



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA 5/15

In the matter between:

CONSOL GLASS

First Appellant

and

THE NATIONAL BARGAINING COUNCIL FOR

THE CHEMICAL INDUSTRIES

First Respondent

COMMISSIONER M.S. RAFFEE N.O

Second Respondent

SUCCESS NZIANA

Third Respondent

Heard: 30 August 2016

Delivered: 03 February 2017

Summary:

The Bargaining Council – finding the dismissal of the third respondent by the appellant on account of misconduct - gross insolence and gross dereliction of duty - to have been substantively fair.

On review to the Labour Court - the third respondent contending, *inter alia*, that the commissioner had failed to determine the real issue in dispute between the parties and had curtailed his right to cross-examine the appellant's witness.

The Labour Court – refusing to condone the late filing of the appellant’s answering affidavit in that no explanation had been proffered for the delay. Finding that the evidence adduced at the arbitration centred on the third respondent’s poor work performance as opposed to his misconduct –further finding that even if the commissioner had considered the matter on the basis of the third respondent’s poor work performance the outcome would remain one which a reasonable commissioner could have reached. On the question of failure by the commissioner to afford the third respondent his right to cross-examine the witness- finding that this resulted in failure of justice. The award - reviewed and set aside and the matter remitted to Bargaining Council for the arbitration *de novo*.

On Appeal and Cross-appeal: the Labour Appeal Court - finding that the approach by the Court *a quo* in not considering the prospects of success when refusing the application for condonation of the late lodging of the appellant’s answering affidavit was wrong. In considering the applications for condonation the Court has a discretion to be exercised judicially upon a consideration of all the facts which included the appellant’s prospects of success.

Finding - that the commissioner displayed a level of intolerance when the third respondent was testifying - whilst the commissioners are enjoined to conduct the arbitrations in a manner they consider appropriate in order to determine the *dispute* fairly and quickly they must guard against exhibiting petulance to any of the parties. Judicial temperament, which is inherent in their duties, is an important element to the realisation of justice for all.

Finding- that the denial of a right to cross-examine a witness goes to the root of a fair hearing and the resultant award stood to be reviewed and set aside. The normal remedy would be to refer the matter to the Bargaining Council for the arbitration *de novo* before a commissioner other than the second respondent. Finding - on the facts of the case, it served no purpose to do so because the appellant had failed to prove the fairness of the dismissal.

The appeal dismissed, the cross-appeal upheld, the order of the Court *a quo* substituted with an order upholding the review application.

Coram: Waglay JP, Tlaetsi DJP and Phatshoane AJA

JUDGMENT

PHATSHOANE AJA

- [1] This is an appeal and a cross-appeal by Consol Glass and Mr Success Nziana, the appellant and the third respondent, respectively, against the whole of the judgment and order of the Labour Court (Morgan AJ) dated 17 September 2014, refusing to condone the late filing of the answering affidavit by Consol Glass; reviewing and setting aside the arbitration award issued by Commissioner M.S Raffee of the National Bargaining Council for the Chemical Industries (the Bargaining Council) issued under Case No: GPCHEM498-11/12; and remitting the matter to the said Bargaining Council for the arbitration *de novo* before a different arbitrator. The appeal comes before us with the leave of the Court *a quo*.
- [2] The dismissal of an employee on account of his/her culpable poor work performance (misconduct) at times overlaps with his/her dismissal on the basis of his/her inability to do the work (incapacity). This obfuscation is central in this appeal.
- [3] Consol Glass (Consol) produces glass containers and bottles for the local and the export market and employs 154 employees. Mr Success Nziana (Mr Nziana) was employed by Consol on 25 June 2008. He occupied the position of a shift supervisor but on 01 May 2011, was appointed to the position of a shift manager and led a crew of approximately 40 employees. His monthly salary was R30 983.92. As at 01 July 2011, his guaranteed annual remuneration package was R371 387.00.¹

¹ The amount is captured in a letter dated 01 July 2011 headed annual salary review which was addressed to Mr Nziana and signed by the General Manager of Consol.

[4] On 14 May 2012, Mr Nziana was subjected to discipline and dismissed on 21 May 2012 on account of the following two acts of misconduct:

4.1 Gross insolence in that he made comments inciting his crew members against management during the cascade meeting held on 07 May 2012.

4.2 Gross dereliction of duties due to his repeated poor work performance, lack of shift control and failure to address production and quality related issues on time.

[5] Mr Nziana lodged an internal appeal against his dismissal. The appeal was dismissed on 01 June 2012. He referred his dispute to the Bargaining Council which culminated in the arbitration before Commissioner Raffee. What follows is the factual milieu leading up to his dismissal.

[6] Mr Nziana reported to Mr Johan George Pelzer, a production manager at Consol. According to Mr Pelzer Mr Nziana's key performance areas were to, *inter alia*, maintain discipline on the shift; look after the production; strive to keep his performance statistics at 90% plus; and was responsible for his shift's human resource and industrial relation issues. Mr Pelzer testified that during the first six months of Mr Nziana's employment as a shift manager, various training initiatives were offered to him. He says that it was clear in those six months that Mr Nziana was battling to perform up to Consol's required performance standard in comparison with his three co-workers he underwent training with.

[7] Mr Pelzer further says that in February 2012, there was a meeting between himself, Mr Selema Magatikele, the general manager of the plant, and Mr Nziana, the purposes of which was to discuss Mr Nziana's performance and determine if the latter needed assistance. Certain targets were also set for Mr Nziana. Mr Pelzer intimated that Mr Nziana's attitude was that he did not require any assistance from them. Mr Pelzer went on to say that Mr Nziana worked with qualified and experienced managers in Wadeville for almost three months. He was also moved from D-crew to manage C-crew, which was a better performing crew. Although there was some slight improvement to his

performance, following this move, there were some anecdotes regarding Mr Nziana's lack of leadership qualities by his crew. Mr Pelzer did not sit with Mr Nziana to discuss the anecdotes instead, three months later, on 07 May 2012, just less than few days before Nziana was disciplined, a crew meeting was held to obtain clarification on these rumours. Mr Pelzer says that Mr Nziana was very defensive and shifted the blame on everyone else.

- [8] Mr Pelzer testified that the relationship of trust between Consol and Mr Nziana had disintegrated irreparably because the performance targets were slightly adjusted upwards and said "I just think that Success (Nziana) will not make it". He also says that the utterances made by Mr Nziana at the meeting of 07 May 2012, although he could not recount them, irreparably broke the relationship of trust.
- [9] According to Mr Pelzer, one of the senior managers of Consol, Mr Morné Roberts, had a discussion with Mr Nziana regarding the rumours that were circulating concerning his poor work performance. It is noteworthy that Mr Roberts said nothing about the discussion he had with Mr Nziana regarding his poor work performance. His testimony was to the effect that Mr Nziana reported to him when Mr Roberts was doing weekend standby duties. Mr Roberts says that every time he tried to call Mr Nziana he would not answer his phone. This resulted in him driving to the workplace and would find Mr Nziana sitting in the office.
- [10] Mr Roberts mentioned an occasion where he called Mr Nziana at least five to six times without an answer. He then drove to work. Mr Nziana reported to him that his phone was being charged. When he confronted him on his failure to respond to telephone calls he would say that the phone was dysfunctional or that he did not hear it rings as it was in the office whereas he was on the floor. He says that Mr Nziana did not give him accurate feedback on the problems experienced at the plant. Over the weekends the employees on the floor complained to Mr Roberts about Mr Nziana. He went on to say that Mr Nziana was never on the floor and did not discipline his shift workers.

- [11] Mr Selemo Magatikele, the general manager, also testified in the case for Consol. The whole of his evidence was not tested through cross-examination because the commissioner stymied that process. In his examination-in-chief Mr Magatikele testified that Mr Nziana impressed him during his interviews for the position of a shift manager. Consol commenced coaching Mr Nziana from the moment he was appointed. At a later stage, Mr Magatikele says, he noticed some challenges in how Mr Nziana was running his shift. He went on to say that he sat with Mr Nziana and discussed with him his shift log reporting structure and what he expected of him to put in his report. He further informed him that running a shift operation was “like playing soccer...You are not going to fix everything, but you need to prioritize...have your fingers on the pulse all the time”.
- [12] Mr Magatikele says that Consol owns a computer program called GR8 which indicated the problem areas needed to be followed through. At times, when he was a duty manager, he called Mr Nziana to inform him of the defects he observed on the GR8. Mr Magatikele says that whenever Mr Nziana was on shift, the other shift managers on standby complained because Mr Nziana “does not act on issues quickly”. He noticed that Mr Nziana was battling and he spoke to Mr Pelzer to assist in coaching him.
- [13] Mr Magatikele says that they kept coaching Mr Nziana until he decided they needed to sit with him so as to understand what his problem was. He called a meeting with D-crew, headed by Mr Nziana at the time, because it had absenteeism problems, late coming, and lack of general discipline. One of the shift employees reported at this meeting that they did not have a leader because Mr Nziana sat in the office; would not come to the floor; and allowed the workers to strive with work on their own. He intimated that the management of Consol decided that Mr Nziana be given a strong team, C-crew, which was packing the target of 90% consistently. This was aimed at assisting Mr Nziana by taking him out of the pressure environment and giving him a fresh start.
- [14] Mr Magatikele went on to say that not long after Mr Nziana had taken over C-crew problems started emerging. One of these was that Mr Nziana had

allowed two of his line controllers to take leave simultaneously, an act unheard of in their area of operation. There was also an incident of late coming. He intimated that at a meeting held on 13 February 2012 Mr Nziana claimed not to have known what his key performance areas were. This was surprising, he says, because these were made clear to the shift managers. He nevertheless outlined this to Mr Nziana. In the e-mail he directed to Mr Nziana, dated 13 February 2012, he wrote:

'This is to formally record our discussion of this afternoon. I wish to indicate at the outset that this was not for the first time that I have had a discussion with you to highlight the areas of performance that you needed to focus on. It was rather disappointing to note that you did not believe there were any concerns with your performance and attendant to that you indicated that you did not require any help from Anton and myself. As I pointed out to you the objective of today's meeting was to afford you an opportunity to indicate to us if there is any form of assistance that you require from us in your execution of your duties.

It is rather discomfoting that at your level you were not certain of what your key performance areas were. I expect that a person at your level will raise any uncertainties immediately. As a reminder we reconfirmed to you that our target is 90% PTM and that the following are the key indicators that you should focus on:

1. Defects Management - c+ losses of less than 3% and camera losses of less than 2.5%. Moulds must not be on cid for more that the lehr length time.
2. Ware handling - you need to manage ware handling on both the Hot End and Cold End to minimize unaccounted losses, both in terms of ware that is lost for whatever reason and jam ups.
3. Call out – you should hold your Forming specialist and QA Techs accountable. This requires that before you call out someone you confirm with them what they have done to try to fix the problem. There are instances where you have called out specialist for simple issues which Shift specialist should have fixed.
4. Held ware – you must enforce quality management system discipline to ensure that held ware is reduced.

5. Line balancing- you must manage balancing, false rejects as well as invalids.
6. Accuracy of information- you need to ensure that the information you report is accurate and not exaggerated.
7. Absenteeism – ensure that your team is on time and delinquent absenteeism is addressed.

As I said to you, we moved you from D-crew to C-crew as I believe the discipline on D-crew has fallen flat and I required someone who could get the discipline back on track. Please note that we cannot afford to drop the discipline on C-crew and also that we are not going to move you again for similar reasons.

Please note that you are now; starting today under a three months performance review process. Your performance will be reviewed every two weeks until on 14 May to determine if you are still suitable for the role of the shift manager. During this period, we will coach, guide, train and instruct you. Please indicate any development areas that you might need assistance with.” (My emphasis)

[15] Mr Magatikele intimated that he called a meeting of C-crew on 07 May 2012, shortly before Mr Nziana was notified of his disciplinary hearing. It was reported in that meeting that the level of discipline in that team was declining; there was no sense of urgency; and the reaction time was poor. Some crew members reported on the lack of leadership. Mr Nziana was afforded an opportunity to respond to the accusations by his crew members. Mr Magatikele says that Mr Nziana became extremely arrogant and said he was being targeted and that what his crew did was being exaggerated and sensationalised. Mr Magatikele says that the arrogance was grossly insolent and disappointing.

[16] On 08 May 2012, following the meeting referred to in the preceding paragraph, Mr Magatikele directed an e-mail to Mr Nziana recording the following:

- '1. You said that C-crew is on the spot light and suggested that everything that happens on C-crew is blown out of proportion. What did you mean by that and can you provide some examples?
2. You said Tallman has got an absenteeism tendency. How many times has he been absent? Did you take this up with anyone? How do you know that no action was taken?
3. Your crew members stated that discipline has dropped, reaction time is poor and that communication is poor- is this a fabrication?
4. The employees have pointed out that the morale is down, and that there is a problem "Upstairs" and suggested a leadership training intervention- what is your take on this?'

[17] Two days later, on 10 May 2012, Mr Nziana was suspended from duty and disciplined on 14 May 2012 on charges of gross insolence and gross dereliction of duties, as highlighted hereinbefore.

[18] Mr Nziana testified that in February 2012, before his removal from D-crew to C-crew, his production statistics were 90% on daily basis. At some stage, he achieved 88% because there were some problems. He was transferred to C-crew not because of the decline in his team's scores but due to the rumours that he sat in the office. At the meeting held on 13 February 2012 he suggested to management to conduct the weekly performance review and to show him his areas of weakness with a view to improving same. He would be coached and guided thereafter. He says that Mr Pelzer reported in that meeting that one week of performance review was too short and suggested two weeks which was accepted by all parties concerned. The performance review process did not take place as agreed.

[19] Mr Nziana says that on 14 February 2012, when he took over C-crew, its month to date performance was at 89.3%, below the 90%plus target. On 25 February 2012, when C-crew closed, its performance score was 92.3%. This performance was celebrated by means of a braai. Mr Magatikele also testified to this celebration but said that the achievement was mainly due to a certain Mr Madoda, who managed C-crew prior to its transfer to Mr Nziana. Mr

Nziana says in March 2012 his crew came second at 89% and other crews were below him. In April again the crew scored 90.6%. Before he was dismissed his month to date score was 91.5%. The performance statistics referred to by Mr Nziana in his evidence were never disputed by Consol.

- [20] Mr Nziana intimated that he was dismissed because Consol had a perception that he was not performing well but the real reason for his dismissal was “just politics”. He sought reinstatement to his position as a shift manager from the commissioner.

The arbitration award:

- [21] The commissioner summarised the evidence that was led at arbitration. His analysis of the evidence and argument is captured in five lines as follows:

‘The applicant (Nziana) was unable to rebut the allegations made by the respondent’s witnesses. Instead, he chose the route of suggesting that it was the internal politics in the respondent’s business that led to his dismissal. There is little before me to indicate that the charges were trumped-up or that they were not genuine in any way.

The balance of probabilities favour the version of the respondent more than that of the applicant.’

The commissioner then concluded that Mr Nziana’s dismissal was substantively fair. It was on this basis that his dismissal claim was dismissed.

The proceedings before the Labour Court:

- [22] Aggrieved with the outcome of the arbitration Mr Nziana filed an application with the Labour Court to review and set aside the arbitration award. The Court *a quo* took no cognizance of Consol’s answering affidavit to the review and refused to condone the late filing thereof because no explanation was tendered for the delay of 30 days which occurred after Consol’s representative had been made aware of the running of the *dies* for purposes of filing its opposing affidavit by Mr Nziana’s erstwhile attorneys of record. The Judge *a quo* dealt with the four grounds of review referred to in Mr Nziana’s

heads of argument. Namely: (1) Alleged failure by the commissioner to explain the arbitration process; (2) Alleged failure by the commissioner to determine the real issue between the parties; (3) Alleged failure by the commissioner to determine the factual dispute and lastly; (4) The curtailment of Mr Nziana's right to cross-examine Mr Magatikele by the commissioner.

[23] With regard to the first ground of review, failure by the commissioner to explain the arbitration process, the Court *a quo* found that no basis for it was established in the founding papers or supplementary affidavit and that in any event, Mr Nziana conducted the arbitration with little difficulty.

[24] With regard to the ground that the commissioner had failed to determine the real issue between the parties the Court *a quo* observed that much of the evidence centred on Mr Nziana's performance as opposed to his purported misconduct. The Court remarked that Mr Nziana categorised his dispute in the referral form as one pertaining to conduct. It then held:

'It may well be that Consol should have dealt with the matter as one of incapacity, based upon poor performance however, that is not for the Court to decide. The fact of the matter is that Nziana was dismissed, fairly or unfairly, for reasons related to his conduct.'

[25] The Judge *a quo* further observed that Mr Nziana, as a senior employee, had a greater degree of responsibility. The Judge was of the view that the evidence with regard to his poor work performance was substantial. It reasoned that the absence of the performance review by Consol did not advance Mr Nziana's case because there were regular follow-up meetings and feedback provided to Mr Nziana with regard to his performance and that Consol made a concerted effort to assist him by providing him with a mentor and transferring him to a stronger team. The Court further held that Mr Nziana was "resistant to this, believing himself to be above the need for help and the victim of politics". The Judge *a quo* was satisfied that the commissioner determined the real issue between the parties and expressed a view that "Even if the commissioner should have considered the matter on the basis of performance the outcome would not have been different and the award

remains (in this respect at least) one which a reasonable arbitrator could make”.

[26] On the ground whether the commissioner addressed the disputes of fact, the Court *a quo* held that it was clear from the commissioner’s recordal of the evidence that he preferred the version of Consol and that he did not commit any reviewable irregularity in that regard.

[27] The last ground of review to the effect that the commissioner committed an irregularity by curtailing cross-examination of Mr Magatikele by Mr Nziana was a cause for concern to the Judge *a quo*. He pronounced:

‘[51] Mr Hutchinson, appearing on behalf of Consol, however, submitted that the ultimate decision remained reasonable and that any perceived irregularity had not affected the result.

[52] In light of the totality of evidence led, I am inclined to agree with Mr Hutchinson to a degree that the outcome may well have remained the same had Magatikele been effectively cross-examined. The evidence against Nziana was, with respect to him, substantial. Much of the evidence was not challenged and it was apparent to the arbitrator, as it is to this Court, that Nziana’s performance was not up to the required standard and that numerous attempts had been made to correct this.’

[28] The Judge *a quo* then referred to several decisions of the Courts on the review test.² He then concluded that failure by the commissioner not to allow Mr Nziana to cross-examine Mr Magatikele resulted in a failure of justice because Mr Nziana did not receive a fair hearing. He was of the view that it mattered not whether the outcome would have remained the same. He reasoned that this failure amounted to gross irregularity as envisaged in s 145(2) of the Labour Relations Act, 66 of 1995, (the LRA) and concluded that this rendered the award one which a reasonable arbitrator could not reach. On this basis alone, he was of the view that, the application for review had to succeed. As already alluded to, the Labour Court set aside the award;

² *Inter alia*: *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 ILJ 943 (LAC); *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA)

remitted the matter to the Bargaining Council for the arbitration afresh; and made no order as to costs.

[29] The grounds of appeal by Consol are that the Court *a quo* erred:

- 29.1 In finding that the commissioner did not afford Mr Nziana a fair hearing;
- 29.2 In finding that the curtailment of cross-examination resulted in failure of justice;
- 29.3 In failing to condone the late lodging of Consol's answering affidavit; and
- 29.4 In not dismissing the review application and ordering Mr Nziana to pay Consol's costs.

[30] The grounds of the cross-appeal by Mr Nziana come down to the following. The Court *a quo* erred:

- 30.1 In finding that Mr Nziana reported to Mr Magatikele;
- 30.2 In finding that Mr Nziana's poor work performance was regularly addressed with him by e-mails and informally;
- 30.3 In finding that the disciplinary process appears not to have been challenged by Mr Nziana;
- 30.4 In determining that the commissioner addressed the real issue before him; and
- 30.5 In finding that the commissioner did not commit a reviewable irregularity by failing to consider the factual disputes.

Analysis of the grounds of appeal:

[31] It is expedient to commence this enquiry with the application for condonation of the late filing of Consol's answering affidavit to the review application which was refused by the Court *a quo*.

- [32] Consol had 10 days within which it had to deliver its answering affidavit.³ The affidavit was filed on or about 28 June 2013, approximately 30 days outside the statutory prescribed period.
- [33] Mr Simon Mosuwe, the Human Resource Manager of Consol, and the deponent to its answering affidavit, explained that upon learning from Mr Nziana's attorneys that Consol could file its opposing affidavit he immediately instructed Consol's attorney to uplift the record. He also says that, when he received a notice of set down showing that the matter had been enrolled on the unopposed roll, he instructed Consol's attorneys to file the answering affidavit. Mr Mosuwe does not proffer any explanation for the delay of almost 30 days after he had learned from Mr Nziana's erstwhile attorneys of record that the time period within which to file its papers had commenced running.
- [34] A party seeking condonation must satisfy the Court that it has a reasonable explanation for its delay in failing to comply with the time-limits applicable to that party. Its failure to put before the Court such a reasonable and acceptable explanation entitles a Court to refuse the application for condonation. If a Court takes the view that there is little prospect of success then it can justifiably refuse to grant a party the indulgence sought.⁴
- [35] The Court *a quo* did not consider Consol's prospect of success. It refused to condone the late lodging of the affidavit solely on the basis that no explanation had been proffered for the delay. The approach adopted by the Court *a quo* was, in my view, wrong. In considering the applications for condonation the Court has a discretion, to be exercised judicially upon a consideration of all the facts which include but not limited to the degree of lateness, the explanation thereof, the prospects of success, the respondent's interest in the finality of the judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice.⁵ In my view,

³ Rule 7A(9) of the Rules of the Rules for the conduct of proceedings before the Labour Court provides that: 'Any person wishing to oppose the granting of the order prayed in the notice of motion must, within 10 days after receipt of the notice of amendment or notice that the applicant stands by its notice of motion, deliver an affidavit in answer to the allegations made by the applicant.'

⁴ *Novo Norsdisk (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and Others* (2011) 32 ILJ 2663 (LAC) at 2668 para 28.

⁵ *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC) at 369C-E.

the Court a *quo* ought to have granted the application. There could have been no prejudice in so doing in the circumstances where it extensively dealt with the merits of the review.

[36] As already alluded to, the commissioner restricted Mr Nziana right to cross-examine Mr Magatikele. At the commencement of Mr Magatikele's cross-examination the commissioner advised Mr Nziana as follows:

'Commissioner: Please understand, if there is anything that this witness has said, that is untrue or that is incorrect those will be the questions that you put to him. Do you follow?

Mr Nziana: Okay.'

Mr Nziana asked one or two question and thereafter the commissioner began questioning Mr Nziana on issues pertaining to his case. At some stage, during this interrogation, the record reflects the following:

'Mr Nziana: I was treated unfairly.

Commissioner: In which way?

Mr Nziana: Well, I can mention many things. But....[intervenes]

Commissioner: Well, I am going to give you that opportunity to do so now. Thank you sir [Mr Magatikele]. You are excused...'

Thereafter Mr Nziana's evidence-in-chief commenced. Further on during his testimony the following is recorded:

'Commissioner: what comment have you got to what was said by the previous witness? The general manager?

Mr Nziana: He said a couple of things. I had questions lined up for him. Basically to basically question him so that you understand what was happening. Because I got, I had a lot of questions. As you can see.

Commissioner: I see.

Nziana: Ja.'

The commissioner took this issue no further and did not take the trouble to recall Mr Magatikele, at least for purposes of allowing Mr Nziana to cross-examine him.

[37] Mr Hutchinson, for Consol, contended that Mr Nziana was afforded the opportunity to cross-examine the first two key witnesses called by Consol whose evidence was eminently more important than that of Mr Magatikele. Counsel sought to suggest that even if the evidence by Mr Magatikele was to be disregarded it would not have changed the outcome of the arbitration. On the contrary, in my view, Mr Magatikele's evidence was essential to the determination of the question whether the dismissal was effected for a fair reason.

[38] In *President of the Republic of South Africa and Others v South African Rugby and Football Union and Others*⁶ the Court pronounced:

'[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations....

[65] These rules relating to the duty to cross-examine must obviously not be applied in a mechanical way, but always with due regard to all the facts and circumstances of each case. But their object must not be lost sight of. Its proper observance is owed to pauper and prince alike...'

[39] The perusal of the record of the arbitration proceedings reveals that the commissioner displayed a level of intolerance when Mr Nziana was testifying. This is inappropriate. Commissioners are enjoined to conduct the arbitrations in a manner they consider appropriate in order to determine the dispute fairly and quickly but must, in doing so, guard against exhibiting petulance to any of the parties appearing before them. After all, judicial temperament, which is inherent in their duties, is an important element to the realisation of justice for all. There is a considerable body of authority in this Court on the manner in

⁶ 2000 (1) SA 1 (CC) at paras 61 and 65.

which the commissioners are supposed to conduct the proceeding before them.⁷

- [40] The minority decision of the Constitutional Court in *Toyota SA Motors (PTY) LTD v Commission for Conciliation, Mediation & Arbitration and Others*⁸ set out the principles laid down in case law on gross irregularity as a ground of review and pronounced as follows at 346 para 105:

'[105].....As the authorities referred to above reveal, a gross irregularity is conduct on the part of an arbitrator or decision maker that prevents one of the parties from having its case fairly heard or that prevents a fair trial of issues. Any decision by the commissioner to prevent Toyota from cross-examining Mr Makhotla on such a crucial aspect of the case would be a gross irregularity justifying the setting aside of the commissioner's award.'

- [41] The denial of a right to cross-examine a witness goes to the root of a fair hearing and the resultant award stands to be reviewed and set aside. The normal remedy under these circumstances would be to refer the matter to the Bargaining Council for arbitration *de novo* before a commissioner other than the second respondent. However, on the facts of this case, it shall serve no purpose to do so because, as it shall be demonstrated below that notwithstanding the fact that Nziana was not given a fair hearing, Consol did not prove the fairness of the dismissal.

- [42] Infused in the ground of appeal that the Court *a quo* erred in dismissing the review application with costs is the primary question whether the commissioner considered the principal issue before him; evaluated the facts presented at the arbitration; and came to a reasonable conclusion. The cross-appeal also lies against this question.

- [43] In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by how the legal representatives styled the nature of the dispute in their referral forms. The labels that parties attach to a dispute cannot change its underlying nature. The informal nature of the arbitration

⁷ See the judgment of this Court in *Satani v Department of Education, Western Cape and Others* (2016) 37 ILJ 2298 (LAC) and other authorities cited therein.

⁸ (2016) 37 ILJ 313 (CC) at 343-345 paras 95 – 102.

process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.⁹

- [44] Although the dismissal was predicated on Mr Nziana's alleged gross insolence and gross dereliction of duty, from the background evidence sketched, there can be no question that the dispute between the parties was in the main actuated by Mr Nziana's alleged poor work performance and not necessarily his conduct. It is also noteworthy that, when he commenced his address before us, Mr Hutchinson, for Consol, contended that the principal issue in dispute between the parties was Mr Nziana's poor work performance.
- [45] Mr Hutchinson referred to some e-mails exchanged between the parties to show that Consol had discharged the *onus* to prove the substantive fairness of the dismissal. Most of these e-mails, although they form part of the record, were never referred to during the arbitration. Apparent from these e-mails is that Consol's major grievance against Mr Nziana was that he was unable to discipline his crew. Mr Hutchinson argued that Mr Nziana was mentored, coached, and subjected to counselling. It is important to remember that Mr Pelzer's evidence was to the effect that he never sat with Mr Nziana to inform him of his poor work performance. He intimated having sent e-mails, every second week, to Mr Nziana explaining to him that his performance was not up to the standard required by Consol. Those e-mails were never handed in as evidence.
- [46] Mr Magatikele testimony was to the effect that he coached Mr Nziana. Save that he once sat with Nziana to discuss what he should put in his shift report and that he, on a number of occasions, called him to inform him of the defects he observed on the GR8 and told him to keep "his finger on the pulse" no evidence was presented by Consol to show what form of coaching, guidance or training was provided to Mr Nziana during his tenure as a shift manager. Neither was there any evidence led to show how Mr Pelzer, Mr Madoda, Mr Nziana's co-worker, coached Mr Nziana as testified by Mr Magatikele.

⁹ See *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at 224 para 66.

- [47] According to Mr Pelzer, although Mr Nziana's performance statistics may show that his shift scored 90% at times and therefore above the target of 90% plus this was misleading because his held ware was far higher than of any other shift. He intimated 'Your heldware was far higher than any other shift. But I did not take it off the stats, otherwise it would have put [you] in a worse light'. In my view, this was unhelpful. It is remarkable that Consol would complain of Mr Nziana's poor work performance but portray same in a positive light. When Mr Nziana confronted Mr Pelzer to provide proof that Mr Nziana did not reach his targets, his response was "alright, I can go and pull the stats of last year". Those statistics, if they do exist, were not handed in as evidence at arbitration.
- [48] The *onus* rested on Consol to prove the fairness of Mr Nziana's dismissal. It remained in its province to produce the e-mails showing how he was coached by Mr Pelzer and the statistics reflective of the true state of affairs and/or to confront Mr Nziana with such information. It did not do so. The evidence by Consol to the effect that Mr Nziana was subjected to various training, coached and guided without substantiation was in my view fanciful and artificial.
- [49] In terms of the Code of Good Practice: Dismissal- Guidelines in cases of dismissal for poor work performance, Schedule 8 Item of 9 of the LRA: Any person determining whether a dismissal for poor work performance is unfair should consider whether the employee failed to meet a performance standard and if the employee did not meet a required performance standard whether or not: (i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard; (ii) the employee was given a fair opportunity to meet the required performance standard; and (iii) dismissal was an appropriate sanction for not meeting the required performance standard.
- [50] The Code of Good Practice did not feature in the analysis of evidence by the commissioner. It has been held that where an employee is a member of senior management his knowledge and experience qualify him to judge whether he meets the required standard. In that instance an employer may not be required to follow a formal procedure or counsel the employee.

However, this expectation depends on the existence of acceptable standards of performance.¹⁰ Consol undertook to subject Mr Nziana to a three months performance review process in terms of which Mr Nziana's performance would be reviewed every two weeks until on 14 May 2012. It is common cause that the said performance review process was never implemented.

[51] Mr Nziana may have been aware or made aware of the performance standard required. It is to be recalled that during the first six months of his employment as a shift manager, the evidence by Consol was to the effect that, he was "battling" to perform. This was not a case of an employee who had previously performed well and later deviated from the required performance standard set. In my view, under these circumstances, there was an onerous duty on Consol to assist Mr Nziana to attain its required performance standard. Following the first six months of the poor work performance by Mr Nziana, from February 2012 until his dismissal in May 2012 anecdotes surfaced that he was unable to manage his shift. Consol did nothing about the anecdotes. Mr Pelzer testified that he "could not go on rumours". He intimated that the purpose of the meeting that was held on 07 May 2012, two days prior to Mr Nziana's suspension, was to ascertain the veracity of the rumours. Mr Magatikele went to say that in that meeting Mr Nziana's subordinates suggested that he be subjected to leadership training. Management did not take heed of the suggestions instead it took the route of disciplining and discharging him from his service. All these demonstrate that Mr Nziana was not given a fair opportunity to perform.

[52] Quite apart from not affording Mr Nziana the opportunity to perform, the extract from Consol's Disciplinary Code, which forms part of record of this appeal, headed: "Disciplinary Matrix Consol Glass Division: Nigel Factory, classifies "Work Performance" into four types: Incompetence, Negligence, Gross negligence and Poor quality. For each nomenclature a system of graduated discipline, as opposed to dismissal, is proposed as a guideline for handling the "Work Performance" that may be at issue. All things considered,

¹⁰ See *Palluci Home Depot (Pty) Ltd v Herskowitz and Others* (2015) 36 ILJ 1511 (LAC) at 1536 para 53.

in my view, the dismissal of Mr Nziana for poor work performance under the guise of gross dereliction of duty was unfair.

[53] Mr Hutchinson argued that the complaint that Mr Nziana was insolent was a side issue interlinked to his poor work performance. Contemptuousness of authority (insolence, impudence, cheekiness, disrespect or rudeness) may constitute a ground of dismissal (provided, of course, that it is willful and serious).¹¹ The basis of the charge of gross insolence was that Mr Nziana had allegedly made comments inciting his crew members against management during the cascade meeting held on 07 May 2012. To prove the fairness of his dismissal, on this charge, at least the evidence pertaining to the comments that Mr Nziana made was necessary. Except to say that he was arrogant Mr Pelzer could not say what comments Mr Nziana made. Mr Magatikele's evidence was to the effect that Mr Nziana had said in the meeting that he was being targeted and that what his crew did was being exaggerated and sensationalised. In the light of allegations made by his crew that he lacked leadership qualities, it is probable that Mr Nziana may have been arrogant in trying to defend himself. However, there is nothing on the evidence showing that he was contemptuous of any authority or that he incited his colleagues against management. If at all anything, the insolence was not of a serious nature.

[54] Both the Commissioner and the Judge *a quo* treated the dispute as if it was premised, in the main, on Mr Nziana's misconduct. This was far from it. Clearly, the commissioner did not apply his mind to the totality of the facts. He misconceived the nature of the enquiry he was called upon to determine which resulted in a material disconnection between the evidence and the conclusion reached by him. On this conspectus, the result of the arbitration was unreasonable.

[55] The Court *a quo* was wrong in concluding that because Mr Nziana had categorised the dispute as misconduct it be handled on that basis. It also erred in holding that: "It may well be that Consol should have dealt with the matter

¹¹ See *Commercial Catering & Allied Workers Union of SA and Another v Wooltru Ltd t/a Woolworths (Randburg)* (1989) 10 ILJ 311 (IC) at 315F.

as one of incapacity, based upon poor work performance however, that is not for the Court to decide". This question was central to the review. It follows that the Court *a quo* ought to have reviewed and set aside the award on the basis that it was unreasonable. This finding is dispositive of all the other issues raised in the appeal and the cross-appeal. It is therefore unnecessary to traverse same.

[56] As already alluded, Mr Nziana sought reinstatement in the event that the award is reviewed and set aside. I can conceive of no reason not to order reinstatement. With regard to the back-pay none of the parties is largely to blame for the four-year delay, reckoned from date of dismissal, in disposing of this matter. In the circumstances, equity and fairness would dictate that the retrospective pay be limited to a period of twelve months back-pay.

[57] On the question of costs. The Court *a quo* made no order as costs because Consol had not acted unreasonably in opposing the review. There is no reason for this Court to reverse that order. Insofar as this appeal is concerned Mr Nziana was unrepresented and therefore the question of costs does not arise. In the result, I make the following order.

Order

1. The appeal is dismissed;
2. The cross-appeal is upheld;
3. The order of the Court *a quo* is set aside and substituted with the following:
 - (a) *The condonation for the late filing of the answering affidavit is granted;*
 - (b) *The application to review and set aside the arbitration award issued by the National Bargaining Council for the Chemical industries, the first respondent, under Case No: GPCHEM 498-11/12 is granted;*
 - (c) *The arbitration award issued by the first respondent under Case No: GPCHEM 498-11/12 is reviewed and set aside;*

(d) *Mr Success Nziana's (the third respondent's) unfair dismissal claim succeeds;*

(e) *Consol Glass, the appellant, is ordered to reinstate Mr Success Nziana to his position as a shift manager with effect from 21 May 2012, being his date of dismissal;*

(f) *Consol Glass is ordered to pay Mr Success Nziana twelve months' compensation in the amount of R 351 000.00 (three hundred and fifty-one thousand rand) within 30 days from date of this order.*

(g) *No order is made as to costs.*

MV Phatshoane

Acting Judge of the Labour Appeal Court

Waglay JP and Tlaetsi DJP concur in the judgment of Phatshoane AJA

APPEARANCES:

FOR THE APPELLANT:

Adv W.J Hutchinson

Instructed by Fluxmans Attorneys

FOR THE THIRD RESPONDENT:

Mr Success Nziana (*in person*)