



THE LABOUR COURT SOUTH AFRICA, DURBAN

Not Reportable

Case No: D1141/19

In the matter between:

TRANSNET SOC LTD

Applicant

And

PRANESH MAHARAJ

First Respondent

TRANSNET BARGAINING COUNCIL

Second Respondent

VEESLA SONI N.O.

Heard: 12 June 2025

Delivered: 23 October 2025

Summary : Opposed Review Application – Review Application to set aside the Award of the Third Respondent, as Arbitrator. Arbitrator found dismissal of the First Respondent substantively unfair. Ordered reinstatement and 12 months backpay and benefits. Arbitration Award found to be reasonable and no reason for interference justified

Revival Application - necessary as Review deemed to have lapsed through late filing of Record. Review application reinstated and the late filing of the transcribed record condoned

Rule 11 application for dismissal of Review – First Respondent application dismissed.

Costs – no order as to costs.

JUDGMENT

LAWRENCE, AJ

Introduction

- [1] This is a review application that has been brought by the Applicant in terms of section 145 of the Labour Relations¹ (LRA). The Third Respondent (the arbitrator) issued an award dated 21 June 2019. Same was delivered to the parties on or about 4 July 2019.
- [2] In terms of that award, the arbitrator ordered the Applicant to reinstate the First Respondent into its employ, with backpay. In awarding backpay, the arbitrator limited this to remuneration and benefits capped at a period of one year, in the sum of R452,093.52.
- [3] The Applicant launched the review application in the six-week period anticipated in section 145(1)(a) of the LRA. On 5 November 2019, the Applicant's attorneys

¹ Act 66 of 1995.

received a notice, in terms rule 7(A)(5) of the Rules for the Conduct of Proceedings in the Labour Court² (the rules), from the Second Respondent.

- [4] From the revival application filed on behalf of the Applicant, it was contended in the founding affidavit, that the transcribed record was received from the transcribers on 29 November 2019.
- [5] On 13 December 2019, the Applicant delivered its notice in terms of rule 7(A)(8)(b) of the rules, standing by its notice of motion and founding affidavit that had been filed initiating the review application. The record was curiously only filed on 9 March 2020 despite it having been received by the Applicant's attorneys of record as far back as November 2019.
- [6] On 15 July 2020, the First Respondent filed his answering affidavit to the review application and did not raise issue with the lateness of the record. The review application was set down in this court on 9 June 2022, as an opposed motion.
- [7] I struck the matter from the roll, due to it being deemed to have been withdrawn and no application had been brought by the Applicant to reinstate the review. It would appear that neither of the parties were aware of the fact that the record, which had been filed on 9 March 2020, was some 25 days out of time.
- [8] The first time this issue emerged was when the First Respondent, though its attorneys, filed his heads of argument in the matter, and contended that the record had not been timeously filed and the review was thus deemed to have lapsed.
- [9] The Applicant, in its application to have the review application revived, contended that immediately upon its attorneys ascertaining that there had been a delay in respect of the filing of the record, undertook an investigation. In terms of this investigation, it emerged that the Applicant's attorneys of record had been responsible for the delay in the record being timeously filed.

² Now repealed and replaced with the Rules for the Conduct of Proceedings in the Labour Court. Effective 17 July 2024.

- [10] The exact cause of the delay is unknown. From the explanatory affidavit filed on behalf of the Applicant, it would appear that this was on account of the fact that the attorney seized with the matter, had left the employ of the Applicant's attorneys and had since emigrated. Although no confirmatory affidavit was obtained from Mr Chuma Vabaza, the attorney in question, it was contended that the new attorney, Ms Skosana, had contacted Mr Vabaza in Germany and he recalled the matter but bore no independent recollection of why the record had not been served.
- [11] The contention ultimately made in relation to the delay is that it appeared that this may have been on account of an administrative oversight. Reference was made to the contents of the attorney's file, and it was contended there was no indication as to why the record was not timeously filed. On the face of it there appeared to be no impediment to this and the only inference to be drawn was that this happened through sheer oversight.
- [12] It was also contended that the delay in filing the record was not significant and had not materially delayed the review application. In addition to this, it was submitted in argument that the explanation for the delay was reasonable and that the interests of justice favoured condonation being granted and the review application being revived.
- [13] In response to this, the First Respondent contended that the explanation given by the Applicant's attorneys of an "*administrative error*" was not reasonable and that in the absence of a full and reasonable explanation, the merits of the matter are irrelevant, and condonation should not be granted for the delay.
- [14] Shortly before the Applicant lodged its revival application, the First Respondent had brought an application in terms of rule 11 of the rules for the dismissal of the matter. All three matters were set down before this Court for determination on 12 June 2025.

- [15] Both the representatives, for the Applicant and First Respondent, indicated that they were inclined to having all issues argued and disposed of in the hearing set down on 12 June 2025.

The revival application and rule 11 application

- [16] The record in this matter has been filed some 25 days late, which the First Respondent argues constitutes a substantial delay.
- [17] What is however clear is that the Applicant's conduct cannot be faulted in relation to this delay. From the sequence of facts that were placed before this Court on affidavit, prior to 9 March 2020 the Applicant appears to have acted with the necessary expedition in prosecuting its review application.
- [18] As far as the actual reason for why the record was delayed, the First Respondent is correct that this explanation is fairly vague and lacking in detail. Of further concern is the fact that Mr Vabaza has not deposed to a confirmatory affidavit in respect of his version before this court.
- [19] Notwithstanding this, what does become apparent from Ms Skosana's affidavit, though, is that Mr Vabaza appears to have emigrated and seemingly through inattention or oversight within the Applicant's attorneys' offices, the record was not filed timeously. The Applicant's attorneys have not been able to ascertain conclusively what actually led to the omission and they have therefore inferred that this was on account of an administrative oversight
- [20] Despite the failure to file an affidavit by Vabuza, the conclusion reached by the Applicant's present attorney does not appear to be unreasonable and for that purpose, this Court is satisfied that to the extent possible a reasonable explanation has been provided for the oversight and failure to file the record timeously.
- [21] As to the extent of the delay, while is fairly extensive it is abundantly clear that the Applicant has at all times remained interested in pursuing its review

application and apart from this incident, it has never shown any dilatory disposition or conduct in the manner in which it has gone about this matter.

- [22] When the matter was struck from the roll on 9 June 2020, the Applicant's attorneys acted with the necessary diligence in bringing the necessary revival application.
- [23] In the case of *E-Tradex (Pty) Ltd t/a Global Trade Solution v Finch and others*³, the Labour Appeal Court confirmed that a Review Application is akin to a condonation application and good cause must be shown before a review application is revived. A reasonable explanation has been provided for the delay, and this Court is satisfied that the interests of justice favour the Revival Application being granted.
- [24] Having regard to the aforesaid, the application brought by the First Respondent, in terms of rule 11 stands to be dismissed, with no order as to costs in respect of each of the motions brought by the respective parties.

The Review Application

- [25] The First Respondent was employed by the Applicant on 3 June 1996 and served in the position of Operations Supervisor – Lighthouses, Richards Bay, at the time of his dismissal.
- [26] On 24 July 2017, he was served with a notice to attend a disciplinary hearing and that hearing commenced on 25 August 2017 and was finalised on 7 September 2017 which was the same day that the First Respondent was dismissed.
- [27] The charges preferred against the First Respondent were briefly as follows:

“Charge 1 – Gross negligence:

- (1) between May 2015 and April 2017, you failed in your duty as Operations Supervisor of LNS Richards Bay, to monitor the maintenance of Gannet

³ (2022) 43 ILJ 2727 (LAC) at para 11.

Trailer with Registration Number CA771891 and/or to ensure that the vehicle repairs had been effected prior to its usage.

- (2) You then allowed the trailer to be used on 4 April 2017 when the vehicle was not roadworthy, resulting in the vehicle being impounded by the police and incurring financial costs.

Charge 2 – Dishonesty and gross negligence:

- (1) On 12 May 2017, you informed your manager, Mr Moodley, via email, that your department had executed two buoy changes involving the refurbishment of 19 buoys in the port of Richards Bay in the previous financial year, when instead only six buoys had been changed / refurbished during the last financial year.
- (2) You invoiced or caused to be invoiced, to the Harbour Master for the last financial year, 2016 / 2017, for services that were not rendered by your department relating to the following:-
 - refurbishment of buoys;
 - manufacture of day markers;
 - port traffic light maintenance;
 - other services listed as diverse work."

[28] The Applicant's key duties included:

28.1 upkeep, maintenance and overall operation of five lighthouses and the upkeep and maintenance of floating and fixed aids to navigation located in the port of Richards Bay;

28.2 supervision and coordination of maintenance and project activities for upkeep and establishment of facilities and equipment at the various lighthouses, project management and execution and third-party liaison;

28.3 ensuring the effective maintenance and correct functioning of operational equipment, grounds, buildings, equipment and associated infrastructure;

28.4 ensuring safety, security and housekeeping standards and compliance to corporate and other policies, procedures and guidelines; and

28.5 Managing the financial budget for the lighthouse's unit.⁴

[29] To achieve the key outputs of his job, the First Respondent was given the responsibility of managing the annual financial budget for the lighthouse unit, which the Applicant expected him to operate with utmost integrity and honesty.

[30] On 4 April 2017, it would appear that a truck, boat and trailer, owned by the Applicant and used by the First Respondent and his team for work purposes, was stopped at a routine traffic stop between Durban and Richards Bay. At the time in question, the trailer was being towed by a truck, belonging to the Applicant.

[31] The traffic officer noted that the braking system on the trailer was defective in that the handbrake was not working properly, and the number plate light was also not working.

[32] In the respective versions given by the witness, on behalf of the Applicant and the First Respondent, at the arbitration there is some dispute as to whether the trailer and boat were impounded by the traffic officer or whether the person operating the truck was simply precluded from removing it from the scene. In this regard, Mr Moodley who testified for the Applicant, contended that the trailer had been impounded, whereas the First Respondent vehemently denied this, saying that it had simply been precluded from leaving the scene on account of certain defects which related to the braking system and the number plate light. In any event, the boat and trailer were not allowed to leave under tow of the truck and ultimately had to be taken to Richards Bay on a lowbed truck which had to be

⁴ Index to arbitration record p 339.

procured by the Applicant from a specialist transport company at a cost of R20,691.00

- [33] It was contended by the Applicant, that the First Respondent was responsible for ensuring that the trailer was at all material times in a roadworthy condition and that he had been grossly negligent in executing his duties, as maintenance and repairs had not been effected on the trailer despite this being routinely required. In addition, the need for repairs had been flagged almost two years before the trailer had been stopped and it was alleged that the First Respondent had been remiss in not ensuring this was done and as such it had resulted in the trailer being impounded and financial costs being incurred by the Applicant in returning it to Richards Bay. Initiatives had been taken previously to send the trailer for repairs to an external service provider, but this was halted on account of the steep costs, and the intention was for this to be done internally or through Shop 24(a sister business of the Applicant). Mr Moodley was apparently aware of this.
- [34] As far as the second charge against the First Respondent was concerned, this essentially consisted of two parts. In relation to the first part, it was contended that he had informed his manager, Mr Moodley that his department had executed two buoy changes, involving the refurbishment of 19 buoys in the port of Richards Bay, whereas only six buoys had been refurbished during the 2016/2017-year period. To this end, the Harbour Master had apparently been financially charged for this maintenance but upon a perusal of the documentation from Shop 24 no invoices could be found to support the First Respondent's version that 19 buoys had been refurbished at the relevant time.
- [35] In the second part of Charge 2, it was contended that the First Respondent had fictitiously generated costs and invoiced the Harbour Master for work that had not been done. The objective for the First Respondent doing this, it was contended at arbitration, was to ensure that he had utilised his budget.
- [36] The First Respondent did not deny that, insofar as the issue of port traffic lights was concerned, these charges ought not to have been raised by him. In all other

respects, he denied that he had fabricated the expenditure amounts or overstated them. In his evidence, he also sought to suggest that there was a fair degree of latitude that had been afforded to him in relation to how he attributed his available budget to specific expense items. For example, in relation to the day markers he stated that “Chinese accounting” was permissible and remarked that this had in fact been alluded to by Mr Moodley when he testified for the Applicant at arbitration. In effect, this meant that money did not change hands but internal spend transactions for different divisions could be allocated under various headings with the blessing of the Harbour Master provided there was budget available for this.

[37] The Applicant only led one witness, namely Mr Moodley and the First Respondent gave evidence on his own account.

[38] It is apparent from the Award, that the Arbitrator considered the charges raised against the First Respondent and assessed these in relation to the evidence adduced by the Applicant to substantiate the charges.

[39] In deriving her finding that the dismissal of the First Respondent was substantively unfair, the Arbitrator notably alluded to the following:

39.1 the onus rested on the Applicant to establish that the dismissal of the First Respondent was substantively fair⁵.

39.2 that she is tasked to weigh up the evidence of all the witnesses and make a determination on probabilities based on the sufficiency of evidence and credibility of witnesses⁶.

39.3 in resolving disputes of fact, that emerge from conflicting versions, the approach endorsed in *Stellenbosch Farmers Winery Group Ltd and Another versus Martel et Cie and Others*⁷ was apposite.

⁵ Index to pleadings at para 26.

⁶ Index to pleadings: p 27, para 26.

⁷ 2003 (1) SA 11 (SCA).

- [40] After indicating the approach that she would take in dealing with this matter, the Arbitrator went on to essentially reject the version of the Applicant's witness, Mr Moodley, and she thus preferred the evidence of the First Respondent insofar as Charge 1 was concerned. In this regard, she noted, *inter alia*, that the Planner, who was on the same level as the First Respondent, was responsible for authorisations for repairs and maintenance as he was central to everything and would issue job cards to enable the department to proceed with the work.⁸
- [41] The Arbitrator further concluded that Charge 1 was a huge embellishment and overstatement as any follow-up required, on repairs that were needed to be done on any vehicle, was ultimately the responsibility of the Regional Manager, Mr Moodley, who himself appeared to have not done this for over a period of close on two years. She also found that in terms of the SAP system, Mr Moodley could have verified whether repairs had been done and that as the Arbitrator, she had difficulty in accepting how he could have been under the impression that repairs were effected when the trailer had made a number of trips to Durban and Mr Moodley was aware of this and had allowed it. In essence, she found that the First Respondent was not exclusively responsible for the state of repair of the trailer and the fact that certain maintenance/repair work may not have been undertaken in relation to it.
- [42] As far as Charge 2 was concerned, she concluded that the First Respondent had provided proof to the effect that at least 13 buoys had been placed at Shop 24 for refurbishment and that the Applicant could not gainsay or objectively prove that only six buoys had been refurbished. She noted that Mr Moodley had simply relied on his correlation of the paperwork, which informed his perception that the work had not been done. He had not, however, taken into account the possibility that the paperwork had not been properly done and processed by the Planner, and if that had been the case there would have been discordance.

⁸ Index to pleadings: p 30, para 30.

- [43] In relation to the second part of charge 2, she found that the amounts claimed by the First Respondent, from the Harbour Master, had occurred systematically over an extended period of months and with the stringent system of checks and balances available to Mr Moodley and the Harbour Master on a monthly basis. As such she observed that it was curious and unlikely that none of the alleged discrepancies had been discovered earlier.
- [44] In respect of the issue of charges raised by the First Respondent for port light maintenance, she accepted the explanation tendered by him, that this was an error and found that he had been transparent and candid about his failure in this regard. She noted, as well, that for an infraction of this nature, dismissal would not be an appropriate sanction.
- [45] In conclusion, the Arbitrator found that there was a dispute in the versions regarding the definition of “diverse work” and what costs could be attributed to this line item and rejected the Applicant’s version that the costs raised by the First Respondent under this head, as well as for other items listed in charge 2 (except for port light maintenance) were excessive, misrepresented or fictitious. She found that the First Respondent had consistently explained these costs raised for these items and was candid and clear about how he had approached dealing with his budget. On the other hand, the Applicant through the evidence of its solitary witness, Mr Moddley, had failed to discharge the onus of showing that the First Respondent had been dismissed for a fair reason.

Analysis

- [46] In essence, the Applicant contended that the arbitrator had committed a gross irregularity in the conduct of the arbitration proceedings and thus arrived at a conclusion which no reasonable decision maker could have reached on the evidence before her. This ground was raised in respect of the Arbitrator’s findings in relation to both Charge 1 and Charge 2.

[47] The test on review, to be applied by the Labour Court, has become fairly trite. In various courts, the content of assessing what is an “unreasonable award” has been dealt with on innumerable occasions over the years, as has the issue of what would constitute as a “gross irregularity” in the conduct of an arbitration proceeding.

[48] It is perhaps useful to refer to the decision of the Labour Appeal Court (LAC) in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*⁹, where the Court stated as follows:

“[14] Sidumo does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator. The court in Sidumo was at pains to state that arbitration awards made under the Labour Relations Act (LRA) continue to be determined in terms of s145 of the LRA but that the constitutional standard of reasonableness is “suffused” in the application of s145 of the LRA. This implies that an application for review sought on the grounds of misconduct, gross irregularity in the conduct of the arbitration proceedings, and/or excess of powers will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision-maker could come to on the available material.

[15] A ‘process-related review suggests an extended standard of review, one that admits the review of an award on the grounds of a failure by the arbitrator to take material facts into account, or by taking into accounts facts that are irrelevant, and the like. The emphasis here is on process

⁹ [2014] 1 BLLR 20 (LAC) at para 14 to 16.

and not result. Proponents of this view argue that where an arbitrator has committed a gross irregularity in the conduct of the arbitration as contemplated by s145(2), it remains open for the award to be reviewed and set aside irrespective of the fact that the decision arrived at by the arbitrator survives the Sidumo test. I disagree. What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by Sidumo. The gross irregularity is not a self-standing ground insulated from or standing independent of the Sidumo test. That being the case, it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard failure by the arbitrator to consider all or some of the issues albeit material as rendering the award liable to be set aside on the grounds of process-related review”

[49] The LAC further concluded at paragraph 16 as follows:

“[16] In short: A review court must ascertain whether the arbitrator considered the principle issue before him/her, evaluated the facts presented at the hearing and came to a conclusion, which was reasonable to justify the decision he/she arrived at.”

[50] The Applicant in its grounds of review was critical of a number of findings and conclusions which the Arbitrator in her analysis of the matter but having regard to the approach endorsed in Goldfields (*supra*) the question needs to be asked as to whether she considered the “*principle issue before her, evaluated the facts and came to a decision that falls within a band that a reasonable decision maker could come to*”.

[51] The arbitrator, undeniably, sets out in fairly extensive detail the background to the matter, recording the essential aspects of the evidence led by the Applicant’s only witness, Mr Moodley, as well as by the First Respondent.

[52] Prior to assessing that evidence, she sets out the approach that she is required to take as an arbitrator in dealing with onus, probabilities, conflicting evidence,

particularly where disputes of fact arise as is generally the case where each party only calls one witness.

- [53] She correctly asserts that the onus rests with the Applicant and then proceeds, in fairly exhaustive detail, to apply her mind to the versions that had been proffered by Mr Moodley and the First Respondent. In rejecting the version of Mr Moodley and preferring that of the Applicant, she offers reasons, which with respect, cannot be faulted as they are rationally connected with the facts and evidence that was placed before her.
- [54] In dealing with the contention that the First Respondent was guilty of gross misconduct by failing to maintain and repair the Gannett trailer, she undertakes a fairly detailed analysis of the relevant evidence that was placed before her, and this is apparent from paragraphs 29 and 30 of the Award.¹⁰
- [55] From an examination of paragraph 29 and 30 of the Award, it becomes apparent that there are two conflicting versions that emerge from the evidence provided by Mr Moodley of the Applicant and by the First Respondent.
- [56] She notes that Mr Moodley of the Applicant contended, for example, that the trailer was in an unroadworthy condition and in disrepair and that it was the responsibility of the First Respondent to effect the repairs as part of his duties but records as well as the concession by Mr Moodley that the Planner in the office was responsible for maintenance but the direction and the instruction had to be given via the First Respondent. In contrast, she notes the First Respondent's version, which is that the Planner was responsible for authorisations and was central to everything and would issue the job card to enable the department to proceed with work.
- [57] The conclusion that the Arbitrator thus reaches, at paragraph 34 of the Arbitration Award, is that charge 1 *"was exaggerated to the extent that it was made to appear that the First Respondent was completely negligent"* in the discharge of

¹⁰ Index to pleadings: at p 29 and 30, para 29 and 30.

his duties when in simple truth, the actual issue was that there were some repairs not effected to the trailer. She goes on to find that the trailer was randomly stopped at a roadblock and while it could not continue its journey to Richards Bay, this was purely on account of a faulty handbrake, which was not relevant while the trailer was being towed as it would be reliant on the trucks' braking system, and for a non-functioning number plate light, which was also not determinative as far as the roadworthy state of the trailer was concerned. In any event she finds that the Applicant had not convincingly controverted the evidence of the First Respondent that this repair/maintenance of the trailer was not his exclusive responsibility¹¹. The Arbitrator satisfactorily and rationally draws a causal connection between the evidence tendered at the arbitration, her assessment of it and the ultimate conclusion that she reaches, which is that the First Respondent was not culpable of Charge 1 and that the Applicant failed to discharge the onus of establishing gross negligence.

[58] As was correctly contended by Mr Van As, on behalf of the First Respondent, the LAC has held that the requirement for dismissal, based on negligence, is that the employee must have failed to exercise a standard of care that can reasonably be expected of him through conduct that caused loss or potential loss to the employer.¹² This as the Arbitrator found, was not established by the Applicant at the arbitration.

[59] As far as the second ground of review was concerned, similarly the Arbitrator, in considering whether the First Respondent was guilty of dishonesty in respect of charge 2, analysed the position at paragraph 45 of her Award.

[60] The Arbitrator also analysed the versions placed before her by Mr Moodley on behalf of the Applicant and the First Respondent, in respect of this charge, and this is apparent from paragraphs 37 to 45 of her Award¹³.

¹¹ Index to pleadings: p 31, para 34.

¹² *EOH Abantu (Pty) Ltd v CCMA and Others* [2019] 12 BLLR 1304 (LAC) at para 19.

¹³ Index to pleadings: pp 32 to 34.

- [61] Her analysis, shows a detailed assessment of Charge 2, in respect of both of its sub-components, namely Charge 2.1 and Charge 2.2.
- [62] In respect of Charge 2.1 - which relates to the contention by the Applicant that the First Respondent *"had informed his manager, Mr Moodley that he had executed two buoy changes involving the refurbishment of 19 Buoys, whereas this had only been in respect of six buoys"* - she sets out Mr Moodley's version and records as well the First Respondent's contrary version. It is clear from an examination of the Award and the Record that there are material divergences in the version proffered by Mr Moodley and that which was provided by the First Respondent.
- [63] Moreover, the Record quite clearly indicates that despite the Applicant contending that only six buoys had been refurbished during the 2016/2017 period, it was apparent from the documented evidence that at least 13 buoys had been refurbished by Shop 24. The Arbitrator also compellingly refers to the incomplete documentary evidence, adduced by the Applicant which did not show a complete picture and more importantly conflicted with the documentary information produced from Shop 24 which showed at least 13 buoys had been refurbished. She notes, as well the First Respondent's assertion that the Planner had probably not completed all the relevant documentation, which would have accounted for additional buoys, which had been refurbished and why there appeared to be unexplained discrepancies. In this regard, the Arbitrator's Award cannot be assailed, particularly her finding that there was no evidence of dishonesty or gross negligence established against the First Respondent in relation to correspondence which he had sent to Mr Moodley, where it was suggested he had misled Mr Moodley.
- [64] In respect of Charge 2.2, the allegations here were that the Harbour Master had been invoiced for the 2016/2017 period for services that had not been rendered. Again, there was a conflict between the evidence that had been adduced by Mr Moodley on behalf of the Applicant and the First Respondent's version. As was

stated by the Arbitrator at paragraph 40 of the Award, Mr Moodley did not physically verify that the work was not undertaken and simply relied upon the correlation of paperwork and proceeded on the basis that if this was “... *not in sync with each other, then he believed that the work was not done*”¹⁴. Here again, there was an issue about the incomplete state of the paperwork, and, in this regard, it is notable that the Applicant neither called the Planner, Mr Les Warren, nor did it call the Harbour Master to dispute the First Respondent’s claims that:

74.1 there was a problem with the paperwork and that the work had actually been done; and

74.2 there was an arrangement, with a latitude in place for certain costs to be attributed to items such as diverse work and also how he had reconciled and allocated the day markers manufacture claims.

[65] She accepted that the First Respondent had been forthright and honest as far as the port traffic lights claim was concerned and that this was a genuine error.

[66] While one may have some misgivings about the contention by the First Respondent that the claim for port lights was an error or that the claims, which had been inserted in respect of the manufacture of day markers, was allowable, it has to be said that the Applicant ought to have called the Harbour Master or the Planner to corroborate this version given by Mr Moodley. Moreover, the Arbitrator’s reasoning that there was never any suggestion that the First Respondent had personally or financially benefitted from these transactions reinforces the reasonableness of her finding that dismissal was not appropriate.

[67] Even though the Arbitrator did not allude to this in her reasons, at a holistic level and considering the actual thrust of the allegations of wrongdoing against the First Respondent, viewed in relation to his length of service, her reinstatement of

¹⁴ Index to pleadings: p 33, para 40.

the First Respondent, with a capped backpay of 12 months, does not seem unreasonable at all.

[68] The Arbitrator found that the First Respondent's was a "*constant and reliable witness and explained the processes with conviction and clarity*"¹⁵.

[69] In the area where the First Respondent had been shown to have possibly committed an infraction, she went on to find the following:

"The First Respondent admitted that there was an error with regard to part two of Charge 2, which did not warrant a stringent sanction. To the contrary, the evidence presented by the First Respondent and the lack of contradictory evidence demonstrated that he was an exemplary employee."

[70] This reasoning rationally substantiates her preferring the First Respondent's evidence even though she at the outset she may have been complimentary of Mr Moodley in the presentation of his evidence.

[71] Turning to the issue of costs, it is trite that the Constitutional Court and the LAC have come out against liberally awarding costs in labour matters. In particular, I am mindful of the dicta of the Constitutional Court in *National Union of Mineworkers on behalf of Masha and Others v SAMANCOR Limited (Easter Chromes Mines and Others)*¹⁶ where the Court stated as follows at paragraphs 32-33:

"[32] It is a trite principle that a court considering costs exercises a discretion. This discretion is to be exercised and in accordance with the correct principles in law.

[33] In this matter, the Labour Appeal Court did not provide reasons for its cost's orders. The costs orders are at odds with this Court's decision in Zungu and fly in the face of what was said in Dorkin. In this regard, it erred in departing from the general rule that losing parties in labour

¹⁵ Index to pleadings: p 33, para 41.

¹⁶ 2021 (10) BCLR 1191 (CC).

matters should not be ordered to pay the successful parties' costs, unless there are reasons warranting the imposition of a costs order. Therefore, the Labour Appeal Court did not exercise its discretion judicially. This Court is thus entitled to interfere with the costs order. It follows that the appeal on costs should be upheld, and the costs orders set aside."

[72] In the premise the following order is made:

Order

1. The Application to Review and set aside the Arbitrator's Award is dismissed.
2. There is no order as to costs.

I. Lawrence

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Mr B Mgaga – Garlicke & Bousfield Inc, Durban

For the First Respondent : Adv Van As

Instructed by : Fluxmans Inc, Johannesburg

LABOUR COURT