THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA 52/24

In the matter between:

GLENCORE OPERATIONS SOUTH AFRICA (PTY) LTD **Appellant**

and

THOKOZANI TAALA **First Respondent**

NATIONAL UNION OF MINEWORKERS **Second Respondent**

COMMISSION FOR CONCILIATION
MEDIATION & ARBITRATION **Third Respondent**

COMMISSIONER ALFRED MASHEGOANA *N.O* **Fourth Respondent**

Heard: **18 March 2025**
Delivered: **27 March 2025**
Coram: **Van Niekerk JA, Nkuta Nkotwana JA *et* Sutherland AJA**

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JUDGMENT

VAN NIEKERK, JA

Introduction

[1] This appeal has its genesis in an incident that occurred on one of the appellant's mining operations at 15:21 on 23 November 2016, when a crane in the process of lifting a Pit Viper drill mast toppled over, causing a loss of some R5.6 million. The accident occurred because the drill mast was too heavy for the crane's selected parameters – the wrong counterweight had been selected and fitted to the crane in relation to the load to be lifted.

[2] An investigation into the incident revealed that the crane operator had furnished the first respondent (employee), a rigger, with the incorrect load chart for the counterweight fitted to the crane. The appellant alleged that the employee was negligent because he had failed to verify the rigging details furnished to him by the crane operator against the actual crane configuration. The employee was found guilty of the charge and dismissed.

[3] The employee disputed the fairness of his dismissal and ultimately referred the matter to an arbitration hearing conducted by the fourth respondent (arbitrator). The arbitrator found that the employee's dismissal was substantively unfair because the appellant had failed to prove that the employee was required to verify the crane operator's selection on the crane's load chart and secondly, on account of the appellant's failure to take disciplinary action against other employees whom the employee alleged should also bear culpability for the incident. The arbitrator ordered that the employee be reinstated into his position without loss of benefit.

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[4] The appellant sought to have the arbitrator's award reviewed and set aside. The Labour Court (per Dave AJ) dismissed the application and upheld the arbitrator's award. With the leave of that Court, the appellant appeals against the Labour Court's order.

The arbitration proceedings

[5] At the arbitration hearing, the employee disputed the fairness of his dismissal on two grounds; first, that he was under no duty to verify the correctness of the load chart selection provided by the crane operator (specifically, that there was no written rule which required him to do so) and secondly, that the appellant had failed to act consistently in the exercise of discipline because the supervisor who signed the permit had not been dismissed.

[6] It was not in dispute that the direct cause of the accident was that the crane had been fitted with a counterweight of 16.7 tons, an insufficient weight to balance the crane when lifting 25.6 tons, the weight of the drill mast. The resulting imbalance caused the crane to topple forward when it attempted to lift the drill mast. The first witness to testify on behalf of the appellant, Mr Neil van Zyl, read from a statement prepared at the time of the accident. He testified that the crane was operated by Mr Sam Serage. The electronic control system (the LICCON system) used in the crane displayed a load chart in the cabin, indicating that the operator had used code 0027, which represented a counterweight of 46.5 tons. The actual counterweight fitted to the crane was 16.7 tons, corresponding to code 0021. The crane operator had furnished the employee with a load chart that indicated a counterweight of 46.7 tons, sufficient to safely conduct the lifting operation. Van Zyl testified that it was not for the employee simply to accept the information given to him by the crane operator – "*[H]e must confirm that it is the correct detail that he puts on his rigging study*".

[7] Mr Dudley Lotter, an engineering manager who led the team that investigated the accident, spoke to the report and testified that the direct cause of the accident was that the drill mast was too heavy for the crane's selected parameters. The rigging study

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calculation had been correctly performed by the employee, but the incorrect load chart information had been supplied to him by the crane operator. The crane operator had given the employee information that was used for the 46.7-ton counterweight instead of the actual 16.7 that had been fitted to the crane. In other words, the crane operator had selected the wrong load chart for the counterweight of 16.7 tons fitted to the crane.

[8] The report prepared by the investigation team made a number of findings. The first was that the direct cause of the accident had been that the rigging study calculation was correctly done by the rigger (the employee), but the wrong load chart information was supplied to him by the crane operator, resulting in the wrong counterweight being selected. Further, the crane operator had selected the wrong load chart for the counterweight fitted to the crane. Under the heading '*Absent or failed defences*', the report indicates the following:

'2. The Lifting and Cranage COP, procedures and PTO as well as the lifting and cranage permit do not require the actual counterweight and the actual load chart to be matched as a check.

3. The crane's safety system (LICCON) requires operator to select the correct chart for the counterweight fitted, thereby providing an opportunity to override the safety system through a manual input.

4. The rigging study calculation was correctly done by the rigger, but the wrong load chart information was supplied to him by the crane operator resulting in the wrong counterweight being selected.

5. Not all supervisors taking charge of lifting activities and the permit have specific training on the rigging studies and more technical aspects of the lifting and crane each process.

Contributing Factors- Individual or Team Actions (Human Factors)

6. The rigging study calculation was correctly done by the rigger the wrong load chart information was supplied to him by the crane operator resulting in the wrong counterweight being selected.

7. The crane operator selected the incorrect load chart code for the counterweight fitted to the crane (16.7T).

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8. At the end of the shift, the initial guide rope handlers went home resulting in the risk assessment not being discussed with the new guide rope handlers by the rigger…

11. The Lifting and Cranage COP, procedures and PTO as well as the lifting and cranage permit do not require an actual counter weight and the load chart to be matched as a check….'

[9] Item 11 was identified as a key corrective/preventative action to avoid a repeat incident. One of the other corrective actions identified in the report was "*Consequence management for failure to perform the rigging study correctly to ensure crane operator selected the correct load chart for counter weight fitted (Rigger)*".

[10] Lotter described the duties of a rigger. These include the preparation of a lifting plan, which defines where the crane must be positioned, the load to be lifted, the weight of the load, and the swing radius. The rigger calculates the counterweight needed to lift the specified load. In the present case, the employee calculated that the weight required was 25.8 tons, with an allowance of up to 35.5 tons. The crane was thus set up with a safety factor of more than 25%. Lotter testified that at Tweefontein, two counterweights were in use: for smaller loads, a 16.9-ton counterweight was used; for heavier loads, a 46.5-ton counterweight was used. In the present instance, the 16.9-ton counterweight was utilised. That counterweight was selected in circumstances where the chart selected the 46.5-ton counterweight.

[11] Lotter's testimony was that it was the employee's responsibility to ensure that the load chart and the counterweight matched. He testified that the employee was culpable on account of the following:

'So he never physically went and checked in the crane on the system what it is which should have happened because that is part of responsibility to ensure that he has got the right load chart and that he has got the right counterweight fitted for that load chart on the crane.'

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Put another way, for Lotter, the source of the obligation to verify the information furnished to him by the crane operator lay in the employee's appointment as the competent person and his overall responsibility for the lifting procedure:

'Well, number 6 is really, it is contributing. It is the same point but it says rigging study calculation was correctly done by the rigger but the wrong load chart information was supplied to him by the operator resulting in the wrong counterweights being selected. So based on that point if he then actually checked in the cab and said, whoa, you know, this is the chart you selected but that is not the counterweight at the back you selected, you know, he could have actually then said, it is not correct.

[12] After Lotter's evidence, and after the appellant's third witness, De Bruyn, had been called, the arbitrator made clear that:

'…the company's case if I understand it correctly was that the applicant was supposed to verify the information received from the operator. Now the question is becoming whether or not and lead evidence whether or not that is in terms of his job description, in terms of his standard operating procedure. That is what is needed to prove or disprove the other party's case.'

[13] By the time of that intervention, the parties could have been under no illusion that the central issue in dispute was the source of any obligation on the part of the employee to verify the information furnished by the crane operator and that it was necessary to lead evidence to establish that source. De Bruyn's evidence centered on the qualifications demanded of a rigger, a level 4 NQF qualification. De Bruyn's evidence was largely concerned with the relevant unit standards and their content, none of which was in dispute. Under cross-examination, De Bruyn could not comment on the existence of any obligation by a rigger to confirm a loading chart furnished by a crane operator; his evidence was limited to more general observations regarding the training of a rigger and the relevant standards.

[14] The employee's evidence was based on a written statement recorded at the time of the incident. In essence, the employee stated that he was given the task of installing

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the drill mast and went to the site with his assistant and the crane operator. He completed the rigging study, which was handed to his supervisor, who issued the permit required to proceed with the lift. The employee stated that he conducted the rigging study together with the crane operator. He was not permitted to come closer to the crane to verify whether the crane operator had selected the correct code for the load chart, and he was not allowed to operate the crane. The senior supervisor who approved the permit should also have been charged with misconduct. He confirmed that he had selected the 16.9-ton counterweight in the rigging study based on what the crane operator told him. Had the crane operator selected the correct code, the accident would not have occurred. The employee denied that he had any obligation to verify whether the crane operator had selected the correct code and stated that he was not authorised to enter the crane operator's cab. In the employee's view, the accident was caused by the crane operator entering the wrong code into the system. In doing so, he overrode the crane. In the employee's view, if he and the crane operator were to be charged in relation to the accident, the supervisor who had signed the permit for the lift to proceed ought also to be charged. Under cross-examination, the appellant's representative focused on the NQF qualification attained by the employee, the training that he had received and the unit standards that were met. The unit standards put to the employee for his comment were those derived from NQF levels dated 2009, in circumstances where the employee had completed his trade test in 2004. The employee thus disputed the fairness of putting standards to him that may not have been applicable at the time of his training.

<u>The arbitration award</u>

[15] After a summary of the evidence and the applicable legal principles, the arbitrator came to the following conclusions:

'35. The ICAM report clearly stipulates that the Applicant's calculations were correct and this was common cause to both parties. The issue is not with the Applicant supposed to verify the load chart selected and given to him by the Crane operator, Whether or not there was a rule to this effect?

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36. The respondent's witnesses confirmed that there were no written rules and argued that the Applicant was the senior person responsible to manage the team as per unit standard, these was disputed by the Applicant. Bundle M, the unit standards dated 2009 was highly challenged and it was not confirmed whether it was for the same unit standard at the time when the applicant qualified as a rigger in 2004…

37. … The respondent had the duty to proof that it was still the same unit standard as of 2004 when the Applicant qualified as a rigger…

38. The other issue was that the rigging study was compiled by the applicant and discussed with the supervisor who in turn issued a work permit, the supervisor was not dismissed…

40. The question is why the Applicant was dismissed, and not the supervisor as well, approved and issued the work the job to be done without verifying if it was safe. The respondent did not proof that the Applicant contravened the rule that required him to verify the selection of the load charts. It was not in dispute but the load chart of the crane is fitted inside the operator cab, and that the Applicant is not authorized to operate the Crane, it was not proven as to how the Applicant could have been able to verify the selected load chart without getting into the crane cab.

41. I find that the dismissal of the applicant to be substantially unfair and not effected for good reasons. The applicant sought re instatement and I find no reason not to accede to the Applicant's request…

42. In the circumstance I find that the dismissal of the Applicant to be substantively unfair and I do not find any justifiable reasons why the supervisor was treated differently and I accordingly, find that there was an inconsistent Application of the rule by the respondent party (sic).'

[16] In essence, the arbitrator upheld both of the employee's contentions and found that the dismissal was substantively unfair on the basis that the appellant had failed to establish the existence of any workplace rule that required the employee to verify the information furnished to him by the crane operator and further, that the appellant's failure to take disciplinary action against the employee's supervisor amounted to the inconsistent application of discipline.

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<u>The Labour Court's judgment</u>

[17] On review, the appellant submitted that the arbitrator had failed to apply his mind to the totality of the evidence and rendered an award that failed to meet the reasonableness threshold. In relation to the charge of negligence, the appellant contended that the employee was highly qualified and experienced and that, on the evidence led by the appellant during the proceedings, it had been established, on the balance of probabilities, that the employee had the personal responsibility to determine the configurations for the lifting task. Further, the employee was required to perform this task with regard to safety considerations. This required the employee to ensure that the correct configuration was selected in the rigging study and the load chart. Further, the crane operator had acted on the employee's instruction and direction to ensure that the correct weight was selected. The appellant submitted further that the arbitrator's rejection of its evidence concerning the employee's qualifications, competency and duties based on the applicable unit standards was unreasonable. Contrary to the arbitrator's finding, the unit standards established that the employee was trained to ensure that the lifting task was correctly done and that he had a duty to verify that the crane operator provided him with the correct chart.

[18] Finally, the appellant submitted that the arbitrator failed properly to apply his mind to the evidence and legal principles concerning inconsistency and that in circumstances where the engineering superintendent was not qualified to perform the duties of rigger and had relied on the employee's calculations, the principle of inconsistency, as an element of fairness, had no application.

[19] The Court noted that it was common cause that the rigging study calculation was correctly done by the employee but that he had based his calculations on incorrect information supplied to him by the crane operator, resulting in the wrong counterweight being selected. The Court (correctly) regarded the essence of the dispute to be whether

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the appellant had established that the employee had any responsibility for verifying the crane operator's selection on the crane's load chart.

[20] Mindful of the applicable threshold of reasonableness, the Court held that the arbitrator's finding, that the appellant had failed to establish that the employee had such a duty, was a finding to which a reasonable decision-maker could come on the available evidence. The Court came to this conclusion on the basis that there was no written rule that required the employee to verify the correctness of the load chart. In relation to inconsistency, the Labour Court found that the arbitrator's findings in this regard were reasonable and thus not subject to review.

The grounds for appeal

[21] The appellant advances four contentions on appeal. The first is that the Labour Court erred by not finding that the arbitrator committed a reviewable irregularity and thus rendered an unreasonable award by finding that the appellant had failed to prove that the employee had a duty to verify the load chart selection given to him by the crane operator. Secondly, the Labour Court erred by not finding that the arbitrator committed a reviewable irregularity and rendered an unreasonable award by failing to determine whether the employee exercised a reasonable standard of care expected of a rigger with his qualifications and experience. Thirdly, the Labour Court erred in not finding that the arbitrator committed a reviewable irregularity by finding that the evidence reasonably established that the appellant had failed to apply discipline consistently, with the result that the employee's dismissal was substantially unfair. Finally, the appellant contends that the Labour Court erred in not finding that the arbitrator had committed a reviewable irregularity by ordering the employee's reinstatement.

Evaluation

[22] In essence, the grounds for review on which the appellant relied related to the arbitrator's assessment of the evidence. Had he assessed the evidence correctly, so the

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appellant contends, the award that the arbitrator issued would have been different. The consequence of the arbitrator's misdirection is an unreasonable award. The appellant pursues the same submissions on appeal, urging us to find that the Labour Court erred by concluding that the arbitrator's findings fell within a band of reasonableness.

[23] A ground for review based on an arbitrator's assessment of the evidence more often than not raises the red flag of an appeal rather than the more limited, permissible recourse of review. *Sidumo and another v Rustenburg Platinum Mines Ltd and another*[1] established that the right to review established by section 145 of the Labour Relations Act[2] (LRA) is to be viewed through the lens of the constitutional right to lawful, reasonable and procedurally fair administrative action.[3] It is well-established that the Labour Court may intervene if the applicant seeking to have an award reviewed and set aside, demonstrates some reviewable irregularity on the part of the arbitrator that has the consequence of an unreasonable result, in the sense that the outcome of the proceedings under review represents a decision that no reasonable decision-maker could reach on the available evidence. In other words, even if the record discloses a reviewable irregularity in relation to the commissioner's conduct or reasoning, provided the result or outcome falls within a band of decisions which a reasonable decision-maker could reach on the available evidence, the award cannot be assailed.

[24] The limitations inherent in a right of review were recently affirmed by this Court in *Makuleni v Standard Bank of South Africa Ltd and Others*[4]*,* where Sutherland JA said the following:[5]

> '… The court asked to review a decision of commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation is reserved for the court of appeal. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are

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[1] [2007] ZACC 22; 2008 (2) SA 24 (CC).
[2] Act 66 of 1995, as amended.
[3] See s 33(1) of the Constitution of the Republic of South Africa, 1996.
[4] [2023] ZALAC 4; (2023) 44 *ILJ* 1005 (LAC).
[5] Ibid at para 4.

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> untenable. Only if the conclusion is untenable is a review and setting aside warranted.'

And further:

> 'To meet the review test, the result of the award has to be so egregious that, as the test requires, no reasonable person could reach such a result.'[6]

[25] The hurdles that the appellant was required to overcome on review were to establish some misdirection on the part of the arbitrator in his assessment of the evidence and, secondly, that the factual conclusions that he drew were untenable, rendering the award one to which no reasonable decision-maker could come. Implied in the Labour Court's finding is that the arbitrator had regard to relevant evidence, did not take irrelevant evidence into account, and arrived at a conclusion that fell within the bounds of reasonableness.

[26] As the Labour Court correctly pointed out, the nub of the dispute is not whether the employee's calculations were correct but whether he was required, given his function as a rigger, to verify the information received from the crane operator. In the parlance adopted by the Code of Good Practice: Dismissal[7], was there a 'rule' imposing such an obligation on the employee? It was common cause that there was no written instruction or operating procedure to the effect that the employee was required to verify the information furnished to him by the crane operator. In the review proceedings, the appellant had sought to locate the source of the obligation for which it contended in the employee's skill, qualifications and experience, and the employee's training in particular unit standards that the appellant submitted was applicable.

[27] As I have indicated, the Labour Court found that the arbitrator had considered the relevant evidence and not unreasonably rejected the appellant's contentions. When pressed in the hearing before us on the source of any obligation by the employee to verify the crane operator's load chart, the appellant's representative confirmed that

[6] Ibid at para 13.
[7] Schedule 8 of the LRA.

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there was no written instruction in terms of which the employee was obliged to verify the correctness of the load chart. He referred us to the lifting and cranage procedure dated March 2016, and especially paragraph 5, which provides that the authorised rigger performing the lifting task must draw and inspect all the required lifting equipment from the rigging store. We were also referred to the Code of Practice dated April 2017. None of these sources disclose a direct or even indirect obligation by a rigger to verify a load chart presented by a crane operator.

[28] The appellant's representative further appealed to a general duty not to act in a negligent manner and submitted that, ultimately, the true gravamen of the appellant's complaint is that the employee failed to perform his duties at the level that his skill set required. This was not the case made out by the appellant at the arbitration hearing. The arbitrator made clear that to sustain a finding of negligence in the form of a failure to verify the information submitted to him by the crane operator, it was necessary for the appellant to lead evidence that was directly concerned with the source of the obligation for which the appellant contended. The appellant's representative failed to heed that caution. There may well have been a case to be made against the appellant, but the fact of the matter remains that it was never clearly articulated. The arbitrator considered the evidence before him and reached a decision. Whether that decision is correct on the available evidence is not the test that the Labour Court is required to apply. The Labour Court's decision that the arbitrator came to a conclusion that fell within the band of decisions to which a reasonable decision-maker could come cannot be faulted. It certainly cannot be said that the arbitrator's finding was untenable. The Labour Court was correct to dismiss the review application, and the appeal must fail.

<u>Costs</u>

[29] The rule applicable in this Court is that costs do not necessarily follow the result and are awarded only in exceptional circumstances. In the present instance, there are no exceptional circumstances. The existing collective bargaining relationship between the parties is a factor that mitigates against a costs order. For the purposes of section

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179 (1) of the LRA, the requirements of the law and fairness are best met by each party bearing its own costs.

[30] I make the following order:

Order

1. The appeal is dismissed.

André van Niekerk

Judge of the Labour Appeal Court

Nkuta-Nkotwana JA and Sutherland AJA concur.

APPEARANCES:

For The Appellant: Mr G Allsop, Pinsent Masons South Africa Inc

For The First and Second Respondents: Adv K Phuroe

Instructed by: Seleka Attorneys Inc.

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