REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Not Reportable
C193/2020

In the matter between:

ASSOCIATION OF MINEWORKERS & CONSTRUCTION UNION (AMCU) obo LONN VAN GRAAN	**Applicant**
and	
METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL (MEIBC)	First Respondent
SINGH-BHOOPCHAND N.O.	Second Respondent
GRI WINDSTEEL SA (PTY) LTD	Third Respondent

Date heard: 19 April 2023
Delivered: 28 June 2023 by means of email; deemed received at 10.00hr on the 29 June 2023.

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed review to set aside an arbitration award under case number MEWC 11855. The applicant also seeks condonation for the late filing of the review. In terms of the Award, the second respondent (the Arbitrator) found that the dismissal of Van Graan was fair.

[2] The review was filed some three weeks after the expiry of the six week limit. The reason given for this is the imposition of the Covid 19 Lockdown in March 2020, a day after Van Graan received the Award. Given that the delay is not excessive and that he was restricted in travelling, I am prepared to grant condonation and deal with the merits of the review.

[3] The background to the dispute before the arbitrator is set out in the Award as follows:

> "6 The applicant was employed by the respondent as a storeman He commenced his employment in November 2014, and he was dismissed on 6 December 2018 after having been found guilty of misconduct at an internal disciplinary hearing. The charge that he faced read as follows:
>
> > "failing in your duty to carry out a reasonable instruction by refusing to perform activities that is part of your scope and duties."
>
> 7. It is respondent's case that the applicant had been given a verbal instruction on several occasions. It is common cause that the instruction was reduced to writing on 19 November 2018 and that applicant was warned of the consequences of not obeying the instruction. It is also common cause that the applicant had been given three final written warnings for similar offences."

[4] The instruction in question was to assist in offloading 'flanges' from trucks into the third respondent's yard. The third respondent (the employer) manufactures steel towers for wind turbines. A flange, as the employer's supply chain manager testified at arbitration, is a circle of steel with holes in it which hold sections of steel plates together.

[5] The grounds of review relied on by the applicant are the following:

> 5.1 The Arbitrator was incorrect in her factual findings in accepting that Van Graan was trained to obey the reasonable instruction to assist with off-

loading the flanges due to his crane driving certificate which reflected that there was a module including training in rigging and slinging;

5.2 The Arbitrator failed to consider that there was no breakdown in the trust relationship and that there was no evidence to support the trust relationship had broken down irretrievably. She ignored the evidence of Esau who testified that he could still work with Van Graan.

5.3 Consistency. It is common cause that all the storeman refused to assist but not all were dismissed.

5.4 Failure to consider another sanction short of dismissal.

Evaluation

[6] The question of whether Van Graan was given a lawful instruction which he refused to carry out is key in this review. A consideration of the record before the arbitrator reflects that it was not disputed by Van Graan at his disciplinary hearing that he received the instruction to assist offloading the flanges. His defence is recorded as being that "he did not refuse any instruction but only asked how he will offload as he has never been trained practiced or experiences that kind of work before and only requested a written document from the employer that informs him to perform the job." In his referral to arbitration he stated that his dismissal was unfair because "the employee did not refuse, only ask for written confirmation The Employer did not issue a written confirmation to the employees for authorizing them to perform the/their duty."

[7] However, under cross-examination at the arbitration proceedings Van Graan's evidence about the day in question is reflected as follows in the transcript:

"**MR. G DE KOKER**: …… we've established now that by the time that the flanges arrived, there was not a lot of work in the Mounting Store where you were based and you are saying that you were asked to assist with the offloading of flanges but would agree that for the Supervisor, for the Supervisor to give

you an instruction to offload the flanges, that would have been a reasonable instruction?

MR. L VAN GRAAN: Yes

MR. G DE KOKER: Okay

MR. L VAN GRAAN: If he give me instruction to offload the flange.

MR. G DE KOKER: It would be a reasonable instruction? And if he received, if he gave you the instruction on the day which he said he did, that would have been a reasonable instruction?

MR.L VAN GRAAN: No I don't know what instruction you talking about. You ask me a question now, you say on **that** day, if he give me instruction.

MR G DE KOKER: Mm?

MR L VAN GRAAN: So, he didn't give me instruction that day."

[8] In his evidence in chief, Van Graan had stated that at about 12.30 his supervisor (John Essau) called him and said "can you please come and assist me in the Yard." He agreed. On his way to the yard Mr Lottering, the Logistics Manager asked him to intervene with a fellow Storeman, Malcom Coetzee who was refusing to assist with the off-loading of flanges. His evidence is recorded in the transcript of the arbitration as follows:

"COMMISSIONER: Who called you?

MR L VAN GRAAN: Riaan Lottering, the Manager. So I ask him, what's the problem, and he explain to me because I heard he and Malcom is raising voices and I asked Malcom what's the problem; and he say no, this guy refuse to offload flanges and plates. So, I told Malcom in that time, as a shop steward, I told him my friend, you can't refuse any duty and Malcom's words was "I never

refuse, I'm just asking this man to give me a letter to offload, to safeguard our work colleagues and for himself". So, when we sort it out, Malcom was moving to the plates, I was going, he was moving and Riaan was walking away, so John was busy on the truck, offloading. He have the control in his hand and he was busy with the slinging, that's why it was unsafe for him to go on there because I told him, John, that's unsafe to have the control on the truck and you busy with rigging, so I make a video, that's the time when the Manager and the Supply Chain Manager came to me and say, I can't make videos because it's against company policy. I didn't argue with them, I take my phone and I put it off and I put it in my pocket. So, I was standing that side and they were standing next to me, and that's how it happen, and that was the last that they speak to me, and then they left."

[9] The evidence in chief of Van Graan also included his answer to the question from his representative as to what John told him when he "asked you to come and assist?" His answer was the following:

"**MR L VAN GRAAN**: John just phone me and tell me Lonn, you must come assist when you finish there, and when I came there, he didn't give any instruction to say Lonn, you must take the crane or Lonn, you must do the rigging, Lonn, you must do this, he was just, that time he was busy on the truck and that's the time when Riaan call me. So I never speak to John, I never speak to John to say, John, I am here what must I do."

[10] The contradictions in the testimony of Van Graan ultimately contributed to the Arbitrator finding that he was an unsatisfactory witness and his version before her was improbable, and that he did receive an instruction on the day in question. Her finding in this respect is supported by the fact that in his affidavit before this Court contradicts what he testified in the Arbitration. The following version is put forward in his founding affidavit:

"12. On 11 October 2018, I was working the morning shift, John Esau called me to come to the yard. On my way to the yard I saw Malcom and Riaan. Riaan asked to come to assist him in my capacity as shop steward. I gave my advice

to Malcom which included that he was required to assist Riaan and not to refuse to obey an instruction.

13. On my way to the yard I noticed that activity was taking place which was unsafe. Pursuant to my lack of knowledge and training in flanges, I did not involve myself in the unsafe activity.

14. During the morning meeting, the store-men were advised that we would be assisting with flanges I raised my dissatisfaction as I am not training in flanges and assisting in this activity will be of great risk to myself and attract liability for the Third Respondent. It is against this background that I attended at the office of my supervisor in order to discuss this instruction I advised that I was not suitably qualified and trained to attend to this task and as a result, I required a written instruction."

[11] The Arbitrator found on the employers' evidence before her that the instruction was within the broad ambit of the applicant's job and duties. The employer's version was supported by evidence of a certified trainer who testified that the training modules contained in the bundle of documents clearly indicate that the crane driving programme included training in rigging and slinging which is the required skill to perform the task of offloading flanges. I note that the evidence before her also reflects that Van Grann and fellow workers did in fact do that task when a written instruction was given later in November. His evidence regarding his inability to perform the task that he was instructed to do i.e. offloading flanges from trucks was as the Arbitrator reasonably found, not credible.

[12] On a reading of the Award and the record before the arbitrator, her finding that the applicant was guilty of misconduct as charged is well within the bounds of reasonableness. As to the challenge on sanction, the Arbitrator's careful consideration of the evidence before her, the fact that the Applicant had a history of similar offences and his complete lack of remorse, led to the conclusion she made on dismissal being an appropriate sanction. The issue of consistency (which is not an immutable principle) appears to have been raised as a last ditch attempt to successfully review the Award. No evidence was presented to lay any basis to

suggest that that this principle should have been applied by the Arbitrator.

[13] In all the above circumstances, I do not find the Award susceptible to review on any of the grounds alleged. My finding is premised on the jurisprudence of this Court and the LAC in relation to the duties of the Labour Court on review[1]. The third respondent has asked for costs given the lack of merit in the review application. However, given the relationship between the parties, I decline to award costs. I order as follows:

Order

1. The application for condonation is granted.

2. The review application is dismissed.

3. No order as to costs.

H.Rabkin-Naicker
Judge of the Labour Court

Appearances

Applicant:	A.L. Cook
Instructed by	Larry Dave Inc
Third Respondent:	Graham Leslie SC
Instructed by	Guy and Associates

[1] Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) 2013 (6) SA 224 (SCA); Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others inter alia