IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 62/2015

In the matter between:

TSEPANG PASCALIS NOOSI **Appellant**

and

EXXARO MATLA COAL **Respondent**

Heard: **25 August 2016**

Delivered: **10 January 2017**

Summary: The appellant employee was dismissed from the services of the respondent company for gross negligence in that he failed to comply with the Safety Rules and gross insubordination as he refused to carry out a safety related instruction. The CCMA- finding that the dismissal was procedurally and substantively fair. The Labour Court- dismissing the application for condonation of the late filing of the review application but dealing with the merits of the review. The Labour Court- finding that the dismissal was fair as it measured up to the standard of reasonable decision makers. The decision of the Labour Court confirmed on appeal.

Coram: Landman JA, Savage AJA, and Phatshoane AJA

JUDGMENT

PHATSHOANE AJA

[1] This is an appeal against the whole of the judgment of the Labour Court (per Molahlehi J) handed down on 25 June 2015 refusing to condone the late filing of the review application and dismissing the review with no order as to costs. The appeal is with leave of this Court.

The factual background

[2] Mr Tsepang Pascalis Noosi (Mr Noosi), the appellant, commenced working for Exxaro Matla Coal, the respondent, on 14 February 1995 as an electrician. This case concerns the alleged breach of the Safety Rules and Regulations by him. Mr Hermanus Petrus Schoeman (Mr Schoeman), a senior foreman and head of department (Maintenance), testified in the case for Exxaro and stated that Mr Noosi was under his supervision whereas Mr Moses Mcina was his line supervisor.

[3] The offence said to have been committed by Mr Noosi has its genesis in the workings of the conveyor belt the operation of which Mr Schoeman explained as follows. The conveyor has stop switches at every 200 meters. The switches are utilised to stop the conveyor belt from running in cases of an emergency. From the last stop switch is a feeder breaker with a pull wire on each side which have been installed for safety reasons. The belt is stopped by pulling these wires. The conveyor belt cannot run without these wires extending up to the feeder breaker on both sides. Mr Schoeman explained that it is the duty of the electricians, of which Mr Noosi was one, to lock out the belt; extend the stop switches; and fit in the pull wire. It was also the duty of every employee to ensure the safety of fellow employees.

[4] On 27 January 2010, during the day shift, the Inspector of Mines paid Exxaro a visit at section 22. On the day in question Mr Noosi accosted Mr Schoeman and the shaft manager. He informed them that the section conveyor belt was running and that the pull wire had not been extended from the last stop switch up to the section feeder breaker. Mr Schoeman says that he gave Mr Noosi a lawful and reasonable safety instruction, in the presence of the shaft manager, because he had the authority and the legal duty to do so, to stop the conveyor belt and lock it out. Mr Noosi climbed on the belt bridge and walked over the

belt. At some stage, in the process, he turned to face Mr Schoeman and the shaft manager.

[5] Later on that day, 27 January 2010, the Inspector pointed to Mr Schoeman and the shaft manager to alert them that the belt was running without the pull wire extending up to the feeder breaker. He instructed them to stop the belt immediately which they did. Mr Schoeman called Mr Noosi and enquired from him in the presence of the Inspector, the shaft manager, and the safety officer, why he did not carry out his instruction to stop the belt as earlier directed. According to Mr Schoeman, Mr Noosi made some argument to justify his failure to comply with the instruction.

[6] Mr Schoeman went on to testify that Mr Noosi disregarded the mine's Safety Rules and Regulations and created a false impression to the Inspector regarding the mine's safety measures. He remarked that the mine had been fortunate not to have received a fine from the Inspector in respect of the incident. Prior to this episode, during his induction, Mr Noosi wrote and did well in a test on conveyor belts and was properly trained in the mining environment. In one of the tests Mr Noosi was required, *inter alia*, to name eight forms of abuses of conveyor belts. One of his answers was "Not following the lock-out procedures".

[7] Mr Schoeman explained that the disciplinary enquiry against Mr Noosi, for this transgression, was not instituted immediately following his misconduct because Noosi had been intermittently off duty in the period stretching from 28 January to 24 March 2010. On a document handed in as evidence headed: "Sequence of events" it is recorded that on 28 January 2010 he was in Witbank; on 01 to 03 February 2010 he was in Lesotho; on 04 February 2010 he was off sick; on 05 February 2010 he visited a dentist; on 08 February to 19 March 2010 he took his annual leave. He returned to work on 23 March 2010. Apart from these events Mr Noosi had prior pending disciplinary cases against him at the workplace. Mr Schoeman says that the shaft manager reported to him that there was a special request from Mr Noosi's union, National Union of Mineworkers (NUM), that these cases be completed prior to the issuance of a fresh notice to attend a disciplinary enquiry. He says that Mr

Noosi had been made aware of this arrangement by Mr Moses Mcina, a foreman.

[8] The extract from Exxaro's Disciplinary Code provides in part:

> '4.24 Provision is made for a more flexible time period in order to protect the Company in any instances where the initiation process is slowed down or beyond the direct control of the Company. A complaint, which has been verified, should be initiated within a period of 3 (three) working days after management have reasonably become aware of such an alleged offence or complaint. **The Company reserves the right to initiate disciplinary proceedings outside of the period of 3 (three) working days in circumstances which are out of its direct control and the Company hereby undertakes not to unreasonably delay the initiation of the proceedings.**
>
> 4.25 The purpose hereof is to ensure that the individual complaint is considered by management and resolved as close as possible to the point of origin and as expeditiously as practically possible. **The company and the employees lodging the complaint may by mutual agreement, extend or reduce the time limit of such procedure.**
>
> 5.3 Unless otherwise agreed, not more than 10 working days should elapse between the fact-finding enquiry and a disciplinary hearing.' (My emphasis)

[9] On 18 May 2010 Mr Noosi was charged with these two acts of misconduct:

9.1 Contravention of Code 11 (gross Negligence) in that on 27 January 2010 he failed to install an emergency stop pull wire between the last emergency stop and the feeder breaker on the section belt in section 22 and allowed the conveyor belt to be operated in contravention of the Mine Health and Safety Act, 29 of 1996.

9.2 Contravention of Code 5 (gross Insubordination) in that on 27 January 2010 he was instructed by the senior foreman (head of Maintenance) to stop the section belt in section 22, when the specified belt was

operated without an emergency stop pull wire between the last emergency stop and the feeder breaker.

[10] Mr Schoeman testified that the trust relationship between the mine and Noosi had disintegrated irreparably due to these transgressions. The Disciplinary Code sanctions immediate dismissal for gross insubordination. Pursuant to a disciplinary enquiry Mr Noosi was dismissed from the services of Exxaro on 07 June 2010. According to Mr Schoeman there were employees who committed similar misconduct and were charged of gross negligence. They exculpated themselves by demonstrating to the presiding officer that they made attempts to have the belt moving by extending the pull wire. They also guarded the area for their entire shift. They were exonerated.

[11] Mr Maxwell Modau is the HR officer at Exxaro. His evidence essentially confirmed that Mr Noosi had been intermittently absent from work during the period 28 January 2010 to 24 March 2010 as already alluded to.

[12] Mr Noosi called Mr Moses Mcina to testify in his case. Mr Mcina says that on 27 January 2010 Noosi reported to him that the conveyor belt was running without stop switches, the green line and the pull wires. Mr Mcina inspected the situation as he knew that it could be hazardous. He confirmed that the section electricians, amongst whom was Mr Noosi, were responsible for installing the pull wires, the green line and the stop switches. According to him everyone in the section, including Mr Noosi, was responsible for safety in that section as well as the safety of fellow workers.

[13] In his defence Mr Noosi testified that his responsibilities were to take hour meter readings at the beginning and the end of the shift; reporting on cables; and attending to electrical breakdowns but not all of them. He referred to a document headed: “Standards for Installation, Operation, Repair, Maintenance and Patrolling of Belt Conveyor System” in terms whereof, he says, the Foreman Services, through his electricians, ensured that “Every Conveyor belt is fitted with a lock-out and the green line pull wire accessible from both sides of the conveyor system, along the length of the conveyor, to stop the system at any point in case of an emergency”. This was not his

responsibility because he worked at the production department. In instances where the belt was running without stop switches and the green line the crew would fix it. He added that the conveyor belt operator was responsible to stop the belt or to rerun it. He was not a belt operator.

[14] Mr Noosi says that on 27 January 2010 he met Mr Schoeman next to the feeder breaker. He reported to Mr Schoeman that the stop switches and the pull wires were not in a working order. At no time did Mr Schoeman give him instructions as alleged or at all. He was on leave from 26 February to 18 May 2010 and was notified of his disciplinary enquiry on the date that he returned to work. He was not informed that there would be some delay in the initiation of his disciplinary enquiry.

[15] The above was the sum total of the evidence that served before the commissioner.

The arbitration award

[16] The commissioner comprehensively sketched out the evidence that was led during the arbitration in his award. With regard to the procedural fairness of the dismissal, although he did not say this in so many words, it appears that he accepted Exarro's version that it was not possible to hold the disciplinary enquiry against Mr Noosi within the time-frame stipulated in the Disciplinary Code because he had intermittently been on leave. In addition, his union had requested that the enquiry be held in abeyance pending the finalisation of his other disciplinary enquiries at the workplace.

[17] Having had regard to Item 4.24 of the Disciplinary Code[1] the commissioner determined that Exxaro was unable to subject Mr Noosi to a disciplinary enquiry within the time-frames set out in the Code for reasons beyond its control. Consequently, he concluded that the dismissal was procedurally fair.

[18] With regard to the substantive fairness of the dismissal the commissioner found that Mr Noosi was not a credible witness in that he gave contradictory versions on whether Mr Schoeman gave him an instruction to stop the

[1] This is referred to in para 8 of this judgment.

conveyor belt and lock it out. The commissioner had no doubt that Mr Schoeman gave Mr Noosi the instruction. On the basis of this he concluded that Mr Noosi's dismissal was substantively fair. Resultantly, on 19 October 2010, the commissioner dismissed Mr Noosi's alleged unfair dismissal claim.

The review proceedings

[19] On 10 February 2011, eight weeks and four days outside the statutory prescribed six-week period,[2] Mr Noosi filed the review application with the Labour Court accompanied by an application for condonation.

[20] In his explanation of the delay Mr Noosi states that upon receipt of the award Mr Richard Mahlangu, his representative at NUM, advised him that the award was forwarded to NUM's regional office in Witbank for a decision whether to review it. He says that a certain Mr Malahlela of NUM's regional office informed him that he had, in turn, forwarded the award to Mr Lazarus Nica Rakau at NUM's head office in Johannesburg for an opinion. Mr Noosi intimated that in December 2010 he called Mr Mahlangu who informed him that the review had already been filed at the Labour Court and that it will take months to be finalised.

[21] Mr Noosi claims that on 07 February 2011 he again enquired from Mr Mahlangu about the progress in the matter. Mr Mahlangu called Mr Rakau who replied that he knew nothing about the case. Mr Mahlangu then reminded Mr Rakau of their December 2010 conversation. Mr Rakau then said that he thought that at that stage, in December 2010, he was talking to a different Mr Mahlangu and that the report he gave at that the time, about the review having been lodged, pertained to a different case. Mr Noosi says that on investigation it became apparent that Mr Malahlela of the regional office had indeed sent the award to Mr Rakau but the latter had not received it due to a computer crash. He further states that the "*Information technologies experts were allegedly engaged and they retrieved the fax from Malahlela. Rakau and Mahlangu then discussed the case with me and told me that I do not have good prospects of success with my case"*. The two union officials declined to

[2] See s 145 of the Labour Relations Act, 66 of 1995 (LRA).

assist him further. He then instructed his current attorneys to institute the review proceedings on his behalf.

[22] Mr Noosi stated that the union officials he interacted with refused to provide him with confirmatory affidavits. It is noteworthy that, in support of his explanation for the delay, he did not provide the specific dates in respect of which he communicated with his union. Two and half years later, on 29 July and 30 August 2013, Mr Rakau and Mr Mahlangu, attested to the confirmatory affidavits in support of Mr Noosi's case. Save to confirm the correctness of the contents of Mr Noosi's founding affidavit, insofar as it related to them, they denied having refused to depose to the confirmatory affidavits which Mr Noosi sought from them.

[23] The Court *a quo* set out comprehensively the explanation proffered by Mr Noosi for the late filing of the review application. It then dealt with the principles governing applications for condonation. The Judge *a quo* was of the view that Mr Noosi was supposed to have provided reasons why the union officials that were assisting him refused to provide him with the confirmatory affidavits but did so only two and half years later. The Judge was of the view that the filing of these supporting affidavits was an afterthought actuated by Exxaro's objection to the impermissible hearsay contained in Mr Noosi's founding papers and that Mr Noosi had also failed to attach the affidavits of the technicians who allegedly retrieved the award from the computer that had crashed. He held that Mr Noosi could not be absolved from the negligence of his union because, *inter alia*, he failed to mention the date in respect of which his union advised him that he had no prospects of success in reviewing and setting aside the award. Mr Noosi also did not say on which date he instructed his attorneys to take over the matter from his union. The Judge then remarked that *"It may well be that the delay was occasioned by the attorneys also. It may also be as indicated above that the two union officials may have told applicant in time that he did not have a case but he delayed instructing his attorneys to institute the review application.*" Accordingly, the Court refused to grant condonation in the light of the poor explanation provided by Mr Noosi for the delay.

[24] The Court *a quo* found it expedient, in the event it was found to have been incorrect in refusing condonation, to deal with the merits of the review application. It did so painstakingly covering all the defences that Mr Noosi had raised. It found the review to be without merit and reasoned that the conclusion reached by the commissioner was reasonable on the material before him. It then dismissed the review.

The grounds of appeal

[25] The grounds of appeal are convoluted, characterised by argument and disjointed criticism of the judgment of the Court *a quo*. In respect of the application for condonation, paraphrased, they boil down to the following. That the Court *a quo* erred:

25.1 In its piecemeal approach to the application for condonation, in particular, ignoring Mr Noosi's good prospects of success and not exercising its discretion judicially;

25.2. In holding that the Court will not readily grant condonation in individual dismissal cases unless an applicant's case was compelling. It was argued that this is tantamount to unfairly discriminating against employees in individual dismissal cases whose jobs were just as important as in mass or group dismissals cases;

25.3 In holding that the delay was excessive and that the explanation proffered by Mr Noosi for the delay was insufficient;

25.4 In finding that the union officials had acted negligently thereby delaying the filing of the review application. That the delay was not as a result of any negligence on the part of the union officials but fallibility of humankind; and

25.5 In finding that Mr Noosi could not be absolved from the negligence of the union.

[26] The grounds of appeal in summary, in respect of procedural fairness of the dismissal, are that the Court *a quo* erred:

26.1 In finding that Exxaro had not lost its authority to discipline Mr Noosi. Mr Makinta, for Mr Noosi, contended that Exxaro did not have the authority to institute disciplinary proceedings against Mr Noosi after the time prescribed in the Disciplinary Code had lapsed. That Exxaro was not prevented by circumstances beyond its control to hold the disciplinary enquiry. In any event, counsel argued, there was no agreement between NUM and Exxarro to suspend the institution of a disciplinary enquiry beyond the period prescribed in the Code.

[27] With regard to the substantive fairness of the dismissal the grounds of appeal and the argument advanced, condensed, are that the Court *a quo* erred:

27.1 In finding that Mr Noosi's defence to the effect that Mr Schoeman did not have authority to give him the instruction that he did was unsustainable. Mr Makinta argued that Mr Noosi did not hear Mr Schoeman's instruction to stop the conveyer belt. In any event, he went on, the instruction was not valid, lawful and enforceable as it was in conflict with Exxaro's policies. According to counsel, Mr Schoeman was also not authorised to give the instruction because he was not Mr Noosi's immediate supervisor; that Mr Noosi was prohibited from carrying out the instruction because he was not a service electrician but was engaged in the production department; and that he was also not employed to operate and stop the conveyer belt.

27.2 In finding that the documentary evidence confirmed that it was Mr Noosi's responsibility to carry out the instruction.

27.3 In finding that Mr Noosi failed to establish a *prima facie* case of inconsistency whilst the evidence was that two of his colleagues had committed the same offence but were not dismissed.

[27.4] In finding that the misconduct complained of was very serious and broke the trust relationship between Exxaro and Mr Noosi irreparably.

Analysis of the grounds of appeal with regard to the application for condonation

[28] Condonation for the non-observance of the Rules of this Court and the Labour Court is by no means a mere formality.[3] The Court restated the principles that underpin the consideration of the application for condonation as follows in *Melane v Santam Insurance Co Ltd*[4]

> 'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success that are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.'[5]

[29] The delay of eight weeks and four days outside the six-week period provided for in s 145 of the LRA, as correctly found by the Court *a quo,* was inordinate. One of the primary purposes of the LRA is the effective and expeditious resolution of labour disputes.[6] On this score the Constitutional Court had the following to say in *Commercial Workers Union of SA v Tao Ying Metal Industries and Others*[7]

> 'The LRA introduces a simple, quick, cheap and informal approach to the adjudication of labour disputes. This alternative process is intended to bring

[3] See *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC) at 370H, *National Union of Mineworkers and Others v Western Holdings Gold Mine* (1994) 15 ILJ 610 (LAC) at 613C, *Van der Grijp v City of Johannesburg* (2007) 28 ILJ 2079 (LC) at 2084 para 10
[4] 1962 (4) SA 531 (A).
[5] At 532C.
[6] Section 1(d)(iv) of the LRA.
[7] (2008) 29 *ILJ* 2461 (CC)

> about the expeditious resolution of labour disputes. These disputes, by their very nature, require speedy resolution. Any delay in resolving a labour dispute could be detrimental not only to the workers who may be without a source of income pending the resolution of the dispute, but it may, in the long run, have a detrimental effect on an employer who may have to reinstate workers after a number of years.'[8] [Footnote omitted]

[30] The applications for condonation in individual dismissal cases should be strictly scrutinised for purposes of speedy resolution of labour disputes. In *Queenstown Fuel Distributors CC v Labuschagne NO and Others*[9] this Court pronounced that:

> '[24] ... In principle, therefore, it is possible to condone non-compliance with the time-limit. It follows, however, from what I have said above, that condonation in the case of disputes over individual dismissals will not readily be granted. The excuse for non-compliance would have to be compelling, the case for attacking a defect in the proceedings would have to be cogent and the defect would have to be of a kind which would result in a miscarriage of justice if it were allowed to stand.
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> [25] By adopting a policy of strict scrutiny of condonation applications in individual dismissal cases I think that the Labour Court would give effect to the intention of the legislature to swiftly resolve individual dismissal disputes by means of a restricted procedure, and to the desirable goal of making a successful contender, after the lapse of six weeks, feel secure in his award.'[10]

This dictum was followed in *Mbatha v Lyster and Others* (2001) 22 *ILJ* 405 (LAC); [2001] 4 BLLR 409 (LAC) at para 18; *Hardrodt (SA) (Pty) Ltd v Behardien and Others* (2002) 23 *ILJ* 1229 (LAC) at paras 3-4; *Shaik v South African Post Office Limited and Others* (DA 4/09) [2013] ZALAC 18 (19 July 2013).

[31] In my view, failure to deal with labour disputes promptly and effectively may render the purpose of the LRA manifestly nugatory. Mr Noosi did not provide a plausible explanation for the wanton delay. He failed to provide the dates in

[8] At para 62.
[9] 2000) 21 *ILJ* 166 (LAC).
[10] At paras 24-25.

respect of which he interacted with his union representatives and those in respect of which he instructed his attorneys of record to assist him. This would have enabled the Court to assess the legitimacy of the explanation proffered for the delay. The remissness on the part of the union officials to file the review application in time ought to squarely be imputed to him.

[32] The prospects of success, although not individually decisive, are an important consideration to an application for condonation. It was argued on behalf of Mr Noosi that the Court *a quo* erred in considering the condonation application on a piecemeal basis in that it did not deal with the prospect of success. In my view, there is no merit in the argument because the Court *a quo* effectually dealt with the merits of the review. Mr Noosi's prospects of success were poor. I will demonstrate this point in my analysis of the grounds of appeal on the review application to which I now turn.

Analysis of the grounds of appeal with regard to the review application

The procedural fairness of the dismissal

[33] At first blush the institution of a disciplinary enquiry after the lapse of approximately 111 calendar days appears to be excessive. It will be recalled that Exxaro justified this delay by demonstrating that Mr Noosi had been on and off duty for a period stretching from 28 January to 24 March 2010. It also said that there was an agreement between itself and NUM to hold in abeyance the issuance of the fresh notice of a disciplinary enquiry against Mr Noosi pending the finalisation of the other disciplinary enquiries he was attending. In terms of clause 4.25 of the Disciplinary Code Exxaro may extend or reduce the time limit for the initiation of a disciplinary enquiry by mutual agreement with an employee.

[34] Apparent from the truncated reconstructed record of the arbitration proceedings no evidence was led to challenge the existence of the agreement to defer the disciplinary enquiry. Under cross-examination Mr Schoeman was merely asked:

> 'Q:….Can you prove that you were going to charge the Applicant after all pending cases were finalised?
>
> A: The applicant was informed that all pending cases needed to be conducted before he could be charged. He was aware.'

Mr Noosi did not take this issue any further when he took the stand because he did not disclaim the existence of the agreement. The Court *a quo* cannot be faulted in having concluded that "the version of the first respondent (Exxaro) that an agreement was reached with the union that the institution of the disciplinary proceedings against the applicant should be delayed pending the finalization of other pending disciplinary action was not challenged by the applicant (Noosi)." In addition, no shred of evidence was presented by Mr Noosi that he had been prejudiced by the delayed in the initiation of his enquiry.

[35] The Disciplinary Code does not necessarily restrict Exxaro to initiate the enquiry within three or 10 days from the date of the commission of the misconduct. This is so because, in that same Code, Exxaro reserved its right to institute the disciplinary proceedings outside the period of three working days in circumstances which were beyond its direct control. It also undertook not to unreasonably delay the initiation of the proceedings.[11] The commissioner had regard to the delay in the institution of the enquiry and was satisfied that it had been due to circumstances beyond Exxaro's control.

[36] The review test as laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[12] and restated in several decisions of this Court and the Supreme Court of Appeal is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach.[13] I am

[11] See clauses 4.24; 2.25 and 5.3 quoted in para 8 of the judgment.
[12] (2007) 28 ILJ 2405 (CC).
[13] At 2439 para 110 the Court pronounced: "To summarise, *Carephone* held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: **Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?** Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair."

of the view that the conclusion reached by the commissioner that the dismissal was procedurally fair was reasonable.

The substantive fairness of the dismissal

[37] The commissioner correctly identified that, on the evidence presented, Mr Noosi was dismissed on charges of gross insubordination and gross negligence. On a reading of the arbitration award it is apparent that the complaint that Mr Noosi breached the safety rules was overshadowed by the allegation that he did not carry out the head of department's safety instruction. However, it does not follow that the commissioner cleared Mr Noosi of the breach of safety rules as Mr Makinta sought to suggest. That suggestion is, in my view, devoid of substance. The complaint of gross insubordination was so intrinsically intertwined with the offence of gross negligence (Noosi's alleged failure to observe the safety rules).

[38] Exxaro's evidence to the effect that Mr Schoeman gave Mr Noosi instruction, in the presence of the shaft manager, to stop the conveyor belt and lock it out was not seriously challenged. For instance, it was not put to Mr Schoeman that he did not give any instruction to Mr Noosi nor was it put to him that the instruction was unlawful, invalid and/or unenforceable.

[39] Insofar as Mr Noosi did not put his version to Exxaro's witnesses Mr Makinta contended that there was a legal obligation on the commissioner to caution him and his representatives of their failure in this respect. The following remarks in *Bafokeng Rasimone Platinum Mine v Commission for Conciliation, Mediation and Arbitration and Others*[14] are apposite:

> '[17] In conclusion, it needs to be stated that whereas there is a duty on arbitrators to provide guidance and assistance to lay litigants, the question of whether such duty arose and whether failure to carry it out is an irregularity rendering an award reviewable is a matter to be decided with reference to the particular circumstances of each case. Care should be taken not to straddle the fine line between legitimate intervention by an arbitrator and assistance amounting to advancing one party's case at the expense of the other.

[14] (2006) 27 ILJ 1499 (LC) at para 17.

> Otherwise we would be opening the floodgates allowing every lay representative who has bungled his/her case to seek its reopening by shifting the blame to the arbitrator. At the end of the day, the cardinal question is whether the merits of the dispute have been adequately dealt with and fairly so in compliance with the provisions of s 138 of the Labour Relations Act. That question can best be answered by considering the conduct of the arbitration proceedings as a whole rather than 'nitpicking through every shrapnel of evidence that was considered or not considered', as was stated in *Coin Security Group (Pty) Ltd v Machago* (2000) 5 LLD 283 (LC).'

40] Mr Peter Nchabeleng deposed to Exxaro's answering affidavit. At 24.1, 24.2 and 60.2 thereof he states:

> '24.1 The applicant's allegation that the commissioner failed to caution him together with his representative to put his case to the respondent's witnesses in full is without basis when one takes into account that the applicant was represented by a seasoned union representative with vast experience in the conduct of the arbitration proceedings and was well aware of the consequences of leaving evidence unchallenged.
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> 24.2 The applicant was afforded an opportunity to cross-examine the respondent's evidence. Blame cannot be accorded to the Commissioner for the Applicant's failure to cross-examine the respondent's evidence.
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> 60.2 ……As already stated elsewhere above, the applicant was represented in the arbitration hearing by a seasoned union representative who had extensive experience in representing employees at the CCMA.'

[41] In his replying affidavit Mr Noosi did not address any of these damning statements against him and his representative. The Court *a quo* was right in finding that there was no evidence on the record that the union representative was a lay person who did not understand the consequences of failure to put a version to a witness.

[42] The argument that Mr Schoeman had no authority to give Mr Noosi instructions is fallacious. He was the head of the department and a senior foreman in the section. The learned Judge *a quo* found that Mr Noosi did not produce any documentary evidence in a shape of a policy or employment

contract in support of his version that: Mr Schoeman had no authority to give the instruction; and that Noosi was not a service electrician and therefore was not authorised to execute the instruction. The learned Judge was satisfied that the documentary evidence presented by Exxaro, which had not been questioned by Mr Noosi, showed that the instruction given fell within his responsibilities. He was persuaded by the decision of the Labour Court in *Exxaro Coal Mpumalanga Ltd v CCMA and Others* (Unreported, Case No: JR 269/11, delivered on 13 January 2015 in particular, the following pronouncement at para 15:

> '…Should it be shown that the instruction was lawful, it would be the end of the enquiry. If it is found that the instruction was lawful, the expectation is that the employee to whom such an instruction was issued should have complied. It will have little, if any, to do with whether the instruction related to the employee's job description because it will never be a justification for an employee to refuse lawful instructions merely because the instructions are not [his or her] direct functions.'

[43] The whole argument by Mr Makinta to the effect that Exxaro's policy required that no one should perform any artisan work unless such an employee was specially trained and appointed to do that work is not supported by any evidence that served before the commissioner. His argument that in terms of Exxaro's Engineering policy "Lock out Procedure for Conveyor Devices" only an authorised competent person could work on conveyor belts, including starting and stopping the belt was never dealt with at arbitration[15] nor was any witness confronted on the contents of the document.

[44] Exxaro presented sufficient documentary evidence, as correctly found by the Court *a quo*, to demonstrate that Mr Noosi, as an electrician, was adequately equipped and responsible for the task he was requested to perform by Mr Schoeman. For instance, the induction tests relating to the workings of the conveyor belts, which he passed with flying colours, were submitted in evidence during the arbitration.

[15] In his confirmatory affidavit appearing at Vol 1 p 95-96 paras 5-7, Mr Herrick Makweng, a shop steward of NUM at Exxaro, says that the document headed "lock out Procedure for Conveyor Devices ("EP03") could not be located and therefore it never formed part of the bundle of documents and the pleadings.

[45] Mr Noosi's defences, *inter alia*, that the electricians were not authorised to attend to the stop switches; that he was engaged in the production department; and that he was not a belt operator cannot hold water. The probabilities are overwhelming that a valid, reasonable and lawful instruction was issued to him. He refused to adhere to the order simply because that was not part of his responsibility. Belatedly, in the review papers, Mr Noosi stated that he had previously been found guilty of having done work that he was not qualified for. This underhand attempt to introduce new evidence on review is impermissible.

[46] Mr Makinta's further argument that Exxaro was inconsistent in the application of discipline is unfounded for the reasons that follow. As already alluded to, Mr Schoeman testified that there were other employees, without mentioning their names, who were subjected to discipline for the similar type of misconduct. They were exonerated, he said, because they demonstrated to the presiding officer that they made attempts to have the belt moving by extending the pull wire. They also guarded the area for their entire shift. In what had become a pattern, this piece of evidence was not challenged.

[47] In his supplementary affidavit to the review application, Mr Noosi states that there were service electricians, who worked prior to his shift, who were not subjected to similar discipline. Be that as it may, he did not lead any evidence during the arbitration of any disparate treatment. What is baffling is that Mr Makinta's argument took a different direction. Before us he argued that Mr Schoeman and Mr Mcina, both electricians, were not disciplined for failing to stop the conveyer belt and out of the blue he also contended that the belt operator ought to have been disciplined. Counsel conceded that these issues were not raised before the commissioner.

[48] A generalised allegation of inconsistency is not sufficient. A concrete allegation identifying who the persons are who were treated differently or preferentially and the basis upon which they ought not to have been so

treated must be set out clearly.[16] The argument on the inconsistent application of disciplinary measures in this case cannot pass muster.

[49] The Court *a quo* correctly found that the misconduct committed by Mr Noosi was of a serious nature. The fact that no injuries were sustained or that there had been no damage to any property cannot avail him. Mr Schoeman's evidence to the effect that the trust relationship was completely destroyed, as a result of the misconduct committed by Mr Noosi, remained uncontroverted and is persuasive. After all, the Disciplinary Code prescribed the sanction of dismissal for gross insubordination.

[50] The Court *a quo* exercised its discretion judicially in refusing to condone the late lodging of the review. There is nothing in this matter which merits that the findings of the commissioner or that of Court *a quo* be upset as there are no material or noteworthy misdirections.

Costs

[51] Mr Makinta confirmed from the bar that NUM is funding the appeal and that the costs should follow the result. Mr Noosi was advised by his union that he had no prospects of success but, despite this, he persisted with the appeal. All things considered, the requirements of law and fairness would dictate that the costs follow the results of this appeal. I make the following order:

Order

1. The appeal is dismissed with costs.

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MV Phatshoane

Acting Judge of the Labour Appeal Court

[16] *National Union of Mineworkers on behalf of Botsane v Anglo Platinum Mine (Rustenburg Section)* (2014) 35 *ILJ* 2406 (LAC) at 2417 para 39.

Landman JA and Savage AJA concur in the judgment of Phatshoane AJA

APPEARANCES:

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FOR THE RESPONDENT:	Adv G C Pretorius SC
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