achieve. It reads:

> "2.4 **The Scheme has been designed to achieve the following:**

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**2.4.1 incentives achievement of Group performance targets,**

**2.4.2 reward employees for superior performance,**

**2.4.3 reward team performance."**

Clause 4 of the agreement sets out the objectives of the agreement. It reads:

**"4. Objectives**

**4.1 The objectives of the scheme are to:**

**4.1.1 align performance with overall company goals;**

**4.1.2 align employee outputs with performance drivers;**

**4.1.3 encourage superior performance through achievable incentives;**

**4.1.4 incentives on going contributions to significant performance improvement;**

**4.1.5 encourage and reward superior team performance;**

**4.1.6 attract and retain people who can, are, and continue to add economic value;**

**4.1.7 create a competitive advantage;**

**4.1.8 improve the rewards without a negative impact on the Group's cost structures."**

[4] Under clause 5 of the agreement certain principles are set out which govern the incentive scheme. It is not necessary to quote all of them. It suffices to identify only some. Clause 5.1 reads:

**"The parties recognise their mutual interest in the objectives set out above and consequently agree to co-operate in the promotion of the objectives set out above."**

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Clauses 5.3.2 to 5.3.11 excluding clauses 5.3.5 and 5.3.6 read thus:

"5.3.2 **The Scheme will be fair, transparent and designed to enhance teamwork,**

5.3.3 **The Scheme must be self-funding.**

5.3.4 **The Scheme recognises the achievement of quality.**

5.3.5 ......

5.3.6 ...........

5.3.7 **performance criteria will be weighted according to the focus of various teams;**

5.3.8 **performance measures will be established for each performance criteria;**

5.3.9 **targets will be set for each team based on these performance measures relative to the stretch targets;**

5.3.10 **Actual performance will be assessed relative to the targets;**

5.3.11 **the incentive payments will be based on the team's result, but may be linked to the performance of various teams where there is interdependence;**

5.3.12 **Performance measurement is a core principle of the Scheme requiring that the performance of**

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**every team be measured against pre-determined targets set in terms of clause 14. Previous reference was to clauses 6 and 8.**"

[5] Clause 15 bears the heading: "**MEASUREMENT PERIOD.**" Clause 15.1 reads as follows:

"**The measurement period will depending on the nature of the team's work, be monthly, quarterly, or annually as agreed to between the parties and will coincide with the Company or Group Company's financial period.**" (Underlining supplied).

Clause 16 deals with the payment of incentives. Its heading is: "**Incentive payment.**"

Clauses 16.1 and 16.2 read as follows:

"**16.1 Incentives payments will be calculated as a percentage of basic remuneration.**

16.2 **Basic remuneration is defined as pensionable emoluments or flexpac as applicable.**"

[6] Clause 18 deals with the period of operation of the scheme and the termination of the agreement on notice. Clause 18 reads as follows:

"18. **PERIOD OF OPERATION/TERMINATION**

**18.1 The Scheme will be implemented for a period of 12(twelve) months which coincide with the Group Company's financial year. Notwithstanding the date on which the Group Company signs the operational level agreement this Scheme shall be deemed to have come into effect from 1 January 2003.**

**18.2 The Committee will review the Scheme at the end of the 12(twelve) month period. Subject to the outcome of the review the Committee will, after due**

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**consultation, determine the continuation of the scheme.**

**18.3 Any party may terminate this agreement on one (1) months written notice to all other parties to this agreement."** (Underlining supplied).

[7] Clause 19 bears the heading:

**"COMPANY/GROUP COMPANY'S RIGHTS OF TERMINATION:"** It reads as follows:

"19.1 **The Company or any Group Company may immediately terminate either temporarily or permanently the Scheme on the following grounds:**

**19.1.1 In the event that the Company or Group Company is unable on financial grounds, to pay incentives in accordance with the Scheme;**

19.1.2 **Where the metal price in Rand terms falls below the unit cost of production, or where the metal price falls below a threshold level of a 15% (fifteen percent) decline from the planned metal price for the financial year."** (underlining supplied).

[8] There were two annexures to the agreement, namely, annexures "**A**" and "**B**". Annexure "**A**" deals with the functions and powers of "**EXCO**" as well as "**Decision Making.**" Annexure B deals with the "**RULES OF THE Scheme.**" Paragraph 3 of annexure B says in the first sentence:

> **"Performance measurement is the core principle of the scheme i.e the performance of every team will be measured against pre-determined targets."**

Paragraph 7 of Annexure B deals with time frames. It reads:

"**7. TIME FRAMES**

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Concept

- **The measurement period will vary depending on the nature of the work**
- **Incentive payments will be made at different time intervals for different teams.**
- **Measurement period for a particular team should be similar at all Business Units."**

Part of what appears under paragraph 9 of Annexure B is the following:

"**Termination (resignations, dismissals, retrenchments)**

- **Employees who resign or are dismissed before the end of the applicable measurement period do not participate in incentive payments. However, those who are dismissed or resign after the end of the measurement period but before the incentive is paid will receive payment if they qualify".**

[9] It will have been seen that clause 19.1.2 of the agreement refers among others to a planned metal price. It is necessary to explain this phrase because of its significance in the application and interpretation of clause 19.1.2. The evidence by Mr Cressley, the only witness to give evidence in the arbitration, was that the management would, before the end of each year, make projections as to what the metal price for the following year would be. The planned metal price would be the metal price projected by the management as the metal price for the following financial year.

[10] It is clear from the agreement that the main objective thereof was that the employees should provide superior performance resulting in the achievement of certain targets in return for which the

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employer would provide the employees with incentives in the form of bonuses. It is common cause that during the period of operation of the agreement or scheme, which was 1 January 2003 to 31 December 2003, the employees affected by these proceedings did meet their performance targets. However, when they expected the employer, i.e. the third and fourth respondents, to pay them their bonuses, the third and fourth respondents refused to pay them their full bonuses and "**terminated**" the agreement or "**terminated**" the agreement but only paid them some small amount of money which they said they were paying as an ex gratia payment.

**The dispute**

[11] A dispute then arose between the third and fourth respondents, on the one hand, and, the appellant, on the other, on whether or not the third and fourth respondents were obliged to pay the employees' bonuses in terms of the agreement. The appellant said that the third and fourth respondents were obliged to pay the bonuses whereas the third and fourth respondents said that they were not obliged to pay. The dispute was then referred to the Commission for Conciliation Mediation and Arbitration ("**CCMA**") and was assigned to the second respondent to arbitrate. I have already stated above the effect of the arbitration award that the second respondent issued.

**Arbitration proceedings**

[12] The appellant delivered a statement of case to the arbitration forum setting out what its case was. The third and fourth respondents also delivered their own statement of case-it should have been referred to as a statement of defence-in which they set out what their defence was to the appellant's case. The appellant's case was that in terms of the agreement its members were entitled to be paid

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certain incentive bonuses if they met certain prescribed performance or production targets for or during the year 2003, that its members had met their performance or production targets for 2003 and were, therefore, entitled to the payment of their bonuses by the third and fourth respondents but that the third and fourth respondents had refused to pay the bonuses. As far as the third and fourth respondents' defence is concerned, it is not clear from their statement of case whether their defence was that the metal price fell below the threshold level of 15% decline from the planned metal price for 2003 and this meant that they were not liable or whether their defence was that they had terminated the agreement as a result of the metal price falling below the threshold level of 15% decline from the planned metal price for 2003 and such termination meant that they were not liable to pay the bonuses.

[13] Prior to the commencement of the arbitration proceedings, the appellant, on the one hand, and, the third and fourth respondent, on the other, concluded a pre-arbitration agreement in the form of a pre-arbitration minute in which they once again set out their respective cases and the issues which the commissioner was required to decide. Of the seven issues that the parties agreed should be decided by the commissioner, only the first two are still of relevance to the matter at this level. The first two were:

(a) whether the third and fourth respondents were entitled to cancel or terminate the agreement when they purported to do so on the 24th February 2004.

(b) what the consequences were of the third and fourth respondents' conduct in terminating (or purporting to terminate) the agreement on the 24th February 2004.

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[14] The only oral evidence that was led in the arbitration proceedings was that of Mr Cressley who testified on behalf of the third and fourth respondents. There was also documentary evidence that was submitted to the commissioner. In the view I take of this matter I do not propose to deal with the evidence given by Mr Cressley at this stage. I shall refer to one or two aspects thereof in so far as it may be necessary for the determination of the issues, as I see them, in this appeal.

[15] The commissioner found, as already stated earlier, that the appellant's members were not entitled to any payment of bonuses in addition to the payment that the third and fourth respondents had said they were paying as ex gratia payment. With regard to the first question in the pre-arbitration minute, the commissioner's decision was that the third and fourth respondents were entitled to cancel or terminate the agreement when they purported to do so on the 24th February 2004. With regard to the second question in the pre-arbitration minute, he found that the (purported) termination of the agreement by the third and fourth respondents on the 24th February 2004 had no retrospective effect or consequences and could only affect future rights. I now proceed to refer to certain aspects of the arbitration award

**<u>The arbitration award</u>**

[16] In par 28 of his award the commissioner found that the third and fourth respondents were entitled to cancel the agreement when they purported to do so on the 24th February 2004. He relied upon the objectives and principles of the agreement in support of this finding. He said that, when one looked at the clauses dealing with such matters, it was clear that the purpose of the scheme was "**to encourage superior performance through achievable**

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**incentives, to improve the rewards without negative impact on the company's costs structure and the scheme had to be self-funding.**" He then said that the parties had agreed that the measurement period for the agreement was "**annually**". The commissioner then said that these were some of the "**objective facts**" which the third and fourth respondents had to consider "**in making a decision whether or not to terminate the Scheme.**"

[17] The next question that the commissioner considered was when it would be "**appropriate**" for the third and fourth respondents to terminate the scheme. He said in par 27 of his award that the answer to this question was that it would be appropriate to terminate the scheme at the end of the measurement period "**when it would have had all the necessary objective facts required for it to exercise its termination right in terms of clause 19.1.2 of the Incentive Scheme Agreement.**" Effectively what the commissioner said in par 27 of his award is that the third and fourth respondents had a right to terminate the Scheme at the end of the measurement period which was the end of the 12 month period. At the end of par 28 of his award the commissioner made a finding that the third and fourth respondents were entitled to cancel the Incentive Framework Agreement on the 24th February 2004.

[18] In par 29 of his award the commissioner stated that the next question for consideration was what the legal consequences of the third and fourth respondents' conduct in "**terminating**" the agreement on the 24th February were. The commissioner pointed out in par 30 of his award that Counsel for the appellant's interpretation of clause 19 did not have retrospective effect nor did it affect any entitlement to bonuses already vested in the employees before such termination.

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[19] In par 32 of the award the commissioner said that a notice of termination becomes operative at the time when the notice is brought to the attention of the other party. He then said:

> **"Unless the contrary appears either expressly or by necessary implication it should be presumed that an act of cancellation in terms of clause 19.1.2. [was] intended to affect the future matters - not to take away the vested rights."**

Effectively in this passage the commissioner found that the third and fourth respondents' conduct in purporting to terminate or cancel the agreement could not, as a general rule, affect rights that had already been acquired but it could only affect future rights. In other words the commissioner upheld the submission made on behalf of the appellant that the purported termination of the agreement on the 24th February 2004 did not operate with retrospective effect but only operated prospectively.

[20] In par 34 of his award the commissioner went on to say that "**in accordance with what**" he had said earlier it was only fair that the third and fourth respondents should pay the members of the appellant the incentive bonuses for the period in respect of which "**the 15% threshold was not triggered.**" He went on to say in the next sentence: - "**Otherwise the interpretation preferred by the respondents will lead to an unfair advantage and which may constitute an unfair labour practice in terms of section 27 of the Constitution.**"[1]

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1 I note that there is duplication in the numbering of certain paragraphs of the arbitration award. The paragraphs of the award are numbered 1-36 and those that come after paragraph 36 are not numbered 37 onwards but 24 to 32.

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**Proceedings in the Labour Court**

[21] The appellant was aggrieved by the commissioner's arbitration award. It accordingly brought an application in the Labour Court for an order reviewing the arbitration award and setting it aside and for a declaratory order to the effect that the third and fourth respondents were obliged to pay the relevant members of the appellant their bonuses for the year 2003. As I have already indicated, the Labour Court dismissed that application with no order as to costs. It is necessary to deal with the reasons upon which the Labour Court relied for its conclusion.

[22] The Court a quo made three points in paragraphs 21, 22 and 23 of its judgment. The first point it made was that the agreement made provision for its cancellation in clauses 18 and 19 but did not **"specifically provide whether or not the applicant employees would be entitled to a pro-rata payment of the bonus which either covers the period as the date of the suspension or can collation thereof."**

[23] The second point that the Court a quo made was that the agreement failed to provide **"in uncertain (sic) terms"** what the consequences would be if the agreement **"were not to be cancelled in terms of clause 19.1.2 immediately within the financial year but only after, as in this case, where the metal price fell below the threshold level of a 15% decline from the planned metal price for the financial year."** The third point that the Court a quo made was that the agreement **"did not stipulate in clear terms as to when the calculation of the actual fall of the metal price below the threshold level of 15% from the metal price for the financial year would be determined in order to trigger the operation of clause 19.1.2 of the agreement."**

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[24] In par 27 of its judgment the Court a quo suggested that the commissioner's reference to the provision of sec 27(1) of the Constitution which provides that "**every person shall have the right to fair labour practice**" and his reliance upon clause 18.3 of the agreement made it think that the commissioner's conclusion in favour of the third and fourth respondents was "**rationally justifiable in relation to the reasons given for it.**" In the result the Labour Court dismissed the review application.

**The appeal**

[25] Counsel for the appellant contended that the conclusion reached by the commissioner that the third and fourth respondents were not obliged to pay the relevant members of the appellant employed by them their bonuses was a conclusion that a reasonable decision maker could not reach and that, therefore, it was an unreasonable decision that is susceptible to being reviewed and set aside. He also submitted that the second respondent's conclusion that the cancellation of the agreement or scheme did not have any retrospective effect was in conflict with his other conclusion that the appellant's members employed by them were not entitled to the payment of their bonuses by the third and fourth respondents. Counsel for the third and fourth respondents submitted that the commissioner's award and the interpretation of the agreement upon which the commissioner relied were correct but that, even if they were not correct, they could not be said to be unreasonable.

[26] The appellant's case was crisp. It was that in terms of the agreement the appellant's members employed by the third and fourth respondents were entitled to the payment of their incentive bonuses provided for in the agreement if they had met performance targets required of them pursuant to the agreement. In this regard

Counsel for the appellant argued that, since the appellant's members had met their side of the bargain, namely, they had met their performance targets for the entire period of operation of the agreement or period of operation of the incentive scheme, the third and fourth respondents were obliged to pay the employees their bonuses for the entire period.

[27] Counsel for the third and fourth respondents submitted that the appellant's members were not entitled to any bonuses. With regard to why the third and fourth respondents had not invoked their right to terminate the incentive scheme in terms of clause 19.1.2 of the agreement in July 2003 or soon thereafter once they had realised that the metal price had fallen below the 15% threshold level decline from the planned metal price for the financial year, Counsel for the third and fourth respondents submitted that the third and fourth respondents were entitled to cancel the agreement at the time at which they did, namely, on the 24th February 2004 as opposed to July 2003 or soon thereafter because the measurement period was the whole period from 1 January to 31 December 2003. He submitted that the third and fourth respondents could only measure the metal price at the end of the measurement period and that that is why they could not terminate the agreement prior to the expiry of the measurement period.

**What was the third and fourth respondents' defence to the appellant's claim**

[28] I have set out above the appellant's case as well as the third and fourth respondents' case. There is no difficulty with what the appellant's case is and always was. However, the third and fourth respondents' case is not as unambiguous as the appellant's case. When one reads the record and the arbitration award, one gets two

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impressions of what the third and fourth respondents' case was and is. The one impression is that the third and fourth respondents' case is that the fact that the metal price fell below the threshold level of 15% decline from the planned metal price for the financial year of 2003 was enough to exonerate the third and fourth respondents from liability to pay the appellant's members their full bonuses after they had met their performance targets. The other is the that the third and fourth respondents' case is that it is their conduct in "**terminating**" the agreement on the 24th February 2004 which exonerated them from liability to pay the full bonuses of the appellant's members.

[29] From the third and fourth respondents' statement of case in the arbitration it would seem (from par 10 thereof) that the third and fourth respondents' defence to the appellant's claim was that they were not obliged to pay the appellant's members' bonuses despite such members having met the stipulated production targets if "**certain profitability benchmarks**" were not maintained and in this case such "profitability benchmarks" were not maintained. There the third and fourth respondents alleged: "**In particular it was a term of the Incentive Agreement that the respondents would not be liable to pay the Incentive Bonus if the actual metal price fell below a stipulated benchmark level for the relevant measurement period.**" The third and fourth respondents then allege in par 11 of their statement of case that **"(t)he relevant measurement period applicable to the respondents in terms of the Incentive Agreement was 1 year, namely, the calendar year 2003 ("the measurement period").**" In par 12 of their statement of case the third and fourth respondents alleged that the actual metal price for the measurement period fell below the stipulated

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benchmark level. In par 13 the third and fourth respondents concluded:

> "**13. Accordingly:**
>
> **13.1 The respondents cancelled the Incentive Agreement; and**
>
> **13.2 As they were entitled to do, terminated the scheme and declined to pay the Incentive Bonus.**"

[30] In the arbitration proceedings Counsel for the third and fourth respondents also articulated the third and fourth respondents' case as being that the falling of the metal price below the threshold level of 15% decline from the planned metal price for the financial year was enough by itself to exonerate the third and fourth respondents from liability to pay the bonuses. Before the commissioner, he, inter alia, said:

> "**Now, the case, the case then revolves around the interpretation of 19.1, that is the essence of the dispute before you. The union says well, if you terminate, then whatever has happened before then you must pay. The company says well, that makes nonsense of the clause, meaning of the clause. The company says look if there is a measurement period of one year and you measure the criteria in 19.1 for that year and you find out, after the calculations had been done and the audit has been done that the exchange rate has been so bad, that you, really all the projections have been wrong. The scheme is now unaffordable, then you are excused from implementing the scheme. That is the proper meaning. So that is really the dispute between the parties. And we will argue that more fully and we will put the necessary evidence before**

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**you so you can deal with those issues. And quite simply the company will lead evidence to show that for a one year measurement period, you can obviously only establish all these criteria, properly audit them in fairness to the employees at the end of the period".**

A reading of the answering affidavit reveals that the third and fourth respondents' defence to the appellant's claim was that the falling of the metal price below the specified threshold level of 15% decline from the planned metal price for the financial year was by itself enough to exonerate them from liability to pay the bonuses. In this regard I refer to paragraphs 5, 6, 7, 8, 13.2, 17, 19, 24.2.4, 44, 47 and 48.3.3 of the third and fourth respondents' answering affidavit.

[31] It was common cause that for the first half of 2003 the metal price did not fall below the threshold level of 15% decline from the planned metal price for the 2003 financial year. The reference to the financial year herein and in clause 19.1.2 is a reference to the third and fourth respondents' financial year which ran from 1 January to 31 December. In July 2003 the metal price fell below the threshold level of 15% decline from the planned metal price for the 2003 financial year.

[32] In order to determine this appeal, it is necessary to refer to the issues that the commissioner was called upon to decide. In terms of the pre-arbitration minute agreed to by the appellant, on the one hand, and, the third and fourth respondents, on the other, there were seven issues that the commissioner was required to decide. Of the seven issues only his decisions in regard to the first two require our consideration. He decided the five other issues and his

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decisions on those were not challenged by either party before us. The first two questions he had to decide were the following:

(a) whether the third and fourth respondents were entitled to cancel the scheme in accordance with clause 19.1.2 of the Incentive Scheme Agreement;

(b) what the legal consequences of the third and fourth respondents' conduct in "**terminating the agreement**" on the 24th February 2004 were.

[33] In par 4.7 of the appellant's founding affidavit it is stated that the third and fourth respondents informed their employees on the 24th February 2004 "**that the scheme for 2003 had been terminated because the metal price was below a threshold of a 15% decline from the planned metal basket price for the financial year for the full measurement period, 1 January to 31 December 2003**" and that "**(t)he third and fourth respondents contended that this excused them from paying any incentive bonuses in terms of the agreement.**" In par 31 of their answering affidavit the third and fourth respondents admitted this. Whereas the references to portions of the third and fourth respondents' statement of case above suggest that the falling of the metal price below the stipulated threshold level was put up as a defence to the appellant's claim on its own, the admission in par 31 of the answering affidavit of what the appellant said in par 4.7 of its founding affidavit suggests that the "**termination**" of the agreement was their defence to the appellant's claim. The first two questions of the pre-trial minute agreed to between the parties also suggest that the third and fourth respondents' defence was the termination of the agreement as opposed to the fact that the metal price had fallen below the threshold level of 15% decline from the planned metal price for the

financial year. I propose to address both defences in this judgment although I shall place more emphasis on the "**termination**" of the agreement as the third and fourth respondent's defence because of its role in the first two questions of the pre-arbitration minute that the parties asked the commissioner to decide.

[34] In par 17 of the answering affidavit the third and fourth respondents refer to what they say was the commissioner's central finding which, they imply, vindicated their interpretation of clause 19.1.2. There the third and fourth respondents say:

> **"the central finding of commissioner, based on a reasonable interpretation of the agreement and consistent with the uncontested evidence, appears at para 27 of the award, in which the commissioner found that the correct time for one of the respondents to terminate the incentive scheme was 'at the end of the measurement period when it would have had all the necessary objective facts required for it to exercise its termination right in terms of clause 19.1.2.' This was both a reasonable and justifiable conclusion as evidenced, inter alia, by the finding that, on the applicant's interpretation, the parties would not be afforded 'an opportunity to reach the goals they had set out in the agreement' during the whole of the measurement period (para 28). The commissioner's interpretation of clause 19.1.2 of the agreement is dispositive of this matter, and no regard need be had to any further findings."**

[35] In the last sentence of par 17 of the third and fourth respondents' answering affidavit, quoted above, the third and fourth respondents say that the commissioner's finding that the correct time for the

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termination of the incentive scheme was at the end of the measurement period "**is dispositive of this matter, and no regard need be had to any further finding.**" Of course, if the finding is dispositive of the matter, that must be the case irrespective of whether the finding on the point is in the third and fourth respondent's favour or in the appellant's favour. It, is therefore, appropriate that I should turn to that finding. Whether the third and fourth respondents' defence to the appellant's claim was the fact that the metal price fell below the stipulated threshold level or was the fact that it "**terminated**" the agreement as provided for in clause 19.1.2 of the agreement, this requires the determination of the meaning of clause 19.1.2 with regard to either "**defence**". I therefore propose to examine the meaning of clause 19.1.2 with a view to establishing whether both "**defences**" are provided for in clause 19.1.2 and, if so, when they apply.

**What is the meaning of clause 19.1.2 of the agreement with regard to the defence to a claim for payment and to the timing of the termination of the scheme?**

[36] In order to properly consider the above issue, it is apposite to once again quote clauses 19.1.1 and 19.1.2. They read as follows:

> "COMPANY/GROUP COMPANY'S RIGHTS OF TERMINATION
>
> **19.1 The Company or any Group Company may immediately terminate either temporarily or permanently the Scheme on the following grounds:**
>
> 19.1.1 **in the event that the Company or Group Company is unable, on financial grounds, to pay Incentives in accordance with the scheme;**

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**19.1.2 where the metal price in Rand terms falls below the unit cost of production, or where the metal price falls below a threshold level of a 15% (fifteen percent) decline from the planned price for the financial year.**"

It is of paramount importance to bear in mind that the third and fourth respondents did not and do not rely upon clause 19.1.1 as their defence but rely upon clause 19.1.2.

[37] Both the commissioner and the Judge a quo came to the conclusion that the time for the termination of the incentive scheme under clause 19.1.2 of the agreement was at or after the end of the measurement period i.e. at or after the 31st December 2003. In my view that finding was a fundamental error because the scheme and the agreement were for the period 1 January to 31 December 2003 and by the 24th February 2004 there was no longer any scheme or agreement to terminate when the third and fourth respondents purported to terminate the scheme or agreement on which the scheme was based. The notion of the "**termination**" of an agreement that has already come to an end is not only unknown in law but also it makes absolutely no sense. To "**terminate**" an agreement the period of operation of which has expired is a legal impossibility. What clause 19.1.2 refers to when it refers to the termination of the scheme is the termination of the scheme during its operation. That is the normal concept of terminating an agreement. That is a concept which is not only well-known in law but it is also a concept that accords with common sense. Accordingly, the meaning of the word "**terminate**" in clause 19 is to terminate the scheme or agreement during the period of operation of the scheme or agreement.

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[38] The view expressed above that the termination of the scheme contemplated in clause 19.1.2 could only be effected during the operation of the scheme and not after the expiry of the measurement period is supported not only by the ordinary meaning of the term "**to terminate**" but also by the presence of the word "**immediately**" before the word "**terminate**" in clause 19.1.2. The adverb "**immediately**" denotes the time when the act of terminating the scheme as provided for in clause 19.1.2 is required to be done. Although the word "**may**" is used in clause 19.1.2, this is a case where the position is that, if the right to terminate is to be exercised, it must be exercised at a certain time and at no other. In this case it had to be exercised "**immediately**":

"**19.1.1** **in the event that the company or group company is unable, on financial grounds, to pay incentives in accordance with the scheme;**

**19.1.2.1** **where the metal price in Rand terms falls below the unit costs of production, or where the metal price falls below a threshold level of a 15% decline from the planned metal price for the financial year.**"

[39] It would seem that the third and fourth respondents' contention is that the adverb "**immediately**" in clause 19 does not mean that the termination must be immediate upon the happening of the events described in sub-clauses 19.1.1 and 19.1.2 of the agreement but means that, once the third and fourth respondents had taken a decision to terminate the scheme, they had to <u>immediately</u> inform the other parties to the agreement. This, too, is a contention which is devoid of any merit. In law, as a general rule there is no termination of an agreement unless the decision to terminate the agreement has been conveyed to the other party to the agreement.

Accordingly, one can only speak of the termination of an agreement where the other party to the agreement has become aware of the decision to terminate the agreement. If that is what the termination of an agreement means, then the meaning of the word "**immediately**" suggested by the third and fourth respondents falls away.

[40] The right to terminate the scheme or agreement provided for in clause 19.1.1 and 19.1.2 which the third and fourth respondents seek to rely upon as their defence is a right that should be exercised immediately upon or after the happening of any of the events stipulated in clauses 19.1.1 and 19.1.2. That is the meaning of the word "**immediately**" in clause 19. It is common cause in this case that the event contemplated in clause 19.1.2, namely the falling of the metal price below the 15% level decline occurred already in about June 2003 but that the third and fourth respondents purported to exercise the right to terminate the scheme in February 2004 - about eight months after the event. By no stretch of the imagination can it be said that the right to terminate the scheme or agreement was exercised "**immediately**" in this case as required or prescribed by clause 19.1.2. That already places the third and fourth respondents outside clause 19.1.2.

[41] The third and fourth respondents' interpretation of clause 19.1.2 was that it contemplated that for the measurement period the metal price must have fallen below a threshold level of a 15% decline from the planned metal price for the financial year. That interpretation is based on the third and fourth respondents' reading into clause 19.1.2 the words "**for the measurement period**" between the words "**where**" and the article "**the**" in the phrase "**the metal price**". A reading of clause 19 reveals that there is no

reference to the phrase "**for the measurement period**" in clause 19. It is also possible that the third and fourth respondents read the words "**for the financial <u>year</u>**" at the end of clause 19.1.2 as indicating that whether or not the metal price fell below the threshold level of a 15% decline should be decided after the completion of the financial year or measurement period. In my view that would be a misunderstanding of the words "**for the financial year**" which appear in clause 19.1.2. The words "**for the financial year"** refer to the words immediately preceding that phrase. Those words are "**the planned metal price.**" The evidence was that towards the end of each year the employer would effectively make a projection of what the metal price would be for the following financial year (i.e. 1 January – 31 December). Accordingly, clause 19.1.2 meant that, if the metal price fell below the threshold level of a 15% decline from the metal price projected for the financial year, the third and fourth respondents could then terminate the scheme either temporarily or permanently as provided for in clause 19. It did not necessarily refer to a situation where the metal price fell below the prescribed threshold level for the whole year or for the whole of the measurement period.

[42] On the above construction of clause 19.1.2, if, during the period of operation of the incentive scheme, the metal price fell below a threshold level of a 15% decline from the planned metal price for the financial year, the third and fourth respondents could terminate the scheme and thus stop incurring any liability for new bonuses but remain liable for the bonuses earned before the termination. If, later, but during the same financial year or the same 12 month period, the metal price went up beyond the 15% threshold level again, the third and fourth respondents could reinstate the scheme and in that way ensure fairness and transparency which are some of

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the principles of the scheme contemplated in clause 5.3.2 of the agreement. On the third and fourth respondents' interpretation of clause 19.1.2 the third and fourth respondents do not have to do anything during the period of operation of the scheme by way of terminating it if the price goes down below the 15% level decline contemplated in clause 19.1.2 and their right to terminate is a right to terminate a non-existent agreement after the end of the period of operation of the agreement. I find this construction completely untenable and not borne out by the wording and purpose of clause 19.

[43] It seems that the third and fourth respondents' case is based on the proposition that, since the measurement period was the whole period of 12 months from 1 January 2003 to 31 December 2003, the third and fourth respondents could not terminate the scheme until the measurement period had expired. That is based upon a misconception of the concept of the measurement period. The implied suggestion that this conveys is that the third and fourth respondents could not determine or see whether the metal price had fallen below the threshold level of 15% decline until the measurement period had expired. The truth of the matter is that, if, in a particular month during the measurement period, the metal price fell below the threshold level of 15% decline from the planned metal price for the year, the third and fourth respondents could see or determine that. If, during the following month, the metal price went up 15% above the planned metal price for the financial year, the third and fourth respondents could and would see that or determine that that is what had happened. If in one month the metal price fell below the threshold level of 15% decline from the planned metal price for the financial year, that was a ground to terminate the scheme but, when, in the next month, the

metal price went up 15% above the threshold level of 15% from the planned metal price for the year, that was a ground to reinstate the scheme using provisions relating to the temporary termination of the scheme provided for in clause 19.1.2. This demonstrates that the contemplation in clause 19.1.2 was that the third and fourth respondents would see when the metal price fell below the threshold level during the period of operation of the scheme and the right to immediately terminate the scheme temporarily or permanently was made available to the third and fourth respondents to use as a shield whenever the metal price fell below the prescribed threshold level. In conclusion the meaning of clause 19 is that the third and fourth respondents could only terminate the scheme or agreement in terms of clause 19.1.12 if they did so "**immediately**" upon or after the event contemplated in clause 19.1.2. The next question is: what was supposed to be the commissioner's reply to the first question in the pre-arbitration minute agreed to between the parties? I now turn to consider that question. What was supposed to be the commissioner's answer to the first question in the pre-arbitration minute?

[44] In the light of the above I am of the opinion that the commissioner should have answered the question whether or not the third and fourth respondents had a right to cancel the scheme or agreement when they purported to do so on 24 February 2004 by saying that they had no such right because by that time there was no agreement or scheme to terminate. With regard to the question of what the consequences were of the third and fourth respondents' conduct in purporting to terminate the agreement on the 24th February 2004, I am of the view that the commissioner should have decided that such purported act of termination had no legal consequences. If he had so concluded, he would have been driven to further conclude

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that, in so far as the third and fourth respondents may have relied upon such purported termination of the scheme or agreement as a defence to the appellant's claim for payment of the appellant's members' bonuses, such purported termination fell outside clause 19.1.2 and provided no such defence.

[45] In so far as the third and fourth respondents' case was that what excused them from the liability to pay the appellant's members their bonuses was the mere fact that the metal price had actually fallen below the threshold level of a 15% decline from the planned metal price for the financial year, the commissioner should have found that that was no defence in terms of clause 19.1.2. If one reads clause 19.1.2 carefully, one sees that it did not make the falling of the metal price below the stipulated level an event that exonerated the employer from the liability to pay the bonuses when the production targets had been achieved. It makes the falling the metal price below the stipulated level a ground that confers on the employer the right to "**immediately terminate either temporarily or permanently the scheme ....**". Clause 19 specifically refers to this as being one of the "**grounds**" upon which the employer "**may immediately terminate ...the scheme...**" Since the third and fourth respondents did not terminate the scheme during the period of its operation, nor did they terminate it "**immediately**" upon or after the falling of the metal price below the level prescribed in clause 19.1.2, their purported termination thereof after the period of operation of the scheme had expired and about eight months after the metal price had fallen below the level prescribed in clause 19.1.2 had no legal effect.

[46] I am alive to the fact that, since the matter before the Court a quo was a review application, it was not the correctness or otherwise of

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the commissioner's award or interpretation of clause 19.1.2 that was in issue. What was in issue was whether that award or the commissioner's interpretation brought the case within one or other of the grounds of review for CCMA arbitration awards upon which it was attacked by the appellant. In my view the conclusion by the commissioner that the third and fourth respondents were entitled as at 24th February 2004 to terminate or cancel the scheme or agreement that had ended on 31 December 2003 was unreasonable in the sense that it is a conclusion that a reasonable decision-maker could not have reached. On this ground alone the Court a quo should have reviewed the award and set it aside. The commissioner's conclusion that such purported termination had the consequence that the appellant's members who had met the production targets for 2003 were not entitled to the payment of their bonuses was also unreasonable.

[47] The commissioner's finding that the third and fourth respondents were entitled to terminate the scheme or agreement on the 24th February 2004 in terms of clause 19.1.2 despite the fact that clause 19.1.2 required that such right be exercised immediately upon or after the happening of the event provided for in clause 19.1.2 and when it was common cause that such event had occurred already in June or July 2003 necessarily implied that the commissioner took the view that the purported termination of the scheme or agreement on 24 February 2004 complied with requirement of clause 19 that the right to terminate be exercised immediately upon or after the happening of such event. A conclusion to that effect when the third and fourth respondents purported to exercise that right about eight months later is, in my view, a conclusion that a reasonable decision maker could not reach and is, therefore, unreasonable and falls to be set aside.

**Conflicting findings by commissioner**

[48] In paragraphs 34-37 of its judgment, the Court a quo discussed what it said were conflicting remarks that were made by the commissioner in his arbitration award. It said that the commissioner "**made a conflicting and mutually destructive analyses of the issues alluded to above.**" In par 35 it said that "(t)he mutually destructive remarks by the arbitrator, which tended to favour the applicant's contention that they were entitled to the incentive payment for the period in respect of which the 15% threshold was not triggered, were uttered on the basis that '....... *It should be presumed that an act of cancellation in terms of 19.1.2 intended to affect the future matters only and was not intended to take away the vested rights.*' The Court then said in the next sentence:

> **"[The commissioner] goes further to state that if the scheme were terminated on a months notice in accordance with clause 18, the Applicant employees would be entitled to a pro-rata payment of the bonus earned for that period. He went further to state that failure to pay the pro-rata bonus as aforesaid would amount to an unfair labour practice."**

It seems from par 35 of the judgment of the Labour Court that the statements made by the commissioner which the Court a quo found to be "**mutually destructive**" are the following:

(a) the statement by the commissioner that "**an act of cancellation in terms of 19.1.2 intended to affect the future matters only and was not intended to take away the vested rights**", and

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(b) the statement by the commissioner that, if the scheme were to have been terminated on a month's notice in accordance with clause 18, the employees would be entitled to a pro-rata payment of the bonus earned for that period and that failure to make the pro-rata payment of the bonus earned for that period would amount to an unfair labour practice.

[49] I do not see anything "**mutually destructive**" in the above two statements of the commissioner. I see the two statements as consistent with each other. The first one says that, if the employer terminated the scheme, such termination would affect the future and not what had already happened before the termination. In my view that statement is, as a matter of law, correct. The second statement is to the effect that, if the employer terminated the scheme or the agreement, he remained liable for bonuses if, prior to the termination, the employees had achieved their performance targets. In my view that statement of the law by the commissioner was also correct. Where the commissioner made "**mutually destructive**" conclusions is, in my view, where, on the one hand, he concluded that the termination or cancellation affected the future i.e. post-termination or cancellation but, on the other, also concluded that a "**termination**" which occurred on the 24th February 2004 after the period of operation of the scheme and agreement had lapsed on 31 December 2003, effectively exonerated the third and fourth respondents from liability for bonuses that had been earned upto 31 December 2003. In my view the conclusion reached by the commissioner in this regard could not have been reached by a reasonable decision-maker and was, therefore, unreasonable.

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[50] In the light of all the above I conclude that the Court a quo should have granted the review application and should have set the arbitration award aside. As all the material was before the Court a quo and it would have served no useful purpose to remit the matter to the CCMA, the Court a quo would have been entitled to determine the dispute itself after setting aside the award. This is provided for in sec 145 of the Labour Relations Act, 1995. That is what I propose to do. As to costs I am of the opinion that in this case the requirements of the law and fairness dictate that the third and fourth respondents should pay the appellant's costs.

[51] In the premises I make the following order:

1. The appeal is upheld.
2. The third and fourth respondents are ordered to pay the appellant's costs on appeal jointly and severally, the one paying the other to be absolved.
3. The order of the Labour Court is hereby set aside and, for it, the following order is substituted:

"(a) **The review application is granted.**

**(b) The arbitration award issued by the second respondent in the dispute between the applicant, on the one hand, and, the third and fourth respondents, on the other, in this matter is hereby reviewed and set aside and for it the following award is substituted:**

**"(i) The first and second respondents are ordered to pay the applicant's members employed by them who were covered the "Incentive Scheme Framework Agreement Financial Year 2003" and who achieved the performance targets required of them in**

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terms of that agreement their bonuses for the 2003 financial year less the pro-rata payment that was effected in 2004".

(c) The third and fourth respondents are directed to pay the applicant's costs jointly and severally, the one paying the other to be absolved."

Zondo JP

I agree.

Davis JA

I agree.

Jappie JA

Appearances:

| | |
|---|---|
| For the Appellant: | Mr JA Van der Riet SC |
| Instructed by: | Cheadle Thompson |
| | |
| For the Respondent: | Mr PJ Pretorius SC |
| Instructed by: | Leppan Beech Inc |
| | |
| Date of judgment: | 29 January 2010 |