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EMPLOYMENT ALERT

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IN THIS
ISSUE

I'M ENTITLED TO ASK YOU QUESTIONS...

The right to cross-examine a witness goes to the root of a fair hearing.

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The Labour Appeal Court has recognised that the failure of a commissioner to allow a party to cross-examine a witness may constitute a reviewable irregularity and may result in the award being set aside.

The Labour Court accordingly set aside the award and referred the matter to the Bargaining Council to hear the matter afresh.



The right to cross-examine a witness goes to the root of a fair hearing.

Despite the onus on a commissioner to deal with arbitration disputes quickly and with minimum legal formalities, there are certain procedural requirements that may not be dispensed with and may result in an arbitration award being set aside.

The Labour Appeal Court has recognised that the failure of a commissioner to allow a party to cross-examine a witness may constitute a reviewable irregularity and may result in the award being set aside.

In *Consol Glass v National Bargaining Council for the Chemical Industries and Others* (JA5/15) [2017] ZALAC 12, the commissioner unduly curtailed the cross-examination of a witness. Furthermore, the record of the arbitration proceedings revealed that the commissioner displayed a level of intolerance when one of the witnesses was testifying.

The Labour Court held that the commissioner's failure to allow a party to cross-examine a witness resulted in a failure of justice in that the party did not receive a fair hearing. The Labour Court was of the view that it mattered not whether the outcome would have remained the same and reasoned that the failure to allow a party to cross-examine a witness will amount to a gross irregularity as envisaged in s 145(2) of the Labour Relations Act, No 66 of 1995 and will render the award one which a reasonable arbitrator could not reach. On this basis alone, the Labour Court held the review application had to succeed.

The Labour Court accordingly set aside the award and referred the matter to the Bargaining Council to hear the matter afresh.

The matter was taken on appeal to the Labour Appeal Court. It found that it was clear from the record of the arbitration proceedings that the commissioner displayed a level of intolerance towards one of the parties and that this behaviour was inappropriate. The court held that judicial temperament is inherent in a commissioner's duties and is an important element of the realisation of justice for all.

The Labour Appeal Court also referred to the minority decision of the Constitutional Court in *Toyota SA Motors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (CCT 228/14) [2015] ZACC 557 wherein the court held that any decision by a commissioner which prevented a party from cross-examining a witness on a crucial aspect of a case will be seen as a gross irregularity justifying the setting aside of the award.

The court concluded by stating that "the right to cross-examine a witness goes to the root of a fair hearing" and a failure to allow a party to cross-examine a witness will constitute a reviewable ground.

What is clear from the Labour Appeal Court judgment is that cross-examination is a fundamental procedural aspect of a fair arbitration hearing as parties have the right to test each other's evidence.

I'M ENTITLED TO ASK YOU QUESTIONS...

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It is important for representatives conducting arbitrations to be fully aware of their rights during arbitrations so as to ensure that their case is properly ventilated.

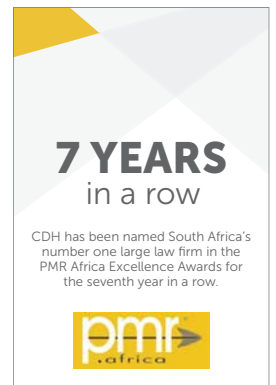


It is also apparent from the Labour Court judgment that the failure to allow cross-examination of a witness, even if this did not impact on the outcome of the award, may still amount to a reviewable irregularity.

The Labour Appeal Court decided that the evidence of the witness whose cross-examination was curtailed was essential to the question of whether the dismissal was effected for a fair reason.

It is important for representatives conducting arbitrations to be fully aware of their rights during arbitrations so as to ensure that their case is properly ventilated.

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Mohsina Chenia and Piet Joubert



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EMPLOYMENT STRIKE GUIDELINE
answers our clients' FAQs.

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