



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR706/23

In the matter between:

SIBANYE GOLD (PROPRIETARY) LIMITED Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION** First Respondent

SESELE, L, N.O Second Respondent

SOLIDARITY OBO NELL, JHT Third Respondent

Heard: 3 July 2025

Delivered: 14 August 2025

(This judgment is handed down electronically by circulation to the parties' through their legal representatives by email, publication on the Labour Court website and released to SAFLI. The date in which the judgment is delivered is deemed to be 14 August 2025).

JUDGMENT

VENTER, AJ

Introduction

[1] On 3 December 2021, there was a Perfect Storm at the 27 Decline (the Decline).

[2] There was an unusual combination of unpredictable events that led to a catastrophic accident that resulted in the death of Frank Swart (Swart), Mr Alfred Sicelo Ngalo (Ngalo), a rock drill operator and Mrs Mabohlokoa Tsoafo (Tsoafo), a pump attendant.¹

[3] Mr Nell, the mine overseer who held a legal appointment and was responsible for the Decline, became the scapegoat for the unauthorised actions of others within his area of responsibility. None of the other persons involved in the incident were charged.² The findings of the investigation point to various other causes, none being Nell's conduct.³

[4] The unusual combination of unpredictable events that led to the catastrophic accident, which were largely common cause and undisputed in the arbitration, was the following:

¹ The unpredictability of the events was described by Nell in his evidence-in-chief as follows: "*MR NELL: But in this case as well while we are on that point, the miner did, after he was informed by the driver that they have completed loading he can now enter, the miner did exactly that. He entered, he made the workplace safe, he declared it safe for him to continue with his normal work. He did that. He did not, the thing that went wrong is neither him nor nobody expected the artisans to go to the workshop to ask for the LHD to be used to transport the oxygen bottle down the decline. None of us expected that. At the point of the time that when the miner was in the decline doing what he was supposed to do he did follow all the rules. The thing that happened is an unauthorized person took it upon himself to take the LHD in the workshop and drove down the decline knowing that....*", transcript 415, line 15 to 416, line 2.

² Transcript, pp 491, lines 1 – 3.

³ Documentary Bundle, pp 161.

4.1 The Load Haul Dump (the LHD), a large earth-moving vehicle, operates daily in the Decline between the hours of 05h00 to 09h00 to clean the spillage at the bottom of the shaft.⁴

4.2 On the morning of 3 December 2021, the licenced operator of the LHD, Mqobi (Mqobi), reported in his checklist that the LHD would not start, and he left the Decline after getting permission from the foreman, Dean Barkley (Barkley).⁵ Mqobi left the LHD at the workshop for the mechanic, Swart, to fix.⁶

4.3 Nell was not aware that the licensed operator of the LHD, Mqobi had left the Decline that morning.⁷

4.4 There was a discussion that morning among the secondary support crew that the LHD would not operate in the Decline that day.⁸

4.5 Nell was not aware of this discussion that the LHD would not operate that day.⁹

4.6 The secondary support team proceeded to the Decline that morning after Mqobi had already knocked off, and in fact encountered Mqobi at the lift on his way out of the Decline.¹⁰

4.7 On their arrival at the Decline, the secondary support team found the LHD operating in the Decline.¹¹

⁴ Transcript, pp 164, 318, 319, 332 and 368. The LHD is 4 meters long, 2.8 meters wide, 1.4 meters high and takes up almost the entire area, with little room between the wall of the shaft and the LHD. Transcript, pp 445 to 447. The importance of this daily task was highlighted by Makhwanazi, the vice president of the Mine, transcript, pp 318 - 319 as well as Nell, transcript, pp 393, which Nell understood to be his responsibility and priority, transcript, pp 398 and pp 407, the loading of the spillage was "*daily planned work*".

⁵ Transcript, pp 482.

⁶ Transcript, pp 395 – 396.

⁷ Transcript, pp 372 and pp 482 - 483.

⁸ Transcript, pp 99 – 100.

⁹ Transcript, pp 455.

¹⁰ Transcript, pp 99 – 100.

¹¹ This was the version of Phalatse, who did not in his evidence-in-chief distinguish between the First and Second Incidents.

4.8 Swart, a diesel mechanic, not licensed and not authorised to operate the LHD, took it upon himself that morning to operate the LHD to load the spillage.

4.9 Nell was not aware that Swart was operating the LHD that morning.¹²

4.10 On noticing that the LHD was operating in the Decline, Phalatse, the miner of the secondary support team, contacted Vincent Phahlane (Phahlane), the mine overseer of the secondary support team, who was on the surface.¹³ Phalatse approached Nell in his office, who was also on surface, and informed Nell that the secondary support team had not started drilling yet as the LHD was still operating in the Decline¹⁴.

4.11 Nell, not aware that the LHD was being operated by Swart who was unlicensed and not authorised, under the impression that the LHD was being operated by the licensed driver, Mqobi, and not aware that the secondary support team were in the Decline at the time, contacted the miner, Phalatse and informed Phalatse that the secondary support team should allow the LHD to complete its daily task of loading the spillage and that while the LHD operates, the secondary support team should stay safe and stay clear of the Decline.¹⁵

4.12 Nell's evidence was as follows:

'MR NELL: The reason I allowed the LHD to be operated when I was in discussion with Mr Nayo was solely based on the information that I had at the time. Starting from the morning I was not informed that there was a discussion underground. I was not informed by anybody of the people that had the discussion underground that the LHD will not be operated. I was not informed

¹² Transcript, pp 377. The fact that Swart was not licensed meant he was not trained in the operation of the LHD and thus unaware of the emergency procedures to be applied in the event of a run away. The operators are trained, in the case of a brake failure, to steer the LHD into the wall to stop its downward path. As Swart was not trained to do so, he did not apply these emergency procedures and failed to stop the LHD before running into Ngalo and Tsoafo. Transcript, pp 419, to 421.

¹³ Transcript, pp 101

¹⁴ Transcript, pp 368, 369, pp 415 - 416. Phahlane was not called to give evidence on this discussion with Nell. Nell's version was thus unchallenged.

¹⁵ Transcript, pp 469 – 471, Nell's evidence. This evidence is consistent with the documentary evidence before the commissioner, pp 63, section 11.5 Injury Investigation Report.

that the LHD had a problem. I definitely was not informed that the LHD driver, the appointed driver has got permission to come out of the mine.

APPLICANT REP: Just assist us there, what is the driver's name?

MR NELL: Mr Mqobi. So when I spoke to the miner, Mr Nayo the information that he gave me was that he could not start working yet. The LHD is operating in the decline. He is operational in the decline. So to me that means that the LHD is already operating before he phoned me, so currently as we speak the LHD is operational, he is operating in the decline. Therefore, my decision to Mr Nayo then you stay clear of the decline, you take your people, you ensure that they are safe and you allow for the LHD to operate in that decline.

If at any stage during that morning I was informed otherwise I would have acted differently. I would have given different instructions. Even when Mr Nayo phoned me, I spoke to the Mr Nayo the miner underground, he was part of the decision making. If I was informed by him at the time of the telephone communication that there were other arrangements made underground, I surely would have given other instructions. But based on the information that I had I made a decision that at that point and time I thought best for that LHD to continue to operate to clean the shaft bottom as per requirement. I have put in place all the necessary steps too ensure that while that LHD is operating in the decline people are safeguarded. There is no people in that decline and then also as you can see through the evidence or through the paperwork of investigations on the mine that during that time of operation nobody got injured. Nobody was in the decline, they were all kept out of the decline by the responsible people underground.

I was sitting in the office on surface. I did not have eyes that could see through ground 800 metres to go and see for myself what is happening there. The information I had was from the people underground at the working place and based on that I made a clear decision and I gave clear instructions that this is still the time for the LHD to operate, you are in fact telling me that the LHD is still operating and then you have not started working yet and therefore I said, allow the LHD to operate'¹⁶

¹⁶ Transcript, pp 469, line 17 to pp 471, line 13. My emphasis.

4.13 Nell, at the time of the phone call, did not know the whereabouts of the secondary support team, i.e whether they were in the Decline or cubby¹⁷ or elsewhere.¹⁸

4.14 The secondary support team, who were in the cubby at the time of the phone call, obeyed the instruction of Nell to stay safe and stayed in the cubby while the LHD was operating in the Decline, with no incident. The secondary support team remained safe.¹⁹

4.15 The operation of the LHD in the Decline while the secondary support team were in the Decline was understood by the parties at the arbitration to be the "First Incident".

4.16 The LHD completed its loading, and Swart told the secondary support team that he had finished loading and that the crew can start working in the Decline.²⁰

4.17 The secondary support team proceeded into the Decline to commence work, however, there was an issue with the compressed air, and one of the crew members of the secondary support team went up the Decline to investigate. This crew member saw the LHD parked in the workshop.²¹

4.18 Phalatse, after it was reported to him that the LHD had finished loading, declared the workplace safe.²² The secondary support team commenced working in the Decline.

4.19 There was no further communication with Nell.²³

4.20 While working in the Decline, a Mr Janse van Rensburg and a boilermaker assistant, Lekeklane, who were working on the staircase with a Mr Pienaar, had to replenish an oxygen cylinder. Mr Pienaar and Lekeklane proceeded up the Decline past the secondary support team drilling to get a

¹⁷ Transcript. pp 104 and 105. The cubby is a place within the Decline where workers can escape to when the LHD moves into the Decline, it is a safe place, transcript, pp 103 and pp 412. There was a prior incident and the cubby was no longer regarded as a safe space.

¹⁸ Transcript, pp 512 and pp 516.

¹⁹ Phahlane and Phalatsi, on Nell's version should have withdrawn the crew alternatively the crew should not have gone into the Decline while the LHD was operating.

²⁰ Transcript 140 and 141, 197 and 462.

²¹ Transcript 140, 141 and 197.

²² Transcript, pp 144 and 174.

²³ Transcript, pp 145 and 190.

new oxygen cylinder. Instead of taking the oxygen cylinder down the Decline on foot, they asked Swart to transport it down the Decline with the LHD whilst knowing about the secondary support team working in the Decline.²⁴ This conduct by Mr Pienaar, the boilermaker assistant and Swart was unauthorised and contrary to the safety rules.

4.21 Swart, unlicensed and unauthorised, agreed to transport the oxygen cylinder down the Decline with the LHD, in contravention of the special instruction not to operate the LHD while pedestrians are in the Decline.²⁵

4.22 Nell was not aware of Mr Pienaar and the boilermaker assistant's request to Swart. Nell was not aware that Swart had agreed to transport the oxygen cylinder down the Decline with the LHD, which he was unlicensed and unauthorised to operate.²⁶

4.23 Unbeknownst to Swart, the brakes of the LHD were faulty. Swart, the mechanic who, prior to operating the LHD, had worked on the LHD, had swapped the hydraulic hoses around, and the parking brake was not working.²⁷

4.24 What happened next is unthinkable. The LHD proceeded down the Decline with a faulty parking brake. Swart, not trained in emergency procedures, did not follow the emergency rules, with the result that the LHD continued down the Decline. The secondary support team attempted to run to safety; however, Ngalo and Tsoafo were struck and killed. Swart was ejected from the LHD and later succumbed to his injuries.

4.25 The fatal accident was understood by the parties to be the "Second Incident".

[5] Nell, subsequent to the fatal incident, was charged, found guilty and dismissed for the following offence:

'Conduct which endangers the lives of other employees and/or neglect of duties in that:

²⁴ Transcript, pp 376 and pp 463.

²⁵ Transcript, pp 464.

²⁶ Transcript, pp 456.

²⁷ Transcript, pp 306, 307 and pp 473.

1. On 3 December 2021 at about 9h00 am, you gave permission for the LHD to operate in a decline while you had full knowledge that the Secondary Support crew was also working in the same area.

[Hereinafter referred to as Charge One].

2. Failure to ensure that the Secondary Crew members go through on the job induction on operating procedures before commencing work on the decline on/or about 3 December 2021.²⁸

[Hereinafter referred to as Charge Two].

The Award

[6] The commissioner, on the evidence before him, in respect of Charge One, found that:

6.1 Swart was on a “*frolic of his own*” when he operated the LHD.²⁹

6.2 Nell was not aware that Swart was operating the LHD when he instructed the secondary support team to stay safe.³⁰

6.3 The secondary support team was safe, and there was no incident.³¹

6.4 Swart was on a frolic of his own when he transported the oxygen cylinder with the LHD, particularly where he had told the secondary support team that he had completed the loading.³²

[7] The commissioner concluded in regard to Charge One that:

‘The first incident of using the LHD to load two scoops was not rationally connected to the second incident of loading the gas bottle.’³³

²⁸ Documentary bundle, pp 10. My emphasis.

²⁹ Pleadings, FA, Award, pp 31, para 62.

³⁰ Pleadings, FA, Award, pp 31, para 62.

³¹ Pleadings, FA, Award, pp 31, para 62.

³² Pleadings, FA, Award, pp 31, para 62.

³³ Pleadings, FA, Award, pp 31, para 62. It appears from the transcript at page 465, line 21 that the Commissioner during Nell’s evidence in chief was grappling with Nell’s accountability for the incident which led to the fatalities.

[8] The commissioner, on considering the appropriate remedy, further concluded as follows:

'The Applicant argued for reinstatement. The evidence for the Respondent was based on the fact that the Applicant did not stop LHD during 1 continuous operation which resulted in fatalities. I have already distinguished between the first incidence and the second incident. The Applicant should not been dismissed for the first incident of loading. There is therefore no merit in the contention that the trust relationship was broken'.³⁴

[9] In regard to Charge Two, the commissioner found that:

9.1 The secondary support crew were shown the workplace.

9.2 The secondary support crew conducted planning and a risk assessment and identified that the LHD operates daily in the Decline.

9.3 The secondary support crew members were trained in safety, and prior to working, declared the workplace safe.

[10] After these findings of fact, the Commissioner found Nell not guilty of Charge Two, to quote the Commissioner:

'My finding is that this charge against the Applicant is without merit.'³⁵

The review test

[11] The review test is trite.

[12] For purposes of completeness, I will quote from the Labour Appeal Court's judgment in *Makuleni v Standard Bank of SA Ltd & others*³⁶ where the review test was restated as follows:

'The test for reviewing and setting aside an award of the CCMA is whether the decision reached by the commissioner is one that no reasonable person could have reached. The proposition has been articulated so often that it is now

³⁴ Award, pp 31, para 64. My emphasis.

³⁵ Pleadings, FA, Award, pp 31, para 63.

³⁶ (2023) 44 ILJ 1005 (LAC); [2023] 4 BLLR 283 (LAC) at paras 2 to 4.

trite. Nonetheless, this case is an example of the test being misapplied, and the Labour Court being misled into treating the case for a review as if it were an appeal. In our view, the Labour Court was in error to have set the award aside. It is therefore appropriate to revisit the leading authorities in order to set out the essentials of the review test.

The critical approach to reviews that turn on 'unreasonableness' was articulated by Murphy AJA in *Head of Department of Education v Mofokeng & others*. The significant passages are emphasised:

'[30] The failure by/an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal (the SCA) in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* and this court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.

[31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of interrelated questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in s 6 of the Promotion of Administrative Justice Act (PAJA); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously, etc. The court must nonetheless still consider whether apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in

Herholdt, the arbitrator must not misconceive the enquiry or undertake the enquiry in a misconceived manner. There must be a fair trial of the issues.

[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted s 145 of the LRA, confining review to “defects” as defined in s 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something, more is required. To repeat: flaws in the reasoning of the arbitrator evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the

determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.'

The import of these remarks demands reflection in order to digest the essence of the exercise that a commissioner embarks upon. 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 untenable. Only if the conclusion is untenable is a review and setting aside warranted. (Own emphasis).'

Grounds of review

[13] The applicant's grounds of review³⁷ are in essence *inter alia* that:

13.1 The commissioner misconstrued the nature of the enquiry in that any reasonable commissioner would have considered whether a reasonable mine overseer would have foreseen that operating the LHD *while the secondary support crew were in the Decline could have resulted in harm*.³⁸

13.2 The commissioner committed a gross irregularity in that he failed to have regard to material evidence and had he done so he would have found that Nell was guilty of Charge One as he failed to take steps to stop the LHD from operating, had he done so, the driver would have been identified as Swart, and would have been instructed not to go *back down* the Decline.³⁹

³⁷ At the hearing of the application, the applicant indicated that it will not pursue the grounds of review relating to the conduct of the commissioner during the arbitration proceedings.

³⁸ Pleadings, FA, pp 14, para 29, SA, pp 35 – 40. My emphasis.

³⁹ Pleadings, FA, pp 15 -17, para 33 -34. My emphasis. Here the applicant conflates the First Incident and Second Incident by contending that had Nell stopped the LHD from operating in the First Incident, the Second Incident would not have happened. This is opposite to the applicant's case that the Second Incident is immaterial.

13.3 The commissioner failed to consider material evidence in considering Charge Two, and had he done so, he would have concluded that Nell failed to induct the secondary support crew before working on the Decline on 3 December 2021.⁴⁰

13.4 The applicant, in its supplementary affidavit, refers to the evidence relating to Swart not being authorised as immaterial.⁴¹

13.5 The applicant also contends that the evidence that the secondary support crew were safe while Nell knew the LHD was doing its daily task of loading the spillage, as immaterial, as the test for negligence is whether the harm is foreseeable.⁴²

13.6 The applicant further contends that the commissioner's distinction between the two incidents is irrational, as had Nell taken steps in the First Incident, the Second Incident would not have happened.⁴³

[14] Nell's opposition to the review can be summarised as follows:

14.1 The commissioner found Nell not guilty of the charges, and this finding was reasonable.⁴⁴

14.2 The commissioner correctly analysed the evidence and arrived at a reasonable outcome.⁴⁵

Is there a demonstration of unreasonableness

[15] In respect of Charge One, the high water mark of the applicant's case is that:

15.1 The LHD should not have been in the Decline while people were working.

⁴⁰ Pleadings, FA, pp 17, paras 35-37.

⁴¹ Pleadings, SA, pp 40, para 7.5. This is in line with its contention that the Second Incident is immaterial.

⁴² Pleadings, SA, pp 42, para 7.5.2. The applicant's contention is that the commissioner should have found that Nell could have foreseen harm to the secondary support crew by allowing the LHD to operate.

⁴³ Pleadings, SA, pp 42, para 7.5.3. This is yet again a conflation between the First Incident and the Second Incident contrary to the applicant's own contentions.

⁴⁴ Pleadings, AA, para 2.33 and 2.34.

⁴⁵ Pleadings, AA, para 2.40, 2.56, 2.69, 2.71,

15.2. Nell had a 'golden opportunity' to stop the LHD from operating when Phalatse phoned him.

15.3 Nell did not stop the LHD from operating, thus endangering employees' lives.⁴⁶

[16] It appears from the award that the commissioner found Nell not guilty of the offence of conduct which endangered the lives of other employees, i.e. Charge One.⁴⁷

[17] Is this decision of the commissioner rationally connected to the evidence and reasonable?

[18] The applicant in one breath contends that the Second Incident is immaterial, but in another argues that had Nell stopped the LHD from operating, the Second Incident would not have occurred.

[19] It is not clear whether the applicant is contending that:

19.1. Nell, in failing to stop the LHD from operating, is responsible for the Second Incident, or;

19.2. Nell should have foreseen that the Second Incident could have occurred when he failed to instruct the LHD to cease operating in the Decline; or

19.3. Nell, by not stopping the LHD from operating when he received the phone call from Phalatsi, endangered the lives of others.

[20] The applicant, in my view, blows hot and cold.

[21] What is clear, however, is that Nell was not charged for any misconduct relating to the Second Incident and thus I understand the applicant's argument to be the latter, i.e. that Nell endangered the lives of others when he allowed the LHD to

⁴⁶ Transcript, Mkhwanazi, pp 244 and 249 -250.

⁴⁷ The commissioner found that Nell should not have been dismissed for the First Incident. While the sentence of the commissioner may not be the model of clarity, the reasoning of the commissioner as appears from the award as a whole is that Nell was not guilty of Charge One.

operate *while knowing that the secondary support crew where* in the Decline at the time.

[22] This much is confirmed by the applicant itself in the arbitration proceedings.

[23] In the arbitration proceedings, the applicant pinned its colours to the First Incident with its representative, Mr Makwe, contending as follows:

'RESPONDENT REP: No Commissioner. Commissioner my issue was...

COMMISSIONER: Your case is...

RESPONDENT REP: At nine o'clock, not the second instance, meaning the first instance. Our case is at the first instance. The second instance would probably be an aggravating, but that is not where our main case is. Our main case is which I have said it over and over. When the applicant said it is fine, let them continue. During that first instance communication he injured, he actually put people's life [sic] at risk and that is where we stand.'⁴⁸

[24] Mkwanazi, the applicant's vice president, when examined on the nature of Charge One, testified:

'This is also endangering people's lives' We are not talking about the incident that happened when it ran away, we are talking about that.'⁴⁹

[25] In fact, Mkhwanazi, in his evidence-in-chief, appeared confused as to the nature of the charge and was unable to explain what the applicant was blaming Nell for:

'RESPONDENT REP: Why should then Sibanye blame him for something that happened without his knowledge? What will be your response?

MR MKHWANAZI: I do know, if maybe you can clarify for me, we are blaming him for what, what are we blaming him for?

⁴⁸ Transcript, pp 523, lines 14 - 24. Mkhwananzi confirmed in his evidence in chief that Nell was "blamed" for the First Incident.

⁴⁹ Transcript, pp 243, lines 24 - 26.

RESPONDENT REP: He is alleging that there was first operation of a LHD which he did not do. According to you he had an opportunity to do so. The second aspect after the LHD was parked.’⁵⁰

[26] I agree with the applicant that by pinning the colours to the First Incident, all the evidence of the events leading to the Second Incident becomes irrelevant.

[27] The commissioner’s task was accordingly to evaluate the evidence to determine whether the applicant had led sufficient evidence to show, on a balance of probabilities, that Nell was guilty of Charge One, i.e allowing the LHD to do its daily task of loading the spillage while he was fully aware that the secondary support team was in the Decline at that time.

[28] The commissioner was to conduct such an evaluation without considering the evidence relating to the Second Incident. His conclusion that the two incidents were not rationally connected was rational and reasonable and in line with the applicant’s own case. The applicant must thus be understood as having led all the evidence on the Second Incident as aggravation for the dismissal. For the applicant to contend otherwise would be nonsensical, as a large part of the evidence led at the arbitration related to the Second Incident.

[29] The case before the commissioner was as simple as having to determine whether the applicant had led sufficient evidence to show that Nell was guilty of endangering lives by giving *permission for the LHD to operate while he had full knowledge that the secondary support crew was also working in the same area.*⁵¹

[30] If all the evidence on the Second Incident is disregarded as immaterial, as per the applicant’s contention, the evidence before the commissioner was that:

⁵⁰ Transcript, pp 242, lines 18 - 26.

⁵¹ Own emphasis.

30.1 Nell was informed by Phahlane, the mine overseer responsible for the secondary support crew that the team had not started working yet as the LHD was *operating* in the Decline.⁵²

30.2 At the time of this discussion, it was made clear to Nell that the secondary support crew had *not* started working yet. In fact, Nell was not even aware that the secondary support team were in the Decline at the time.⁵³

30.3 The LHD operates daily between the hours of 5h00 to 9h00 to load the spillage, so it was not unusual that the LHD was operating at that time.⁵⁴

30.4 Nell phoned Phalatsi, who informed Nell that the secondary support team had not entered the Decline as the LHD was operating.⁵⁵

30.5 Nell told Phalatsi to stay clear of the Decline and stay safe.⁵⁶

30.6 Nell was not aware that at that time the secondary support crew were in the Decline.

30.7 Nell was not aware that Mqobi had knocked off and that Swart was operating the LHD at the time.

[31] If regard is had to this evidence, the commissioner's finding that Nell was not guilty of giving permission for the LHD to operate *while he had full knowledge that the secondary support crew were also working in the area*, is connected to the evidence and is reasonable.

[32] Under the circumstances, Nell could not have foreseen harm as the secondary support crew, to his knowledge at that time, was not in the Decline while the LHD was being operated, which was a usual daily activity.

⁵² Transcript, Nell, pp 388, 389 and 393. Phahlane could have withdrawn his team from the Decline but did not, transcript, pp 454. "*Operating*" being the operative word. If the secondary support crew found the LHD operating in the Decline, why did they enter the Decline, a question that is unanswered by Phalatsi and which arises on Phalatsi's own version.

⁵³ Phahlane was not called by the applicant and Nell's evidence as to this discussion was unchallenged.

⁵⁴ This was common sense.

⁵⁵ Transcript, pp 369.

⁵⁶ Transcript, pp 369, pp 412. Phalatsi, in his evidence, transcript pp 116, does not distinguish between the First and Second Incident and his version is thus difficult to comprehend.

[33] The grounds of review as to the findings by the Commissioner in respect of Charge One have no merit.

[34] On Charge Two, the high-water mark of the applicant's case is that Nell failed to inform the secondary support crew of the special instruction.⁵⁷

[35] The evidence before the Commissioner was that:

35.1 The secondary support crew has its own line of responsibility/accountability with a miner and mine overseer who hold legal appointments and who are responsible for the safety of the crew.⁵⁸

35.2 On 15 November 2021, planning was conducted for the work in the Decline.⁵⁹

35.3 On 23 November 2021, the secondary support crew conducted a risk assessment of the workplace – the Decline and identified that the LHD operated in the Decline daily.⁶⁰

35.4 Prior to the secondary support crew commencing their work, there was a site visit where the operation of the LHD was discussed.⁶¹

36.5 There is a sign at the top of the Decline that no movement is allowed while the LHD is operating.⁶²

35.6 The secondary support crew are trained in safety and are experienced miners.⁶³

35.7 The special instruction was drafted for Nell's team and was not intended for the secondary support crew.⁶⁴

⁵⁷ Documentary bundle, pp 36.

⁵⁸ Transcript, pp 160, 166.

⁵⁹ Transcript, pp 51 – 57, 224, pp 332, 334, 335, 336, pp 426 and 430, pp 540.

⁶⁰ Transcript, pp 118, pp 162, pp 239, pp 276 – 277, documentary bundle, pp 10, transcript, pp 329, 331, pp 402. 506, documentary bundle, pp 49.

⁶¹ Transcript, pp 27, pp 364 and 365 and 400, 401.

⁶² Transcript, pp 61, pp 509.

⁶³ Transcript, pp 44, 45, 570 – 571.

⁶⁴ Transcript, pp 417 – 418, pp 505 documentary record, pp 37.

[36] The Commissioner's finding that Nell was not guilty of Charge Two is connected to the evidence and is reasonable.

[37] Accordingly, I make the following order:

Order

1. The review application is dismissed.
2. There is no order as to cost.

D Venter

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicants: Adv R Itzkin

Instructed by: Solomon Holmes Attorneys Inc

For the third respondent: Karla Endres of Solidarity Trade Union